IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL 27/16
(SCA 3-9/2016)
C#5949/15 & 793/16

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Donald Hooker

Appellant

Before:

The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Hon Dennis Morrison, Justice of Appeal

Appearances: Crister Brady (Brady Law) for the appellant and Nicole Petit for DPP

JUDGMENT

Revised from transcript of oral judgment 7 March 2017 and Approved
Released 28 March 2017

MARTIN, J.A.

On the 22nd of April 2016, Donald Kelvin Hooker was sentenced in the Summary Court to a total of seven years' imprisonment for a series of different offences committed between 2012 and 2015. He had pleaded guilty to all the charges against him.

On the 2nd of September 2016, his total sentence was reduced by the Grand Court (Justice Mettyear) to a term of five and-a-half years. He now applies to this Court for leave to appeal against the sentences imposed on him.

The applicant is now aged 41. He is a long-term drug addict whose addiction has regularly brought him into conflict with the authorities. He has a criminal record which the judge rightly described as "appalling" and has been to prison many times.

The offences for which the applicant was sentenced were as follows:

A) Case 2430/15. Burglary of a dwelling house committed on 15th of January, 2013. Nobody was in the house at the time of the offence, which was not sophisticated. Rooms were ransacked and items of sentimental value were taken. The applicant was on bail at the time of the offence. The sentence imposed in the Summary Court was 34 months' imprisonment which was upheld by the Grand Court.

B) Case 2431/15. Burglary of a dwelling house committed on 4th or 5th of November, 2014. The house was in the course of renovation and was not occupied. Items of relatively high value were taken. There was some planning but no ransacking. The sentence imposed in the Summary Court was 22 months' imprisonment consecutive to the term of imprisonment imposed in the case of 2430/15. This was upheld by the Grand Court.

C) Case 4630/15. Theft of the contents of a Red Cross collection box on the 15th of February 2015. There was no evidence as to the contents of the box. The judge described this as "clearly a mean offence". The sentence imposed in the Summary Court was 12 months' imprisonment consecutive to the other sentences. The term of imprisonment was reduced by the Grand Court to five months' consecutive.

D) Case 5949/15. Criminal trespass committed on the 21st of August 2015. The appellant obtained entry to a dwelling house after knocking on the door. According to the magistrate, he was again on bail at the time of the offence. The sentence imposed in the Summary Court was eight months' imprisonment consecutive to the other sentences, reduced in the Grand Court to five months' consecutive.

E) Case 2432/15. Theft of and criminal damage to a motor vehicle committed on the 30th of December 2012. The vehicle was of low value. The sentence imposed in the Summary Court was six months' imprisonment for the theft and one month for the criminal damage. Those sentences were ordered to be served concurrently with each other but consecutively to the other sentences. The length of these sentences was upheld by the Grand Court but they were ordered to be served concurrently with the sentences imposed in the other cases.

F) Cases 4703/15 and 00793/16. A variety of road traffic offences for which the applicant was sentenced by the Summary Court to a total of two months' imprisonment to be served consecutively to the sentences imposed in the other cases. The length of these sentences was upheld by the Grand Court but they were again ordered to be served concurrently with the sentences imposed in the other cases.

The net effect of the Grand Court's decision was a total reduction of the sentences of ten months with a further eight months being ordered to be served concurrently rather than consecutively. The time to be served was accordingly reduced from 84 months or seven years to 66 months or five and-a-half years.

The basis on which the magistrate sentenced in the Summary Court was set out in a chart which the judge reproduced. It is evident from that chart and from her sentencing

remarks that in each case, except that of criminal damage to the motor vehicle and the road traffic offences, the magistrate took a starting point, added to it to take account of aggravating factors, notably the applicant's criminal record, and then reduced the total by 1/3 to take account of the applicant's guilty plea. Thus in relation to case 2430/15 - the starting point taken was 36 months, 15 months were added for aggravating factors and a reduction of 17 months was then applied, giving a total of 34 months.

The reason for the Grand Court's reduction in the overall sentence was that the magistrate had failed adequately to take into account the totality principle. The judge dealt with the point in the following way:

> "Whilst of course I accept that the learned magistrate did consider totality, it is difficult to see how she applied it. Her careful sentencing remarks on the individual offences show her selecting and announcing what she believed were the appropriate sentences for each of those offences. She then added those sentences together and produced the total of seven years. Nowhere is there any sign of her taking the usual steps necessary when applying the principle. If she were applying it one would expect to see reference along the way to her imposing concurrent sentences which would otherwise be consecutive or deliberately reducing the length of the sentence to accommodate the principle. These are routine and conventional ways to illustrate the application of the principle but they are absent in the present case. Had she stood back from the sentences which she first felt to be appropriate and applied the principle, then she should, in my judgment, have concluded that an overall sentence of seven years' imprisonment was too long. I see nothing wrong with her individual sentences, although some of them are at the top end of the acceptable bracket but the total is manifestly excessive".

The judge then expressed his conclusion as follows:

> "Looked at broadly, these are non-violent, non-sexual offences committed by a hopeless addict. I accept that some of the offences are serious, distressing or mean. They deserved a total sentence which was substantial, but in my judgment, the appropriate sentences are as follows:
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> A) 2430/15, 34 months.
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> B) 2431/15, 22 months' consecutive.
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> C) 4630/15, five months' consecutive.
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> D) 5949/15, five months' consecutive. All other sentences and orders are to remain as they were but ordered to be concurrent with the sentences already mentioned. That produces a total of 66 months' imprisonment or five and-a-half years rather than 84 months' imprisonment or seven years. Time spent on remand will count towards the sentence".

The grounds of the appeal that the applicant seeks leave to bring are, in summary:

That the sentencing exercise in the Summary Court was based upon sentencing guidelines that were not in place when he pleaded guilty in 2014.

That the wrong starting points were adopted and that the overall sentence was harsh and excessive.

The applicant also claimed that he had been "railroaded".

The applicant was not represented before us. He explained that by "railroaded" he meant that the sentencing exercise was dragged out until 2016 so that the new guidelines were then applied. He said that it was wrong to say that the offences had been committed while he was on bail and he pointed out to us that he had been since in prison and while on bail on programmes designed to allow him to make amends for his criminal conduct such as the Sycamore Tree which was designed to make him aware of the impact of his crimes on the victims. Let us say at once that is not a ground of appeal but it may stand him in good stead when the time comes for his consideration for release from prison. We do not consider there to be anything in the proposed grounds of appeal. The Summary Court was entitled to take into account the new sentencing guidelines which do no more than set out best practice in current social circumstances. We consider that the law on this topic is accurately stated in the English cases of the Crown against Chunxia Bao 2008 2 Cr. App. R. (S.) page ten and the Crown against H 2012 2 Crim. App. R. (S.) page 21.

In the former of those cases, the English Court of Appeal Criminal Division said this:

> "The Guidelines published by the Sentencing Guidelines Council are reflections of current sentencing policy and practice. They are not rules of law. In that respect they are no different from the status of guideline cases in this Court which were used to provide assistance on sentences in different types of cases. The tariff might change from time to time but so long as the sentencing regime or maximum sentence had not changed, a judge would be obliged to follow the most recent guideline case if handed down before sentencing. This would be so even when the new guideline or the tariff had been promulgated after the offence or conviction or guilty plea as here."

In our view, there is no difference in principle since the establishment of the current regime where the Sentencing Guidelines Council publishes its definitive guidelines. If the contrary position were to hold it would lead to manifest inconsistencies in sentencing. It would add further complications to an already complicated sentencing

regime. Therefore we reject the submission that the judge was wrong to follow the Sentencing Guideline Council's report".

Like the judge, we consider that the magistrate was entitled to adopt the starting point she did and we find it impossible to accept that the reduced sentence imposed by the Grand Court can be regarded as in any way "excessive". On the contrary, the result reached by the judge is, in our judgment, a principled and entirely apt recognition of the circumstances of the offences and of the circumstances of the applicant and the overall criminality of the case.

This application is accordingly dismissed.