Judgment 21/2011 **Jason John Duncombe v Law Officers of the Crown – Court of Appeal (File No. 418) – 12th July, 2011**

Burglary – application for leave to appeal against sentence – application refused.

IN THE COURT OF APPEAL OF GUERNSEY

The 12th day of July, 2011 before Jonathan Philip Chadwick Sumption OBE QC presiding, Sir de Vic Carey and Sir Hugh Bennett

JASON JOHN DUNCOMBE

(Applicant)

-v-

THE LAW OFFICERS OF THE CROWN

In the matter of the application by the Applicant for leave to appeal from the sentence of four years and six months' imprisonment imposed on him by the Royal Court on the 11 February, 2011;

THE COURT, having heard the Applicant in person and Crown Advocate G Perry, GAVE JUDGMENT this day in the attached terms and REFUSED the application.

S M D ROSS
Her Majesty's Deputy Greffier

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION – APPEAL NO 418

Between:

JASON JOHN DUNCOMBE

(Applicant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondent)

Before:

Jonathan Philip Chadwick Sumption, OBE, QC (Presiding)
Sir de Vic Carey
Sir Hugh Bennett

JUDGMENT OF THE COURT ON RENEWED APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

Judgment delivered 12th July 2011

The Applicant was unrepresented
The Crown was represented by Advocate G Perry

Cases, texts and statutes:
R v Cunningham (1993) 2All ER 15
McCarthy v Law Officers GLR (2007-2008) page 414 at paragraph 21
Poullard & Beck v Law Officers Judgment 49/2007

CAREY JA

Introduction

1. This is the judgment of the Court on a renewed application for leave to appeal against a sentence of four years and six months, imposed in the Royal Court (Judge Finch and nine Jurats) on the 11th February last, following guilty pleas by the Applicant and his co-accused Thomas Philip Marr to an indictment containing one count of burglary of Paints the jewellers in the Pollet, committed on 6th July 2010. The Applicant was represented by Advocate S Mallett.

2. This Advocates later assisted the Applicant in the preparation of his application for leave to appeal to this court which was originally considered along with an application from Marr, by the Bailiff sitting as a Single Judge on the 8th June. The Bailiff refused both applications for leave to appeal against sentence and confirmed the grant of legal aid up until that day

Particulars of the Offence

3. The Prosecution Outline indicated that Marr had been observed the on 5th July the day previous to the offence, driving his silver VW Lupo, to Gaudion's hardware store at Camp du Roi. He originally went there at 11:50 and was seen to pick up and study a Stanley Fubar which was described as a tool for splitting, prying and striking tasks. He left without buying anything.

4. At 14:20, he arrived at B & Q and left just before 15:00 having purchased a pair of gardening gloves and a broom with a detachable handle. By 15:16 he was back at Gaudion's and he duly purchased the Stanley Fubar. It was observed that he was wearing completely different clothing to that which he had worn on his first visit.

5. At 18:00 hours, the two men arrived at Duncombe's grandmother's house at Vazon. Duncombe stayed for tea and was collected by Marr in his car at 19:00. It is not known what the men then did, but at 4.13 am in the early hours of the following morning, the Marr's car was captured on CCTV arriving at the top of Smith Street. It would appear that they left the car wearing hooded clothing and went down, either Smith Street or Forest Lane into the Pollet, arriving at the shop Paints, at 4.15 am.

6. The CCTV camera inside the store recorded the burglary taking place and the two men were seen in the doorway. It was impossible to identify which was which. One of the males was carrying what looked like a sledgehammer and shortly after they arrived the other male appeared to use a pair of bolt croppers to try to cut the bottom of one of the metal grills protecting the windows. They attacked one of the metal grills, bending it downwards and used the fubar to strike the window on a number of occasions until it smashed. One of the males then reached into the window on at least four occasions and removed a large quantity of jewellery. They were on the scene for just over four minutes and were only able to take items of jewellery from a small area below the hole they made in the window. The alarm did not activate and they made good their escape without detection. The retail value of what they took was estimated to be £104,805.

7. By 4.22 am, some seven minutes after they originally parked the car, they drove off from the place it was parked in Smith Street and the vehicle was seen on the Royal Court CCTV camera heading towards the Grange. The broken window was reported to the Police at 5.00 am and an investigation began immediately. A crime scene investigator attended and he reported that the metal guard to one of the windows had been pulled down and the welds holding it in place had been snapped. He noted numerous impact marks indicating that a number of blows had been struck to the window before it smashed.

The apprehension of the Applicants

8. Further enquiries revealed that Duncombe had gone to his grandmother's house and was found by her there when she awoke. He said he had slept there the night but he left shortly afterwards. She later noticed Marr's VW Lupo parked outside where it remained until Police Officers found it later that day. By noon, Marr and Duncombe had arrived at the Rockmount public house at Cobo where they bought two quarter bottles of champagne and a pint of lager for a third male they met in the bar. They went up on the roof terrace and sat together with a laptop bag and contents belonging to Duncombe on the table.

9. At 12.45 pm Police and Customs officers arrived at the Rockmount, following information received. On seeing the officers, the two men ran at the officers in an attempt to escape and a violent struggle ensued on a nearby spiral staircase. Duncombe dropped a gold bar which he was seen to have removed from his jeans. This was recovered and identified as having come from the burglary. The Applicant and his co accused were arrested and in the recovered laptop bag was a small gold ingot and two gold coins as well as a sock which contained a large amount of jewellery and other valuables stolen in the burglary.

10. Further searches were carried out, including one at a property known as The Gables, Grand Rocque, where Duncombe had recently stayed. A still smouldering bonfire was found and in the embers were a broom handle and a partially burnt pair of jeans. A search of the undergrowth in the garden led to the Police finding a set of bolt croppers, a pair of snips, a wooden handled sledge hammer and a Stanley fubar, all of which had clear signs of being burnt in the nearby fire. These items were all used to commit the burglary. Nearby, officers unearthed a small plastic container containing two rings which came from the burglary.

11. When interviewed the Applicant produced a prepared statement in which he admitted to being in possession of the gold bar at the Rockmount, but said he did not know it was stolen. He declined to comment in response to further questions

Personal circumstances of the Applicants

12. The Applicant who is 27 years of age has previous convictions, mainly for drug offences. The Probation Officer said he has a record of displaying a strong work ethic, although he was described as not being employed by the Prosecution. The Probation Officer indicated some difficulty in providing a clear analysis of the offence, but does consider it most likely to be motivated by the expectation of personal gain, although there was some suggestion of acting out of misplaced loyalty to the co-defendant. The Applicant was of no fixed abode. He did have a partner, but lost the flat where they were living following his last imprisonment. He claimed financial difficulties as a result of continued unloading of his funds by those responsible for enforcing a Drug Trafficking Confiscation Order imposed in 2006. His primary carer in his formative years was his grandmother with whom, as we have seen, he is still in contact. There is also a clear indication of substance abuse in the past, mainly cannabis and alcohol related disorderly behaviour.

Mitigation offered at Trial

13. Miss Mallett, on behalf of the Applicant made the following points:

    1) A guilty plea was entered at the first opportunity, namely the Plea and Directions hearing in November 2010 (he had previously so indicated at the committal hearing). His failure to engage in a discussion of the offending was suggested as being due to fear.

    2) That although a degree of pre-planning was accepted, it was not a highly sophisticated burglary.

    3) So far as the items that have not been recovered, the Applicant claimed no knowledge of them and should not be sentenced on the basis of the outstanding jewellery.

    4) She then raised the issue that the valuation by the Prosecution had been on the basis of the retail value rather than the cost value.

    5) There had been no breach of trust involving employees of the jewellers in the execution of the burglary. Further, the choice of execution of the burglary at night when the premises was empty ensured the least stress possible was caused. The premises were not a private dwelling. They had not been physically entered other than putting hands through the window, and therefore issues of violation and damage inside the property did not feature.

    6) The Applicant had not had the best start in life with difficulties throughout his childhood. Notwithstanding this he had a good work ethic, of trying to make progress as a self-employed carpenter. Indeed there was a reference from a man for whom he had worked and who spoke well of him.

    7) He had been prevented from building himself up and benefitting from the progress he had made with his business as a result of continuing seizures of money due under the Drug Trafficking Order. His financial situation had become dire and that led him on to commit this offence which was out of character to the extent that his only previous dishonesty offence was in 1998.

    8) Finally, Miss Mallett referred to the fact that his grandmother relied on him and that he was very upset that she would be affected by his behaviour as she was his

only real family. Miss Mallett accepted that a custodial sentence was likely and did not urge against its imposition, merely asking that it should be the minimum possible. She did refer to a case which the judge later said was not a guideline case and of very limited value. It is not clear to us whether it was a Guernsey or an English case and at what level of court the sentence was imposed.

Sentencing Remarks in Court below

14. The Court noted that commercial burglaries of this kind were rare in Guernsey. It took note of the element of pre planning, of the 'no comment' interviews, the strong forensic and other evidence implicating the Applicant and the violent struggle that ensued on arrest. Reference was made to English Sentencing Guidelines and that the range there is 12 months to 7 years. The Court concluded that an element of deterrence was called for on the basis that if a particular type of offence is rare in the Island, it is the Court's public duty to do what it can to keep it so. A starting point of around 6 years was identified.

15. The Court went on to consider mitigation and concluded that there was not a great deal of personal mitigation in respect of either accused and the effect of the guilty pleas was limited by the fact that the evidence on any sensible view was compelling. The sentence imposed was four years and six months for each accused on the basis of a 25% discount for the guilty plea to run from the 6th July 2010. The car was to be forfeited but compensation in respect of the damage and the unrecovered items from the burglary were left for civil proceedings.

Representations made to the Single Judge

16. Miss Mallett, argued that the sentence was manifestly excessive and that the Court wrongly applied the law which had a further effect of making the sentence defective. She took issue with the Court concluding that a deterrent sentence was appropriate when the offence was not common in Guernsey and cited the English case of R v Cunningham (1993) 2All ER 15. She further argued that it was wrong in principle to impose a sentence "based on local considerations". Here she relied on the decisions of this Court in McCarthy v Law Officers GLR (2007-2008) page 414 at paragraph 21. She also took issue with the limited discount for the guilty plea, citing Poullard and Beck v Law Officers Judgment 49/2007 again in this court.

The Decision of the Single Judge

17. The Bailiff, as President of the Court of Appeal, considered the application and rejected it. He granted legal aid up to the day of the handing down of his decision and refused further legal aid, leaving the matter for the plenary court if the application was renewed.

The hearing before this Court

18. The Applicant was not represented before us, Miss Mallett having declined to assist him further. We asked him if he wished to say anything else in support of his application. He adopted all that his advocate has said on his behalf. He felt he should have had the full discount making the point that being found in possession of the stolen goods was evidence of handling, not burglary. He accepted the evidence concerning the bonfire at the property where he had been living. He felt the sentence was too long when compared with other offenders who were currently in prison and pointed out that his recent record had been in relation to substance misuse.

Conclusions

19. We have read and taken careful note of the points made by Miss Mallett in the court below and in her helpful written submissions to the Single Judge. This Court agrees with the conclusion of the Bailiff as single judge that including an element of deterrence in sentences for offences which are only infrequently seen in the Guernsey cannot be wrong in principle and does not consider it helpful to suggest to the Royal Court the that it should be constrained by the perceived ratio of the English decision such as R v Cunningham. That decision in that case seems to have turned on the

personal circumstances of the applicant but the issue which concerned the Court was the interpretation of some recently introduced statutory provision that a custodial sentence shall be for such term as is 'commensurate with the seriousness of the offence'

20. In response to the point that it was wrong in principle to take account of "local considerations" we have studied carefully the judgment of this Court delivered by Beloff JA in McCarthy and we do not consider what the Court was saying in that case concerning breach of trust cases and the assistance to be derived from English sentencing policy has to be read across to preclude the Jurats of the Royal Court from taking their own view of the appropriate sentence for offending of the kind they had before the court on this occasion.

21. So far as the issue of discount to be allowed for a guilty plea is concerned the decision in Poulard and Beck cannot be regarded as of general application in prescribing the discount to be applied. There this Court had found that the sentences were too high and had therefore to resentence and as part of the resentencing exercise concluded that a one third discount was appropriate in that particular case. The Court did draw attention to the possible dangers for the Royal Court in terms of workload if it was perceived to be ungenerous in the treatment of those who pleaded guilty but the judge delivering this Court's judgment made it clear that this is essentially a matter for the Royal Court. In any event the practice of the Royal Court may have changed since 2007.

22. Having disposed of the points of argument that the Royal Court erred in principle we return to ask ourselves whether this sentence can be regarded as manifestly excessive. We are not so persuaded, although it may be at the upper end of the range. The application is refused. We will however not require as provided by the Law that 4 weeks of the time awaiting the hearing of this application be disregarded in the computation of the Applicant's sentence.