8 pages.

COURT OF APPEAL

24th September, 1990 136

Before: J.M. Collins, Esq., Q.C., (President)
J.M. Chadwick, Esq., Q.C., and
E.A. Machin, Esq., Q.C.

The Attorney General
- v -
AS and
AL

Application for leave to appeal against total sentence of four years' imprisonment passed by the Royal Court (Superior Number) on the 9th July, 1990.

The Attorney General.
Advocate R.J. Renouf for AS.
Advocate J.C. Gollop for AL

JUDGMENT

THE PRESIDENT: On the 22nd June, 1990, AS and AL pleaded guilty to an offence of breaking and entering and larceny in that on the 17th April of this year they broke and entered a dwelling house and armed with weapons, stole £700.00 in cash from Miss N , putting her in fear.

They further pleaded guilty in the case of the appellant, AS, to an offence of taking and driving away a motorcar without the owner's consent on the previous day and in the case of the appellant, AL to allowing himself to be carried in that car knowing that it had been taken without the owner's consent. AS further pleaded guilty to driving the same car without insurance. All those offences were connected in that the motorcar was taken to enable them to carry out the burglary.

They were sentenced by the Royal Court on the 9th July, 1990, and leave to appeal was refused on the 1st August, 1990. They now make application to this Court for leave to appeal.

Each defendant was sentenced to four years' imprisonment in respect of the offence of burglary and theft, and there were concurrent sentences in respect of the other offences of nine months and six months in the case of the appellant, AS, and six months in the case of the appellant, AL. AS was in addition sentenced to a further twelve months' imprisonment concurrently with each other and with the sentences imposed in respect of each of a large number of offences in respect of which he had been made the subject of a probation and community service order on the 9th February, 1990.

Each defendant now applies to this Court for leave to appeal against sentence and we have treated the hearing of the substance of the appeal as the hearing of that application.

Miss N is a lady of advanced years. She is 78 years old and seriously crippled with arthritis so that she can only walk with two sticks, or when in her house, with the aid of a tea trolley on which she keeps her belongings. Among those belongings were some £700 which she kept in two bags on a bottom shelf.

On the 11th April, a man called GC who is the brother of the appellant, AL, made a delivery of coal to the house and on being paid cash by Miss N became aware of the fact that she had a large amount of money in the house. He told AL of this and in no time the plot was hatched: AL and AS would go to steal the money. They

were driven out to see the house by GC and AS went to the Airport, found a car with its keys in the ignition, and took it. The appellant, AL, being present with him at any rate when they drove to St. Martin where Miss N lived.

The appellant, AS cut the telephone cable which effectively cut this disabled lady off from seeking outside help.

At about one o'clock in the morning Miss N heard a noise outside which sounded to her like a tile falling off the roof and she tried to telephone to the police, being already somewhat alarmed, but of course she found the line was dead. She went to her bedroom taking her old dog with her. She locked the kitchen and sitting room doors behind her. The noise started again and she again tried unsuccessfully to use the telephone and she lay on her bed with her dog to await whatever might befall.

At the time the appellants were trying to gain access to her, first by the kitchen window and then by the dining room window, by which means they were attempting unsuccessfully to circumvent the doors which she had secured internally. They then drove away again and she was left in the house again wondering what was going to happen.

The idea was that they would go back when she was asleep, no doubt realising that the noise which they had made would have alerted her. And so an hour or so later it was that they returned.

In the meanwhile, far from being able to go to sleep, Miss N had been lying on her bed in a frightened state.

It was at about quarter past three in the morning that they returned and smashed the glass in the front door, opened it and gained access to the hall and then to Miss N 's bedroom. The appellant, AL said: "Give us the money" in a deep voice and she saw him carrying a piece of metal which she took to be a poker. She also saw the appellant, AS behind him. Both men were wearing cloths over their faces.

Miss N.'s response to the demand that she give over the money was a courageous one; her first thought was for her dog. "Don't hurt the dog", she said, "he is very old". They searched the room and found some £400 in £10 notes in a plastic bag and some £300 with her pension book and national savings vouchers. They took the bags and left the house and only a part of the money was ever recovered.

While it is true to say that neither defendant offered actual violence to the old lady in that neither struck her or took hold of her, the presence of two young men with their faces covered, armed in one case with an iron bar taken by her to be a poker, who had smashed their way into the house is almost as serious a case of aggravated burglary as one can imagine.

We have approached the question of sentence along these lines. First we have asked ourselves whether the sentences imposed are out of line with the standards set by previous cases.

In this respect we would refer first to two observations of the Court of Appeal (Criminal Division) in England. First we refer to the observations of Lane L.C.J., in the case of R -v- O'Driscoll (1986) 8 Cr. App. R. (S) 121. In the course of giving judgment in that case Lord Lane said that not only in his experience but in the experience of the Court "there is an increasing tendency for burglars to select as victims elderly or old people living on their own. It is plain why. First of all they are not likely to offer very much resistance and the chances are that they have got not inconsiderable sums of money concealed in the house".

Secondly, we have had regard to the observations of the same Court in the case of R -v- Gramito (1984) 6 Cr. App. R. (S) 399. In the course of giving judgment in that case, Hodgson J. said this: "Burglaries vary greatly in seriousness. But to suggest that night-time invasions of the occupied homes of people are not the most serious or among the most serious of burglaries is a contention which this court does not think can be supported for a moment. The invasion in that way for the purpose of theft of occupied homes during the night is

an offence which borders on offences which can properly be called offences of violence".

Against that background we have first sought assistance from the numerous authorities which have been referred to by counsel for both appellants and we are satisfied that the sentences passed in this case are well within the boundaries appropriate for offences of this nature.

Before leaving this aspect we would refer to the decision of the Court of Appeal (Criminal Division) in the case of R -v- Funnell (1986) 8 Cr. App. R(S) 143. This was an authority to which the Court below referred specifically and a criticism was advanced in respect of that reference in that it was urged upon this Court that the lower Court had mistakenly taken that case as a case which was comparable to the case at present under appeal, whereas it was said it was in fact a case of robbery and so it was said that the Court below was not making a proper comparison. In fact when we looked at the authority of Funnell and others, we found that although it is in a chapter in Thomas on Principles of Sentencing (2nd Edn.) which is headed "Robbery", it was in fact a case of aggravated burglary. The two appellants pleaded guilty to aggravated burglary in that case. They tied the householder who was 84 years old to a chair, but did not commit any other act of violence. They entered the house of the man in question armed with an imitation firearm and blank cartridges. We consider that it was a case which it was proper for the Court below to take into account as comparable, having regard in particular to the nature of the particulars of offence to which these two appellants pleaded guilty.

Those particulars, it is quite clear, include the same elements: they entered the house of this lady whilst armed with weapons and put her, Miss N , in fear and then they stole the money in question. The ingredients, therefore, of what would on the mainland be regarded as aggravated burglary as provided for by statute are in fact contained in the particulars of offence in this case. It is therefore entirely an appropriate case for the Court to have taken into account.

In that case two of the appellants who had entered the house had been sentenced to 9 years' imprisonment, and the Court of Appeal reduced the sentence of 9 years' imprisonment to one of 6 years' imprisonment. It is appropriate to note that this was a case in which the defendants in question had pleaded guilty, so that the sentence of 6 years substituted by the Court of Appeal (Criminal Division) for 9 years was against the background of a plea of guilty and the mitigation which that imports.

Secondly, we have asked ourselves whether there is anything in the personal history of the appellants which should have an effect on our views in regard to sentence. Their youth has been urged upon us and it is right to say that as a matter of principle the age of the defendant in the case of offenders of this age is a relevant circumstance. But we have come to the conclusion that their age in the case of each appellant is properly taken into account in the sentences which were in fact passed.

We have also had regard to the 'jump effect' as it is called; that is to say the appropriateness of a more substantial sentence than any which has been imposed in respect of previous offences for which an offender has been dealt. We have taken account of those submissions, but having regard to the nature of the offence and the ratio of the sentence passed in this instance to those which have been previously passed, we consider that this case falls within the observations of the Court of Appeal (Criminal Division) in the case of Sharp which was decided in October of 1972 and is referred to at p.205 of Thomas' Principles of Sentencing (2nd Edn.), when the Court, while accepting that there was a substantial jump between the present and previous sentences, upheld the sentence with the comment that the answer is that there is also a very great jump in the gravity of the crime. The fact that there is an increased gravity in the crime does not mean that the Court does not still look to see whether there is a jump which is unfair and inappropriate, but we consider, having looked at the records of these two defendants and considered the nature of the offence to which they have pleaded guilty, that the relationship of the sentence at present under appeal to the sentences which they have previously

undergone reflects properly a comparison between the seriousness of this grave offence with those earlier offences.

Accordingly, the judgment of this Court is that these applications for leave to appeal be dismissed.

Authorities

A.G. -v- Sheldrake (7th February, 1985) Jersey Unreported C of A.

A.G. -v- Reucroft & Ors. (30th April, 1990) Jersey Unreported.

A.G. -v- Allo & Collins (1983) JJ 85 C of A.

Thomas: "Current Sentencing Practice":

R. -v- O'Driscoll (1986) 8 Cr. App. R(S) 121 at page 2318/2.

R. -v- Funnell & Ors. (1986) 8 Cr. App. R(S) 143 at page 2319.

R. -v- Doherty & Ors. (1988) 8 Cr. App. R(S) 493 at page 2319-20.

R. -v- O'Callaghan & Broughton (1987) 9 Cr. App. R(S) 58 at page 2320-20/1.

R. -v- Ireland (19th October, 1973) at page 3011.

R. -v- Pinnock (1979) 1 Cr. App. R(S) 169.

Thomas: "Principles of Sentencing":

p.p.20-22: The Intermediate Recidivist.

p.195: The Age and History of the Offender.

p.p.204-5: The 'jump effect': Sharp.

A.G. -v- Aubin (1987-88) JLR Part 1, No.6

(6th July, 1987) Jersey Unreported C of A.

(14th May, 1987) Jersey Unreported.

Thomas: Current Sentencing Practice: Part A5 3(C):

pp 2331-2334/1: Burglary: Gramito.

Thomas: Principles of Sentencing: pp 141-2: Violent Burglary

pp 147-157: Burglary.