The Court of Appeal for Bermuda

CRIMINAL APPEAL No 9 of 2015

Between:

JOESHUN RUSSELL

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Kawaley, AJA

Appearances: Ms. Aura-Lee Cassidy, Kiaros Philanthropy, for the Appellant
Ms. Nicole Smith, Department of Public Prosecutions, for the Respondent

Date of Hearing & Judgment: **14 March 2016**

EX TEMPORE JUDGMENT

Appeal against sentence of 8 years' imprisonment reduced to 6 - numerous offences of burglary and dishonesty whilst on probation - drug addiction with previous convictions - early plea of guilty - assistance to police

PRESIDENT

1. The appellant is age 40. He's a single man, but father of two children. In April 2014, he was committed by a magistrate for sentence for numerous offences of dishonesty, something around 30 in total. They included burglary and obtaining property by deception, making and using false instruments, and taking a scooter without consent. The offences spanned the period October 2013 to March 2014 and the total amount involved was in the region of $7,000. The appellant had been released from prison in September 2013, very shortly before these offences

commenced and was in fact serving a period of probation that had been ordered to follow his prison sentence. The sentence he had been serving was 15 months followed by two years' probation and that was imposed on 18 February 2013 for amongst other offences, burglary.

2. The first offence of those which are the subject of this appeal coincided with the appellant's lapse into heroin use. The detailed circumstances of the offences do not all need to be described, we summarise.

3. The first of the burglary offences was committed on 7 October 2013 when the complainant, Ms Warren, left her house for work and on her return at five o'clock in the evening, she discovered that the window in the rear door had been broken but the door was still locked. She unlocked the door, entered the house, and immediately suspected that the house had been broken into because the kitchen area had been ransacked. She called the police. It was later discovered that a pair of gold earrings were missing, valued at $925 and a gold charm bracelet, with numerous charms on it, was also missing. That was worth in the region of $1,000. The appellant admitted the burglary and said that he had entered by breaking the rear door.

4. The offence of taking a vehicle without consent occurred in February 2014. Mr Neim is the owner or was the owner of an auxiliary cycle, a green Yamaha scooter, and on Monday, 24 February 2014, he left his bike secured in a bike parking bay across the street from his office building. When he returned at eight o'clock in the evening of the same day, the bike was missing. The appellant took the police to Harlem Heights Road in Hamilton Parish where a green Yamaha scooter was recovered. The plate had been changed, but the appellant admitted that he had taken the bike from Front Street three weeks before. He said he removed the plate that was on it and threw it in the pond and he placed his own plate on the bike and drove it around as his mode of transportation until at some point it ran out of petrol or broke down and he abandoned it.

5. On 22 March 2014 Ms Jackson, the owner of a two bedroom property at 80 Glebe Road in Devonshire, left her property secured at half past nine in the morning. When she returned at two o'clock in the afternoon, she discovered that the property had been forcibly entered through a small rear kitchen window. Once inside the burglar had ransacked the dwelling, opening all the drawers and closets removing most items and throwing them onto the floor and beds, obviously in search for something valuable to steal. She did not notice at the time that anything was missing but the appellant admitted that this was one of the burglaries that he had committed and also admitted that he stole a gold chain and a couple of gold rings and had sold them for cash.

6. The next offence of burglary relates to Ms Johnson's property at 37 South Road, Smith's and on 1 April 2014 the police went to her property and told her that they were conducting enquiries into a series of burglaries. She was told that the police had received information (that was from the appellant) that her property was one of those that he had burgled. She was unaware of any burglary but the police asked her if any cheques were missing from her cheque book and when she looked she found that one was missing and that her account had been debited $870 in respect of it. That cheque had in fact been cashed on 17 March at an HSBC bank. And the cheque had been made payable to the appellant. The appellant said that he randomly selected the victim's house and entered through the front eastern window which was insecure. He said that he used the money for rent, food and heroin. The appellant was arrested at a bank when, with another person, he was seeking to cash another cheque.

7. The full extent of the appellant's offending was disclosed by him to the police. One of the offences involved St. John's Pre-School. In March 2014 it was noticed that the pre-school's cheque book was missing. One of the cheques had been made out and cashed by the appellant. A few days later the appellant and another male were arrested trying to cash another cheque. That was the cheque that I earlier referred to.

8. On 28 August 2014, Mr Justice Greaves sentenced the appellant to a total of eight years in imprisonment and ordered that section 70P should be applied, the result of which is that the appellant is to serve half of his sentence before he is eligible to be considered for parole.

9. The sentence was made up of a sentence of five years imprisonment plus a sentence of three years imprisonment consecutive. It was made up in this way that for the offenses on informations ending in 158 and 163, there was five years on each offence concurrent. And for the offences on informations 194 and 195 a sentence of three years imprisonment concurrent with each other but consecutive to the earlier sentences on 158 and 163 of five years, making a total of eight years. The probation order was revoked and the Learned Judge recommended the appellant for drug rehabilitation whilst in prison.

10. We have raised with counsel on both sides the reason for the consecutive sentences being passed and we are not persuaded that there was any appropriate reason in principle for the learned judge to have done so. What he ought to have done was to have formed a view as to the appropriate total sentence in the circumstances and passed that concurrently on all the offences save for the offence of taking the vehicle without consent where the maximum penalty is two years imprisonment and the judge, by a slip, passed a sentence of three years which was in the circumstances, therefore unlawful.

11. We, therefore, have to consider what was the appropriate sentence for the Learned Judge to have passed. In the first place, it's necessary to look with some care at the circumstances of these offences. They could accurately be described as a spree of offending spanning the period between October 2013 and March 2014. There is no doubt whatsoever that they were committed in order to fund the appellant's drug addiction. That is not a mitigating circumstance as was made clear by the learned Chief Justice when my Lord said in the case of Lyndon *Raynor v Stanley Davis* [2012] Bda LR 36 at page 4 that where someone uses in breach of the criminal law an illegal substance, which is widely known to be

highly addictive, becomes addictive and then commits further offences to feed that addiction, the starting assumption must be that this is not a mitigating circumstance as a matter of law.

12. Nevertheless, the court looks at the whole circumstances surrounding the commission of these offences. It is also relevant that these offences were committed whilst the appellant was on probation. No separate penalty was imposed by the learned judge for that.

13. The appellant has a very bad record of offending. In 2001 he was sentenced to twelve months imprisonment concurrently for a number of offences. In 2006, three year's imprisonment with a recommendation for drug treatment; August 2005, two years imprisonment; In August 2006 another sentence of imprisonment with a recommendation for drug treatment. In September 2010, two years imprisonment followed by two years' probation with a recommendation for drug treatment; and in 2012, six months imprisonment in the month of June. And finally the sentence passed on the 18 February 2013 to which we have already referred, of fifteen months' imprisonment for various concurrent offences with other offences taken into consideration and a probation order to follow.

14. The court has also seen two reports, one from the Bermuda Assessment and Referral Centre of 27 June 2014, the other a probation report of 20 June 2014. Both reports reveal long standing substance abuse and addiction.

15. One of the reports refers to a medium to high risk of re-offending, which this Court regards as an understatement. The report also refers to the need for rehabilitation services for the appellant. With that this Court entirely agrees.

16. The Judge in passing sentence had this to say at page 56:

> "You entered, apparently, every drug treatment program that was available here in Bermuda on more than one occasion. You have been through the drug treatment court at least twice. You continue to be ravaged by these drugs. You are

> unable to help yourself. The courts are left with no devices by which they can assist you. The only solution left is for the court to impose a sentence given the limits of the law that would protect society from you by as much time as the law will limit the court."

17. And he then referred to the maximum sentence being 14 years for the burglary and 10 years for other offences of dishonesty. At page 61, he recommended the appellant be entered into such drug rehabilitation programmes as are available during the course of the sentence.

18. Ms Cassidy has urged us to give full account to the mitigating circumstances. There are, in our judgment, two. First, the appellant's early plea of guilty; and second, his help to the police in identifying the full extent of his offending and to recover such items including the scooter as he was able to assist with.

19. She points out that her client is remorseful and is keen to tackle his drug addiction. She also submitted that he had done his best to obtain help and treatment after his release but that unfortunately he was not able to be taken on any programme right away.

20. Ms Smith for the prosecution draws our attention to a number of aggravating circumstances. She points out that there was, here, persistent offending. The appellant has got an appalling record and he has not been able to take advantage of the opportunities that he has been given in the past. There was, she submitted, not only persistence in offending to fund his addiction, but also that he ransacked several of the houses he burgled.

21. There are no authorities to which we have been referred, that in our judgment are precisely in point. It is necessary, even when imposing a heavy sentence, as was plainly appropriate in this case to have in mind a sense of perspective in relation to the levels of sentence for other offences such as offences involving violence and so forth. Be that as it may, the primary concern here of the Court is the

protection of the public, and it is plain that as matters stand, the only way in which that can be achieved is when the appellant is locked up.

22. We have come to the conclusion that the total sentence of eight years is manifestly excessive and therefore should be reduced. We have come to the conclusion that the right sentence for the whole of this offending is a total of six years imprisonment and that will be imposed by virtue of six years for the burglary offences with three years' imprisonment concurrent for all the other offences, with the taking of the vehicle without consent being two years' imprisonment. We have considered whether it might be appropriate to impose an additional period of probation. But we think in the light of the sentence of six years, that would not be appropriate in this case, but we do urge the authorities endeavour to give the appellant whatever assistance they can to deal with his drug addiction both when he is in Prison and when he is eventually released.

23. The order under section 70P stands as does the judge's order requesting treatment in prison for his drug addiction if that can be achieved.

24. Accordingly, the appeal will be allowed to that extent.

Signed

Baker, P