IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 33/2016
IND. 4/2016
C#0491/2016

BETWEEN:

DAVID WILLIAM McLAUGHLIN-MARTINEZ

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 Jonathan Hughes of Samson Law for the Appellant
Mr. Greg Walcolm for the DPP

Date of Hearing: 6 November 2017

JUDGMENT
Revised from transcript of oral judgment 6 November 2017 and Approved
Released 19 December 2017

Sir John Goldring, President:

1. On the 31 November 2016, the applicant was convicted of the robbery of an elderly and disabled woman called Mrs. Sarin. The trial judge, the Honourable Madam Justice Dobbs, sentenced him to 11 years' imprisonment. He now seeks an extension of time and leave to appeal against conviction and sentence. We are grateful to Mr. Hughes for dealing with this case at comparatively short notice. He advanced every point that could have been advanced on behalf of the applicant.

2. Much of the evidence was not in dispute.

3. Mr. and Mrs. Sarin were both elderly. Mrs. Sarin required a carer. They owned a house on Rum Point in Grand Cayman. The applicant knew the house. He had worked there as a plumber in December 2015. He knew there was, as he later said, "*stuff*" around.

4. At about 6:15 p.m. on 11 January 2016, a man wearing a balaclava and carrying a knife with a six-inch blade entered the house. The applicant's case was that that man was someone called "*Boom*," to whom he owed money. To discharge his debt, the applicant said he pointed out to Boom an empty house to enable him to burgle it. In fact, Boom went into the occupied house of Mr and Mrs Sarin. The applicant himself remained outside for between about 15 to 30 minutes, during which time the events we shall shortly describe took place. He saw, and to some extent heard, those events unfold. He later, for a short time, looked after some jewellery which was stolen. He received some of the cash; namely, a thousand dollars and also a bottle of whisky. His debt was written off.

5. In short, it was the Crown's case that the applicant participated in the robbery as "*lookout*". It was his case that he never agreed that a robbery would take place. He was not a lookout.

6. Mr. Sarin was in the porch area when the man came in. Mrs. Sarin was sitting on a recliner in the living room. Their helper, Miss Jocson, was preparing dinner in the kitchen. Mrs. Sarin heard a commotion. She saw her husband turned over on the floor with the chair he had been sitting on. He was bleeding and seemingly unconscious. In fact, he had suffered a comminuted fracture of the cheek bone. Mrs Sarin cried out. When Miss Jocson went to help Mr. Sarin, a man grabbed her by her hair. He held a knife to her neck. He asked her where the money and jewellery were. Miss Jocson was led to where Mrs. Sarin was sitting. The man instructed Miss Jocson to remove Mrs. Sarin's jewellery. She removed a

necklace and a ring from Miss Sarin's finger and neck; also, some bangles. Boom made threats such as: "*Give it to me or I'll kill you*". Mr. Sarin came round. He was brought to a chair. Some items he was wearing and his watch were removed. About US$4,000 dollars were taken from a bag in the kitchen. The man kept demanding jewellery. He went upstairs with Miss Jocson to search for it. He threatened that they would be killed if the police were called. He spoke of having someone watching them who would kill them. Items were taken upstairs. The telephone line was cut. The man was continually asking where money and jewellery were. Throughout he held the knife in his hand. He finally left, having taken some more money and a bottle of whisky. When leaving, he repeated his threat to kill them. Miss Jocson had the impression he spoke to someone outside. She heard him say: "*Are you there?*". The person he spoke to, alleged the Crown, was the applicant.

7. In all, the value of what was taken amounted to some US $33,000 plus about CI $5,500 in cash.

8. The applicant was interviewed for the first time on 15th January of 2017. He first denied knowing about the robbery. He finally gave the police what in broad terms was his account at trial. He said Boom threatened him. The house he selected he believed was empty. He said the split of proceeds from the burglary, as he put it, was to be half and half, if possible. His debt for the drugs would be cancelled. When Boom arrived, the applicant said he went into a house which the applicant could see was occupied. He saw Mr. Sarin. He heard the chair drop. He saw Broom with Miss Jocson. He saw the knife. He heard the demand for jewellery. Throughout he remained outside. He was later given US$1,000 and the whisky. He was asked briefly to look after two of the rings and some other items. At a later interview, he said he saw Boom put on the balaclava and gloves before going into the house. He remained outside because "*curiosity got the better of me*". He wanted to see what would happen. He was waiting for Boom to tell him to leave. He had no explanation, he said, as to why he accepted the money. He

drank the whisky almost immediately. He used the money to buy a vehicle. He would never, he emphasised, have agreed to participate in a robbery.

9. The judge summarised the legal and factual issues in the following way.

> *"The issue for you in this case is whether the defendant, Mr. Martinez I'm going to call him, was a party to the robbery because from the evidence, you know that the defendant was not the one that went into the house and carried out the physical robbery. However, it's the Crown's case that this defendant played his role in the offence by acting as "the lookout". The defendant's case is that he never agreed to enter the premises nor would he have participated in a plan to enter occupied premises or rob the occupants. He didn't know or contemplate that violence or the threat of violence would be used.*
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> *Now the prosecution submit to you that this was an agreement to rob from the outset and they say that you can be sure that the defendant was involved in agreement to rob because A) he was the one who identified the premises. He was staking it out. He had agreed to be a lookout. He saw people inside when Boom entered the house. He saw Boom holding Ms. Jocson with a knife in his hand and he stayed outside watching throughout the whole incident which lasted up to 30 minutes, notwithstanding seeing the knife and hearing the threats to kill. Moreover, say the prosecution, he had agreed with Boom beforehand to split the proceeds and he did accept a thousand dollars from the robbery and he looked after some of the stolen goods for Boom.*
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> *The prosecution say that even, and this is their alternative position, even if you accept that Mr. Martinez initially only agreed to burgle the premises, once he had seen the people in the house, which he did almost immediately, he remained. When he saw Boom holding Ms. Jocson with a knife in his hand, he remained. When he heard the threats to kill, he remained. He stayed outside watching throughout the whole incident which lasted up to 30 minutes. Moreover he accepted a thousand dollars from the robbery and he looked after some of the stolen goods for Boom. You can infer from all the evidence, say the prosecution, that he became a party to the robbery and was lending support by remaining outside as a lookout.*
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> *Now the defendant says that he did not agree to rob anyone. He didn't know that Boom was going to enter the Sarin's house – you remember in evidence he has, he pointed out the little house to Boom, the one next door, the white one. He didn't know that Boom had a knife on him before he entered the house. His reason for remaining was not to act as lookout or support for Boom but out of pure curiosity and you will remember Mr.*

Dixey drew your attention to the fact that when Boom was calling out – as if calling out to his accomplice outside – this defendant didn't respond. Accepting some of the proceeds from the robbery may make Mr. Martinez, the defence submit, guilty of other offences but not the offence of robbery.

Now members of the jury, if you think what Mr. Martinez says is or may be true, then he is entitled to be acquitted. It's only if you reject his evidence and you are sure that he was playing a role in the robbery that took place; namely acting as a lookout, then your verdict will be guilty."

10. At the heart of the handwritten grounds of appeal and of Mr. Hughes' submissions to us, was that the judge did not sufficiently direct the jury on joint-enterprise. She should have mentioned "*joint-enterprise*" by name. She should have set out the principles of joint-enterprise for the jury. What she said in her directions were insufficient. She should have said more about the applicant's account.

11. The relevant section of the Penal Code was section 18. That provides:

"*In section 18(1)*

(a) Where an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to have committed the offence and may be charged with actually committing it; that is to say, every person who actually does the act which constitutes the offence…

"(b) Every person who does any act for the purpose of enabling or aiding any other person to commit the offence.

(c) Every person who aids or abets another person in committing an offence".

12. As is plain from the direction the judge gave, it was quite clear to the jury that in order to convict they had to reject his account in one of two possible ways.

13. First, they could convict if they rejected his account as to the nature of the agreement between him and Boom; in other words, if they were sure the

agreement was to commit robbery. There was ample evidence to support such an analysis.

14. Second, they could convict if they rejected his account that he remained outside for up to 30 minutes, as the robbery was taking place, out of curiosity. Again, there was ample evidence to support this analysis.

15. As it seems to us, the judge's direction encapsulated the issues the jury had to decide in a clear, succinct and helpful way. It can give rise to no conceivable ground of appeal.

16. There is, too, a submission that the sentence of 11 years after this trial was manifestly excessive. The submission is that inadequate account was taken of the applicant's good character. He personally did not use violence. He only participated to that limited extent because of the pressure he was under. Insufficient credit given for the fact that he implicated Boom. That resulted in a valuable necklace being recovered.

17. As the learned judge referred to the Cayman Islands Sentencing Guidelines. As she said, this was plainly a category A case as far as culpability was concerned. It involved, "*production of a bladed article to threaten violence*".

18. The learned judge categorised harm in terms of category one. As she was entitled to, she did so on the basis of the actual and sentimental value of the jewellery. She might too have done so on the basis of the serious injuries caused to Mr. Sarin in the course of this robbery.

19. The starting point under the guidelines was 11 years. The bracket was 9 to 13. The plainly aggravating features were those which we have set out; an elderly couple, one disabled, the use of the balaclava. Against that was the absence of previous convictions and the slightly lesser role played by the applicant, all

features which the judge took into account. No criticism whatsoever can sensibly be made of the sentence she imposed.

20. In the circumstances, we refuse leave to appeal both against conviction and sentence.

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