

**IN THE SUPREME COURT OF SEYCHELLES**  
**Criminal Side: CN 36/2016 AND CN 37/2016**  
**Appeal from Magistrates Court decision 135/2010 and 317/2010**

[2017] SCSC 616

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**MARCUS FARDIAL**  
Appellant

versus

**THE REPUBLIC**  
Respondent

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Heard: 10 April 2017  
Counsel: Mr. Nichol Gabriel Attorney at Law for Appellant  
Mr. Khalyaan Karunakaran, Senior State Counsel for the Respondent  
Delivered: 13 July 2017

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JUDGMENT

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**Burhan J**

[1] The Appellant in this case was charged before the Magistrates' Court (MC) as follows:

In MC 135 of 2010,

**Count 1**

*Breaking and Entering into Building and Committing a Felony therein Contrary to Section 291 (a) of the Penal Code.*

*The particulars of the offence are that Marcus Faria Mariotto of no occupation residing at Plaisance, Mahe during the weekend of 5<sup>th</sup> to the 6<sup>th</sup> of February 2010 at Huteau lane complex, did break and enter the office of Mr. Bernard Adonis and did steal therein 1 mobile phone, make Nokia to the value of Rs 1500 being the property of the said Bernard Adonis.*

[2] The Appellant was sentenced on the 6<sup>th</sup> of September 2011 to a term of 7 years imprisonment after being found guilty after trial. It was further ordered that the sentence run consecutively to the sentence imposed on the Appellant in MC Case No 134/2010 where he had been sentenced for a similar offence.

[3] In MC 317 of 2010 by way of amended charge dated 22<sup>nd</sup> October 2011 the Appellant was charged as follows:

**Count 1**

*Stealing Contrary to and Punishable under Section 260 of the Penal Code*

*Particulars of offence are that Marcus Fardial residing at Plaisance, Mahe, on the 20<sup>th</sup> February 2010 at Premiere Building Victoria, Mahe, stole from room 102, an office belonging to Mr. Radley Webber, SR200,000/-, 9000 Euros and 3000 US Dollars belonging to the said Mr. Webber.*

**Count 2**

*Stealing Contrary to and Punishable under Section 260 of the Penal Code*

*Particulars of offence are that Marcus Fardial residing at Plaisance, Mahe, on the 20<sup>th</sup> February 2010 at Premiere Building, Victoria, Mahe, stole from room 102 an office belonging to Mr. Radley Webber a pair of silver earring to the value of SR1500/- belonging to Emma Webber.*

[4] In this case Appellant was convicted on his own plea of guilt and sentenced on the 22<sup>nd</sup> of October 2012 to a term of 3 ½ years imprisonment on Count 1 and to a term of 1 ½ years

imprisonment on Count 2. It was further ordered that the sentence run consecutively and after the expiration of all sentences he was serving.

[5] Learned Counsel for the Appellant has preferred an appeal in respect of the sentences imposed in both cases based on the following similar grounds:

- a) The total sentence imposed on the Appellant by the Learned Magistrate was manifestly harsh, excessive and wrong in principle.
- b) The total sentence imposed on the Appellant by the Learned Magistrate should have been made to run concurrently to one another and concurrently with the previous sentence of imprisonment he was serving since the offence occurred during the course of the same transaction.
- c) The Learned Magistrate failed to apply the principle of totality of sentences.

[6] With the consent of both parties the aforementioned appeals CN 36/2016 and CN 37/2017 were consolidated.

[7] I have considered the submissions of learned Counsel for the Appellant. Learned Counsel for the Respondent failed to file any submissions on behalf of the Respondent by the given dates.

[8] I observe that the value of the items stolen in MC 135/2010 is SR 1500/-. It appears the learned Magistrate has proceeded to sentence him to a term of 7 years imprisonment. Having considered the value of the items stolen SR 1500 in the said case, I am of the view that the sentence is harsh and excessive and using the principles laid down in the case **Roddy Lenclume v R SCA 32 /2012** where a sentence of 10 years was reduced to a sentence of 5 years on the basis inter-alia that the value of the stolen items was SR 320. Fernando JA of the Seychelles Court of Appeal held *“We are of the view that the imprisonment of 10 years imposed on the Appellant who was 18 years old and a first time offender, in respect of case numbered 527/12 for burglary and theft of mainly food items valued at SR 320/- was grossly disproportionate to what would have been appropriate. We, accordingly, quash the sentence of 10 years imprisonment imposed on the Appellant and substitute thereof a sentence of 5 years.”*

[9] In the case of **Jean Fredrick Ponoov Vs The Attorney General SCA 38/2010**, the Seychelles Court of Appeal held in dealing with the issue of mandatory sentences that: *“While the legislature is*

*concerned in a general way with the penalty that should attach to an offence, the Court is concerned in a case to case basis the actual sentence that should be meted out to the particular offender. There is a difference between the preoccupations of the legislature in legislating a penalty provision and the preoccupations of the court in sentencing a particular offender.”*

[10] In Ponoo (supra) the mandatory jail term of 5 years given to the accused for breaking and entering into a building and stealing a pair of shoes therein, was reduced to 3 years.

[11] In these circumstances I would hold that the sentence of 7 years is harsh and excessive and proceed to quash the sentence imposed and substitute it with a reduced term of 3 years imprisonment.

[12] I observe that in case 317 /2010 the Learned Magistrate has proceeded to make order that the sentence of 3 ½ years on Count 1 and the sentence of 1 ½ years in Count 2 to run consecutively. However I observe these two incidents occurred in the course of the same transaction, I therefore make order make order that both terms run concurrently refer case of ***Neddy Onezime v Republic SCA 06/2013.***

[13] I make further order that the sentence of 3 years imprisonment imposed in case MC 135/2017 run consecutively to the sentence of 3 ½ years imprisonment imposed in case MC 317/2010 totalling 6 ½ years which in my view would be an appropriate sentence proportionate to the offences committed. Total time spent in remand to count towards sentence.

[14] I make further order that fresh warrants of commitments be issued in respect of the aforementioned cases and served on the Superintendent of Prisons forthwith.

Signed, dated and delivered at Ile du Port on 13 July 2017

M Burhan  
**Judge of the Supreme Court**

