IN THE SUPREME COURT OF SEYCHELLES

THE REPUBLIC

VS.

DERECK VEL

Revision Side No. 4 of 2006

Mr. Durup for the Republic

Mr. Freminot for the Accused – Absent

JUDGMENT

Gaswaga, J

The learned Attorney General, on behalf of the Republic, has invoked the jurisdiction of the Supreme Court in revision in respect of the sentences imposed by the Magistrate's court 'C' sitting at Victoria, Mahe. The accused, a resident of Anse Royale who stood unrepresented was convicted on his own plea of guilty in four different files each with two distinct counts of: (i) House breaking contrary to section 289 (a) read with section 23 all of the penal code, Cap.158, and (ii) stealing contrary to section 260 as read with section 23 and punishable under section 264 (b) of the penal code, Cap 158. In **Criminal Case No. 580 of 2006** the accused was sentenced to six (6) months on count one and to three (3) months on count two while in **Criminal Case No.581 of 2006** a sentence of four (4) months was imposed on count one and another of one (1) month on count two. Jail terms of six (6) and two (2) months were also handed down on counts one and two respectively in **Criminal Case No.582 of 2006.** As for **Criminal Case No.583 of 2006** the

sentences meted out were six (6) months on count one and two (2) months on count two.

The learned Magistrate further ordered each one of the above sentences to start running on the same day i.e 23rd October, 2006, meaning that the accused would serve the longest of all these sentences being six months. It will be recalled that the accused, together with another person still at large, on diverse dates (9th, 16th, 18th and 19th, 2006) and places in south Mahe did break and enter various dwelling houses owned by different people and stole therefrom numerous household items and money.

Learned State Counsel, Mr. Durup invited the court to revisit the sentences so imposed in light of the gravity of the offences. He further argued that although the offences were committed within a small space of time of each other and all the guilty pleas recorded on the same day, the court was supposed to treat them as different transactions thereby applying section 27 A (1) of the Criminal Procedure Code, Cap 54 after the first conviction and impose the minimum mandatory sentence of three (3) years in each of the subsequent cases (files).

It was submitted for the defence by Attorney-At –Law Mr. Freminot that since all the charges were heard on the same day and convictions entered in quick succession of each other of about five minutes apart, and before the same Magistrate at the same sitting, the accused was entitled to be treated as a first offender on each one of the four files whereby the provisions of section section 27 A (1) would not apply.

The foregoing clearly shows that both counsel are poles apart with regard to the interpretation of section 27 A (1) and its applicability to the facts at hand. The section reads thus:

Not withstanding section 27 and any other written law, a person who is convicted of an offence in Chapter XXVIII or Chapter XXIX shall-

(a) *Where the offence is punishable with imprisonment for* ***seven years or more but not more than eight years*** *and the person had, within five years prior to the date of conviction, been convicted of the same or similar offence, be sentenced to imprisonment for a period of* ***not less than three years;***

(b) *Where the offence is punishable for imprisonment* ***for more than eight years but not more than ten years*** *and the person had, within five years to the date of the conviction, been convicted of the same or similar offence, be sentenced to imprisonment for a period* ***not less than five years;***

With due respect to the learned defence counsel the accused cannot be considered to be a first offender in all the four cases which he has admitted to have committed on different dates and diverse places. I reject the invitation by Mr. Freminot to hold that all the said incidents should be categorized as falling under the "same transaction". When the accused pleaded guilty to the first charge **(File No. 580 of 2006)** and a conviction entered he ceased being a first offender. It matters not whether the subsequent convictions were done on the same day in quick succession of each other at the same sitting since one conviction is entered at a time.

I am also unable to agree with the submission of the State counsel that the minimum sentence prescribed by section 27 A (1) (a) for a non- first offender is three years. The offence of 'housebreaking' falls under Chapter XXIX of the Penal Code and since it carries a maximum penalty of ten years, by whatever rule of

interpretation, the legal provision of sub-section (1)(a) can not lend itself to the interpretation which Mr. Durup has placed on it. This provision only applies to sentences of between seven (7) and eight (8) years. However, sub-section (1)(b) would in the circumstances apply. It provides for a minimum sentence of five (5) years if the one prescribed in respect of the offence proffered in the charge sheet is between eight (8) and ten (10) years. I think the intention of the legislature here was not only to severely deal with habitual, serial or repeat offenders in the same or similar line of offences but also discourage or put an end to recidivism such that whoever commits a string of similar offences is sufficiently penalized for each one of them with a minimum mandatory sentence.

In all the four cases there is evidence of considerable loss, distress and suffering on the part of the victims which they have clearly indicated in the letter dated 7th November, 2006 and signed by the husband and wife occupying each of the four houses which were broken into. Such houses however never seem the same again as the break in induces an immediate feeling of insecurity. Further revelations on the record show that a considerable amount of money, household items valued at substantial sums of rupees, and a set of spare keys for one of the houses were taken yet no restitution or compensation order was made to ameliorate the loss. Finding the term of eighteen months rather lenient in a related offence, and further stating that *"the misfortunes and suffering experienced by the complainant.....cannot be quantified in terms of the 18 months meted out*" Bwana, J (as he then was) in the case of **Antonio Jourbert Vs R Criminal Side No. 16 of 1994** warned that society needs protection and that protection is of different aspects. *"Expected from the courts is longer prison terms to convicts so as to keep them out of the streets. Or as stated recently by a USA congressman:....we need to shift the cruel and inhumane treatment from the victims to the criminals."* ***See also*** **Smith and Woollard**

(1978) 67 Cr. App. R. at p.212, R Vs Harvey (1990) 12 G.App. R (s) 165, and R vs. Vierra – 1991 – 12. App. R. 713.

Section 36 of the Penal Code provides as follows:-

> *" 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, other than a sentence of death or of corporal punishment, 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 of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under section 28 (iii)*
>
> *(a) of this Code or of any part thereof."*

It was held in the case of **Dingwall Vs Rep. 1966 S.L.R. 205** that "*an appeal 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."* However, an appeal court is not empowered to alter a sentence on the mere ground that if it had been trying the case, it might have passed a somewhat different sentence.

A further perusal of the record in light of the above provisions shows in my view that the learned Magistrate fell into grave error with regard to the sentences imposed in case files number **581 of 2006, 582 of 2006** and **583 of 2006**. The said

sentences are wrong in law and in principle and cannot be allowed to stand. They are accordingly set aside and instead replaced with the following custodial sentences:

Case file No. 581 of 2006: Five (5) years on count I and
One (1) month on count II.

Case file No. 582 of 2006: Five (5) years on count I and
Two (2) months on count II.

Case file No. 583 of 2006: Five (5) years on count I and
Two (2) months on count II.

Both sentences on each file are to run concurrently. It is further ordered that all the sentences in respect of case files No. 580 of 2006, 581 of 2006, 582 of 2006 and 583 of 2006 are to be executed with effect from the 23rd October, 2006, meaning that the accused will spend a total period of five (5) years in jail for these offences.

However, during the hearing of this matter it transpired that the accused was currently serving time of three (3) years in another case. For purposes of clarity I shall make further orders that the said three (3) years run concurrently with the above five (5) year sentence imposed.

D. GAWAGA
JUDGE

Dated this 15th day of May, 2009.