

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 20 of 2010

(Indictment No. 71/08)

(C#04674/08)

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

SHANE EDWARD CONNOR

Appellant

NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

To: The Attorney General

This is to give you notice that SHANE EDWARD CONNOR having sought leave to appeal against *his* Conviction *and* Sentence passed upon *him* by the Grand Court on the 1st day of July, 2010 as set out below:

Indictment # 71/08

Offence:- BURGLARY

4 years imprisonment, with time already spent in custody for this offence to be taken into account.

The Court of Appeal has finally determined the said appeals, and has this 14th day of April, 2011 given judgment therein to the effect following:

- 1. Leave to Appeal conviction refused.**
- 2. Application for leave to appeal sentence refused.**
- 3. Conviction and sentence affirmed.**
- 4. Transcript of reasons given orally released 5th July, 2011.**

Dated this 5th day of July, 2011



Registrar



IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

**Criminal Appeal No. 20 of 2010
(Indictment No. 71/08)
(C#04674/08)**

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

SHANE EDWARD CONNOR

Appellant

**BEFORE: THE RT. HON. SIR JOHN CHADWICK, President
THE HON. JUSTICE I. FORTE J.A.
THE HON. JUSTICE A. CAMPBELL J.A.**



Court Proceedings on 14th April 2011 (Kerri Francella)
Appearances: Appellant in person. Lucy Organ of Samson & McGrath (amicus).
John Masters Crown Counsel.

Campbell JA:

- On 9 June 2010 the appellant, Shane Edward Connor, was convicted of burglary contrary to section 243(1)(b) of the Penal Code (2007 Revision) and on 1 July 2010 he was sentenced to 4 years' imprisonment, with time spent on remand to be taken into account.
- The conviction followed a trial before the Chief Justice, sitting at the election of the appellant without a jury, which took place between 18 and 25 May 2010.
- Although the appellant was granted legal aid he defended himself. Four attorneys had either withdrawn from the case at the request of the appellant or had felt obliged to do so. Legal aid was transferred to a fifth attorney, Mr Stenning, but as he did not consider he had the necessary experience he did not come on record.
- Mr Stenning did however offer to act as amicus curiae from the afternoon of the first day of the trial during the cross-examination by the appellant of a police officer who gave evidence of identification. The court accepted the offer and Mr Stenning contacted witnesses on behalf of the appellant and obtained proofs of statements in advance of their giving evidence.
- The appellant gave notice of appeal against conviction and sentence on 6 July 2010. He claimed that the sentence was 'harsh and excessive' and that he had to conduct the trial on his own even though he had written to

various people. In a letter accompanying the notice of appeal he said that he needed an attorney to assist him with his appeal.

- The appeal was fixed for 30 November 2010 and the Court was advised in advance of the hearing that Ms Organ, who had come on record for the appellant, required time to prepare for the hearing. The appeal was then fixed for 6 April 2011 during the current session of the Court.
- Ms Organ provided perfected grounds of appeal on 10 March 2011 and on 25 March 2011 she applied for and was granted leave to come off record by Quin J. sitting as a single judge of this Court.
- When the appeal came on for hearing on 6 April 2011 at the request of the Court Ms. Organ appeared and she explained that the relationship between client and advocate had broken down and after taking advice and given the matter careful consideration she had concluded that she could no longer appear for the appellant. The appeal was further adjourned to 13 April 2011 to give the appellant an opportunity to retain another advocate. Mr Furniss who was present in court at the time offered to consult with the appellant with a view to representing him on the appeal.
- The Court indicated that if the appellant was unsuccessful in obtaining the services of another attorney it would invite Ms Organ to act as amicus and she agreed to assume this role should it become necessary.

The facts

- On 7 May 2008 at around 3.38am in response to a signal from a burglar alarm Constable Sullivan drove from Georgetown police station to the Pizza Hut on West Bay Road. As she got out of her vehicle she saw a male person running, at more than jogging pace, from the direction of the Star Mart shop at the Texaco Station, which is situated in front of the Pizza Hut. She described this person as wearing a green coloured shirt, dark coloured long pants with a white shirt over his head. He crossed her path at a distance of 15 to 20 feet and when she called 'Police Stop' he removed the shirt from his head and glanced at her so that she saw him face on. She recognised him as someone she had seen before on four or five occasions in the course of her duties since her service began in late August 2007. She described the man as having very distinct features.
- The officer said the area was well lit by three streetlights. She ran after the man but he jumped over a chain link fence and she did not follow him but went out on to West Bay Road. There she saw a car, without any headlamps showing, moving off from the area of the Marriott Hotel. The driver of this car made a U turn in the direction of Georgetown. She signaled to the driver of a police car that was approaching from the direction of Georgetown to turn and follow this car and he did so. It is not disputed by the appellant that he was the driver of the car followed, at a

distance, by the police car into a complex called Treasure Island. The appellant does not accept the evidence of Constable Coleman, the driver of the police car, that there was a second person in his car when it was being followed. When the appellant's car was found it had been abandoned at Treasure Island. It was locked and his driving licence was lying on the dashboard

- Later, when the car was unlocked and examined in the presence of the appellant at Georgetown Police Station, a black hooded jacket was found on the rear seat. There were 14 cigars in a zipped pocket of the jacket and another on the rear seat. The cigars were similar to those sold in the Star Mart shop and 16 were discovered to be missing from the shop after the burglary. A screw driver was found in the pocket of the driver's door and it was similar to one kept in the cash pan at the shop which was also missing following the burglary. Also missing from the shop after the burglary were 38 packs of cigarettes, 140 phone cards and 12 pairs of sunglasses, keys and money. The cash pan was recovered near the scene as were a number of pairs of sunglasses
- After the appellant's car was found abandoned at Treasure Island there followed a pursuit by officers on foot. At one stage Constable (now Mr) Grevitt and Constable Horner saw two men running across West Bay Road about 100 yards ahead of them. One was wearing a green top on over a white top and he had a white item in his hand. Mr Grevitt recognized this person as the appellant.
- When the police officers first caught up with the appellant he was sitting on the ground wearing only boxer shorts and white socks. There was clothing lying on the ground beside him and he attempted to gather this up before running off again.
- He was eventually caught and arrested on suspicion of burglary. A number of items of clothing were recovered including a green jersey with a white T shirt on the inside and a pair of long jeans with a pair of long white socks in a pocket.
- A CCTV recording from the Star Mart shop showed that three people had entered the premises and they had each covered their hands and faces with clothing. They were also wearing white socks to cover their hands and arms. One was seen to be wearing a black hooded jacket and the inference drawn by the trial judge was that there were two people in the car that drove away from the area of the Marriott Hotel and that the evidence of Mr Grevitt and Constable Horner that they saw another person with the appellant when he ran across West Bay Road tended to confirm this.
- The appellant elected to give evidence and he said that on the night of the 6 and 7 May he was bar hopping and he then parked in the Marriott Hotel car park where he had some wine and smoked a cigar and relaxed

a little. He felt ill and vomited before going to sleep. When he awakened he drove to the entrance where he saw a police officer in the middle of the road. As he drove in the direction of Georgetown a police car approached in the opposite direction and in his rear view mirror he saw this police car brake and turn. As his car was not licensed and he had been drinking he pulled off West Bay Road into Treasure Island. He left his car there and ran because he had something illegal on him. He discarded this "thing" at Dog City but he kept running "so as to get the heat off Dog City".

- When he was stopped by the police he told them that he was drunk but Constable Durrant to whom this comment was addressed said at the trial that there was no scent of alcohol from him. It has to be said that the appellant claimed that he had vomited earlier at the Marriott car park and that he had taken off his outer clothing before he was arrested as he was drunk and vomiting and feeling hot. The smell of alcohol may not therefore have been apparent. The Chief Justice in his judgment records that the appellant was taken to hospital after his arrest because of a complaint of stomach pains and the medical record indicates that he had consumed alcohol. The court declined to draw the inference that he was so inebriated that he could not have taken part in the burglary.
- In his judgment the Chief Justice, applying the guidelines in *Turnbull*, accepted that he had to treat the evidence of identification from Constable Sullivan as being of a fleeting encounter and he reminded himself of the risk that she may have been mistaken. Accordingly, he looked at the other circumstances.
- These factors included the fact that the clothing that the appellant had taken off and which was recovered appeared to match the garments worn by one of the three people seen on the CCTV at the Star Mart shop. He was wearing a pair of white socks and there was another pair in the pocket of the pants when he was arrested. The three people who had entered the shop had white socks covering their arms and hands. The items found in the appellant's car (which had remained locked after he parked it) included 15 cigars similar those sold at the Star Mart, 16 of which were missing after the burglary, and the screwdriver was similar to one that was also missing.

Legal Representation

a) At the hearing of the appeal

- When the appeal came on for hearing on 13 April the appellant stated that as he was unqualified he could not represent himself. He said that he did not wish to be represented by Mr Furniss, who had previously represented him in June 2008. He declined to adopt the perfected grounds of appeal that had been prepared by Ms. Organ when she was acting on his behalf. The appellant said that he had been wrongly

convicted and when he was asked if he wished to be represented he said that he wanted counsel from London. It was pointed out to him that the legal aid that he had been granted did not provide for this. The appellant was then given an opportunity to make submissions on his own behalf and he declined to do so.

- The court then invited Ms Organ to make submissions as amicus curiae acknowledging that she was not doing so either on behalf of or on the instructions of the appellant but in order to assist the court. After she had done so the appellant was given a further opportunity to present any further points that he wished to make. He produced documentary evidence to show that he had been released from custody on 24 October 2007 thus suggesting that if Constable Sullivan had seen him when in custody it would have to have been between the end of August 2007, when she began her service in the police, and the 24 October 2007. As Constable Sullivan was unable to give the dates on when she had seen the appellant when he was in custody her evidence left open the possibility that it was between these dates. The appellant said that the amount of money recovered by the police was a greater sum than they had acknowledged and that money, which was his property, had been stolen from him by the police. The appellant said that the clothing found lying beside him was similar to that worn by many other people.
- As noted earlier the appellant gave notice of appeal in July 2010 and the appeal had been adjourned from the November sittings and further adjourned from the 6 April 2011 to 13 April 2011. The appellant will become eligible for release on license in June of this year. In these circumstances the Court decided that the appeal would proceed and not be delayed further as it appeared unlikely, given the history, that the appellant would find an attorney whose services would be acceptable to him.

b) At the trial

- Ms. Organ referred the court to a number of authorities showing that a wrongful denial of legal representation can be a strong ground of appeal. In particular she relied on *R v Stovell* [2006] EWCA Crim. 27 where the court said "The fundamental question will always be whether or not a fair trial ...in fact took place."
- She referred the Court to Article 6 (3) (c) of the European Convention on Human Rights which provides that everyone charged with a criminal offence has among other minimum rights a right:

"To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require"

Although not incorporated into law in the Cayman Islands the Convention is a guide in the event of any doubt as to the meaning of domestic law – *R v Whorms* 2008 CILR 188.

- As the ECHR said in *Croissant v Germany* (No 13611/88) “this right cannot be considered absolute”. The appellant had also a right under Article 6 of the Convention to a “fair and public hearing within a reasonable time.” The offence with which he was charged was alleged to have taken place on 7 May 2008 and almost two years had elapsed before his trial was able to begin on 18 May 2010. With these competing rights it had become imperative that there should be no further delay before the trial began unless there was reason to believe that the appellant would find a legal advisor who was acceptable to him.
- We regard it as appropriate to infer that those attorneys who had withdrawn their services had done so for good reason and would have continued to represent the appellant had it been possible for them to do so. Other attorneys he had dismissed for his own reasons. As has been demonstrated to this court a further adjournment of the trial to allow the appellant yet more time to seek the services of another attorney who would be acceptable to him was most unlikely to prove fruitful.
- Even if it was necessary to commence the trial without the appellant having legal representation the question remains did he receive a fair trial? We have read the transcript and noted the competence with which the appellant cross-examined the witnesses for the prosecution exploring every avenue that may have assisted his defence. As the trial judge said in his judgment the appellant reminded him of the need to apply the principle regarding a ‘fleeting glance’ referred to in *R v Turnbull*. In doing so he showed that he was familiar with the leading case on identification. He was in our view sufficiently articulate and informed for us to be satisfied that although unrepresented by an attorney, the appellant did have a fair trial.

The evidence of identification

- The identification was made by a police officer attending, during the night, the scene of a possible crime following an alarm call. This is not a case of some unremarkable activity being discovered later to be associated with a crime. The person was seen running from the immediate vicinity of the place where the alarm call had originated. The officer had therefore good reason to observe the clothing and features of the person who ran across her path. Although she could not name this person she said that she recognised him and that he had distinctive features. The trial judge was right to remind himself of the risk of an innocent mistake and to look for other evidence to support the correctness of the identification in order to make sure that there had not been a mistaken identification.

- The evidence, referred to earlier (at paragraph 20), provided ample support for the correctness of the identification.
- It was submitted by Ms Organ that the trial judge at the close of the case for the prosecution ought to have invited the appellant to make an application that there was no case for him to answer. She suggested that had he done so and gone on to apply the test in *R v Galbraith* [1981] 2 All ER 1060, that where there is some evidence but of a tenuous character and no jury properly directed could properly convict, the judge should have stopped the trial.
- After considering the state of the evidence at the close of the case for the prosecution it is clear to this Court that if such an application had been made it would have been bound to fail.
- Having had regard to of the points that have been advanced by Ms Organ, to whom we are grateful for her assistance, and also to those made by the appellant we do not consider the conviction to be either unsafe or unsatisfactory and accordingly we refuse leave to appeal.

Application for leave to appeal against sentence

- In his sentencing remarks the Chief Justice noted that the guidelines indicated a sentence of 3 to 4 years imprisonment for a second or subsequent offence of burglary. The appellant had 18 previous convictions and of these two were for burglary in 1995 when he received short sentences. There then followed more serious offences including possession of a firearm with intent to commit an offence and a conviction for grievous bodily harm. As Ms. Organ said one should not take into account other burglary offences as being subsequent offence under the guidelines and then again as forming part of a defendant's record. Otherwise, there was a risk that the same offence had been taken into account twice. She referred us also to the fact that this was a burglary of business premises when they were unoccupied and the value of the items taken was small. Though it is right to say that the premises were ransacked.
- While it was at the upper end of the scale a sentence of 4 years' imprisonment for this offence cannot be regarded as manifestly excessive or wrong in principle. We therefore refuse leave to appeal against sentence.

Chadwick P

Forte JA

Campbell JA

