

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 592

CA 05/2020

(Appeal from Magistrates Court in CR 338/2019)

JEFFERSON MARIE

(rep. by Nichol Gabriel)

Appellant

and

THE REPUBLIC

(rep. by Aishah Molle)

Respondent

Neutral Citation: *Marie v The Republic* (CA 05/2020) [2021] SCSC 592 (29 July 2020).

Before: Dodin J.

Summary: Appeal against sentence. Consecutive sentences. Whether harsh and excessive.

Heard: Written submissions

Delivered: 29 July 2021

ORDER

Grounds 1 and 2 of the appeal are dismissed.

Ground 3 of the appeal is partly allowed in that the sentence is reduced from 4 ½ years imprisonment to 3 ½ years imprisonment to run consecutive to the sentence the Appellant is now serving.

JUDGMENT

DODIN J

[1] The Appellant Jefferson MARIE was convicted and sentenced to four years and six months imprisonment for the offence of grievous harm under section 221 of the Penal Code. The sentence was made to run consecutively to any sentences that the Appellant was already serving. The Appellant was already serving a sentence of 6

years imprisonment for the offence of stealing. He was to complete that sentence in August 2021. The Appellant is now appealing to the Supreme Court against the sentence of the learned Magistrates Court on the following grounds:

- i. *The learned Magistrate erred in her arguments prior to sentencing the Appellant that the Counsel for the Appellant had argued for a consecutive sentence when in fact he had mitigated for a convenient sentence.*
- ii. *The sentence of four years and six months imposed by the learned Magistrate should have been made to run concurrently with any sentence the Appellant is already serving and not consecutively. This would reflect the current pattern of sentencing in cases of similar nature.*
- iii. *In all circumstances of the case the sentence of four years and six months was harsh, excessive and wrong in principle.*

[2] Learned counsel for the Appellant submitted that is clear from the record of proceedings that the learned Magistrate erred in law by making a finding of consecutive sentencing when in actual fact counsel for the defence had pleaded for a sentence that is convenient and in other words one that is not harsh or consecutive. He had also pleaded for a hefty fine and to be magnanimous in passing sentence. The Appellant was expected to be released in August 2021 and if the learned Magistrate had not imposed the consecutive sentence like she did, he would have been released in August 2023.

[3] Alternatively learned counsel submitted that the sentence of four years and six months is harsh and excessive and wrong in principle. The learned Magistrate in passing sentence should have taken into consideration the principles laid down in Section 316 of the Criminal Procedure Code. Under the auspices section 316 of the Criminal Procedure Code the Appellate Court will only alter a sentence imposed by the trial court if it is evident that it has acted on a wrong principle or overlooked some

material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. In the case of R. v/s Neysorne and Browne (1970) 54 Cr. App. R. 485, Lord Widgery stated further that an Appellate court will interfere when:

- i. The sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law;
- ii. Where the sentence has been passed on the wrong factual basis;
- iii. Where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or
- iv. Where the sentence was wrong in principle or manifestly excessive.

[4] The Court was also referred to *Archbold* para 7-147 Vol. 1 1992 Edition maintain that sentences imposed in previous cases of a similar nature while not being precedents do afford material for comparison.

[5] The Court was further referred to Nigel Walker on ‘Sentencing-theory and practice which states at paragraph 1.22 that:

“When the ground of appeal has been that the sentence was excessive, the Court has asked itself not what its members would have imposed had they been the sentencing judge, but whether the sentence was within the appropriate range of sentences. Consequently it does not usually make minor reductions. On the other hand, if it is persuaded that in the particular circumstances of the case an “individualised” measure would be appropriate, it will often substitute it, even though the original sentence was within the range which it considers appropriate as a punishment or deterrent. Sometimes, however, it condemns a sentence as “wrong in principle”, meaning that it disagrees with the sentence’s reasoning, and in such cases will alter the sentence even if the practical effect is small. Or again it may reduce or vary the sentence – even if only slightly – to give weight to a mitigating factor which should have, but did not influence the sentence”.

[6] The Court was further referred to Article 19(4) of the Constitution arguing that a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed.

[7] Learned counsel submitted that this provision is in line with the doctrine of the prohibition of ex-post facto laws and the imposition of retrospective penalties and requires the imposition of the lesser penalty where criminal sentences have changed between the offence and conviction. This is exactly the provision prescribed in the International Covenant on Civil and Political Rights of 1966 and which Seychelles became a party on the 5th May 1992. Article 15 of this Covenant states that:

‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.’

[8] Learned counsel however admitted that there was no local legislation passed by the National Assembly that would have enacted this provision into law and make it executory. Nevertheless, learned counsel argued that the Constitution of Seychelles in its Article 48 under Principles of Interpretation makes provision for the international obligations of Seychelles relating to human rights and freedoms and further maintains in sub paragraph (a) that a Court shall, when interpreting the provision of this

Chapter, take judicial notice of the international obligations containing these obligations.

[9] Learned counsel further submitted that in the Court of Appeal case of *Ponoo v/s the Attorney General SCA 48/2010* the Court of Appeal stated that even where the convict has been convicted of an offence carrying a minimum mandatory sentence, the sentence to be imposed shall be individualised, and that Courts may impose a lesser sentence if it thinks that the convict justly deserves a lesser sentence than the minimum mandatory sentence. Unfortunately Ponoo would not be applicable in this matter as there is no minimum mandatory under section 221 of the Penal Code.

[10] Learned counsel submitted that when the Prosecutor was narrating the facts at page 3 of the record of proceedings dated 9th day of March 2020, he stated as follows:

“On the 25th February 2018 at Coetivy Island, the accused and the complainant Henry Bristol were convicts serving their respective terms of imprisonment on the island. On that day they had an argument where the accused became aggressive, he slapped the complainant, the complainant picked up a rock and hit the accused with it. The accused reacted by hitting and cutting the complainant with a knife on his head whereby he suffered a 7cm laceration on his head the accused was kept under supervision and was sent to Mahé along with complainant the next day. The former was arrested and charged and the latter received medical assistance.”

The Appellant accepted the facts as read to him. However the learned Magistrate did not address at all a very material factor which in this case is that the victim had caused injury to the Appellant by hitting him with a rock. Had the learned Magistrate considered this very important matter which shows a certain amount of provocation, then she would have addressed her mind on a more balanced and lenient manner by reducing the sentence substantially.

[11] Learned counsel concluded that in the circumstances the sentence of four years and six months was manifestly harsh and excessive and it must be quashed.

- [12] Learned counsel for the Republic submitted that learned Magistrate in sentencing the Appellant, considered the mitigation submitted by Counsel for the Accused (Appellant) and at paragraph 5 of the sentence, the learned Magistrate stated, inter alia, that learned Counsel had asked for the Court to be lenient in imposing sentence. This would imply that the Court had given due regard to the mitigation submitted by Counsel for the accused.
- [13] Learned counsel submitted that in imposing an appropriate sentence the learned Magistrate considered all relevant facts relating to the case and imposed a sentence which was just and appropriated. The learned Magistrate also considered the accused early guilty plea and the severity of the injury sustained by the complainant. In doing so, the Court applied the sentencing principles as laid down in the case of Jean Frederick Ponoo v Attorney general SCA 8 of 2016.
- [14] Learned counsel further submitted that must be stated that as a general principle, the practice is that, if an accused person commits a series of offences at the same time in a single act/ transaction a concurrent sentence would be given. However, in the present case the accused was already serving a 6 years' imprisonment term of which his released date would have been August 2021. This implies that the offence of grievous harm as charged in 2019 was a separate and distinct offence and cannot be made to run concurrent with the current imprisonment term being served by the Appellant. The offence was committed in a different criminal transaction which can only be mete out by a consecutive term of imprisonment. The offence of grievous harm occurred in 2018 whilst the appellant was serving a sentence under the custody of the Prison Authorities.
- [15] Learned counsel submitted that in his third and final ground of appeal learned counsel for the Appellant stated that the sentence imposed were harsh and excessive. Learned counsel argued that the offence of grievous harm is a felony that attracts a maximum sentence of 10 years imprisonment in the event of conviction under Section 221 of the Penal Code. The learned Magistrate imposed a four and half years' imprisonment on

the appellant and this does not represent the aggregate number of years of imprisonment as prescribed by law.

[16] Learned counsel submitted that section 6 of the Criminal Procedure Code states that the Magistrates' Court when presided over by a Magistrate other than a Senior Magistrate may pass any sentence authorised by law, provided that such sentence shall not exceed, in the case of imprisonment, 18 years. The jurisprudence of the Appellate jurisdiction in appeal sentence is settled in that the Appellate Court be called upon to intervene only when the sentence so challenged is:

- (a) wrong in principle;
- (b) either harsh, oppressive and manifestly excessive;
- (c) so far outside the normal discretionary limits;
- (d) some matters taken into consideration improperly or failed to be taken into consideration which should have been; and
- (e) the sentence is not justified in law.

Learned counsel referred the Court to the cases of *Godfrey Mathiot vs. The Republic – Crl. Appeal no.9/1993* and *Livette Assary vs. Republic – SCA No. 18/2010*

[17] Learned counsel submitted that in deciding on an appropriate sentence the learned Magistrate considered all the mitigating fact and aggravating factor related to the case vide paragraph 6 and 7 of the sentence and exercising its discretion in sentencing within the legal parameters and principles in sentencing, especially having regard to the circumstances of the individual attributes of the offender and the nature of the injury afflicted, has imposed a lenient sentence. It is submitted that the learned Magistrate acted judiciously in meting out the sentence against the appellant herein which is legal and justified. Hence, there is no merits in the Appeal.

[18] Learned counsel hence moved the Court to dismiss the appeal in its entirety.

[19] Generally, appeals against sentence are based on the sentence being wrong in law in that the Court had no legal power to pass the sentence; or the sentence was wrong in principle in that the wrong type of sentence was passed; or when the sentence was manifestly harsh and excessive. The Court would consider several aspects of the sentence in order to make a determination on whether there is any reason to interfere with the sentence. Such grounds to be considered are not exhaustive but will include:

- i. The sentence is not justified by law.
- ii. The sentence is incorrect on a factual basis.
- iii. The Judge's or Magistrate's remarks when sentencing.
- iv. That matters were improperly taken in to account.
- v. That there were procedural errors.
- vi. That there was failure to honour a legitimate expectation.
- vii. There was disparity of sentence.
- viii. The sentence was wrong in principle or manifestly excessive.

[20] Grounds 1 and 2 of appeal re taken together as they both deal with whether the sentence should have been made to run concurrently with the sentence the Appellant was actually serving.

[21] Generally, sentences for offences that are committed on separate occasions should be served consecutively whilst where the offences arise out of the same transaction, the sentences should be served concurrently. Even then, Courts are usually cautious not to slavishly impose consecutive sentences merely because offences are committed on different occasions. Matters that Courts take into consideration in deciding whether sentences should be consecutive or concurrent are i) the time frame of the offences, ii) the similarity of the offences, iii) whether a new intent broached each offence, and iv) whether the total sentence is fit and proper.

[22] Section 36 of the Penal Code further provides that:

“36. Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, which is passed upon him under the subsequent conviction, shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or of any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence under Chapter XXVI, Chapter XXVIII or Chapter XXIX be executed or made to run concurrently with one another or that a sentence of imprisonment in default of a fine be executed concurrently with the former sentence under section 28(c) (i) of this Code, or any part thereof.”

The proviso does not apply to this case.

[23] This issue was also addressed in the case of *Excel Jean v The Republic SCA CR No: 12 of 2012* where the Court of Appeal stated:

“It is only in a case when a person is convicted at one trial of two or more distinct offences and the court has imposed the punishments in respect of such offences to be executed consecutively, that for the purpose of appeal the aggregate of consecutive sentences imposed shall be deemed to be a single sentence.”

In this case the Appellant was serving a sentence imposed for an offence not at all linked to the offence now appealed against. The learned Magistrate therefore did not err in imposing a consecutive sentence to the sentence the Appellant was then serving. Grounds 1 and 2 of appeal are therefore not sustainable and are dismissed accordingly.

[24] In respect of the 3rd ground of appeal, it is noted that the maximum sentence for the offence for which the Appellant was convicted is 10 years imprisonment. The

Appellant was sentenced to 4 years and six months imprisonment. Despite him not being a first offender, the learned Magistrate at paragraph 7 of the Sentencing Order treated the Appellant as a first offender. The sentence imposed was less than half of the maximum sentence.

[25] The learned Magistrate has also considered all the mitigating factors advanced by learned counsel for the Appellant at various stages of the Sentencing Order. However, according to the records, neither learned counsel for the Appellant nor the learned Magistrate used the term provocation during the course of the proceedings and sentence. Nevertheless, the Sentencing Order clearly stated that the Appellant and the complainant had an argument. The Appellant then slapped the complainant who in turn picked up a rock and hit the Appellant with it. The Appellant who had a knife with him at the time used the knife to inflict a 7 cm wound on the complainant. That was a clear assessment of the facts which the learned Magistrate took into consideration without making a finding of provocation.

[26] Provocation can be a partial defence in rare cases which can reduce a serious charge to a lesser one but more generally provocation if found, goes to the mitigating of the sentence. Since from the admitted facts it was the Appellant who started the assault by slapping the complainant, I find it presumptuous for the Appellant to now claim that he was provoked. Hence I find no fault with the learned Magistrate not making a determination that the Appellant was somewhat provoked into injuring the complainant. Considering all the circumstances of this case, I do not find the sentence of 4 and a half years to be harsh and excessive *per se*.

[27] Having reached that conclusion however, I have also to consider the fact that the Appellant was serving a sentence of imprisonment at the time and whether the additional sentence for the actual offence would impinge on the totality principles of sentencing. In total, counting the sentence the Appellant is now serving in addition to the current sentence, the period the Appellant would eventually serve would total 10 ½ years for the two offences. This is slightly on the high side but not unduly excessive. On that account and since the current sentence remains consecutive to the

one the Appellant is now serving justice would be best served by reducing the sentence to 3 ½ years.

[28] This appeal is therefore allowed only to the extent that the sentence of 4 ½ years imprisonment is reduced by 1 year to 3 ½ years imprisonment to be served consecutive to the sentence the Appellant is now serving.

Signed, dated and delivered at Ile du Port, Mahe, on 29th July, 2021.

Dodin J