

**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CN 09/2015**

**Appeal from Magistrates Court decision 518/2012**

**[2017] SCSC**

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**KEVIN EDMOND**

Appellant

versus

**THE REPUBLIC**

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Heard:

Counsel: Mr. Gabriel for appellant

Mr. Asba , Assistant State Counsel for the Republic

Delivered: 30 January 2016

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**JUDGMENT**

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Akiiki-Kiiza J

**[1]** The Appellant is appealing against sentence of 14 years imprisonment imposed on him after he was convicted of the offence of stealing from a person contra section 260 and 264 (a) of the penal code.

**[2]** The appellant's memorandum of appeal raises the following grounds:-

- (a) *That the total sentence of 14 years imprisonment imposed by the learned Magistrate is manifestly harsh, excessive and wrong in principle.*
- (b) *That the learned Magistrate failed to apply correctly the principle of the totality and principle proportionality of sentence.*

- (c) *That the learned Magistrate failed to consider concurrent sentencing for all the sentences in all the 3 files.*
- (d) *That the learned Magistrate failed to consider the fact that the Appellant had pleaded guilty and expected a further credit on sentencing.*
- [3] At the hearing Mr. Kalyaan appeared for the Respondent and Mr. Gabriel for the Appellant.
- [4] The brief background of this appeal is that the Appellant had pleaded guilty in the 3 different files involving stealing of Jewellery and was sentenced as follows:
- (1) Case number 518/2012 (CN 9/2015) he was sentenced to 3 years imprisonment. But as the Appellant had a previous of 5 years imprisonment the learned trial Magistrate ordered the sentence of 3 years to run consecutive of 5 years he was serving. This was under section 36 of the Penal Code.
- (2) In the Criminal Case Number 519/12 he was sentenced to serve 3 years which was run consecutively with the 8 years in file 518/12 making it a total of 11 years.
- (3) In the file number 520/12 the Appellant was sentenced to serve a sentence of 3 years in addition to 11 years imposed in the files number 519 and 518 of 2012.
- [5] This made a cumulative sentence of 14 years imprisonment; hence this appeal.
- [6] All the 3 files were consolidated at the hearing and handled together as one file.
- [7] It was Mr. Gabriel's contention that given the current trend of decided cases by the Court of Appeal, the provisions of Section 36 of the Penal Code is subject to Article 16 of the Constitution as well at section 6 (2) of the Criminal Procedure Code. In other words the trial court must consider the totality and the proportionality of the final sentence to be imposed so that such sentence is not only fitting the particular individual but also must be within the sentencing jurisdiction of the trial Magistrate. Secondly that the sentence imposed in the 3 files should have been ordered to run concurrently with the previous sentence imposed before them where Appellant was sentenced to 5 years imprisonment.

[8] On the other hand Mr. Kalyaan for the Respondent submitted to the effect that the 3 files were distinct and separate. Secondly that the Accused did not plead guilty straight away but he did so after some time. He also submitted that given the maximum possible sentence on each file been 10 years, 3 years imprisonment was reasonable in the circumstances. Thirdly that the necklace in the 2 files which were stolen were never recovered. He concluded by submitting that given the circumstances of the cases before the trial Magistrate the Court should uphold the sentences and orders made by the trial Court and dismiss this appeal.

[9] I have carefully considered the submissions of both learned Counsel and also I have carefully and critically reviewed the contents of the lower Court record.

[10] It is now clear that the Court of Appeal has since the cases of NEDDY ONEZIME VERSUS THE REPUBLIC SCA 06/2013 and that of RODDY LENCLUME VERSUS THE REPUBLIC SCA 32/2013 that Section 9 of the Criminal Procedure Code (CPC) and Section 36 of Penal Code are subject to Section 6 (2) of the CPC and the Article 16 of the Constitution.

This means that the total sentence of 14 years imprisonment is subject to the jurisdiction and the sentencing powers of trial Court under Section 6 (2) of the CPC which before the amendments, was 8 years for Magistrates. This meant that the cumulative sentence of 14 years imposed by the learned Magistrate was illegal and the maximum he could impose that was only 8 years. Although this was not raised by the learned Counsel for the Appellant I cannot allow the sentence to stand and accordingly quash it and set it aside.

[11] As to requirement for the sentence to conform with the principles of totality and the proportionality of sentence, the sentence must conform to Article 16 of the Constitution as it must not be outrageous or inhuman. He has a right to fair treated with dignity. Also, in the RODDY LENCLUME case the Seychelles Court of Appeal held that a fair hearing under Article 19 (1) of the constitution also includes a fair sentence.

[12] The trial Court must always ensure that the total sentence is appropriate as stated in the case of R V/S SMITH EDWARD DEWERY [1987] 1 SCR 1045: “*Though the State*

*may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been just.”*

- [13] In addition the sentence must be tailored to the individual circumstances of each accused person. This is a thread which runs through the cases of the ONEZIME and LENCLUME cited above.
- [14] In this particular case, there was a plea of guilty in all the 3 files though belatedly. Secondly the dates and the scene of crime were the same or nearly the same. Some of the property was recovered. It appears the learned trial Magistrate properly applied the principles in PONOO to each individual file, however the order making the sentence to run consecutive was the major drawback and cannot be allowed to stand. He should have made the sentence to run concurrently.
- [15] All in all, this appeal succeeds and I make the following orders:
- (i) The cumulative sentence of 14 years imprisonment imposed in the 3 files is quashed and set aside.
  - (ii) The order making them run consecutively is substituted with an order making all sentences to run concurrently. This means that the Appellant will serve a concurrent sentence of 3 years in all the 3 files along with the other sentence of 5 years imposed for attempted stealing.
- [16] This means the Appellant will serve a total sentence of 5 years imprisonment.
- [17] As ordered by the trial Magistrate, the time he has spent on remand and the time he has served while waiting for the outcome of this appeal must be deducted from the 5 years imprisonment.
- [18] Order accordingly.

Signed, dated and delivered at Ile du Port on

D Akiiki-Kiiza  
**Judge of the Supreme Court**