

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC ~~733~~

CA3/2019

(Appeal Arising in 342/2019)

THUD AGATHINE
(rep. by Nichol Gabriel)

Appellant

and

REPUBLIC
(rep. by Mrs. Monthy)

Respondent

Neutral Citation: *Thud Agathine v Republic* (CA 3/2019) [2020] SCSC ~~874~~⁷³³ (06 October 2020).
Before: Vidot J
Summary: Appeal. Sentence; Application of section 36 of the CPC regarding concurrent and consecutive sentence
Heard: 8 September 2020
Delivered: 06 October 2020

ORDER

Appeal dismissed. Sentence maintained

JUDGMENT

VIDOT J

- [1] The Appellant was charged and convicted on his own guilty plea for the offence of stealing from a dwelling house contrary to and punishable under section 264(b) of the Penal Code. He stole from the house of Percy Amblavany items comprising mainly of alcohol, jewellery and electronic devises. The value of the items stolen amounted to Seychelles Rupees twenty Four Thousand Six Hundred and Eighty Five (SR 24,685.00). The sentence was passed on the 27th August 2019.

Prescription

- [2] On the 18th October 2019, the Appellant filed a Notice of Appeal. The appeal is against sentence only. The appeal is time barred as it was filed outside the 14 days prescribed period. I decided to condone the appeal being filed out of time because the Appellant was incarcerated and being a lay person did not possess the legal knowledge regarding prescriptive periods for filing of cases, especially, as in this case, the filing of appeal. It is also noted that the Appellant had applied for legal aid and the Legal Aid certificate appointing Mr. Nichol Gabriel is dated the 28th July 2020.

Ground of Appeal

- [3] The appeal is against sentence only. It states that the sentence of four years should have been made to run concurrently and not consecutively to any other sentence that the Appellant was already serving, as it does not correspond to current sentencing patterns of cases of similar nature. The Respondent is resisting the appeal and maintains that the sentence was lawful and proper in the circumstances.

The Law

- [4] The accused is charged with an offence that an infraction of section 264(b) of the Penal Code which warrants a sentence to a term of 10 years imprisonment. Such offence falls under Chapter XXVI of the Penal Code. Section 36 of the Code provides thus;

“Where a person after conviction of an offence is convicted of an 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 directs that it shall be executed concurrently with 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 and Chapter XXIX be executed or made to run concurrently with 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.”

Submissions

- [5] The Appellant submits that notwithstanding the general position of the law, the pertinent question and consideration are whether justice in this case has been done; did a consecutive sentence meets the best interest of justice? Counsel for the Appellant refers to **Jean Frederick Ponoov AG SCA 48/2010** as providing “*useful inspiration.*” He argues that the words of the Court of Appeal “*found the proviso of Ponoov does find application in section 36 of the Penal Code on consecutive sentence.*” The position of the Court was that section 36 should not be accorded too strict an application.
- [6] Counsel for the Appellant also argued that the court failed to take certain matters raised in mitigation prior to passing sentence. He enumerated these as including the fact that the Appellant is young; 30 years of age, had pleaded guilty and he is a father of 3 children. He was also a drug addict.
- [7] On her part, Counsel for the Respondent argued that the fact that the Appellant was convicted to only four years imprisonment is indicative that the Learned Magistrate took the matters of mitigation into consideration. The Appellant further had previous convictions, two of which he was serving at the time sentence in the present case was passed. The convictions were for offences of similar nature. She also remarked that the other offences were for stealing of mostly food items whilst in the case, the stealing was getting a little more sophisticated.

Arguments

- [8] It is trite that an appellate court should not interfere with a sentence meted out by a lower court unless the sentence imposed is wrong in law and/or in principle or some material factor was overlooked or that the sentence is manifestly harsh and excessive; see, **Mathiot v Republic SCA 9 of 1993**. To a certain extent a sentence is the discretion of the trial judge. The judge should nonetheless balance the mitigating factors with the aggravating factors and then consider the cumulative effect thereof; vide **Jakari Abdulla Suki v Republic SCA 10/19** (delivered on 21st August 2020). In the present case the Appellant has not argued that the sentence was harsh and excessive, but merely that it is wrong in law.

- [9] In **Neddy Onezime v Republic SCA of 2013** which makes reference to **Frederick Ponoo v The Attorney General** (supra), it is argued that section 36 should not have a strict application and when considering a sentence the court should have regard as to whether a consecutive sentence would be in the best interest of justice.
- [10] **John Vinda v Republic** (1995) (unreported) offers some guidance, where the court reiterated that under Section 36 of the Penal Code, concurrent sentence is the rule whilst consecutive sentence the exception. This suggests that Section 36 should not be given a strict interpretation. The court has to take into account the circumstances of the case and decide on a sentence that is just a fair. The application of the exception can be considered to be the disproportionality of consecutive sentences to the totality of the behaviour of the convicted person or the gravity of the offence.
- [11] There is no doubt in my mind as is made clear in her sentence imposed that the Learned Magistrate considered all factors of mitigation. She mentioned that she considered the circumstances of the case. She considered the early guilty plea of the Appellant which I believed should have earned the Appellant a little more credit considering that he pleaded guilty at early stage of the trial and the cost of the stolen items was not that great. She considered the youth of the Appellant and the fact that he had small children. The same factors of mitigation were considered in other cases wherein the Appellant was convicted. Concurrent sentences were imposed.
- [12] However, as pointed out by the Learned Magistrate the Appellant is a recidivist. He has been convicted in several cases all similar in nature. She notes that the Appellant has 3 unspent convictions for offence of similar nature dating back to 2016. Further, the Appellant was sentenced in 2018 (CO56/18) to 5 years imprisonment on one count and 3 years on another. These sentences were made to run concurrent and again the offence were similar in nature to the present one. Nonetheless, even if the law provides for mandatory minimum sentence for the offence the Appellant was convicted of herein, the Learned Magistrate appropriately applied **Ponoo v The Attorney General** (supra) in imposing the sentence of 4 years.

[13] Noting that the Appellant who claims to be drug dependant, despite being granted by Court several opportunities to reform and has not taken advantage of such opportunities. He continues to on the path of criminality. Therefore, in the circumstances the Learned Magistrate was right in applying section 36 of the Penal Code strictly and to order the sentences shall run consecutively.

[14] Therefore, this appeal stands dismissed and the conviction upheld.

Signed, dated and delivered at Ile du Port on 06th October 2020

A handwritten signature in black ink, appearing to read 'Vidot J', is written over a horizontal line.

Vidot J