IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL 4/16 S
(Ind. 90/15, 90/15A & B)

HER MAJESTY THE QUEEN

Respondent

- and

Otis Myles

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: Appellant in person and Candia James for DPP

JUDGMENT

Revised from transcript of oral judgment 7 March 2017 and Approved
Released 3 May 2017

MORRISON, J.A.

The appellant was convicted in the Summary Court of three burglaries in three separate locations. He was subsequently committed to the Grand Court for sentencing, pursuant to section 7(2)(a) of the Criminal Procedure Code (2013 Revision). Before the hearing in the Grand Court, the appellant had filed appeals against all three convictions in the Summary Court. On the 28th of June, 2015, the appeals from the second and third convictions were abandoned before Mr. Justice Swift in the Grand Court. On that date the appellant was represented by counsel. His appeal against the first conviction was heard and dismissed by Mr. Justice Mettyear on the 11th of August 2015.

In this Court today we are concerned with the result of the sentencing hearing which was heard before Mr. Justice Malcolm on the 24th of March 2016. On that day, Justice Malcolm sentenced the appellant to a total of seven years and nine months' imprisonment, having explicitly taken into account the principle of totality. The appellant now seeks leave to appeal against the sentences imposed by the judge.

The circumstances of the burglaries for which the appellant was convicted, which we take from the judge's admirable sentence ruling, were as follows:

> Charge number 00387 of 2014 related to a burglary committed on a dwelling house in the Prospect area on the 23rd of December, 2013. To this charge the appellant pleaded not guilty and on the 19th of February, 2014 he was released on conditional bail which included a curfew condition between seven in the evening and six in the morning. We will describe this as the "first burglary".
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> Charge number 3746 of 2015 related to a burglary committed on a business place on Seymour Drive, George Town, which were commercial premises on the 24th of May, 2015. This burglary was committed whilst the appellant was on conditional bail arising from the first burglary. We will describe this as the "second burglary".
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> Charge number 3745 of 2015 related to a burglary of the First Baptist Christian School on the 9th of June 2015. The alarm of the school was triggered at 4:00 a.m. Consequently, this burglary was committed not only whilst the appellant was on conditional bail, but it was also committed in breach of his curfew. We will describe this burglary as the "third burglary".

The first burglary was regarded by the judge as the most serious. Residential property in the Prospect area was burgled and ransacked at some time between the 18th and the 23rd of December 2013 while the owners, a married couple, were away from the Cayman Islands for the Christmas holidays. A number of items were taken from the house including, most significantly, a safe containing jewellery valued at between US $125,000 and $150,000, jewellery which had been collected by the wife over many years and held great sentimental value to her and was described by her husband as her "life jewellery collection". In addition, title deeds, identification papers including a passport and a birth certificate, a will, three watches, a pair of night-vision binoculars and $150 in cash were also stolen. Apart from some items; such as, the television set, fishing rods, a laptop and a bag, generator and some diving equipment, which were found abandoned nearby, none of the items taken was recovered. The appellant's fingerprint was found on a tin in the house and he was arrested and interviewed. Although he denied any involvement in the offence, he said that he had assisted a man in the area to move some property.

The second burglary occurred on the 24th of May, 2015 while the appellant was on conditional bail for the first. The door to commercial premises in George Town was forced open sometime prior to 7:30 in the morning. When challenged by a worker at the enterprise who was on the premises, the intruder dropped an item of property belonging to the operators of the business on the property and ran away. Subsequent examination of CCTV footage identified the appellant as having been in the area at the material time and his fingerprints were found on the outside and inside of the rear door of the burgled premises. No property appears to have been taken during this burglary.

The third burglary occurred early on the 1st of June 2015 at the First Baptist Christian School in George Town. Again, no property appears to have been taken, but a second floor office was entered and cabinets and drawers were opened. CCTV footage showed that at 3:31 a.m. a car which the appellant had the use of was seen to travel in the direction of the school and then, at 4:00 a.m., was seen to travel away from it. The DNA on an item of clothing - a headband - found on the roof top of the school matched that of the appellant.

The appellant's social enquiry report showed him to be 29 years old with a record of 21 previous convictions; eight of them for burglary and five for handling stolen goods. He is the father of a one-year old child and he has had a history of drug abuse. A preliminary issue to which the judge was invited to give attention was whether the 2015 Cayman Islands Sentencing Guidelines, which became effective on the 2nd of November 2015, were applicable to the appellant. The submission made on behalf of the appellant was that since all three burglaries pre-dated the introduction of the guidelines, they ought not to apply to this case. Instead, it was submitted the Court should have regard to the Chief Justice's Statement on Tariffs and Guidelines for Sentencing of certain offences, which were issued on the 16th of January 2002.

According to those guidelines, for burglary without aggravating circumstances, the basic measure was that a second or subsequent offence would attract a tariff of three to four years' imprisonment.

In reliance on the decision of the Court of Appeal of England and Wales in the case of the *R v Chunxia Bao* [2008] 2 Cr, App. R (S.) 10 the judge ruled that a sentencing judge in this jurisdiction can have regard to the 2015 Cayman Islands Sentencing Guidelines even where the offences occurred before the guidelines were issued.

The judge also considered another issue raised on behalf of the appellant, which was the question of the prevalence of the offence of burglary. This had been raised by the prosecution as a possible aggravating factor which should be taken into account. The judge considered that the evidence of prevalence before him was not conclusive and that for the purposes of the case he did not propose to take prevalence into account as an aggravating feature. In the result, for the first burglary, the judge sentenced the appellant to six years, nine months' imprisonment having regard to the starting point of six years in the 2015 guidelines and the aggravating factor of the appellant's bad record.

For the second burglary, the judge took into account the fact that nothing was stolen, but considered the fact that the appellant was on bail at the time to be an aggravating factor and therefore sentenced him to nine months' imprisonment, which was three months down from the starting point of 12 months.

On the third burglary, the judge again took into account the fact that nothing was stolen; however, he considered that because the appellant was on bail and in breach of his curfew at the material time, a sentence of 12 months' imprisonment should be imposed.

Finally, in considering whether the sentences should run concurrently or consecutively, the judge said this at paragraph 32 of his sentence ruling:

> "All three sentences should be consecutive, but with an eye on totality, I make the 12 months and nine months' sentences concurrent but consecutive to the six years, nine months. That makes a total sentence of seven years, nine months' imprisonment. Time spent in custody will be deducted from his term of imprisonment".

Before us this afternoon the appellant, who has appeared in person, has submitted that the sentence was too much. He described it as "harsh" and he told us that in his view he had not been dealt with properly on the question of sentencing.

We have had the benefit of a very helpful written submission from Ms. James for the Crown in which it was submitted that, firstly, the judge was correct to apply the 2015 guidelines and that, secondly, the sentences imposed by the judge were appropriate in light of the guidelines and the circumstances of the offences.

Because it gives rise to a question of principle, we will give brief consideration to the issue of the applicability of the 2015 guidelines. As the judge observed, this issue has arisen in England and Wales, particularly in connection with what are now described as "historic sex crimes", where defendants often fall to be sentenced for offences committed many years previously, at times when -- to quote the judge -- "maximum sentences were lower in many cases and the sentencing regime was more lenient".

Two decisions illustrate what is now the accepted approach to the problem. The first is the case of *R v Chunxia Bao*, upon which the judge relied. Delivering the judgment of the Court of Appeal in that case, Aikens, J said this at paragraph 17:

> "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 regimes on maximum sentences have not changed, a judge would be obliged to follow the most recent guideline case handed down before sentencing. This would be so, even when the new guideline on the tariff had been promulgated after the offence or conviction or guilty plea, as here".

More recently, this position was reiterated in greater detail by the Court of Appeal in the case of the *R v H and others* [2012] Cr App.R. (S.) 21 to which Ms. James also referred us. In that case, it was held that the defendant must be sentenced in accordance with the sentencing regime applicable at the date of sentencing.

In the light of these clear statements of principle, we accordingly consider that the decision of the judge that the 2015 guidelines are applicable to this case is correct and fully justified by authority.

The only remaining question is therefore whether the sentences imposed by the judge were manifestly excessive.

In respect of the first burglary, applying the relevant guidelines for burglary in a dwelling house, the judge considered this to be a category one burglary with medium culpability. The recommended starting point of six years was therefore applied and increased by nine months due to the appellant's criminal record. In our view the sentence was not only well within the guidelines, but also appropriate for the circumstances of the case.

We do not think that any complaint can possibly be made in relation to the judge's very balanced approach to passing sentence in respect of either the second or the third burglaries. Accordingly, for the reason we have given, the application for leave to appeal is refused.