SUPREME COURT OF SEYCHELLES

Reportable
[2019] SCSC ..517
CN 12/2018
(Appeal from / Arising in 409/2017)

In the matter between:

ROY ESTICO **Appellant**
(rep. by Rene Durup)

and

THE REPUBLIC **Respondent**
(rep. by David Esparon)

Before:	Burhan J
Heard:	09 April 2019
Delivered:	28 June 2019

JUDGMENT

BURHAN J

[1] The Appellant was charged in the Magistrates' Court as follows:

Count 1

Breaking and entering into building and committing a felony therein namely stealing contrary to section 291 (a) of the Penal Code.

Particulars of offence are that, Roy Estico of St. Louis, Mahe during the period of the 2nd day of September 2017 to the 3rd September 2017 at Revolution Avenue, Victoria, Mahe, broke and entered into the shop of Francourt and son PTY LTD and stole therein, the following items: 2 car stereos, 1 car DVD, 4 mobile phones make Nokia, 1 pink mini laptop, 1 digitech effect, 1 30 inches LED TV, 1 14 inches LED TV, 1 Boss guitar, several pendrives, 1 equalizer, 1 Mackie Mixer, 1 DJ controller and Digitech guitar effect all to

the total value of Rs42772/- being the property Mr. Serge Francourt owner of the Francourt & Son Pty Ltd.

[2] The Appellant was found guilty after trial and convicted of the aforementioned offence and sentenced to a term of 6 years imprisonment on the said Count.

[3] Learned Counsel for the Appellant has appealed against the sentence imposed on the following grounds:

a) *"That the sentence of 6 years imprisonment is manifestly excessive and wrong in principle.*

b) *The Magistrate erred by considering spent sentences."*

[4] The main ground urged by Learned Counsel for the Appellant was that the Learned Magistrate in her order sentencing the Appellant had stated *"the convicted person has a previous record dating back to 1991 with over fourteen (14) priors with (13) being for stealing related offences ....."*. It is apparent that the reason for the Learned Magistrate referring to such convictions was to correctly come to a finding that he was a habitual offender and that society had to be protected from such individuals. This is borne out by her subsequently referring to the case of *Marcel Damien Quarte v Republic [2014] SCSC 227* stating that in sentencing one of the factors a Court should consider is *"... the interest of the public in protecting it from such crimes."* Therefore this Court is of the view that the only reason the Learned Magistrate referred to the history of the previous convictions dating back to 1991 was to come to the finding that the Appellant was a habitual offender and the need for the public to be protected from such individuals. This Court is of further of the view that the Learned Magistrate cannot be faulted for referring to his antecedents and coming to a correct finding that he was a habitual offender and therefore the public had to be protected from him.

[5] For the aforementioned reasons Learned Counsel for the Appellant's grounds for appeal set out in the Memorandum of Appeal bear no merit.

[6] The Learned Magistrate having considered the mitigating factors before her and applying the principles laid down in the case of *Jean Frederick Ponoo v Attorney General SCA 38/2010* had not imposed the minimum mandatory term of 25 years imprisonment. When one considers the value of the items set out in the particulars of the offence, the value of the items amounts to SR 42,772/. The offence has been committed in a shop in a business area in the heart of the town area. Several valuable electronic items have been stolen. It appears none have been recovered. Therefore it cannot be said the sentence of 6 years imprisonment imposed by the Learned Magistrate was excessive.

[7] Further the he Appellant has not expressed any remorse or regret by pleading guilty to the offence. I observe in the case relied on by Learned Counsel for the Appellant namely *Marcus Fardial v Republic [2017] SCSC 616/617,* the sentences imposed in two cases MC 135/2010 and MC 317/2010 against the Appellant Fardial were reduced based on the "totality principle" in sentencing. This principle however does not apply to the facts of this case. Further in the case of *Randolph Pathon v Republic 2016 SCSC 599,* relied on by Learned Counsel for the Appellant, unlike this case, the Appellant Randolph Pathon had expressed remorse and regret by pleading guilty to the offence and the Republic had not resisted the appeal. I find that the circumstances in reducing the imposed sentence in both cases referred to by Learned Counsel for the Appellant are not similar to this case.

[8] Learned Counsel for the Appellant also referred to spent convictions on the basis that certain convictions were over 5 years old. It would be pertinent at this stage to refer to section 2 of the Rehabilitation of Offenders Act CAP 307 which refers to a "spent conviction" as being a conviction in respect of which an individual has been rehabilitated in terms of section 3. It is apparent from section 3 of the said Act, that sentences imposed in respect of convictions such as sentences of imprisonment for life, sentences of imprisonment for more than 60 months and sentences off detention during the President's pleasure are referred to as "excluded sentences" and convictions resulting in such sentences, are excluded from being considered as spent convictions. All other sentences other than "excluded sentences" according to the Act could be considered to be spent after the end of the period of rehabilitation. However in this instant case, it is clear from

the probation report that such rehabilitation efforts have failed and the Appellant continues to reoffend.

[9] Learned Counsel for the Republic also referred to the case of *Marcel Damien Quarte supra* where it was stated in sentencing *"the prevalence of similar cases in the area, the previous record if any of the accused and the interests of the public in protecting it from such crimes."* I would add that the failure of the Appellant to respond to opportunities given to reform himself is another significant factor to be taken into consideration in sentencing an accused. The Appellant in this case was given a presidential pardon and released from prison. It appears he has failed to take the opportunity to reform himself but continues to re-offend soon after his release. The public and society must be protected from such individuals.

[10] However even having considered all the aforementioned facts, on a compassionate basis as the probation report refers to him as a drug dependent individual, I would reduce the sentence of six years to a term of five years imprisonment. The Appellant should be subject to a drug rehabilitation program during this period. Time spent in remand to count towards sentence.

[11] The appeal is partly allowed. The sentence imposed by the Learned Magistrate is varied accordingly.

Signed, dated and delivered at Ile du Port on 28 June 2019

M Burhan J