IN THE SUPREME COURT OF SEYCHELLES

MAGID MOUSTACHE **Appellant**

V

THE REPUBLIC **Respondent**

Criminal Appeal Side No.15 of 2012

Mr. Nichol Gabriel Attorney at Law for the Appellant
Mr. George Robert State Counsel for the Respondent

Dated – 11th March 2013

JUDGMENT

Burhan J

The accused appellant hereinafter referred to as the appellant in this case has been charged in the magistrates' court as follows;

Count 1

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

The particulars of the offence are that Magid Moustache residing at La Retraite Mahe on the 10th day of May 2011 at Hutane Lane Mahe broke and entered the dwelling house of Derothy Abel.

Count 2

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

The particulars of the offence are that Majid Mosutache residing at La Retraite, Mahe, on the 10th day of May 2011, at Huteau Lane, Mahe, stole from the dwelling house of Derothy Abel, one laptop make HP value six thousand rupees, three(3) gold necklaces value fifteen hundred rupees (Rs1500/-), one gold chain value one thousand rupees, one gold ring value three thousand and five hundred rupees, one small chain value twelve hundred rupees, some stud, small chain value one hundred and fifteen rupees and one earring value three hundred and sixty rupees being the property of Derothy Abel.

The appellant had been convicted on his own plea of guilt and sentenced on the 17th day of May 2012 by the learned magistrate Mr. K Labonte, on count 1 to a term of eight years imprisonment and on count 2 to a term of one and a half years imprisonment. The learned magistrate further ordered both terms run consecutively.

This is an appeal against the aforementioned sentence imposed by the learned magistrate.

In the case of ***Godfrey Mathiot v Republic SCA 9/1993*** the Seychelles Court of Appeal held that in sentencing, courts should consider the principles of retribution, deterrence, prevention and rehabilitation. It further held that in appeals in respect of sentencing the court would intervene only where:

a) The sentence was harsh, oppressive or manifestly excessive.
b) The sentence was wrong in principle.
c) The sentence was far outside discretionary limits.
d) A matter had been improperly taken into consideration or a matter that should have been taken into consideration was not or,
e) The sentence was not justified by law.

It is borne out in the proceedings and admitted that the appellant had a previous conviction in magistrates' court case no; 382/11 on the 2nd of May 2012 for an offence committed on the 1st of May 2011.

Section 289(a) as amended by Act 16 of 1995 reads as follows;

Any person who –

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein;or

(b) …….

is guilty of a felony termed "housebreaking" and is liable to imprisonment for ***ten years.***

If the offence is committed in the night, it is termed "burglary"and the offender is liable to imprisonment for fourteen years.

Section 27(1) (b) of the Penal Code as amended by Act 20 of 2010 reads as follows;

Notwithstanding section 26 and any other written law, a person who is convicted of an offence in Chapter XXVIII or Chapter XXIX shall-

(a)…….

(b) 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 the same or similar offence****, be sentenced to imprisonment for a period of* ***not less than eight years.***

In this instant case the appellant had admittedly been convicted of an offence in case no; 382/11 on the 2nd of May 2012 in respect of an offence within Chapter XXIX namely housebreaking and stealing and sentenced to two years and fifteen months respectively to run consecutively. Thus it is apparent within 5 years prior to the date of conviction in this case, the appellant had been convicted of the same type of offences in case no 382/11. Further on considering the date of offences in both cases, the offences in this case, are subsequent offences to the offences in case no 382/11.

It is the view of this court that as the law stands subsequent to the amendment Act 20 of 2010 the learned magistrate cannot be faulted for sentencing the accused to the minimum mandatory term of imprisonment in respect of count 1 which in terms of the aforementioned section 27 (1) (b) of the Penal Code is eight years for a second offender.

The learned magistrate in the sentencing process referred to the case of ***Jean Frederick Poonooo v Republic SCA 38 of 2010*** and came to a finding that there were no exceptional grounds in this instant case, for the minimum mandatory term not to be imposed. I see no reasons to refute the finding of the learned magistrate.

The mere fact that the appellant had pleaded guilty is not an exceptional ground to impose a term of imprisonment lesser than the minimum mandatory term required by law.

The learned magistrate further ordered that the terms of imprisonment imposed in respect of count 1 and 2 run consecutively and consecutive to the terms of imprisonment he is serving in case no; 382/11.

It is apparent that the learned magistrate relied on section 36 of the Penal Code which 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 section 28 (c) (i) of this Code or any part thereof.

Having considered the aforementioned relevant provisions of the Penal Code the learned magistrate's decision to make order that sentences imposed in respect of offences under Chapter XXIX as in this instant case run consecutively to the

sentences imposed in case no 382/11, cannot be faulted as the law provides for same.

Further on consideration of the gravity of the offence, the valuable items stolen as set out in the particulars of offence in count 2, this court is satisfied that a just and appropriate sentence has been imposed by the learned magistrate, after due consideration of the facts of the case and the facts mentioned in the plea of mitigation by learned counsel for the appellant. The case referred to by learned counsel for the prosecution namely ***Ricky Victor v Republic SC Cr App 11/2010*** is in respect of sentences imposed for offences committed prior to the amendment Act 20 of 2010 coming into force (i.e. the 10th of August 2010).

For the aforementioned reasons this court finds no ground on which the sentence imposed by the learned magistrate should be set aside or altered. The appeal is dismissed.

M.N BURHAN

JUDGE

SUPREME COURT OF SEYCHELLES

Dated this 11th day of March 2013.