IN THE SUPREME COURT OF SEYCHELLES

Ricky Folette **APPELLANT**

VERSUS

The Republic **RESPONDENT**

Criminal Appeal No.17 of 2011

Mr. N. Gabriel for the Appellant

Miss E. Gonthier for the Respondent

JUDGMENT

DODIN J.

1. The Appellant Ricky Folette was charged with two counts being:

   i) Housebreaking contrary to and punishable under Section 289(a) of the Penal Code; and

   ii) Stealing from a dwelling house contrary to Section 260 and punishable under Section 264 of the Penal Code.

2. The brief facts of the offence are that the Appellant on the 18th October 2006 at Amitie, Praslin broke and entered the dwelling house of Gerry Uranie with

intent to commit a felony namely stealing therein and that he did steal from the dwelling house of Gerry Uranie one silver digital camera make Eura Cyber, DVD 777 x together with its headphone, one silver ring and one binocular all amounting to the total value of RS.7,000 being the property of Gerry Uranie.

3. The Appellant was convicted on his own guilty plea to both counts and was sentenced to a period of six years imprisonment for the offence of breaking and entering the dwelling house and to a period of one year imprisonment for the offence of Stealing from the dwelling house. The sentences were to run consecutive to each other and consecutive to any sentence the Appellant was then serving.

4. The Appellant now appeals to this Court against the whole of the decision of the Learned magistrate on the following grounds contained in the Memorandum of Appeal:

   (a) On Count 1 that the learned magistrate erred in law by applying the minimum mandatory term of five years and adding an additional one year totaling six years, a sentence that would normally be reserved for a non-first offender as per section 27A(1) (b) of the Penal Code.

   (b) On Count 2 the sentence of one year for Stealing from dwelling house imposed to run consecutively with the six years was manifestly harsh and excessive.

(c) The learned magistrate erred in law by failing to take into account a material particular before sentencing that is the age of the Appellant who was a minor at the material time.

5. I must observe from the outset that I find this procedure of appeal used by the Appellant to be most unusually formulated as no ground of appeal against conviction was raised in the Memorandum of Appeal despite the appellant claiming to be appealing against the whole decision of the Learned magistrate and concluded with the prayer to quash the sentences rather than claiming that the cumulative effect of the sentences were harsh and excessive. I would urge counsel to file clearer reasons and grounds of appeal in future and to separate any ground of appeal against conviction from the grounds of appeal against sentence so as to prevent the summary dismissal of appeal grounds that have not been clearly set out in accordance with set procedures to the detriment of the Appellants. Be that as it may it is obvious that all the 3 grounds of appeal are against sentence only and I shall treat this appeal as such.

6. Learned counsel for the Appellant submitted that the offence of housebreaking under Section 289(a) of Chapter XX1X of the Code which states that any person who breaks and enters a building, tent or vessel used as a human dwelling with intent to commit a felony therein or having committed a felony in any such building, tent or vessel breaks out thereof, is guilty of a felony termed 'housebreaking'. By virtue of Section 27A(1)(b) of the Penal Code Amendment Act 16 of 1995, in case of conviction, the offender is liable to ten years imprisonment.

7. Learned counsel further submitted that the learned magistrate did not address his mind to the provision of Section 27A(1)(b) either before or after the taking of the guilty pleas and the passing the sentence. He erred on the section of law dealing with sentences and did not treat the Appellant as a first offender. He admitted that the Prosecution disclosed the record of previous convictions to the Court but maintained that such disclosure is not on record to show that the Appellant had indeed any previous convictions and of what nature.

8. Learned counsel submitted that a similar offence has been defined under Section 27A (2) as *'an offence falling within the same Chapter as the offence for which the person is being sentenced.'* He submitted that there is no evidence in the proceedings that this was the case prior to passing sentence and further, the Appellant was not given the opportunity to view the prosecution's list of previous convictions and to contest its contents. Learned Counsel concluded that in the circumstances the Appellant should be treated as a first offender and a non-mandatory sentence should be imposed.

9. On the 2nd ground of appeal learned counsel submitted as that the Appellant had pleaded guilty at the beginning of his trial, this mitigating factor should have been treated in his favour. He had not wasted the Court's time and had saved resources considerably in view that he had been transported from prison to Praslin and may well have to be brought back again for continuation of trial. He submitted that the learned magistrate should have considered concurrent sentences as an option particularly in view that the Appellant was young, a first offender and unrepresented.

10. On the 3rd ground of appeal learned counsel submitted that the learned magistrate ought to have adjourned the proceedings and seek more particulars on the age and status of the Appellant prior to passing sentence. He submitted that in the instant case, the learned magistrate has overlooked a material factor in that the Appellant was young and may have been a juvenile at the time the offence was committed.

11. Learned counsel further submitted that under the Children's Act, a young person should not be sentenced to imprisonment if he can be suitably dealt with in any other way provided for under the Act. He referred the Court to the case of *Sanders Vital v/s the Republic (1981) SLR page 36*, which stated that a Magistrate should, before passing sentence of imprisonment on a young person, state in open court and place on record the reasons for passing a sentence of imprisonment instead of dealing with the young person in some other way. He argued that at that time, the Children's Act Section 11(2) was applicable and a young person described in the Act as a person who is 14 years of age or upwards and under the age of 18 years.

12. Learned counsel submitted that the learned magistrate could have alternatively sought a Probation Report, which, although it is not a statutory requirement, might have offered some guidance on the facts and character of the offence and the antecedents of the offender, his age and family background.

13. Learned counsel submitted that the Court can only alter a sentence imposed by the trial court if it is evident that the trial court has acted on a wrong principle or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case. He referred the Court to the case of *R. V/s Neysome and Browne (1970) 54 Cr. App. R. 485*, in support of his submission.

14. Learned counsel submitted that in the circumstances the Appellant's sentences were manifestly harsh and excessive and wrong in law, especially for a young, first offender. He moved the Court to quash the sentences imposed by the learned magistrate in this case.

15. Learned counsel for the Respondent submitted on ground 1 that at pages 2 to 3 of the record of proceedings the learned magistrate inquired as to whether the accused had any previous criminal conviction and the prosecution stated that he did and the same was produced to the court. The Appellant was not a first-time offender. Learned counsel submitted that even if it had been the case that the Appellant was a 1st offender, there is no evidence that the Learned magistrate considered the minimum mandatory term when imposing the sentence, as the Court made no mention of such when imposing the sentence. Learned counsel submitted that the sentence imposed by the learned magistrate falls well within the provision of section 289 of the Penal Code. Learned counsel concluded that the learned magistrate had correctly applied the power of sentencing and used his discretion to apply a sentence below the prescribed ten years.

16. On the 2nd ground of appeal learned counsel submitted that the Learned magistrate rightly ordered the sentences to run consecutively as per the amended section of the Penal Code which mandates that it shall not be lawful for a Court to direct that any sentence under Chapter XXVI, Chapter XXVIII and Chapter XXIX be executed or made to run concurrently with one another; and the offence in this case does fall under Chapter XXIX.

17. On ground 3 of the Appeal learned counsel submitted that the Appellant's age at the time was not on record and no evidence of him being a juvenile was submitted by the Appellant. Learned counsel submitted that the fact that the Appellant was not represented at the trial is not in issue as the Appellant was informed of his constitutional right to legal representation and chose to defend the case himself and he was further given adequate advice before he pleaded guilty.

18. Learned counsel hence moved the Court to dismiss the Appeal and uphold the sentences imposed by the learned magistrate.

19. This appeal raises 3 issues which need to be addressed. First whether the learned magistrate imposed a mandatory minimum sentence for the offence which was committed in 2006 and if so was that sentence unlawful. Second, whether the cumulative effect of the consecutive sentences make the same harsh and excessive and third whether the learned magistrate took into account all the mitigating factors including the young age of the Appellant before passing sentence.

20. It cannot be disputed that the learned magistrate advised the Appellant and it is so recorded in the proceedings of the magistrate court that the 1st count the Appellant was charged with carried a mandatory minimum sentence of 5 years and the learned magistrate clearly stated that to the Appellant prior to the Appellant pleading guilty to the charges. I therefore find the submission of the Respondent that the learned magistrate did not consider the mandatory minimum sentence when imposing sentence on the Appellant to be incorrect.

21. However, learned counsel for the Respondent maintained that even if the learned magistrate had indeed considered imposing the mandatory minimum sentence since the maximum sentence that the learned magistrate could impose was 10 years, the sentence imposed by the learned magistrate was well within the prescribed sentence. That may be so but the issue is whether having so decided that he could not impose a sentence lower that 5 years for the 1st count the learned magistrate unduly restricted himself to imposing a sentence of between 5 and 10 years instead of the full range of 0 to 10 years.

22. Article 19(4) of the Constitution states that:

> *"Except for the offence of genocide or an offence against humanity, a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence, and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that*

might have been imposed for the offence at the time when it was committed."

23. This principle implies also that a Court cannot consider imposing a mandatory minimum sentence for an offence which when it was committed the mandatory minimum sentence was not the law in force. Secondly, courts must always be mindful in imposing sentence that it is not doing an injustice by imposing a sentence that did not exist at the time of the commission of the offence.

24. Consequently I accept the Appellant's contention that the learned magistrate limited his discretion in sentence by the belief that the court must impose a mandatory minimum sentence for an offence which was committed when the law did not require a mandatory minimum sentence.

25. The second limb of this issue is whether the sentence imposed by the learned magistrate was unlawful taking into account that the maximum sentence that could be imposed was 10 years. On the face of it, the learned magistrate imposed a sentence that was well within the limit of the court's sentencing power. However one should always keep in mind when imposing sentence that a sentence must be proportionate to the offence.

26. In the case of *S v Vilakazi 2009 (1) SACR 552 (SCA)* the South African Court made this most pertinent point that may be well applicable to our courts when imposing sentence:

"It is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence and that the essence of the inquiry is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice".

27. Considering the above, imposing 60% of the maximum sentence on a young offender who has pleaded guilty is very much disproportionate to the offence considering all the circumstances of the case and I therefore find that the sentence of 6 years imprisonment imposed by the learned magistrate although not per se unlawful, is harsh and excessive in the circumstances.

28. With regards to the 2nd ground of appeal the issue is whether the sentence of 1 year imprisonment which was to run consecutive to the 6 years imposed for the 1st count is harsh and excessive. Since the two offences occurred during a single transaction the principle known as the single transaction rule should generally apply.

29. In his text entitled *Principles of Sentencing* (2nd ed, 1979) 53 DA Thomas states:

"The one-transaction rule can be stated simply: where two or more offences are committed in the course of a single transaction, all

sentences in respect of these offences should be concurrent rather than consecutive."

30. The rule against double punishment should also generally be observed when the court is determining an appropriate sentence for each offence. The one transaction rule may assist in determining whether the sentences should be cumulative or concurrent but the court must look at the aggregate sentence and consider whether the aggregate is just and appropriate or whether the total sentence is crushing and not in accordance with the totality principle.

31. In *R v White [2002] WASCA 112, [26]* McKechnie J remarked on the above principles:

"There is no hard and fast rule. In the end a judgment must be made to balance the principle that one transaction generally attracts concurrent sentences with the principle that the overall criminal conduct must be appropriately recognized and that distinct acts may in the circumstances attract distinct penalties. Proper weight must therefore be given to the exercise of the sentencing Judge's discretion."

32. It is true that current legislation has attempted to remove that discretion from the courts. Whatever may be one's view on this, the fact remains that the learned magistrate should have applied the principles that were applicable at the time the offences were committed. Since Article 19(4) of the Constitution gives retroactive force only to the offence of genocide or an offence against

humanity and not any other crime, the same principle considered in the 1st ground of appeal should apply to this ground of appeal provided always that the learned magistrate could have used his discretion if he had found it appropriate and necessary to consider the two offences as sufficiently distinct and separate to imposed a consecutive sentence and if considering the totality of all the sentences it would not have made the consecutive sentence of 1 year imprisonment harsh and excessive.

33. On the 3rd ground of appeal, I find that the issue of the Appellant's age was considered by the learned magistrate to the extent allowed by law. In fact there is no evidence to show that the Appellant was actually a juvenile at the time of the commission of the offence, a fact that could have been easily established by producing the Appellant's birth certificate even on appeal. The records show that the learned magistrate considered the mitigating factors before passing sentence which included the youthfulness of the Appellant. Without more to go on, I find thus ground of appeal to be wanting in substance and I would dismiss that ground outright.

34. Consequently, the appeal is allowed against sentence and only to the extent that the sentence of 6 years imposed by the learned magistrate was misconceived, harsh and excessive considering all the circumstances of this case. I therefore set aside the sentence of 6 years imprisonment and impose a sentence of 3 years imprisonment in its place. I also find that the sentence of 1 year imprisonment for the 2nd count was reasonable but that it should not have added to the sentence already imposed as the two offences were part of

a single transaction. I hereby order that the sentence of 1 year imprisonment imposed for the 2nd count run concurrently with the 3 years imprisonment imposed for the 1st count.

35.Judgment is entered accordingly.

C. G. DODIN

JUDGE

Dated this 23rd day of May, 2013.