In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2012: NO. 5

LYNDON RAYNOR
(Police Sergeant)

Appellant

-v-

STANLEY EUGENE DAVIS

Respondent

J U D G M E N T
(In Court)

Date of Hearing: May 28, 2012
Date of Judgment: June 1, 2012

Ms. Susan Mulligan, Office of the Director of Public Prosecutions,
for the Appellant

Mr. Marc Daniels, Charter Chambers, for the Respondent

Introductory

1. On January 12, 2012, the Respondent pleaded guilty in the Magistrates' Court (Worshipful Khamisi Tokunbo) to a charge that he:

   "*On the 22nd day of November 2010, in Pembroke Parish, did enter as trespasser room 210 of the Fairmont Hamilton Princess Hotel, with intent to steal therein.*"

2. The Prosecution appealed this sentence on the following grounds:

"*(a) the sentence of one year consecutive to the sentence being served by the Respondent was manifestly inadequate;*
(b) the Learned Magistrate failed to give due consideration to the aggravating facts of this crime and the seriousness of the Respondent's criminal conduct;

(c) the Learned Magistrate failed to give due consideration and weight to the lengthy related criminal record of the Respondent…"

3. Ms. Mulligan for the Appellant submitted that the circumstances of the offence and the offender warranted a sentence at the top end of the Magistrates' Court jurisdiction. Although that maximum was five years, she conceded that some discount was merited, and concluded that 3 years was the appropriate tariff. She supported these submissions with a careful review of the facts of the case, the Respondent's record and the applicable sentencing principles. Counsel also pointed out that the Respondent only pleaded guilty in the face of DNA evidence linked to clothing left by him at the scene of the crime.

4. Mr. Daniels very sensibly did not seek to challenge these forceful submissions head on, responding in a more nuanced manner. He made three points with particular emphasis. Firstly, this was not the worst possible case because the Respondent was not violent; secondly the Respondent's criminality was fuelled by drug addiction, not wanton criminality and he had no history of violence; and thirdly, sentences of imprisonment coupled with treatment orders were demonstrably of limited effect if the Respondent returned to the same community environment (he now recognized the need to seek to leave Bermuda). If the Court felt constrained to increase the sentence at all, the Court should go no higher than a two-year consecutive term.

Findings: circumstances of the offence

5. The Respondent was convicted of entering the hotel room of two tourists, both septuagenarians (a married couple), at around 2.30 am when they were in bed. The husband sought to restrain him, a struggle ensued, the Respondent shouted "*I have a gun!*" and he escaped (empty-handed) by jumping over a balcony. The hotel in question was not simply a tourist resort; it was also (notoriously) one of the main hotels patronized by international business visitors.

6. Although the offence did not take place in a dwelling-house as legally defined and did not involve any actual violence, the offence involved intruding on the temporary living quarters of an elderly couple and the threat of violence, even though there is no suggestion that any gun was involved. Having regard to the crucial dual role played by international business and tourism in Bermuda's currently[1] somewhat fragile economy, the relevant offence may also fairly be viewed as an indirect attack on the commercial interests of Bermuda residents as a whole.

[1]I.e. from 2009 to the present.

7. Having regard to the potential commercial impact of a burglary offence does not in my judgment entail an impermissible infringement of the principle that the property rights of all Bermuda residents deserve and enjoy equal protection under the law.

8. At the time of the offence the Respondent was on 3 years' Probation for a prowling offence of which he was convicted on September 23, 2008.

Findings: circumstances of the offender

9. The Respondent's record reads like the resume of a man who has dedicated his life to the diligent pursuit of non-violent property offences[2] since the age of around 19 years, with a specialisation in breaking and entering dwelling-houses. These offences may be summarised as follows:

    - 1985: 1 burglary conviction (fine)
    - 1986: 1 cheque-related conviction, 4 separate burglary convictions (including one hotel room) (imprisonment)
    - 1991: 1 commercial premises burglary (imprisonment)
    - 1993: 1 burglary and 1 theft conviction (conditional discharge/fine)
    - 1994: 1 burglary conviction (imprisonment)
    - 1995: 1 burglary conviction (imprisonment)
    - 1997: 2 burglary convictions (imprisonment)
    - 2000: 1 receiving conviction (imprisonment)
    - 2002: 1 conviction on 6 counts of burglary (imprisonment + probation)
    - 2005: 1 conviction on 17 burglary counts (imprisonment + drug treatment)
    - 2008: 1 conviction for prowling (12 months imprisonment +3 years' probation)
    - 2011: 3 convictions for burglaries committed in February, June and July 2011after the present offence (2 years imprisonment with drug treatment + 3 years' probation).

10. Ms. Mulligan fairly conceded that it was not until fairly late in his criminal career that the Respondent received the benefit of any non-custodial remedial sentence, and that was combined with a custodial sentence. I accept Mr. Daniels' submission, which is supported by the drug treatment directions recently made by the courts and the pattern of offending disclosed by the Respondent's criminal record that this is an offender whose offending is driven by drug addiction and not a professional criminal in any generally understood sense.

11. Although the effect of the offending on his victims and the wider community may be no different to similar offences committed for financial gain, the motivation behind the offences is different. Nevertheless it is self-evident that neither imprisonment nor post-release support has yet had any appreciable retarding effect on the Respondent's pattern of offending. The present offence of November 22, 2010 was committed after the

[2] However he does have a small number of convictions for minor assaults.

Respondent had been released from prison for a 2008 prowling conviction and while he was subject to a 3 year probation order imposed to assist his rehabilitation upon his release.

12. It is unclear precisely how the Respondent first became addicted to cocaine (it is said, crack cocaine). From a treatment perspective it may well be right that addiction is an illness; future scientific advances may well develop cures which make current drug treatment solutions appear crude and ineffective. However, from a legal perspective an addiction to illegal drugs cannot easily be viewed as a mitigating circumstance. Cocaine is illegal because the state has determined that is a dangerous substance which citizens should not be permitted to use. Considerable public resources are deployed by law enforcement agencies to reduce the availability of such substances and by 'caring' agencies to warn of the dangers of drug addiction. This has been the position for many years. Where someone uses in breach of the criminal law an illegal substance which is widely known to be highly addictive, becomes addicted 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.

The sentencing hearing in the Court below

13. The Learned Magistrate did not seek to make any comments when signing the record "*other than the comments contained at the time of sentencing*". He did not suggest that any relevant comments were made orally which were not included in the appeal record. If the Learned Magistrate had suggested that the record was incomplete, it could have been supplemented by a transcript prepared from the audio recording of the relevant hearing. The only record of the comments made at sentencing are the words endorsed on the Information:

> "*Committed prior to offences now in custody for-Sentence 12 months consecutive.*"

14. The appeal accordingly proceeded as a review of a sentence of 12 months imprisonment which was imposed with no reasons being given for the custodial term imposed. While it was self-evident that a term of imprisonment was required, it is unclear how the sentencing judge arrived at the particular tariff in question. This made the task of the Appellant, demonstrating an error of principle, far easier than it might otherwise have been. Counsel for the Appellant appeared in the Court below and indicated that she submitted to the trial court that a sentence near the maximum was appropriate.

Sentencing principles

15. The governing sentencing principles applicable under Bermuda law are now largely codified in the following provisions of the Criminal Code:

Purpose

53. The fundamental purpose of sentencing is to promote respect for the law and to maintain a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives—

(a) to protect the community;
(b) to reinforce community-held values by denouncing unlawful conduct;
(c) to deter the offender and other persons from committing offences;
(d) to separate offenders from society, where necessary;
(e) to assist in rehabilitating offenders;
(f) to provide reparation for harm done to victims;
(g) to promote a sense of responsibility in offenders by acknowledgement of the harm done to victims and to the community.

Fundamental principle

54. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Imprisonment to be imposed only after consideration of alternatives

55. (1) A court shall apply the principle that a sentence of imprisonment should only be imposed after consideration of all sanctions other than imprisonment that are authorized by law.

(2) In sentencing an offender the court shall have regard to—

(a) the nature and seriousness of the offence, including any physical or emotional harm done to a victim;
(b)the extent to which the offender is to blame for the offence;
(c)any damage, injury or loss caused by the offender;
(d) the need for the community to be protected from the offender;
(e)the prevalence of the offence and the importance of imposing a sentence that will deter others from committing the same or a similar offence;
(f) the presence of any aggravating circumstances relating to the offence or the offender, including—
(i)evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factors;
(ii) evidence that the offender, in committing an offence, abused a position of trust or authority in relation to the victim;
(g)the presence of any mitigating circumstances relating to the offence or the offender including—

(i)an offender's good character, including the absence of a criminal record;
(ii) the youth of the offender;
(iii) a diminished responsibility of the offender that may be associated with age or mental or intellectual capacity;
(iv) a plea of guilty and, in particular, the time at which the offender pleaded guilty or informed the police, the prosecutor or the court of his intention so to plead;
(v) any assistance the offender gave to the police in the investigation of the offence or other offences;
(vi)an undertaking given by the offender to co-operate with any public authority in a proceeding about an offence, including a confiscation proceeding;
(vii) a voluntary apology or reparation provided to a victim by the offender.

16. The fundamental principles are codified. However, section 55(2) sets out a non-exhaustive list of aggravating and mitigating circumstances, leaving the courts some room for assessment of the facts of individual cases.

17. Precisely what length of sentence ought to be imposed when it is common ground that an immediate custodial term is required is less easy to determine having regard to legislative or judicial precedents. The sentencing judge must consider the above-cited sentencing principles in conjunction with the maximum penalties prescribed for the offence in question and the circumstances of the relevant offence and offender and decide what justice requires. Where guideline cases do not exist, this task will understandably be somewhat difficult.

18. This Court can be greatly assisted by the UK Sentencing Council Guidelines for various offences because the maximum sentences applicable in the superior courts of England and Wales are broadly commensurate with Supreme Court tariffs. The Magistrates' Court in Bermuda have sentencing powers far higher than their English equivalents; but not as high as the upper maximum for the superior courts. The UK Sentencing Council Guidelines are thus of limited utility to the Magistrates' Court unless one adapts them carefully so as to be fit for purpose.

19. Neither counsel referred to any decision of this Court nor the Court of Appeal giving comprehensive guidance as to what sort of custodial term would be appropriate for a serial burglar who has been a convicted burglary in the Magistrates' Court. Ms. Mulligan only referred to *Spence/Parsons-v-The Queen* [1994] Bda LR 12(Court of Appeal); this was a case with somewhat similar facts where 5 years imprisonment was held to be appropriate for the Supreme Court to impose following a committal for sentence from the Magistrates' Court. My own researches have not revealed any further relevant cases.

20. Of course the statutory principles must invariably be applied as best as can be achieved having regard to the relevant facts on a case by case basis. While this is the primary judicial function, persuasive assistance can also be obtained as to the correct practical approach from the UK Sentencing Council Guidelines, '*Burglary Offences Definitive Guideline*'[3]. While it might be suggested that these matters are so obvious as to be self-evident, these Guidelines suggest the following broad principles for domestic burglaries;

    (a) greater harm is indicated when, *inter alia*, the occupier is at home when the offender is present or when violence is threatened although lesser harm is indicated when nothing is stolen;

    (b) non-statutory aggravating factors include commission of the offence at night and commission in breach of existing court orders;

    (c) statutory aggravating factors in the United Kingdom for burglary offences include previous relevant offences (in Bermuda such prior convictions have long been recognised as a non-statutory aggravating factor).

21. In terms of sentencing tariff, the present case applying the Sentencing Council Guidelines for domestic burglaries would straddle Categories 1 and 2 in terms of gravity suggesting a starting point of between 1-3 years imprisonment before aggravating and mitigating circumstances are taken into account in a statutory context in which the maximum sentence on indictment is 14 years (as in Bermuda) but the maximum summary penalty is only 26 weeks' imprisonment (unlike Bermuda where it is 5 years). Although this approach may require refinement in light of further analysis (the Guidelines were not referred to in the course of argument), a working approach might be for the Magistrates' Court to have regard to these Guidelines as if the tariffs suggested for trials on indictment apply to summary cases in the Bermudian context. Both counsel and sentencing courts will have to consider on a case by case basis, as no doubt they presently do, whether an offender with a bad record convicted summarily of serious offences of breaking and entering should be committed to this Court for sentencing. The UK Guidelines are likely to be of assistance because of the close connection between Bermudian and English criminal substantive and procedural law.

22. The maximum penalty for breaking and entering under section 339 of the Code which the Magistrates' Court may impose is 5 years imprisonment; the maximum this Court can impose is 10 years in all cases but 14 years when a dwelling is involved. Ms. Mulligan for the Appellant submitted that the present case, if dealt with in this Court, fell within the following provisions of section 339(3)(b) of the Criminal Code:

    "*(i)where the offence was committed in respect of a building or part of a building which is a dwelling, fourteen years*…"

23. In the course of argument I suggested that this submission must be wrong, having regard to the statutory definition of "*dwelling-house*" in section 3 of the Code. On reflection,

[3] http://sentencingcouncil.judiciary.gov.uk.

counsel's submission may well be right as section 339(3)(b)(ii) uses the word "dwelling", which is not the same term as the more narrowly defined term used elsewhere in the Code. There is no need to formally decide this question for present purposes in the context of reviewing a sentence imposed in the Magistrates' Court[4].

24. I am guided by the following *dictum* of L.A. Ward J (as he then was) delivering the Judgment of this Court in an appeal from the Magistrates' Court in *Osborne-v- Harvey et al* [1987]Bda LR 78:

> "*The leading authority in Bermuda on the meaning of 'manifestly inadequate' is Plant (R) v Robinson Criminal Appeal No. 1 of 1983 in which the Court of Appeal held that manifestly inadequate means obviously inadequate, that is to say obvious to the appellate tribunal that the sentence is much too low and fails to reflect the feelings of civilized society to the crime in question. It also stated that a sentence is manifestly inadequate when it is obviously insufficient because the judge or magistrate has acted on a wrong principle or has clearly overlooked, or undervalued, or overestimated, or misunderstood some salient features of the evidence. It is a failure to apply right principles.*"

Findings: was the sentence imposed manifestly inadequate?

25. While it will rarely be necessary for a sentencing judge to explicitly recite these principles, an appellate review of any sentence must consciously bear in mind the statutory function of sentencing and the umbrella principle under which the discretionary sentencing power falls to be exercised:

    (a) the *"fundamental purpose of sentencing is to promote respect for the law and to maintain a just, peaceful and safe society"* (section 53);

    (b) every "*sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender*"(section 54).

26. In the present case what is in dispute is not the appropriateness of an immediate custodial sentence, but whether or not the one year imposed (taking into account the two year sentence which had been imposed for unrelated matters) may be said to be manifestly inadequate. The following factors I consider to be indicative of the offence being a serious one even though no property was stolen or damaged and no physical harm was inflicted:

    (a) the offence occurred in the presence of the victims;

    (b) the victims were both somewhat elderly;

[4] But counsel's submission finds further somewhat indirect support in the Respondents criminal record form, which suggests that an April 9, 1986 conviction was based on the premise that a hotel room was a dwelling-house.

(c) the offence involved the threat of the use of a firearm an actual physical struggle and the risk of personal injury ; and

(d) the offence potentially caused or risked causing significant damage to Bermuda's commercial interests and reputation as it occurred in this jurisdiction's only large 'city' hotel.

27. The following factors I consider to be aggravating factors:

(a) the offence occurred at 2.30 am when the victims were in their bed;

(b) the offence constituted a breach of a probation order;

(c) the Respondent has numerous convictions for similar previous offences.

28. The only mitigating factor is the Respondent's plea of guilty, albeit in the face of seemingly compelling evidence and entered after he had moved on to commit several other offences. This would, being generous entitle him to a discount of no more than one-third of the sentence which would otherwise be appropriate.

29. The other factor in the Respondent's favour is the totality principle. I have no doubt that the Learned Magistrate, who is an experienced judge, took into account the fact that on August 30, 2011, the Respondent was sentenced to a total of 2 years imprisonment in respect of three similar but apparently less serious offences committed after the offence involved in the present case. On January 12, 2012 when the Respondent was sentenced for the instant offence, he had roughly 18 months left to serve[5]. So looking at the total picture, and imposing a term of one year consecutive to the sentence he was already serving, the Learned Magistrate may fairly be viewed as concluding that a combined sentence of approximately 2 ½ years (or at most 2 ¾ years) followed by the 3 years' probation ordered by the Senior Magistrate was proportionate looking at the offences as a whole.

30. In other words, the Appellant's real complaint is that 3 years should have been imposed for the instant offence, so that a total combined sentence for the 2011 conviction and the 2012 conviction would have been (as of the date of the later conviction) some 4½ years instead of 2 ½ years. It is not suggested that the impugned sentence is only a third of the appropriate penalty as it might appear on superficial analysis. Nevertheless, on balance, I find (in the absence of any reasons for the approach adopted by the Learned Magistrate) that the sentence is manifestly inadequate in all the circumstances of the present case. I arrive at that conclusion for the following reasons:

[5] The record is silent as to the precise dates but it seems likely because of a reference in the criminal record form to time on remand being taken into account that less than 20 months was left to serve.

(a) the sentence of one year consecutive was not proportionate to the seriousness of the relevant offence and the degree of responsibility of the offender, either standing by itself or taking into account the fact that the sentence was to run consecutively to previous custodial terms which had at most 1.75 years to run;

(b) having regard to the fact that the relevant offence was committed in breach of a probation order, and the absence of any reports supporting a hope that fresh rehabilitation measures would likely achieve more success than measures that had failed in the past, the sentence imposed failed to sufficiently reflect the need to protect society and deter the Respondent from committing further offences by separating him from society for a proportionately reasonable period of time;

(c) when the combined criminality of the August 30, 2011 convictions and the January 12, 2012 conviction are looked at in their totality in the light of the Respondent's criminal record, the inevitable conclusion is that a total sentence near the top of the Magistrates' Court jurisdiction was required. In fact, had all the offences have been dealt with on one occasion, the Respondent would have been fortunate if the sentencing judge had not concluded that his powers were not sufficient and committed the Respondent for sentence to this Court where the maximum sentence which could have been imposed would have been at least 10 but more likely 14 years.

31. I set aside the sentence of one year's imprisonment imposed by the Learned Magistrate and substitute a consecutive sentence of 30 months (or 2 ½ years), giving the Respondent the benefit of the doubt in light of the uncertainty as to precisely how much time was outstanding on his 2 year sentence when he was sentenced for the present offence. This sentence takes into account a discount of less than one-third in light of the Respondent's guilty plea and the fact that as at January 12, 2012 he had at least 18 months (1 ½ years) outstanding on his previous sentences.

Conclusion

32. An attempt has been made above to set out some broad judicial guidance as to the approach to sentencing in breaking and entering cases in the Magistrates' Court. Bermudian magistrates now exercise sentencing jurisdiction which is to some extent equivalent to that enjoyed by superior courts elsewhere. The gradual expansion over the last two decades of the criminal jurisdiction conferred upon courts which are still constitutionally treated as courts of 'summary' jurisdiction has not been accompanied by any coherent reformulation of what sentencing tariffs are applicable to indictable offences tried in the Magistrates' Courts. These courts have, by stealth as it were, become hybrids of traditional courts of summary jurisdiction and traditional superior courts. Sentences are now being imposed in the Magistrates' Court of a severity which historically would only have been imposed in this Court, giving rise to a need for greater formality in the trial and sentencing process at the 'summary' level.

33. If magistrates wish appellate courts to show the degree of deference to the decisions made at the Magistrates' Court level which is commensurate with their modern criminal jurisdictional status, adequate reasons for every significant decision (such as a term of imprisonment) must be given. Such reasons must be recorded and included in written form (if given orally) in any subsequent appeal record. Even if the reasons appear to the court to be self-evident. In cases such as the present, the traditional "summary" approach which might be appropriate in relation to traffic matters or purely summary offences was not legally sufficient. In imposing a sentence of only one year's imprisonment consecutive to a two-year sentence previously being served, a significant penalty was being imposed, albeit one which has been found to be manifestly inadequate.

34. I fully appreciate that this advice is a counsel of perfection which will often be difficult to follow due to the heavy caseload in the Magistrates' Court. Nor do I ignore the fact that the vast majority of sentences imposed in the Magistrates' Court are accepted by Prosecution and Defence alike as perfectly lawful and fair. It should therefore be unsurprising that, in the small minority of cases which form the subject of an appeal and which are argued far more fully here than in the court below, this Court will from time to time take a different view as to how the sentencing power ought to have been exercised in the lower court.

35. Where an individual is a persistent offender, threatens the ability of others to enjoy their property rights in their own private space and provides no credible basis for concluding that he will avail himself of rehabilitative options, justice requires a firm and purely punitive sentencing response. For these reasons the consecutive sentence of one year's imprisonment was manifestly inadequate and must be increased to a consecutive term of 2 ½ years or 30 months. In broad terms, the total time he will serve as of the date of his conviction for the instant offence and other offences of which he was previously convicted, is increased from roughly 2 ½ years to roughly 4 years.

36. But justice also requires the Court to encourage the Respondent to overcome his demons and to choose to embrace rather than surrender the ample and hard-won freedoms that Bermuda's Constitution permits him to enjoy.

Dated this 1st day of June, 2012 _____
IAN R.C. KAWALEY CJ