

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 31/2014

Appeal from Magistrates Court decision 34/2014

411/2013

412/2013

556/2013

[2014] SCSC 292

NADDY VOLCY

Appellant

Versus

THE REPUBLIC

Heard: 18th July 2014

Counsel: Mr. Nichol Gabriel for appellant

Mr. George Robert, Attorney General for the Republic

Delivered: 30th July 2014

JUDGMENT

D.Akiiki-Kiiza

[1] The appellant in this action is Mr. Naddy Volcy; he was charged and convicted of Breaking and Entering into a building and committing a felony therein *Contra Sections 219 (a) of the Penal Code Act* in 4 different files and *Retaining stolen property Contra Sections 309 (1) of the Penal Code Act* in the 5th file

[2] He appeared before his Warship Kisnan Labonte, a Magistrate at the Magistrate Court and he pleaded guilty in all the 5 files. He was convicted accordingly. The learned Magistrate sentenced him as follows:-

- a. File 412/13 he was sentenced to 4 ½ years imprisonment.
- b. File 411/13 he was sentenced to 5 ½ years imprisonment.
- c. File 410/13 he was sentenced to 6 ½ years imprisonment.
- d. File 34/14 he was sentenced to 7 ½ years imprisonment.
- e. File 556/13 he was sentenced to 6 months imprisonment.

The learned trial Magistrate ordered that the sentences in the first 4 files were the appellant had been charged with Breaking and Entering into a building and committing thereon a felony, had to run consecutively and the sentence of 6 months imposed in the 5th file regarding Retaining stolen property was to run concurrently with the other 4. The appellant was therefore serve a total of 24 years imprisonment less the periods spend on remand in files 410/13 and 34/14.

[3] Mr. Naddy Volcy was not satisfied with the above sentences and orders of the learned trial Magistrate and now appeals to this court against sentence on the following grounds:-

- a. That the sentences imposed by the learned trial Magistrate are manifestly harsh and excessive and wrong in principle.
- b. That the total sentences of 24 years imprisonment imposed by the learned Magistrate was in excess of his jurisdiction.
- c. That the learned Magistrate failed to apply the principles of totality of sentences.

He therefore prayed for the quashing of the total sentence of 24 years imprisonment.

[4] At the hearing of the appeal, Mr. Gabriel appeared for the appellant and Mr. Robert appeared for the Republic/Respondent. The main contention of Mr. Gabriel, as I understood him, is that the learned trial Magistrate by imposing a consecutive sentence of 24 years was in excess of his jurisdiction of 8 years authorised by *Section 6 (2) of the*

Criminal Procedure Code, before the amendment ushered in by *Act 4/14*. The second contention is that the learned trial Magistrate should have applied the totality principle and sentenced the appellant to much lesser sentence.

[5] On the other Mr. Robert submitted to the effect that the sentenced imposed by the learned trial Magistrate had to run consecutively under *Section 36 of the Penal Code Act* as there are in respect of 4 different files. This in his view was only subject to the principle of totality of sentences.

[6] As to whether the learned trial Magistrate exceeded his sentencing powers when he imposed a total of 24 years imprisonment under *Section 9 (2) of the Criminal Procedure Code*, Mr. Robert submitted to the effect that *Section 9 (2)* applied only to sentences imposed in one file but not where there are many files for different trials as in this case.

[7] For clarity I will set out the provision of *section 9* in its integrity; it is headed:-*Sentences in case of conviction of several offences at ONE trial.*

“9 (1) When a person is convicted at ONE TRIAL of two or more distinct offences, the court may sentence him, for such offence to several punishments prescribe therefore which such court is competent to impose, such a punishments when consisting of imprisonment to commence the one after the separation of the other in such order as the court may direct unless the court directs that such a punishment shall run concurrently.

(2)That for the purpose of appeal the aggregate of consecutive sentence imposed under this section in case of conviction for several offences at ONE TRIAL shall be deemed to be a single sentence” (Emphasis supplied)

[8] To my mind *Section 9 (1) of the Criminal Procedure Code* refers to a situation where an accused person is charged with more than one offence framed in different counts but in one file and prosecuted in the same trial. In such circumstances if he is convicted on more than one count then the sentences have to run consecutively unless the court orders them to run concurrently. Therefore *Section 9 (2)* makes an appeal against the consecutive

sentences imposed by the trial court under *Section 9 (1)*, in the same trial to be deemed to be a single sentence.

[9] In my view therefore, the above situation is different from where there are more than one trials held at different occasions with different files as it is the case presently before me. The appellant were tried in 4 different files independent of each other as opposed to all of them being in one file as different counts. In the premises therefore the provisions of *Section 9 (2) of Penal Code Act* do not apply as the total of in 24 years imprisonment is from 4 files different files.

[10] The learned trial Magistrate adhered to the sentencing limits as allowed him by the law; hence one cannot say in those circumstances he had exceeded his sentencing powers in each file. In the premises the case of ***YANNICK CONSTANCE VS THE REPUBLIC [2014] SCSC 41/14*** should be restricted in its on facts in this regard.

[11] Mr. Gabriel also submitted that the learned trial Magistrate should have put into practice the “*totality of principle*” and reduced the sentences imposed by the appellant accordingly. The Court of appeal has considered this principle and how it should be applied. This was in the case of ***JOHN VINDA VS THE REPUBLIC S.C.A CRIMINAL SIDE 6/95***. Their Lordship stated to effect that execution of sentence under *Section 36 of the Penal Code Act* as a rule should be consecutive unless there are exceptions circumstances such as:-

- a. *Where the offender has committed a series of offences of moderate gravity and has received an aggregate sentence equivalent to the sentence which would have been imposed for an offence of a much more serious nature.*
- b. *Where the offender is relatively young and has not previously served a custodial sentence.*
- c. *Where an offender who is sentenced to a long term of imprisonment for a grave crime is also liable to be sentenced to a much shorter term for some other matter.*

If the above circumstances exist then the court can impose concurrent sentences despite the provisions of *Section 36 of the Penal Code Act* under to the *principle of totality* of sentences.

[12] The next question is whether the total sentence of 24 years imposed by the learned trial Magistrate on the appellant in excessive under the totality principle:-

- a. *In file 412/13- breaking and entering into a building and committing felony thereon he was sentence 4 ½ years. This was committed in 1/8/13*
- b. *In file 411/13- same offence, he was sentence 5 ½ years. This was committed on 27/7/13.*
- c. *In file 410/13- same offence, he was sentence 6 ½ years. This was committed on 7/8/13.*
- d. *In file 34/14- same offence, he was sentence 7 ½ years. This was committed on 30/1/14.*
- e. *In file 556/13-Retaining stolen property, he was sentenced 6 months. This was committed on 16/10/13.*

The first four files the appellant was charged of Breaking and entering into a building and committing therein a felony *Contra Section 29 (1) of Penal Code Act*. The maximum sentence under that section is 14 years imprisonment. The offence in files 411/13, 412/13 and 410/13 where committed in the same locality and within a period of only 10 days. In my opinion they could reasonably be held to have been committed in a spree and falls within the first exception under **JOHN VINDA** case above. I therefore order that the sentences imposed by the learned trial Magistrate in files 410/13, 411/13, and 412/13 run concurrently, this makes a single sentence of 6 ½ years. As the offence in file 34/14 was committed about 4 months later it cannot in my view be reasonably said to be part and parcel of the other 3. I therefore maintain the sentence of 7 ½ years imposed by the learned Magistrate in this regard. As for file 556/13 the learned Magistrate sentenced the appellant 6 months imprisonment and he ordered it to run concurrently with the others. I see no reason why I should interfere in this order.

[13] All in all this appeal succeeds in part as follows:-

- a) The sentence of 24 years imprisonment is reduced to a total of 14 years imprisonment.
- b) The rest of the grounds fail. Order accordingly.

Signed, dated and delivered at Ile du Port on 30th July 2014

D.Akiiki-Kiiza
Judge of the Supreme Court