VILITATI VASUCA v STATE(HAA003 of 2012L)

HIGH COURT — CRIMINAL APPELLATE JURISDICTION

NAWANA J

27, 31 July 2012

Appeal against sentence — single sentence ruling — whether single ruling covering two cases was appropriate — accused pleaded guilty on two different dates to different offences — aggravating factors — habitual offender — concurrent sentences — non-parole period — Criminal Procedure Decree s 256(3) — Sentencing and Penalties Decree ss 20, 22.

The appellant appealed against the single sentence imposed in respect of two cases. In the first case, the appellant was convicted of "Storeroom Breaking, Entering and Larceny". In the second case, the appellant was convicted of two counts each of Burglary and Theft. The Magistrate wrote a single sentence-ruling in common for both cases, by imposing a two year term of imprisonment to run concurrently in respect of all five charges. By then, the appellant was serving a 14 year sentence of imprisonment for other convictions, and the Magistrate fixed a single non-parole period at 11 years.

Held –

(1) Each case is to have its own final judgment unless a court deems it expedient to amalgamate cases for their meaningful disposal in the interests of justice, for which reasons need to be recorded. It was not appropriate for the Magistrate in this case to have written a single sentence-ruling in common in respect of two cases. This is especially so when the accused pleaded guilty on two different dates to a series of distinct offences committed on two different dates, which were 14 months apart. Doing so obscured the necessity of taking into consideration relevant matters and resulted in a failure to impose the appropriate sentence.

(2) The fact that not all the stolen property was recovered and the prevalence of such offences were not aggravating factors that could enhance the sentence.

(3) The appellant was a habitual offender and had committed the Burglary and Theft offences whilst on bail for the Storeroom Breaking, Entering and Larceny offence. He was therefore not entitled to the benefit of concurrent sentences.

Appeal dismissed. Sentences varied.

Appellant in person.

Shelyn Kiran for the Respondent.

[1] Nawana J. The appellant, having obtained leave from this court on 21 May 2012, is appealing against the sentence imposed by the learned Magistrate of Lautoka in respect of two cases bearing Nos 242/09 and 300/10.

[2] (i) In Case No 242/2009, the appellant stood charged for having committed the offence of '*Storeroom Breaking, Entering and Larceny*' punishable under s 300 of the Penal Code. The offence was committed on 22 March 2009 at Lautoka. The total value of the property, which became the subject matter of larceny, was $2,730.

(ii) Summary of facts, as admitted by the appellant, revealed that, around 1.00 am on 22 March 2009, the appellant, along with a few others unknown, had broken into a storeroom under the care of one Mosese Halahigano and stole the property.

(iii) The appellant pleaded guilty to the charge on 25 July 2011; and, he was, accordingly, convicted.

[3] (i) In Case No 300/2010, the appellant stood charged for having committed the offences of '*Burglary*' on 22 May 2010 in Count Nos 1 and 3 punishable under s 312 (1) of the Crimes Decree No 44 of 2009. The appellant also stood charged for having committed the offences of '*Theft*' on 22 May 2010 in Count Nos 2 and 4 under s 291 (1) of the Crimes Decree No 44 of 2009.

(ii) As admitted by the appellant, charges in counts (1) and (3) related to acts of breaking into two dwellings between 2150 hrs-2230 hrs on 22 May 2010, while the charges in counts (2) and (4) related to the stealing of household property to the values of $ 2545 and $ 3080 respectively in the course of same transaction.

(iii) The appellant pleaded guilty to the four charges on 20 June 2011; and, he was, accordingly, convicted.

[4] Learned Magistrate, in writing a single sentence-ruling in common for both cases (bearing, however, the two dates of 03 October 2011 and 04 October 2011), imposed a term of two year imprisonment for the charge [*Storeroom Breaking Entering and Larceny*] in Case No 242/09. He also imposed a term of two year imprisonment each for the charges in Count Nos 1 and 3 [*Burglary*]; and, a term of eighteen month imprisonment each for the charges in Count Nos 2 and 4 in Case No 300/10 [*Theft*].

[5] Learned Magistrate had found the factors, namely:

> *'Not all the items were recovered'*; and,
>
> *'Prevalence of offences of this nature*' to have aggravated the offences in common and imposed above sentences after picking-up starting points of two years for the offence of store-room breaking in 242/09 and for the charges of burglary in count Nos (1) and (3); and, of eighteen months for the charges of 'Theft' in count Nos (2) and (4) in Case No 300/10. Six month each was added and subtracted for the above aggravating factors and for the mitigatory factors of rehabilitation and remorse and arrived at the terms of sentence, as set-out above.

[6] The four sentences imposed in Case No 300/10 were ordered to be concurrent with each other resulting in an aggregate sentence of a two year imprisonment. That term of two year imprisonment was ordered to run concurrent with the two year imprisonment imposed in Case No 242/09. The ultimate sentence that the appellant had to serve was, therefore, only a term of two year imprisonment in respect of all five charges in the two cases.

[7] The appellant, by then, was serving a term of fourteen (14) year imprisonment as imposed by the High Court, Lautoka, in Case No 41/09 pursuant to his convictions after trial on two counts of 'Robbery with Violence' punishable under s 293 (1) (b) of the Penal Code. The sentence of the High Court dated 25 January 2011 prescribed an eleven year non-paroled period for the appellant to serve in imprisonment.

[8] Learned Magistrate, with a view to give effect to s 20 of the Sentencing and Penalties Degree (S&P Decree)in light of the sentence of the High Court, fixed a single non-parole period at eleven years.

[9] The above matters are borne-out by the two Case Records.

[10] It is not in order for the learned Magistrate to have written a single sentence-ruling in common respecting two cases especially when an accused-person pleaded guilty on two different dates to a series of distinct offences committed on two different dates, which were fourteen months apart.

[11] There is indeed no positive rule under the Criminal Procedure Decree No 43 of 2009 either permitting or forbidding the writing of a single judgement in common for more than one case. It is nonetheless a salutary practice, which is almost hardened to a tacit rule of criminal procedure - and, of course, a commonsense approach - for a case to have its own final judgement in its own right on merits unless a court deems it expedient to amalgamate two or more cases for meaningful disposal in the interests of justice, for which reasons need be recorded.

[12] It appears that the decision of the learned Magistrate in these two cases to write a single ruling on the sentence had obscured the necessity of taking into consideration of relevant matters correctly and eventually had resulted in a failure of imposing the appropriate sentence. These two cases, therefore, ought not to have been disposed of with one single ruling on sentence in common.

[13] I note the following errors in the ruling.

(i)Firstly, the learned Magistrate was not correct in choosing the aggravating factors, as reproduced above, to enhance the sentences as they did not really constitute factors to have aggravated the offence. As regards '[*n*]*ot all items were recovered*', it must be stated that an inherent feature akin to the offences of theft and robbery is that the possessor is dispossessed of movable property temporarily or permanently. Deprivation of the property of its lawful possessor, therefore, is embedded in the offences themselves. Consequently, the fact that all or some items of property were not recovered cannot not be considered as an aggravating factor in offending in order to enhance the sentence. Conversely, if property is recovered, that might be a factor to mitigate the sentence but not vice-versa. In any event, the issue of recovery of property is totally inapplicable to the offences of burglary as the issues of recovery simply do not arise in relation to those offences. But, the learned Magistrate had applied that factor, though erroneously, in common to the offence of burglary as well to enhance the sentence. Similarly, '*prevalence of offences of this nature*' is not a suitable factor to enhance the sentence because it does not link with the offending by the accused; but, it is only a societal phenomenon for which an accused-person could not be rightly held accountable by enhancing his sentence.

(ii) Secondly, it appeared that the offences in Case No 300/10 had been committed whilst the appellant was on bail in relation to the offence in Case No 242/09. Therefore, s 22 (2) (e) of the S&P Decree prevented the learned Magistrate from making the sentences of imprisonment concurrent.

(iii) Thirdly, the new single non-parole period in terms of s 20 of the S&P Decree needs to supersede the previous non-parole term of eleven years as imposed by the High Court in HAC 041/09. By fixing the new single non-parole period, too, at eleven years, its effect, in light of the sentence imposed by the learned Magistrate in the two cases, was diminished and was not in accord with the provisions in s 20 (2) of the S&P Decree.

(iv) The sentence does not correctly reflect the aggravating factors and its adjustment does not appear to have been done in an accountable way.

[14] Having observed above irregularities, leave was granted to consider the legality of the sentence broadly in light of the appellant's complaint that the two year term of imprisonment to run consecutive to his existing fourteen year term offends the totality principle. Court, however, informed the appellant that there could be a likelihood of having his sentences enhanced in light of the foregoing observations of this court. Although it looks ironic to result in an enhancement of the sentence when the appellant's plea was for a reduction, this court, in the exercise of appellate and revisionary powers under Part XV of the Criminal Procedure Decree, however, is bound to rectify irregularities committed by the lower court irrespective of its outcome.

[15] The appellant, who was appearing in person, was informed in great detail of the powers of this court in terms of s 256 (3) of the Criminal Procedure Decree and of the apparent irregularities committed by the learned Magistrate to enable him to be ready with his submissions to sustain the sentence of the Magistrate or its reduction. At the appellant's requests, hearing was adjourned to 04 June, 25 July and 27 July 2012.

[16] At the hearing into the appeal on 27 July 2012, the appellant relied on his further written- submissions dated 24 July 2012 and submitted that the consecutive sentence as ordered by the learned Magistrate was wrong in principle and would have a crushing effect. He urged for a lesser sentence.

[17] I have considered the submissions of the appellant and of the learned state counsel. After considering the matters, as set-out above, I exercise the powers vested in this court under s 256 (3) of the Criminal Procedure Decree, and quash the sentences of the learned Magistrate as they do not conform to the law and substitute the sentences as follows.

[18] For the offence of '*Storeroom Breaking, Entering and Larceny*' in Case No 242/09, I pick-up the starting point of two years. The aggravating factors were group offending and the invasion of the storeroom at night. For each factor, I enhance the sentence by six months each and arrive at three years at the interim. I reduce six months for the guilty plea, which was tendered after several days of the proceedings; and, another six months for rehabilitation and arrive at a two year term of imprisonment.

[19] For each offence of '*Burglary*' in Case No 300/10, I pick-up the starting point at two years. Aggravating factor was the home invasion by night, for which I enhance the term by six months each and reach at thirty month imprisonment each. I reduce the term by six months for the guilty plea; and, by another six months for rehabilitation and arrive at a term of eighteen months for each offence. The appellant is sentenced to a total of three year imprisonment for the two counts of '*Burglary*'.

[20] For each offence of '*Theft*' in Case No 300/10, I pick-up the starting point of eighteen months. Home invasion by night was an aggravating factor, for which I add six months and reach twenty four months at the interim. I reduce the term by six months for the guilty plea; and, another six months for rehabilitation and arrive at a term of twelve month imprisonment. The appellant is sentenced to a total of two year imprisonment for the two offences of '*Theft*'.

[21] The appellant had fourteen previous convictions, all of which were for larceny and house breaking. Having regard to his record of previous convictions, I determine that the appellant is a habitual offender under the provisions of Sections 10 and 11 of the S&P Decree. The appellant had committed the offences in Case No 300/10, whilst on bail in Case No 242/09.

[22] The appellant, in view of the reasons in the foregoing paragraph, is not entitled to the benefit of concurrent sentences in terms of the provisions in s 22(2)(c) and 22 (6) of the S&P Decree. In the result, each term of sentence totaling seven years shall run consecutive to each other.

[23] Acting in terms of s 20 of the S&P Decree, I fix a single non-parol period of fifteen (15) years. The sentences shall be deemed to have begun to run from 20 June 2011, being the earliest date on which the plea of guilty was tendered before the learned Magistrate.

[24] Appeal dismissed. Sentences varied. A copy each of this judgement to be filed of record in MC/Lautoka Case Nos 242/2009 and 300/2010. The two Case Records are to be returned forthwith.

Appeal dismissed.