

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

MAGISTERIAL APPEAL

NO. 5 of 2011

BETWEEN:

CARL NORMAN CORBIN

APPELLANT

AND

COMMISSIONER OF POLICE

RESPONDENT

BEFORE: The Honourable Marston Gibson, Chief Justice, The Honourable Sherman Moore, CHB, The Honourable Andrew Burgess, Justices of Appeal

2012: February 7; November 28

The Appellant in person

Mr. Elwood Watts for the Respondent

DECISION

MOORE JA: The appellant was charged with burglary, contrary to **section 24 (1) (b)** of the **Theft Act, Cap. 155** in that sometime between the 16th and 17th days of October 2011 he entered the dwellinghouse of Iretha Moore as a trespasser and stole therein eighty tins of paint, two tubes of painter's caulk and a power saw to the total value of \$1 165.70.

[2] The facts disclosed that sometime between 16th and 17th October 2011 the appellant entered the dwellinghouse through an open window. He was quickly apprehended by the police and admitted the offence.

[3] On 21 October 2011 the appellant pleaded guilty and when asked by **Her Worship Mrs. Barbara Cooke-Alleyne**, Magistrate for District 'E', what he had to say, the appellant replied, "I ain't brek the place. I just went in. It was open". She then sentenced him to 5 years imprisonment.

[4] It is from that sentence the appellant has appealed. He has set forth two grounds of appeal, namely (1) the sentence and conviction was against the weight of evidence and (2) the sentence is excessive for the offence charged.

[5] With regard to ground one of the grounds of appeal, **section 238(2)** of the **Magistrates' Court Act, Cap. 116A** provides:

"In the case of a conviction where the appellant has pleaded guilty before the magistrate, the appeal shall only be against sentence".

Having regard to that **subsection**, we find no merit in ground one.

[6] With regard to ground two, it is necessary to refer to the magistrate's reasons for decision. The magistrate gave the following reasons for her decision:

"The court noted that the accused had no remorse. He indicated that he did not view what he had done as breaking and entering since the window was open. It was of some significance that the accused felt that he could not refuse the "**Open window**" invitation to enter the property.

This made the court recognise that:

(1) The accused did not see that he had done anything wrong as the window was open.

(2) That any "**open window**" is an irresistible invitation to enter someone else's building and remove items, other persons' property without their consent.

The accused's nonchalant behavior of not viewing his action as breaking and entering did have an impact on the court. Society must be safe guarded from persons who have no conscience in taking other person's property. Accordingly the court held the view that this offence was not deserving of non custodial sentence under the **Penal System Reform Act**. The court felt that society should be protected by enforcing a custodial sentence.

Section 59 of the **Magistrates' Court Act** invites the court to have regard to the convictions of the accused in determining the amount of the custodial time or fine.

The accused had 49 convictions, 41 of which are for stealing. His years of crime started in 1985. There was a hiatus in 1993 and in 1995 he recorded another conviction.

His last offence was in 2005 and he was given a three (3) year term of imprisonment. As in 1993 there was a hiatus between 2008 and the present conviction.

The accused's track record, the lack of remorse and the need to protect society led the court to the making of the five (5) year term of imprisonment".

At the hearing of the appeal the appellant was unrepresented by counsel. In respect of ground two, the appellant said that 5 years imprisonment was too long for three cans of paint. In fact the items stolen are set out at the first paragraph of this decision. He also said, "This is five years now I ain't come before the court".

In putting the case for the respondents Mr. Elwood Watts submitted that given the absence of significant aggravating factors, the appellants' history of abusing illegal substances, the early guilty plea and that five years imprisonment is the maximum sentence and notwithstanding the appellant's bad record, the maximum sentence should be reserved for the worst cases and that the appropriate sentence should be three years.

In support of his submission Mr. Watts cited **Sherlan Jamal Joseph v. R Criminal Appeal No. 1A of 2005 (unreported decision of 19 December 2008)** in which **Simmons CJ** cited **Brewster v. R [1998] 1 Cr.App.R (s) 181** in which **Lord Bingham**, making a distinction between domestic burglary and other crimes said at p. 186:

"The record of the offender is of more significance in the case of domestic burglary than in the case of some other crimes. There are some professional burglars whose record shows that from an early age they have behaved as predators preying on their fellow citizens, returning to their trade almost as soon as each prison sentence has been served. Such defendants must continue to receive substantial terms of imprisonment. There are, however, other domestic burglars whose activities are of a different character, and whose careers may lack any element of persistence or deliberation. They are entitled to more lenient treatment."

The appellant has 49 previous convictions 41 of which are for theft, 7 for burglary, including 2 domestic burglaries. Theft and burglary are offences of dishonesty and should be treated as one group of offences.

The appellant seems to be a professional thief and burglar who preys on his fellow citizens and, except for two hiatuses referred to by the magistrate, returns to his trade almost as soon as each sentence has been served. He also has some convictions for the use of cocaine, a controlled drug. We believe that his offences of theft and burglary are committed, at least in part, to finance his acquisition of that drug. We agree with the magistrate that society should be protected from the appellant.

[12] In the circumstances, we dismiss the appeal, affirm the sentence and further order that the appellant undergo such treatment as medical and psychological opinion consider appropriate in order to assist him in overcoming the use of narcotic substances.

Chief Justice

Justice of Appeal

Justice of Appeal