ANGUILLA

IN THE HIGH COURT OF JUSTICE

(CRIMINAL)

CRIMINAL CASE NO. 0015/2010

BETWEEN:

THE QUEEN

Crown

v.

GARY FLEMING

Defendant

Appearances:

Ms. Vernette Richardson Senior Crown Counsel (ag) and Ms. Erika Edwards
Crown Counsel for the Crown
Mrs. Keesha Carty for the Defendant

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2011: April 12th
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JUDGMENT ON SENTENCING

[1] BLENMAN, J: Mr. Gary Fleming was indicted by the Learned Attorney General on two counts of burglary of two dwelling houses. He has pleaded guilty to both counts. The following represents the full judgment of the Court on sentence.

Facts

[2] On the 2nd day of November, 2009, Mr. Gary Fleming broke into the dwelling house of Ms. Leona Richardson and stole a quantity of jewellery, to the total value of US$4,705.00.

[3] On the same day, he broke into the dwelling house of Ms. Randah Connor and stole US$400.00, EC$1,400, a variety of jewellery and a cell phone to the total value of US$9,699.38.

[4] Both Ms. Richardson and Ms. Connor returned home to find that their respective homes were broken into.

[5] Each of them reported the matter to the police and investigations were carried out. Later that day police officers found Mr. Fleming, he had in his possession the items that were stolen from Ms. Richardson and Ms. Connor respectively.

[6] It was against that background that Mr. Fleming has pleaded guilty and is before the court for sentencing.

Submissions

[7] Learned Counsel Mrs. Keesha Carty quite candidly conceded that Mr. Gary Fleming has a number of convictions some of which are of a similar nature. They span over a number of years.

[8] Mrs. Keesha Carty urged the court to be lenient with him. She said that he is 34 years old and has two young children. He has been on remand, for these matters, over the past year. He has been given the opportunity to go outside of the prison to work, during the period of remand, and he has not betrayed the trust reposed in him by trying to escape.

[9] Learned Counsel Mrs. Keesha Carty said that Mr. Fleming accepts that he did wrong and she hoped that he would utilize the period of incarceration in order to reflect on his behavior and to mend his ways.

[10] Learned Counsel said that the main mitigating factors that operate in his favour are that he has pleaded guilty, he has a wife for whose maintenance he is a main contributor and he is the financial provider for his young children.

[11] Learned Senior Crown Counsel Ms. Richardson urged the court to impose an appropriate sentence on Mr. Fleming. Learned Senior Crown Counsel Ms. Richardson drew the court's attention to the fact that Mr. Fleming committed the last two offences, that are reflected on his conviction sheet, while he was on remand awaiting trial. During that period, he was permitted by the prison officials to leave the prison and to undertake paid work. On one of those occasions, on his return from work, he was found in possession of a ring suspected of being stolen and charged. He was found guilty in the lower court and sentenced to 3 months in prison.

[12] Ms. Richardson Learned Senior Crown Counsel also adverted the court's attention to the fact that in Anguilla the sentences for offences of a similar nature have ranged between 5-7 years.

Law

[13] Section 250 (1) (4) of the Criminal Code of the Revised Laws of Anguilla states: that a person who commits the offence of burglary is liable on conviction to 14 years in prison.

Court's Analysis and Conclusion

[14] The court has given careful consideration to the very able submissions of the Learned Prosecutor and Learned Defence Counsel and to the relevant legal principles that must guide the court.

[15] Burglary is no doubt a very serious offence. This is reflected not only by the lengthy sentence which the legislature in its wisdom has recommended, but also based on the fact that the offence amounts to an unlawful invasion of one's privacy.

[16] A review of Mr. Fleming's criminal record reveals that he has 10 previous convictions all of which have to do with dishonesty, even though all of them were of a summary nature. He has only received a custodial sentence for the last one. On all of the other previous convictions he was fined by the court with alternative custodial sentences, should he have defaulted in the payment of the fines.

[17] It is unusual for the court to impose a custodial sentence on a first time offender, absent any aggravating features. In Anguilla, the society abhors the apparent increase in burglaries and other serious offences of dishonesty that are occurring in this pristine tourist destination.

[18] It is of some note that in the case of both offences, to which Mr. Fleming has pleaded guilty, the victims are female. The court would, however, not accede to the Prosecutor's request to conclude that Mr. Fleming deliberately targeted the homes of females who lived alone. However of significance is the fact that Mr. Fleming has numerous convictions for kindred offences.

[19] A sentencer in determining the appropriate sentence must have regard not only to any guidance that obtains in other judgments but additionally to the particular circumstances of the offence committed, its effect upon the victim and the record of the offender.

[20] The sentencer is therefore enjoined to take into consideration the characteristics of the offences and the character of the offender in its determination of the appropriate sentence.

[21] Also, the court must weigh the mitigating factors against the aggravating factors in determining what is the appropriate sentence.

[22] The aggravating factors include: Mr. Fleming's previous convictions of a kindred nature; he has also committed offences while on remand awaiting trial on these matters and he committed both offences on the same day.

[23] Mitigating factors can also include the fact that the items which have been stolen have been recovered. Mr. Fleming has pleaded guilty and that he has a family who depends on him for their upkeep, these are also mitigating factors. They must be weighed against the aggravating factors: he committed two offences on the same day, the victims in both offences are females and he has a number of offences of a similar nature. This must be viewed, also, against background that he committed an offence while he was awaiting trial for these offences, and in prison on remand.

[24] In the court's considered view, the aggravating factors and the mitigating factors are of equal weight, they balance out each other.

[25] It is the law that the custodial sentence that is imposed should be proportionate to the offence. In circumstances of repeat offenders and aggravated offences long sentences are appropriate.

[26] In the case of Mr. Fleming, as the court has previously alluded to, he has a long list of convictions of a similar nature. Also of interest is the fact that last the two of the offences, which are on his record, were committed while he was on remand awaiting trial on these charges.

[27] In sentencing an offender, it is well an established principle that the court should give a discount for the fact that the offender has pleaded guilty. A guilty plea coming early in the trial usually attracts a discount of one third, this is so both in England and in our jurisdiction. In *Desmond Baptiste v The Queen* Byron CJ (as

he then was) stated that the defendant who has pleaded guilty is entitled to a considerable discount and that the discount should be applied not to maximum sentence possible under the statute but rather to the notional sentence, the sentencer might have given save for the guilty plea.

[28] I now address the guilty plea. Where the offender pleads guilty the court shall take into account the plea and the stage of the proceedings at which the offender indicated an intention of doing so. In case at bar, the defendant has pleaded guilty during the trial, I am of the view that the defendant is entitled to receive a discount for so doing. I am buttressed in my view by the very instructive pronouncements of Byron CJ in Civil Appeal Nos. 8, 10,16,22,26,29,34,37,41 and 46 of 2003 *Desmond Baptiste et al v The Queen* ibid. His Lordship Byron CJ stated at paragraph 28, 29 and 30 as follows:

> *"28 In England a plea of Guilty normally attracts a significant, approximately a one third, reduction of the sentence, there are sound public policy reasons for this. The criminal justice system benefits from genuine guilty pleas, such pleas spare the judge, the jury and witnesses the stress and rigours of a full trial. The state saves both time and money. It could be manifestly unfair to accord the identical sentence to co-defendants charged with the same offence where one has pleaded guilty at an early stage and the other has put the state through the ordeal of a long and demanding trial. The defendant who has pleaded guilty is entitled to a considerable discount. While suggesting a discount of the order of one third however, Lord Taylor, CJ stressed in Buffrey that "it would be quite wrong to suggest that there was an absolute rule as to what the discount should be. Each case must be assessed by the trial judge on its own facts and there will be considerable variance between one case and another." In our view our courts should adopt; a similar approach. Clearly,*

the earlier the defendant pleads guilty, the greater the likelihood that he will receive the full discount permissible. Conversely, a plea of guilty late in the proceedings may not yield much of a discount. The discount should be applied not to the maximum sentence possible under the statute but rather to a notional sentence the sentencer might have given save for the guilty plea."

"29, It must be stressed though that the more serious the offence, the less relevant will be this circumstance. In Turner v The Queen *a case of armed robbery, Lord Lane, CJ stated that "the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration when the court is dealing with cases of this gravity." Conversely, the lack of a criminal record would be a powerful mitigating factor where the offence is of an insubstantial nature.*

"30, on the issue of the age of the offender, a sentence should be mindful of the general undesirability of imprisoning young first offenders. For such offenders, the court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects. Where imprisonment is required, the duration of incarceration should also take such factors into account. In the same vein, in cases where the offender is a mature individual with no apparent propensity for commission of the offence, the sentence may also take this circumstance into account in weighting the desirability and duration of a prison sentence. As with first time offenders, the more serious the offence, the less relevant will be these circumstances."

[29] The court can do no more than to apply those very helpful principles

[30] There are other general principles that the court should apply in sentencing. In *R v Sergeant 60* Cr App R 74 at p 77 Lawton LJ identified the classical principles of

sentencing as being retribution, deterrence, prevention and rehabilitation. These principles were judicially acknowledged by Byron CJ in ***Desmond Baptiste*** ibid, at paragraph 23, 24,25 and 26 where His Lordship stated as follows:

Deterrence

> *"Deterrence is general as well as specific in nature. The former is intended to be a restraint against potential criminal activity by others whereas the latter is a restraint against the particular criminal relapsing into recidivist behavior. Of what value however are sentences that are grounded in deterrence? Specific deterrence may be an ineffective tool to combat criminal behavior that is spontaneous or spawned by circumstances such as addictions or necessity. Drug and alcohol addiction as well as need may trigger high rates of recidivism. Experience shows that general deterrence too is of limited effect. These sentences tend to lose their potency with the passage of time."*

Prevention

> *"The goal here is to protect society from those who persist in high rates of criminality. For some offenders, the sound of the shutting iron cell door may have a deterrent effect. Some however never learn lessons from their incarcerations and the only way of curbing their criminality is through protracted sentences whose objective is to keep them away from society. Such sentences are more suitable for repeat offenders."*

Rehabilitation

> *"Here the objective is to engage the prisoner in activities that would assist him with reintegration into society after prison. However the success of this aspect of sentencing is influenced by executive policy. Furthermore,*

rehabilitation has in the past borne mixed results. Of course sentencing ought not to be influenced by executive policy such as the availability of structured activities to facilitate reform."

[31] Further, the matter of rehabilitation was considered by the learned authors Andrew Von Hirsh and Andrew Ashworth, in their treatise Principled Sentencing Readings on Theory and Policy at page 1, where they state as follows:

"Rehabilitation is the idea of curing an offender of his or her criminal tendencies. It consists, more precisely, of changing an offender's personality, outlook, habits, or opportunities often, rehabilitation is said to involve helping the offender, but a benefit to the offender is not necessarily presupposed: those who benefits are other persons, ourselves, who became less likely to be victimized by the offender"

[32] Andrew Von Hirsh and Andrew Ashworth in Principled Sentence Readings on Theory and Policy ibid at page 53 state under the caption "Punishment and Deterrence" that:

"Where an unlawful act has been committed which is followed, or threatens to be followed two wishes naturally suggest themselves to a sentencer's mind: First, to obviate the danger of the like mischief in future; secondly to compensate the mischief that has already been done. The mischief likely to ensure from acts of the like kind may arise from either of two sources – either the conduct of the party himself who has been the author of the mischief already done, or the conduct of such other persons as may have adequate motives and sufficient opportunities to do the like."

[33] In relation to Prevention, Andrew Von Hirsh and Ashworth in Principled Sentencing Readings on Theory and Policy ibid state also at page 54 as follows:

"General prevention is effected by the denunciation of punishment, and by its application, which, according to the common expression, serves for an example. The punishment suffered by the offender presents to everyone an example of what he himself will have to suffer, if he is guilty of the same offence. General prevention ought to be the chief end of punishment, as it is its real justification, if we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would be only adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all."

"When we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all."

[34] Andrew Von Hirsh and Andrew Ashworth in Principled Sentencing ibid say as follows at page 30:

"Sentence is usually based on the seriousness of the offender's crime or on his need for treatment, it will imply something about the impropriety of the behavior. Conduct that is more blameworthy – in the sense of involving greater harm and culpability – is to be (and hereby condemned more severely; conduct that is less reprehensible is to be punished (and hence censured) more mildly."

[35] The court also, finds very helpful the guidelines set out in *Mc. Inerney and Keating v R* [2003] 2 Cr App R 240 a guideline judgment of the English Court of Appeal for the offence of domestic burglary. The guidelines were approved and applied by our Court of Appeal in Criminal Appeal No. 001/2006, *William Penn v The Queen*. In the latter case the Court of Appeal affirmed a sentence of 8 years that had been imposed on each of the three counts of burglary, to run concurrently.

[36] In the case of *Desmond Baptiste v The Queen,* St. Vincent and the Grenadines Criminal Appeal 8 of 2003, the defendant who had a long conviction record pleaded guilty to burglary. He was sentenced to 8 years in prison by the Judge. On appeal, the Court of Appeal affirmed his sentence.

[37] Also in *Denzil Sam v The Queen* St. Vincent and the Grenadines Criminal Appeal No. 3 of 2006, the appellant was convicted of burglary. The Court of Appeal affirmed the sentence of 5 years in prison.

[38] In the *Queen v Keenan Kendell Bethelmy* Criminal Case No. 11 of 2007 the defendant who was a young man of 24 years and who had pleaded guilty to two offences of burglary was sentenced to 10 years and 3 years to run concurrently.

[39] In determining the appropriate sentence, the court will apply the above stated principles.

Conclusion

[40] While the court has given Mr. Fleming discount for the fact that he has pleaded guilty, the court must nevertheless bear in mind that he was found in possession of the stolen items on the same day shortly after they were stolen. The court's view is that the approach which should be taken to his guilty plea is consistent with that expressed by Lord Taylor CJ namely: *"it would be quite wrong to suggest that there was an absolute rule as to what the discount should be. Each case must be assessed by the trial judge on its own facts".*

[41] Be that as it may, the circumstances of the present case are similar to that of *Desmond Baptiste* ibid. The court must take into consideration the totality of circumstances including the need to ensure that the sentence that is imposed serves to deter Mr. Fleming from similar deviant conduct while at the same time providing him with the opportunity for rehabilitation. The sentence must reflect the society's abhorrence of crimes of this nature while serving to deter other like-minded persons from committing similar offences. It cannot go unnoticed that there is a seeming upsurge of burglaries in Anguilla. There is a need to deal condignly with offenders such as Mr. Fleming.

[42] In view of the above, the appropriate sentence to be imposed on Mr. Fleming is a sentence of 3 years in prison on the count of burglary of Ms. Leona Richardson's home. The sentence is to take effect from the date of sentence. On the second count of burglary of the home of Ms. Randah Connor, he is sentenced to 6 years in prison, similarly this sentence takes effect from the date of sentence. Both sentences are to run concurrently.

[43] In imposing the above sentences, the court has taken into consideration the fact that Mr. Fleming has been on remand for approximately one year and three months awaiting trial.

Louise Esther Blenman
Resident High Court Judge
Anguilla