

**IN THE SUPREME COURT OF SEYCHELLES**

**Criminal Side: CN 9/2012**

**Appeal from Magistrates Court decision 13/2011**

**[2014] SCSC 387**

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**DARIO JASON DELCY**

Appellant

Versus

**THE REPUBLIC**

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Heard: 25 September 2014

Counsel: Mr. Nichol Gabriel for appellant.

Mr. George Robert, State Counsel for the Republic.

Delivered: 24 October 2014.

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**JUDGMENT**

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**McKee J**

[1] The Appellant appeals against Sentence. The Appellant is represented by Mr Nichol Gabriel.

[2] The Appellant was charged with the following offences:

[3] **COUNT 1**

[4] Housebreaking contrary to and punishable under section 289[1] of the Penal Code.

[5] **The Particulars of the offence were as follows:**

[6] Dario Jason Delcy, residing at Roche Caiman, Mahe, on the 10<sup>th</sup> day of December 2010 at Anse Baleine. Mahe broke and entered into the dwelling house of Elisia Charles with intent to commit a felony therein, namely, stealing.

[7] **COUNT 2**

[8] Stealing from a dwelling house contrary to section 260 and punishable under section 264[b] of the Penal Code.

[9] **The Particulars of the offence were as follows:**

[10] Dario Jason Delcy, residing at Roche Caiman, Mahe, on the 10<sup>th</sup> day of December 2010 at Anse Baleine, Mahe, stole from the dwelling house of Elisia Charles one pair of shoes make caterpillar, one pair of black shoes, seven yogurt, one packet of cheese, one big bottle of milk strawberry flavour, one small bottle of milk make Perrett, one pair of slippers, one black bag, one bottle of sunlight comfort, all amounting to the total of SR920/- being the properties of the aforesaid .

[11] The Appellant first appeared in the magistrate's court in connection with this matter on 6<sup>th</sup> January 2011. The matter was continued to various dates with the Appellant remanded in custody. On 28<sup>th</sup> February 2011 the Appellant entered pleas of Not Guilty and there were further remands until 1<sup>st</sup> April 2011 when the Appellant was released on bail. The matter was duly continued until **20<sup>th</sup> April 2012** when the Appellant re-appeared, unrepresented. He indicated that he wished to change his plea. The charges were formally read to the Appellant who pleaded Guilty to both charges. The Appellant agreed the brief facts. He was convicted on both charges. The Court was advised that the Appellant was not of clear record and was currently serving a sentence of 10 years imprisonment. The record of proceedings does not indicate that any formal list of previous convictions was presented to the court. It is to be noted that the victim in this case is related to the Appellant, namely his aunt. By way of mitigation the Appellant asked for forgiveness but offered no further information. The Magistrate gave reasons for Sentence. He sentenced the Appellant to 5 years imprisonment in respect of count 1 and 5 years imprisonment in respect of count 2 and ordered that these sentences be consecutive, hence the total term of imprisonment was 10 years. It was ordered that this sentence be consecutive to the term of 10 years then being served.

- [12] It is against the cumulative sentence of 10 years imprisonment that the Appellant now appeals.
- [13] The main thrust of the submission for the Appellant is that the sentences imposed should not be consecutive but be concurrent since both offences were committed during the same transaction. Furthermore, the Magistrate, in imposing a sentence of 10 years imprisonment, went beyond his jurisdictional limits. The magistrate dealing with this matter is a magistrate other than a senior magistrate and hence the limit of his sentencing power was, at the time of sentencing, 8 years imprisonment. It has recently been increased.
- [14] Counsel for the Prosecution submits that the sentences should be maintained but concedes that they should be concurrent. He refers to an up-to-date List of Previous Convictions dated 25<sup>th</sup> June 2014 which indicates that this Appellant had a previous conviction for Robbery for which he received a sentence of 5 years imprisonment. I had doubts as to the accuracy of this previous conviction since the date of conviction for the offence of robbery was 7<sup>th</sup> September 2010 while the date of the offence under appeal was 10<sup>th</sup> December 2010, only some 3 months after the date of the robbery conviction. It followed that if the Appellant had been serving this sentence he could not have been at liberty on the date of the offence on 10<sup>th</sup> December. I sought assistance from Counsel. Mr Gabriel provided the answer. He advises that following the conviction for robbery a Revision was ordered and the Appellant was granted bail pending the decision. Accordingly he was not in custody on 10<sup>th</sup> December 2010. On Revision the Appellant was acquitted of the charge of robbery. This is not reflected in the Previous Conviction Record.
- [15] I am still left with the statement shown in the Notes of Proceedings for the case under appeal which reads as follows “Court: The accused person is convicted on both counts on his plea of guilty [*So far so good*]. Any previous criminal record. He has previous. He is currently serving a term of imprisonment of 10 years.” As stated there is no record that a list of previous convictions was produced to the court on the date of sentence. From the note of the magistrate I infer that he was given this information by the Prosecutor.

[16] A further problem exists. On looking at the list of Previous convictions laid before this court this conviction and the related 10 years prison sentence, which would have been imposed prior to 20<sup>th</sup> April 2012 is *not* shown. Item 3 on the list of previous convictions refers to a conviction *after* 20<sup>th</sup> April 2012. I asked for the magistrate court files relating to this Appellant. I received a copy Warrant of Commitment dated 25<sup>th</sup> October 2011 showing that this Appellant had been convicted for one offence of burglary and two charges of stealing and sentenced to 10 years imprisonment in respect of the burglary charge and sentences of 9 months and 6 months imprisonment in respect of the stealing charges. The sentences were to be consecutive and hence the total sentence was 11 years 3 months imprisonment. While the information given to the Magistrate in the case before me was not entirely accurate I can infer that this is the case referred. The date of these offences was 28<sup>th</sup> September 2010. I have the magistrate court and Appeal Court files relating to these charges. The files show that the Appellant appealed against these sentences and on appeal the term of 10 years imprisonment was reduced to 7 years imprisonment while the sentences for the stealing offences remained unchanged. Hence the total sentence to be served is 8 years 3 months imprisonment and this is the prior sentence referred to by the Magistrate in the present appeal.

[17] For completeness I have a warrant of commitment relating to item 3 on the list of previous convictions which confirms that the Appellant was sentenced to a total of 9 years imprisonment for the offences of housebreaking and stealing which sentence is to be consecutive to other sentences being served. In the absence of further information I accept that this information is correct.

[18] I mention these points to indicate that the List of Previous Convictions presented to this Court in this appeal does not state the true position.

[19] I find that, excluding the present case under appeal, the Appellant has already been sentenced to an aggregate term of 17 years 3 months imprisonment. With this information before me I look afresh at the case under appeal. As matters stand at present, if the sentence of 10 years had to be maintained the Appellant would be required to serve a sentence of 27 years 3 months imprisonment in respect of three separate

incidents. That period of imprisonment seems to me to be of disproportionate length when we are really considering two cases of breaking and entering, and stealing [where in one case, certainly, pleas of guilty were submitted] and one case of burglary and stealing.

[20] **THE PRESENT CASE UNDER APPEAL.**

[21] I find that the offences of housebreaking and stealing should be treated as part of the same transaction and that the sentences imposed should be concurrent, not consecutive. Based on the existing terms of imprisonment the concurrent sentence would be 5 years imprisonment.

[22] I look at the particular circumstances of the case and consider whether sentences of 5 years imprisonment, even if ruled to be concurrent, should remain unchanged bearing in mind that the Appellant is also at present serving a term of 17 years 3 months imprisonment in respect of the other two cases.

[23] In the present matter the Appellant broke into the house belonging to an aunt. The items taken were not of high value. There were some items of footwear but the remaining items consisted of food and a bottle of detergent. In mitigation the Appellant gave no reason for breaking in and only asked for forgiveness. It has been my experience that when an accused breaks in to the house of a relative there can be an underlying and quite often a simple reason. The theft of the food, for instance, could suggest that the Appellant was simply hungry. In any event it is not to be considered the most serious case of stealing.

[24] In respect of sentence, in my view, the principle of totality of sentence falls to be considered. His Honour Judge Gaswaga also followed this principle in the case of *The Republic v Paddy Meme*, Supreme Court Decision No. 60 of 2008. However, having said that, I bear in mind that a concurrent sentence imposed in the present appeal should be consecutive to the term of 17 years 3 months imprisonment. This present case is separate and distinct from the other two cases. I also keep in mind that on the date of sentence, namely, 20<sup>th</sup> April 2012, it is recorded that the Appellant was a young man, 20 years of age.

- [25] The principle of totality of sentence is considered in Section 5 of the text book, Current Sentencing Practice, in the Law Library. It is held that where there is a sentence imposing a series of consecutive sentences particular attention should be paid to the aggregate in the case of a relatively young offender. Secondly, having decided on the appropriate sentence for the offences before him a 'second' judge should look at the sentences presently being served, and should decide, having regard to the total criminality, what is the appropriate sentence.
- [26] In my opinion the totality principle is relevant in the present matter. If I had simply to sentence the Appellant to a concurrent sentence of 5 years imprisonment but consecutive to the sentences at present being served the total sentence to be served would be 22 years 3 months imprisonment. I consider that this total sentence would be somewhat on the high side.
- [27] As a result I allow the appeal against the sentence imposed. I quash the sentences of 5 years imprisonment in respect of Counts 1 and 2 and in their place impose sentences of 18 months imprisonment in respect of each Count. These sentences shall be concurrent and hence the total sentence will be 18 months imprisonment. This sentence of 18 months imprisonment shall be consecutive to the present sentences being served. The total term of imprisonment then to be served by this Appellant is 18 years 9 months. Time spent on remand in connection with this case will be taken into account when the ultimate date of release is calculated.

Signed, dated and delivered at Ile du Port on 24 October 2014

C McKee  
**Judge of the Supreme Court**