IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , A.Fernando (J.A), B. Renaud (J.A)]

Criminal Appeal SCA 01/2015

(Appeal from Supreme Court Decision Criminal Appeal CA 30/2013)

Ron Roy Victor — Appellant

Versus

The Republic — Respondent

Heard: 27 November 2017

Counsel: Mr. France Bonte for the Appellant

Mrs. Michelle Ebrahim for the Respondent

Delivered: 07 December 2017

JUDGMENT

B. Renaud (J.A)

1. On 17th September, 2011 in case Magistrate's Court case 795/10 learned Magistrate K Labonte sentenced the Appellant to 3 years imprisonment on his own guilty plea for the offence of housebreaking.

2. On the same day Learned Magistrate Labonte in case 796/10 sentenced the appellant to 8 years imprisonment for housebreaking and 9 months imprisonment for stealing and ordered these two sentences to run concurrently but after the expiration of the sentence in case 795/10.

3. The Appellant appealed to the Supreme Court against severity of sentences in both cases (795/10 and 796/10) and Learned Judge Burhan on the 20th November, 2015 in his considered Ruling in relation to case 795/10 stated as follows:

> *"[1] It appears that two Magistrates' Court cases bearing Nos: 795/2010 and 796/2010 have been registered under this Appeal bearing No CN 06/2015.*
>
> *[2] However perusal of the register of appeals indicates that Magistrates' Court Case No 796/2010 has already been registered under CN 25/2011 and the matter concluded. Therefore the error is corrected and this appeal bearing No CN 06/2011 refers only to Magistrates' Court case No CN 795/10.*
>
> *[3] It is apparent that this is an appeal against sentence. The sentence of 3 years was imposed by the learned Magistrate as far back as the 17th of September 2011. It is apparent therefore as the Appellant has been a first offender at the time the term was imposed that he has served the said sentence but is now serving other terms of imprisonment imposed thereafter.*
>
> *[4] Therefore there exists no reason to consider the leave to appeal out of time application dated 3rd March 2015 as he has already served his sentence relevant to this appeal. The leave to appeal out of time application stands dismissed."*

4. In another Ruling the same day, 20th November, 2015, Learned Judge Burhan clarified what he stated at paragraph 2 quoted above that Magistrates' Court case 796/10 has already been registered under CN 25/2011 and the matter concluded. His Ruling is as follows –

> *[1] On perusal of the journal entries in the record, it is clear that this appeal CN 25/2011 has been dismissed by this court on the 23rd November, 2012.*
>
> *[2] A copy of the proceedings dated 23rd November 2012, confirms that fact that this appeal has been dismissed as the Memorandum of Appeal has been filed out of time.*

There exists no appeal from the said order of dismissal to the Seychelles Court of Appeal.

[3] This appeal bearing Case No CN 25/2011 as borne out by the records at the registry refers to Magistrates' Court Case No.796 of 2010. As the appeal has already been dismissed on the 23rd of November, 2012, there is no need to consider a leave to appeal out of time application to the Supreme Court dated 23rd October 2015 in respect of Magistrates' Court No. 796/2010.

[4] Learned counsel should have appealed against the order of dismissal dated 23rd of November, 2012 to the Seychelles Court of Appeal.

[5] Therefore this case cannot proceed further and the leave to appeal out of time application to the Supreme Court dated 23rd October 2015 cannot be sustained and is accordingly dismissed.

Accordingly this Court has nothing before it to adjudicate upon in relation to Magistrates' Court case number 795/10 and 796/10.

5. There is now an appeal filed by the Appellant before this Court against the sentences imposed by the learned Judge M Burhan in the Supreme Court case number CN 30/2013 and CN 83/2013.

6. It is the Appellant's ground of Appeal that the sentences upheld and maintained by the Learned Judge are contrary to sentencing principles and harsh and excessive in all the circumstances of this case.

7. In the judgment of the 23rd of January 2015, the Learned Judge of the Supreme Court at paragraph 15 states:

> *"I am of the view considering the overall circumstances of this case, the personal circumstances of the Appellant set out in the plea of mitigation that in the interest of justice the term of $9^{1/2}$ years imprisonment on both Counts CN 83/2013 should be reduced to a term of 8 years imprisonment. The Appellant is sentenced accordingly."*

8. Likewise in Paragraph 10 of the same judgment on page 3, the Learned Judge says –

> "*Therefore as both offences as set out in Counts 1 and 2 were committed in the same transaction, this court makes order that the sentence in respect of Count 1 and the sentence imposed in respect of Count 2 be made to run concurrently. Therefore, in total Appellant is to serve a term of three (3) years in this instant case.*"

9. From what has been narrated above, the conclusion of the matter is that the Appellant was to serve eight (8) years in total for the offence of housebreaking contrary to and Punishable under Section 289 (a) of the Penal Code Cap 158 (as amended by Act 16 of 1995) as well as stealing from dwelling house contrary to Section 264(b) and punishable under section 264 of the Penal Code Cap 158.

10. On the second count of housebreaking contrary to Section 289 (a) and punishable under Section 289 of the Penal Code, stealing contrary to Section 264(b) and punishable under Section 264 of the Penal Code. According to Learned Judge Burhan's judgment, he was to serve three (3) years in total.

11. It would then seem like there is confusion as to what the Appellant is appealing against. It is clear to me that the Appellant is now appealing against the decision of the Magistrate Court where the Appellant was sentenced to undergo 8 years and 1 and a half years' imprisonment respectively and sentence was to run consecutively. Similarly on the other count, he was sentenced to 3 years and 2 years imprisonment respectively and the sentence was to run consecutively.

12. Learned Judge Burhan reversed that decision and substituted the sentences by making them to run concurrently. Nonetheless, I will proceed to the merits of the case.

The Law

13. Section 36 of the Penal Code, as amended provides:-

> *"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 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 section 28(c)(i) of this Code or any part thereof."

14. Section 9 (1) of the Criminal Procedure Code provides:-

"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 therefore 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."***

15. On the issue of whether the sentences were supposed to be made to run consecutively or concurrently, the law has already been expounded above. Furthermore, this Court considered section 36 of the Penal Code in ***Francis Crispin v the Republic SCA 16/2013*** and held the following at paragraph [19] of the judgment –"*The trial judge was therefore within his powers when he ordered that the sentence shall run consecutive with sentence in a previous conviction."*

16. In the case of ***Neddy Onezime v The Republic SCA 06/2013***, it was held that –"*It is the duty of the sentencing court to decide whether the imposition of mandatory terms of imprisonment as prescribed by law, and the imposition of consecutive terms of imprisonment as prescribed by law, meet the best interests of justice".*

17. According to the records, it cannot be said that the offences committed were committed in a single transaction. It is clear that the Appellant committed one crime of housebreaking and

stealing on the 9th of June 2009 and the other on the 14th of September 2011 and therefore, as per the law, the sentences are to run consecutively.

18. As held in ***John Vinda v The Republic CA 6 of 1995***, the offences were - *"related in nature only but unrelated in space and time... [and] different victims were involved."*

19. Furthermore, it was stated in the same case that - *"in principle, sentences ought to be passed for separate offences and should be made to run consecutively unless the offences could be said to be part and parcel of the same transaction."*

20. Turning to the question of whether the sentence was harsh, it is my considered judgment that it was not harsh in the given circumstances.

21. In the case of ***Mathiot v R SCA 9/1993*** it was held that the Appellate Court shall not interfere with the discretion of a court of first instance merely on the ground that that the Appellate Court would reach a different decision. This was emphasized in ***Kelson Alcindor v R SCA 28/2013***, where this Court held that – "*The mere fact that any or all of the judges sitting on an appeal would have imposed another sentence, be it heavier or more lenient, if he presided in the first instance, is not enough reason for a court of appeal to interfere with the sentences imposed.*"

22. Again this reasoning was retaliated in the case of ***Rex v Ball 35 Criminal Appeal Report, pages 165-166*** it was held -

"An appeal Court will not disturb the sentence of the lower court merely because the appeal court might have passed a different sentence if it had tried the case. The appeal court has to consider the facts of the particular case and only review a sentence if -

It was wrong in principle
It is manifestly harsh and excessive or inadequate.

23. In the case of ***Ponoo v Attorney General (2011) SLR 423***, it was said that Sentencing is an inherent judicial power which involves the human deliberation of the appropriate sentence

to be given to a particular offender in the circumstances of the case. It is not the mere administration of a common formula, standard of remedy.

24. I hold that the sentences imposed by the Learned Judge were not manifestly harsh or excessive. The sentences that the Judge imposed were lenient, fair and reasonable under the circumstances of this particular case. A sentencing decision should be overturned only if it is clearly wrong in principle or manifestly excessive as decided in ***Labiche v R SCA (2004).***

25. Following the reasons given above, this appeal should be dismissed which I accordingly do.

B. Renaud (J.A)

I concur:. ..... F. MacGregor (PCA)

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

Signed, dated and delivered at Palais de Justice, Ile du Port on 07 December 2017