



## **The Court of Appeal for Bermuda**

### **CRIMINAL APPEAL No 25 of 2013**

Between:

**WAYNE SMITH**

Appellant

**-v-**

**THE QUEEN**

Respondent

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**Before: Baker, President**  
**Kay, JA**  
**Bell, JA**

**Appearances:** Mr. Kamal Worrell, Lions Chambers, for the Appellant  
Ms. Nicole Smith and Ms. Karen King, Department of Public  
Prosecutions, for the Respondent

**Date of Hearing & Decision: 11 March 2015**

**Date of Reasons: 11 March 2015**

### **REASONS**

#### **PRESIDENT**

1. On the 8<sup>th</sup> November 2013 this Appellant was sentenced to 8 years imprisonment for burglary contrary to section 339(1)(b) of the Criminal Code and 2 years consecutive for assault occasioning actual bodily harm contrary to section 309 of the Criminal Code. He had entered an early plea of guilty to both offences. He now appeals to this court against his sentence of 10 years imprisonment focusing in particular on the element of 8 years imprisonment for the burglary.
2. The circumstances of the case were as follows. The complainant, Rebecca Outerbridge, is a widow who lives with her two young children on North Shore

Road in Devonshire. On the 1<sup>st</sup> March 2013 she was at home with her two children who were asleep in separate bedrooms. About 3:00 a.m. the complainant was woken by the Appellant standing inside her bedroom near her Dutch doors which lead to her outside porch. Her bedroom is on the upper level of her two storey dwelling.

3. On seeing the Appellant the Complainant shouted at him to get the "hell out of her house" in response he leapt onto her bed shouting "shut up, shut up". Both the Complainant and the Appellant fell out of the bed and onto the floor. The Complainant tried to fight the Appellant but he began choking her until she was gasping for air and her body fell limp.
4. The Appellant then dragged the Complainant to a standing position and said "I'll kill you, I have a knife, I'll kill you, where's the cash?" At this point, the Complainant heard the sound of the suspect's zipper being drawn down. He tapped on his right lower jacket pocket saying "I have a knife and I'll kill you." Fearing that the Appellant would sexually assault her and fearing for the safety of her children the Complainant begged the Appellant "please don't, please don't, my children are in the house."
5. She informed the Appellant that she had money downstairs in the kitchen. The Appellant took off his hat and stuffed it in the Complainants mouth and he then held her by the back of her neck and forced her to walk into the kitchen where she reached into a drawer and handed him four \$50 bills. The Appellant then lead the Complainant to the main door of the property where she opened it and he made good his escape running towards Dock Hill in Pembroke.
6. She immediately locked the door and dialled 911. She was subsequently treated in hospital for muscle injuries and mild abrasions. She had an abrasion to her left cheek, left jaw and right cheek bone area and abrasions to both sides of her neck.
7. Fingerprint evidence was recovered from the property and this identified the Appellant who was arrested on the 4<sup>th</sup> March 2013.
8. Whilst he was being processed at Hamilton Police Station he said "I slipped up, I did some nonsense. Just send me up. I did it all." Later that day he was video

interviewed under caution. He admitted the burglary and the assault and described the circumstances surrounding the offences.

9. He also admitted being addicted to illicit substances in particular heroin and said that that was the reason for the commission of the offences i.e. to support his addiction.
10. Now the Appellant unfortunately has a very bad record. He is a persistent burglar. This goes back a long way in time. In 1995 he broke and entered a dwelling house and was sentenced to 2 years and 9 months imprisonment. Again in December 1996 he was convicted of robbery and breaking an entry, on this occasion sentenced to a total of 8 years and 6 months concurrent. In 2001 he was again convicted of breaking and entering and as recently as June 2013 he was sentenced to an 18 month sentence for a further offence of entering as a trespasser a building in Richmond Road and stealing from there.
11. Mr. Worrell, who has appeared for the Appellant before us, takes a number of points in favour of his client. In the first place, he argues that the Judge erroneously sentenced the Appellant on the basis that he had a sexual motive for the offence.
12. When we carefully examined the transcript of what the Judge said, it became apparent to us that there is no substance whatever in this point. What is clear is that the victim feared that there was a sexual motive for the offence when she heard his zip being opened which she assumed was his trouser zip but it is apparent that in fact the motive for the offences was to obtain money which was indeed what the Appellant achieved.
13. The Judge in passing sentence summed up the offences in these terms:

“This was a very harrowing experience for the Complainant. It is an old fashioned burglary that is one carried out in the night time in a dwelling house wherein were her two young children and as she said that fact made her even more scared, as she was in the moment pondering what would happen to them if she died and left them. Maybe it could have been that their life could also have been exposed at the same time. On any view, this was a very serious offense.”
14. Mr. Worrell’s next point is that the Judge was wrong to impose consecutive sentences. Again we can see no force whatever in this point. The assault

occasioning actual bodily harm was separate from and additional to the burglary and in passing sentence for this kind of offence the Judge had discretion how to construct the sentences and we think it was virtually inevitable that he would impose consecutive sentences for what this Appellant did.

15. Mr. Worrell then argues that the totality of the sentence and in particular the sentence for the burglary was manifestly harsh. He drew our attention to the cases of *Perott* in which case the sentence was a total of 17 years, *Selassie* where a total of 25 years was upheld, and *James* where there was a sentence of 7 years and 2 months but the distinguishing fact in *James* was that he had a far less bad record than the Appellant and then *Richardson*, finally, a sentence of 15 years.
16. Where in our Judgment the analysis of Mr. Worrell falls down is he focuses simply on one element of the sentences in those cases that for the burglary and not on the overall picture. Any Judge imposing a long sentence has to be careful to construct it with its constituent element so that in the result it does not breach the totality principle.
17. The one feature of mitigation in this case was the early plea of guilty of the Appellant. That the Judge plainly took into account. The maximum sentence for burglary is 14 years imprisonment. Having reflected on the plea of guilty the Judge alighted on a figure of 8 years imprisonment with a sentence of 2 years imprisonment consecutive for the assault occasioning actual bodily harm.
18. In this court's Judgment, those sentences were entirely appropriate for these very serious offences and this is not a case where any of Mr. Worrell's grounds of appeal succeed and accordingly the appeal against sentence is dismissed.



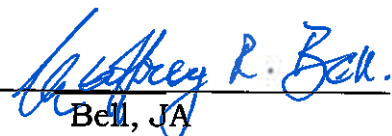
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Baker, P



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Kay, JA



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Bell, JA