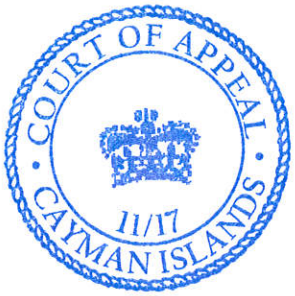
IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 7/2017
IND. 52/2011
C02743/2011



Dan Danvar Kelly

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

BEFORE: The Rt. Hon Sir John Goldring, President
The Rt. Hon Sir Bernard Rix, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Appearances: Mr. Laurence Aiolfi of Priestleys on behalf of the Appellant
Ms. Candia James for DPP

Date of Hearing: 8 November 2017

Reasons Approved for Release: 20 June 2018

JUDGMENT

Revised from transcript of oral judgment 8 November 2017 and Approved Released 20 June 2018

MOSES JA:

1. This is an appeal against a sentence of five years imposed following a trial on this appellant on 3rd October 2016 when he was convicted of robbery and possession of an imitation firearm with intent to commit robbery. The sentence by Mr Justice Quin was on 12th January 2017.

2. The offence took place as long ago as 29th September 2010. On the morning of that day, the appellant, in the company of a co-defendant Derrick Simpson, robbed the Caribbean Bakery, taking cash from the cash register. It was not a large amount, CI$400.

3. During the course of that robbery, the appellant used a modified flare gun as an imitation firearm and struck the cashier over the head with that weapon before helping himself to the contents of the cash register.

4. Following that offence, this appellant was caught, and, whilst being interviewed, gave what the sentencing judge accepted was helpful information in relation to a murder unrelated to this offence. Having done so, as the judge accepted, and having given that assistance, this appellant - who is young man, and was a young man of 18 at the time with no previous convictions - fled the jurisdiction whilst on bail, having been in fear as a result of what was accepted to be that helpful information. Thus there was considerable delay before he was tried.

5. His co-accused, pleaded guilty approximately two years and ten months after the offence (5 August 2013) whilst this appellant was away from the island, and was sentenced by a different judge, Mr Justice Malcolm, to a sentence of three years' imprisonment.

6. The argument is therefore advanced on his behalf, in careful and helpful submissions by Mr. Aiolfi, that the judge, in sentencing this appellant to five years following a trial, failed to take sufficient account of the far lower sentence of this appellant's co-accused and therefore there is an unjust and unfair disparity between the two sentences.

7. It is also argued that the five-year sentence, which without mitigation would be an appropriate sentence, was excessive because the judge failed sufficiently to take

into account for the fear of this appellant that led him to leave the jurisdiction, for the fact that he then came back within the jurisdiction having provided that very helpful assistance to the authorities.

8. Helpful as indeed it was - although it must be noted he did not give evidence at the trial that followed that assistance - the question for us, therefore, is whether there was disparity between the two defendants, and, also, whether the judge failed to give due weight to the mitigation.

9. So far as disparity is concerned, there have been a number of statements as to the approaches of the courts in England and Wales as to the principle that would be applied. We take the view that it is not often helpful to seek to apply a principle when considering disparity, but rather to see whether the sentence is excessive. In the particular circumstances that a co-accused received a significantly lower sentence, our attention was drawn to the decision of the Court of Appeal in ***Coleman and Petch*** EWCA Crim 2318, particularly at para.9.

10. In this case, we need not delve more into trying to reconcile those cases in which the Court of Appeal has not interfered because the other sentence was too low, or those cases where it does interfere because it thinks there was too great a disparity. Because, in this case, there was a clear difference between this appellant and his co-accused.

11. For a start, the co-accused pleaded guilty whereas this appellant, having absconded, did not plead guilty, but fought the case.

12. Secondly, it was this appellant who produced the imitation firearm and inflicted violence upon the cashier. Neither the trial judge, nor we, has any evidence as to the effect on the cashier, although it must have been terrifying, to put it at its least, and because the cashier had left the jurisdiction, coming from the Philippines. We would only emphasise an observation by the President during the course of this

argument, that it is important in order to fit cases into the correct categories and guidelines that during the course of a witness statement the effect upon that witness is noted within that statement itself.

13. The judge - and we have to remain loyal to this - placed this robbery within category 3 where there is a starting point of five years and range of four to eight.

14. The judge also referred to a decision of this court where for robbery of small commercial businesses - which we note are particularly vulnerable on this island - and weapons are used, an accused must expect at least five years' imprisonment.

15. We take the view that a sentence on a trial in the region of eight years would have been appropriate.

16. The appellant, as we said, was a young man of 18, had not been in trouble before, and had given considerable assistance to the police about that other matter. Those were all mitigating factors that justified reducing the sentence of eight years, but we do not think it arguable that it was excessive to reduce it by no more than three years, and in those circumstances we take the view that the sentence of five years cannot properly be impugned. In those circumstances, the appeal is dismissed.