IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Crim) No 010/2013
Ind 004/2012
C#00262/2012

BEFORE

Rt Hon Sir John Chadwick, President
Hon John Martin QC, Justice of Appeal
Rt Hon Sir Alan Moses, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

BETWEEN

JULIO NEWBALL

Appellant

and

THE QUEEN

Respondent

Ms Amelia Fosuhene of Brady Law appeared for the Applicant
Mr Greg Walcolm, Crown Counsel, instructed by the Director of Public Prosecutions appeared for the Crown

Hearing: 2 November 2015
Judgment: 2 November 2015

JUDGMENT
Revised from Transcript and Approved released 11 February 2016

Sir John Chadwick, President:

1. On 13 June 2013 Simon Julio Newball was convicted after trial before Justice Henderson and a jury on two counts: Count 2, Arson of a Motor Vehicle and Count 3, Theft contrary to section 24 (2) of the Penal Code (2002 revision). He was sentenced to two years' imprisonment for the count of arson and to eight years' imprisonment on the count of

theft. On 19 June 2013 Mr. Newball gave notice of his application for leave to appeal against both conviction and sentence.

2. The grounds of appeal, as set out in the application, were these: "(i) Perjury, (ii) Prejudice, (iii) Misled by counsel, injustice; (iv) Late amendment after being acquitted by a jury; (v) Conduct of the trial judge defects in the indictment; (vi) The trial had been a nullity, abuse of process;(vii) Inconsistent verdicts; (viii) Late change in the nature of the case; (ix) Prejudicial publicity; (x) Failure to follow guidelines; (xi) Et cetera, et cetera."

3. Mr. Newball has made applications to this Court on a number of occasions. Those applications have included applications for the provision of transcripts of his trial at public expense; but he has never been able to put before the Court any indication of what issues transcripts would illuminate or whether there were discrete parts of the transcript which he needed as distinct from the whole, so as to enable the Court to determine whether an order for the provision of transcripts at public transcripts is justified. A recent judgment on his application was delivered on 19 August 2014. This Court has adjourned the hearing of his appeals, against both conviction and sentence, from time to time in order to give him the opportunity to obtain transcripts at his own expense. We are now in November 2015. It is time that these appeals be heard and determined. We are satisfied that no further adjournment – if it were sought (and it is not) – would be unlikely to be of any assistance, either to Mr. Newball or to the Court.

4. At the hearing of his appeal against conviction Mr. Newball has represented himself; without the benefit of legal representation or advice On his appeal against sentence he is

represented by counsel, Ms Amelia Fosuhene, who has put forward the points that can properly be advanced in support of that appeal.

5. Mr. Newball's grounds of appeal include, at ground (iv), "Late amendment after being acquitted by a jury", at ground (v) "Conduct of the trial judge, defects in the indictment" and, at ground (vii) "Inconsistent verdicts". Those grounds all stem, I think, from the judge's decision, in the course of the trial, to withdraw from the jury a charge of robbery which had original been included as Count 3. The judge referred to that decision in his sentencing remarks on 13 June 2013. He said this:

> "The defendant Julio Newball has been convicted after trial by a jury of theft and arson. The charge of theft was originally one of robbery but I dismissed the robbery charge on a motion that there was no case to answer and the trial continued with that count representing the lesser included offence of theft".

Mr. Newball asserts that a charge of theft was never put to him but it is clear from the transcript that the judge addressed, correctly, the question whether or not theft could be included in the counts which the defendant had to answer. He directed the jury, in the course of his summing up on the 12 June 2013, in these terms (transcript, 23 June 2013, page 8, lines 14-18):

> "The robbery allegation in count 3 has been dismissed. You should treat count 3 as a charge of theft from Magnum Jewellers".

There is no doubt that the judge was entitled to take that view: the lesser offence of theft being included in the count of robbery charged. Theft was the offence which was before the jury and on which the jury convicted. Mr Newball was represented by experienced counsel at the trial. There is no substance in Mr. Newball's assertion that the withdrawal of the charge of robbery and the continuation of the trial on a

charge of theft was outside the judge's powers or led to any form of injustice or inconsistency.

6. No other particulars of the grounds of appeal against conviction have been advanced. We find no basis for that appeal, which we dismiss.

7. The judge appreciated that, having dismissed the robbery charge and invited the jury to proceed on the lesser charge of theft, it was important to remind himself that it would be wrong in principle to sentence Mr. Newball as if he had committed a robbery. He was to be sentenced in respect of the theft of which he had been convicted; and not sentenced in respect of the charge of robbery which the jury had not considered and on which he had not been convicted. In approaching the matter in that way, the judge reminded himself that the maximum penalty for theft in this jurisdiction is ten years. That is greater than the maximum penalty for theft in the United Kingdom, which is seven years. So it is to be expected that sentences for the offence of theft in this jurisdiction are likely to be somewhat higher than sentences on similar facts for offences of theft committed in the United Kingdom.

8. The judge reminded himself, also, of the sentencing guidelines in this jurisdiction in relation to theft. Those are in these terms:

> "For offences of theft or related offences, depending on the value of the property stolen and any other aggravating factors, an immediate term of imprisonment ranging from one to four years for a first offence will likely be imposed. The tariff could be higher still depending on the seriousness of the offence".

9. The reasoning which led the judge to the conclusion that eight years was the appropriate sentence on the

defendant's conviction for theft may be summarized as follows. First, he identified four aggravating features, which he described as "well recognized" in that they appear as aggravating factors in the United Kingdom sentencing guidelines and the authorities. Second, he reached the conclusion that those four factors in combination justified a starting point in excess of imprisonment for four years for this offence; but he did not, in terms, identify or specify what that starting point would be. Third, he then went on to hold, that there were two further, substantial, aggravating factors which led to the conclusion that the appropriate sentence in this case was eight years' imprisonment on the charge of theft.

10. The aggravating factors are found in the judge's description of the offence. He said this (transcript, 13 June 2013, page 89, line 18 to page 90 line 5:

> "The offence took place on the 22nd of December 2011 at Magnum Jewellers. Three men alighted from a car around 11:00 a.m. One man, armed with a hatchet, smashed the top glass in four of the jewellery cases while the other two men scooped out as much jewellery as they could handle quickly. The men then left the store and sped away in the getaway car. We've watched CCTV footage of the event. It took less than 60 seconds. Some $309,000 worth of jewellery was stolen. Minutes later the three men burned the getaway car".

11. The four aggravating factors which the judge identified in reaching an appropriate starting point were these. First the theft was well planned; it took less than a minute and each man on the CCTV footage seemed to know exactly what his assigned role was. Second, the theft was what the judge termed "professional" in its execution. Third, it was carried out by, if not a gang, by a group of three men. Fourth, it provided each of those three men with a high level of profit. The judge would have been entitled, as it seems to us, to

take the view that those four factors on their own would point to a starting point not only in excess of four years but in the region of six to seven years for this offence.

12. But he then went on, as I have said, to add two further substantial aggravating factors. One, the ancillary offence of arson when burning the getaway car; which, as he went on to say, must be regarded as part and parcel of the theft. Second, the substantial criminal history of the defendant. The judge pointed out that Mr Newball had had a number of convictions for minor offences, including convictions for drugs; but had also been convicted of burglary on at least five occasions between 1998 and 2000. He had been convicted of rape and sentenced to ten years in 2000. His criminal record following discharge from prison in 2006 showed that he had reverted to the sort of relatively minor offences for which he had been convicted in the early to mid 1990s. It cannot be said that the judge sentenced Mr Newball on the basis of the criminal record of the appellant; but having regard to the guidelines in this jurisdiction – which, as I have said, indicate an immediate term of imprisonment ranging from one to four years for a first offence - he was clearly entitled, indeed required, to take the view that previous convictions for burglary were to be taken into account considering what the appropriate for the offence of theft should be in this case.

13. He said that the two further substantial aggravating factors - the act of arson and his criminal history - elevated the sentence substantially. With those matters in mind, he concluded that the proper sentence for theft was eight years. In our judgment that sentence cannot be said to be manifestly excessive, so as to justify interference by this Court on an appeal. The judge was entitled to reach the

conclusion that he did. The appeal against sentence is dismissed.

Chadwick P

Martin JA

Moses JA