IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , A. Fernando (J.A) , J. Msoffe (J.A)]

Criminal Appeal SCA 32/2013

(Appeal from Supreme Court Decision 32/2012)

(Appeal from Magistrates Court decision 527 & 528/2012)

Roddy Lenclume **Appellant**

Versus

The Republic **Respondent**

Heard: 09 April 2015

Counsel: Mr. Daniel Cesar for Appellant

Mr. George Thachett for Respondent

Delivered: 17 April 2015

JUDGMENT

A. Fernando (J.A)

1. The Appellant in this case had been convicted by the Magistrate's Court in cases numbered C. No 527/12 and C. No. 528/12 on his own plea of guilt to both charges levelled against him in the respective cases. The Appellant had pleaded guilty to all the charges levelled against him in both cases on the 25th of April 2012. In both cases he was unrepresented.

2. In case numbered C. No 527/12 he was charged with the following offences:

Count 1
Statement of Offence

Burglary contrary to and punishable under section 289(a) of the Penal Code.

Particulars of Offence

Roddy Lenclume residing at Anse Aux Pins Mahe, on the 27th of May 2012 during the night at Gaza Estate Mahe, broke and entered into the dwelling house of Mr David Marie with intent to commit a felony therein namely Burglary.

Count 2
Statement of Offence

Stealing from dwelling House contrary to section 260 and punishable under section 264 (b) of the Penal Code.

Particulars of Offence

Roddy Lenclume residing at Anse Aux Pins Mahe, on the 27th of May 2012 during the night at Gaza Estate Mahe, stole from the dwelling house of Mr David Marie, 1 tin of cerelac Rs 45/-, 1 box of Jacker Rs 34.50/-, 1 pk of corn flakes Rs 28/-, 1 tin of peanuts Rs 13/-, 1 box containing Rs200/- all to the value of Rs 320/- being the property of Mr David Marie.

3. In case numbered C. No 528/12 he was charged with the following offences:

Count 1
Statement of Offence

Housebreaking contrary to section 289(a) of the Penal Code.

Particulars of Offence

Roddy Lenclume residing at Anse Aux Pins Mahe, on the 23rd of May 2012, at Aux Cap Mahe, did break and enter the dwelling house of Mr Gerarld Belle with intent to commit a felony therein namely stealing.

Count 2
Statement of Offence

Stealing from dwelling House contrary to section 260 and punishable under section 264 (b) of the Penal Code.

Particulars of Offence

Roddy Lenclume residing at Anse Aux Pins Mahe, at Aux Cap Mahe, on the 23rd of May 2012, stole from the dwelling house of Mr Gerarld Belle, 5 tins of cheese craft Rs 62.50/- 3 yourgurt Rs 19.50/-, 1 mobile phone make nokia Rs 1500/-, 1 gold bracelet Rs 2000/-, 3 gold rings Rs 4500/-, 1 money box containing Rs 1000/-, all amounting to the total value of SR 9082/- being the properties of Mr Gerald Belle.

4. The facts as narrated by the Prosecutor in both cases were almost identical to the particulars as set out in the two cases. In 527/12 the Appellant in mitigation had said: "I want to work and pay for what I have done. I apologise for what I have done. I have problem at my parents place. What I have done is wrong. I want to live my life. I am 18 years old. I can work to pay for what I have done."(verbatim) In 528/12 the Appellant had said that: "I have no more submission to make".

5. In case numbered C. No 527/12 the Appellant had been sentenced by the learned Magistrate to 10 years imprisonment in respect of count 1 and 15 months imprisonment in respect of count 2 and in case numbered C. 528/12 sentenced to 8 years imprisonment in respect of count 1 and 18 months imprisonment in respect of count 2. The learned Magistrate had ordered that all the above sentences are to run consecutively. The Appellant had thus ended up with a term of imprisonment of twenty years and nine months. The learned Magistrate had in passing sentence had taken the following facts into consideration: "Therefore in consideration of accused plea of guilty at the first instance and his mitigation and considering his young age and the fact that he is a first offender, I pass on this young accused the minimum mandatory sentence of imprisonment prescribed by the legislation in respect of such offences." (verbatim)

6. The recorded proceedings in case numbered 528/12 shows that the "Constitutional rights to legal representation put to accused in creole as per Art.19(2)(d) of the Constitution." and "Accused is informed of the seriousness of charge and advice to seek legal aid as he will be sent to prison if convicted as there is a minimum mandatory sentence."(verbatim). Article 19(2) (d) of the Constitution states: "Every person who is charged with an offence has a right to be defended before the court in person, or, at the person's own expense by a legal practitioner of the person's own choice, or, where a law so provides, by a legal practitioner provided at public expense."Although the maximum punishment for housebreaking was ten years at the time of the commission of the offence, it could not be said that section 27(1)(b) of the Penal Code which provided that "where the offence is punishable with imprisonment for more than eight years but not more than ten years and the person had, within five years prior to the date of the conviction, been convicted of same or similar offence, be sentenced to imprisonment for a period of not less than eight years"; was applicable to the Appellant, as the Appellant had not within five years prior to the date of the conviction, been convicted of a same or similar offence. We are of the view that the learned Magistrate had in imposing a jail term of 8 years in respect of count 1 in case numbered 528/12 had misconstrued section 27(1) (b). The recorded proceedings also do not indicate that the Appellant was informed of the provisions of **section 9 of the Criminal Procedure Code**. Section 9 states:

"(1) When a person is convicted at one trial of two or more distinct offences the court may sentence him, for such offences, to the several punishments prescribed therefor

which such court is **competent to impose**, such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.

(2) For the purpose of appeal the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence." (emphasis added by us)

7. The recorded proceedings in case numbered 527/12 shows that the "Constitutional rights to legal representation put to accused in creole as per Art.19(2)(d) of the Constitution."(verbatim) The Appellant in this case had not been informed of the seriousness of the charge of burglary which attracted a minimum mandatory term of ten years imprisonment. The Appellant had also not been informed of the provisions of section 9 of the Criminal Procedure Code referred to in paragraph 6 above.

8. The Appellant who had been sentenced to consecutive terms of imprisonment totaling to a period of twenty years and nine months had not been informed by the learned Magistrate of the mandatory provisions of section 36 of the Penal Code under which he had been sentenced. **Section 36 of the Penal Code** reads 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 which is passed upon him under the subsequent conviction, shall be executed after the expiration of the former sentence, unless the court direct that it shall be executed concurrently with the former sentence or any part thereof;

Provided that it shall not be lawful for a court to direct that any 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 section28(c) (i) of this Code or any part thereof".

9. All four offences under which the Appellant was convicted in the respective two cases fall under chapters XXVI and XXIX and thus necessarily attracted the proviso to section 36 of the Penal Code.

10. The total sentence of 11 years and 3 months imprisonment in case numbered No 527/12 and the total sentence of 9 years and 6 months in case numbered No 528/12 in our view was illegal in the sense that it exceeded the sentencing powers of a Magistrate at the time the said sentences were passed in view of the provisions of **section 6(2) of the Criminal Procedure Code**. Section 6(2), as at the date the sentences were passed, read as follows:

"The Magistrates' Court when presided over by a Magistrate other than a Senior Magistrate may pass any sentence authorized by law:

Provided that such sentence shall not exceed, in the case of imprisonment 8 years, and in the case of a fine, Rs 15,000."

This was a case that had been presided over by a Magistrate other than a Senior Magistrate. It is our view that despite the fact that the Penal Code provided for a mandatory term of imprisonment of 10 years for burglary and section 9 of the Criminal Procedure Code provided as a rule that the sentences in case of conviction of several offences at one trial should be consecutive; a Magistrate cannot exceed his powers of sentencing set out in section 6(2) of the Criminal Procedure Code. Section 27 which provided for a mandatory sentence for burglary and section 9 of the Criminal Procedure Code which provides for consecutive sentences are sections dealing with punishments and thus cannot override the provisions pertaining to the jurisdiction of a court in relation to sentencing powers it can impose that has been specifically provided in section 6 of the Criminal Procedure Code. If these sections were meant to take precedence over the sentencing powers of a Magistrate under section 6(2), specific reference would have been made to that effect in the said sections. We also place reliance on **section 9(1) & (2) of the Criminal Procedure code** which states that a courts powers of sentencing is limited to "which such court is competent to impose" and that for the purpose of appeal the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence. Further **section 7(1) of the Criminal Procedure Code** states that "When a Magistrate has convicted a person and he is of opinion that a higher sentence should be passed in respect of the offence than he has power to pass he may commit the offender for sentence to the Supreme Court....."

11. The Appellant aggrieved by his sentence of twenty years and nine months appealed to the Supreme Court against his sentence on the ground that "The sentence is harsh and excessive having regards to all the circumstances of the case and therefore wrong in principle." The Supreme Court by its judgment dated 14th November 2013 varied the sentence of imprisonment of 20 years and 9 months by ordering that the sentences imposed in the cases numbered C 527/12 and 528/12 in respect of the two counts in each of those cases should run concurrently but maintained that the sentences in the two cases should run consecutive to one another. Thus the Appellant was ordered to serve a period of imprisonment of 10 years in respect of C 527/12 and 8 years imprisonment in respect of C 528/12 adding up to a total of 18 years imprisonment.

12. The Appellant aggrieved by the judgment of the Supreme Court has now appealed to this Court.

13. It is pertinent at this stage to examine the provisions of the Criminal Procedure Code in regard to a second appeal. **Section 326(1) of the Criminal Procedure Code** states as follows:

"Any party to an appeal from the Magistrates' Court may appeal against the decision of

the Supreme Court in its appellate jurisdiction to the Court of Appeal on a matter of law but not on a matter of fact or mixed fact and law or on severity of sentence." On the face of it one could conclude that the Appellant is debarred from appealing in view of this provision.

14. This provision has to be read subject to articles 19(11) and 120 (1) & (2) of the Constitution.

Article 19(11) of the Constitution is to the effect:

"Every person convicted of an offence shall be entitled to appeal in accordance with law against the conviction, sentence and any order made on the conviction."

Article 120(1) of the Constitution states:

"There shall be a Court of Appeal which shall, subject to this Constitution, have jurisdiction to hear and determine appeals from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court...."

Article 120(2) of the Constitution states:

"Except as this Constitution or an Act otherwise provides, there shall be a right of appeal to the Court of Appeal from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court."

Article 120(1) prescribes the general jurisdiction of the Court of Appeal and article 120(2) confers a general right of appeal. Article 19(11) which is contained in Chapter III of the Constitution dealing with the Seychelles Charter of Fundamental Human Rights and Freedoms is a specific right granted to any convict and a fundamental right that is enshrined and entrenched in the Constitution. The right of appeal conferred by article 120(2) can only be restricted by the Constitution itself or by an Act which provides that there shall be no such right. The words "Except as this Constitution or an Act otherwise provides" envisage provisions which are expressly exclusionary and which exclude a right of appeal. Where the Constitution confers a right such right can only be taken away, where the Constitution so permits, by statutory provisions which are expressly and manifestly exclusionary. We hold that section 326(1) cannot be interpreted as a provision which excludes a right of appeal to the Court of Appeal, against the decision of the Supreme Court in its appellate jurisdiction on an appeal from the Magistrates' Court against sentence.

15. We therefore go on to consider whether the sentence of 18 years imprisonment imposed on the Appellant who was 18 years old, a first offender and one who had shown remorse in pleading guilty at the first instance and had agreed to pay back the amounts stolen can be justified? In 527/12 the facts as narrated to the Magistrate by the Prosecutor do not disclose how the Appellant broke into the house, whether any implements were used to

break into the house, whether any serious damage was caused to the house or property therein, whether any one was injured while committing the said offences or whether any inmates were in the house at the time the offences were committed. The total value of the items stolen is SR 320/- and consists of a tin of cerelac, a box of Jacker, a packet of corn flakes, a tin of peanuts, and a box containing Rs200/-. For the commission of these two offences the Appellant now stands sentenced for a period of 10 years. In 528/12 the facts as disclosed to the Magistrate by the Prosecutor do not disclose how the Appellant broke into the house, whether any implements were used to break into the house, and whether any serious damage was caused to the house or property therein, whether any one was injured while committing the said offences or whether any inmates were in the house at the time the offences were committed. The total value of the items stolen is SR 9082 and consists of 5 tins of craft cheese, 3 yourghurts, a nokia mobile phone, a gold bracelet, 3 gold rings, and a box containing Rs1000/-. For the commission of these two offences the Appellant now stands sentenced for a period of 8 years. The total period of imprisonment imposed on the Appellant is 18 years as the sentences in the two cases are to be executed consecutively.

16. **Article 19 of the Constitution** guarantees to an accused the right to a fair hearing. This right undoubtedly incorporates a just sentence decided by an independent and impartial court and not one decided by the legislature. The legislature could only prescribe sentences and a general formula for sentencing. It is the responsibility of the court to take into account the particular facts of the case and the personal circumstances adhering to the principle of proportionality which underlie due process.

17. **Thomas O'Malley in the Preface of his text book 'Sentencing Law and Practice'** states: "It has been said that while the legislatures understand offences, courts understand offenders. No statute or guideline system, no matter how finely tuned, can cater in advance for the unique circumstances of every offender who will come before the courts for sentence."

18. In the case of **Jean Fredrick Ponoo Vs The Attorney General SCA 38/2010** this court held in dealing with the issue of mandatory sentences that: "While the legislature is concerned in a general way with the penalty that should attach to an offence, the Court is concerned in a case to case basis the actual sentence that should be meted out to the particular offender. There is a difference between the preoccupations of the legislature in legislating a penalty provision and the pre-occupations of the court in sentencing a particular offender." In Ponoo the mandatory jail term of 5 years given to the accused for breaking and entering into a building and stealing a pair of shoes therein, was reduced to 3 years.

19. We do not venture out to say that the mandatory jail term of 10 years for burglary or the application of consecutive sentences in respect of offences under chapters XXVI, XXVIII or XXIX are by themselves unconstitutional or offend the principle of proportionality in sentencing. The imposition of such sentences may be appropriate in certain cases of aggravated burglary and the concerns of the legislature will be met by such imposition. However in the words of **Laskin CJ in the case of Miller and Cockriell V R (1977) 2 SCR 680,** in a few cases it would prove to be "so excessive as to outrage standards of decency". In **R V Smith (Edward Dewey) (1987) 1 SCR 1045, Lamer J** said "Though the State may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate". **Article 16 of the Constitution** guarantees to every person the right not to be subjected to cruel and inhuman treatment.

20. We are of the view that the imprisonment of 10 years imposed on the Appellant who was 18 years old and a first time offender, in respect of case numbered 527/12 for burglary and theft of mainly food items valued at SR 320/- was grossly disproportionate to what would have been appropriate. We, accordingly, quash the sentence of 10 years imprisonment imposed on the Appellant and substitute thereof a sentence of 5 years. We are also of the view that the imprisonment of 8 years imprisonment in respect of case numbered 528/12 for housebreaking and theft of items valued at SR 9082/- was illegal and grossly disproportionate to what would have been appropriate. We, accordingly, quash the sentence of 8 years imprisonment imposed on the Appellant and substitute thereof a sentence of 3 years. We are also of the view that the order made for the sentences of imprisonment of 10 years and 8 years to be executed consecutively on the Appellant who was 18 years old and a first time offender is grossly disproportionate to what would have been appropriate and tantamount to cruel and inhuman punishment in the circumstances. The sentence of 18 years imprisonment, in our view is so excessive as to outrage standards of decency. We order that the sentences of 5 years and 3 years imprisonment to run concurrently. The period which the person has spent in custody in respect of the offences shall count towards sentence.

21. We are surprised why the learned Magistrate had not acted in accordance with **section 30A of the Penal Code** which reads as follows:

"(1) Notwithstanding section 30 and any other written law to the contrary, where a person is convicted of an offence under Chapter XXVI, Chapter XXXVIII or Chapter XXIX the court **shall**, in addition to the sentence prescribed for the offence, order the person to compensate the owner of property who has been deprived of that property as a result of the commission of the offence."(emphasis added by us). The court shall make such an order where the owner has not been able to recover the property of which he had been deprived.

Section 30 of the Penal Code gives the discretion to make an order of compensation to

any person injured by the offence either in addition to or in substitution for any other punishment ordered against the convict.

This section in our view was introduced in August 2010 by the Legislature to deal with offenders especially like the Appellant, despite the mandatory sentences that had been prescribed and the insistence on consecutive execution of sentences. It would be meaningless to think that the Legislature would have expected a person like, and in the circumstances of, the Appellant to compensate the victim after having spent 18 years of imprisonment.

22. In addition to the sentence of 5 years imprisonment we therefore order in accordance with section 30A of the Penal Code, the Appellant to compensate Mr. Gerald Belle the victim in case number 528/12, by making payment to him in a sum of SR 9082. We do not make a compensation order in respect of case number 527/12 in view of the trivial amount involved. The compensation order shall take effect at the expiry of the Appellant's term of imprisonment and shall be paid within 6 months of his release from prison. Appellant is hereby informed that failure to comply with the compensation order without reasonable cause is an offence.

A. Fernando (J.A)

I concur:. ..... S. Domah (J.A)

I concur:. ..... J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 April 2015