[2005–06 Gib LR 72]

MARTINEZ v. R.

COURT OF APPEAL (Staughton, P., Stuart-Smith and Aldous, JJ.A.): September 9th, 2005

Sentencing—burglary—dwelling-house—starting point of community sentence for first offence of burglary appropriate, if offender suitable, even if no pre-sentence report available—courts to consider extending use of community sentences to more serious burglaries—20-year-old entering flat through open window and stealing property worth £1,500, no ransacking of property, no previous convictions for burglary—1 month's imprisonment

The appellant was charged in the Magistrates' Court with burglary.

The appellant entered a flat through an open window and stole various items with a total value of £1,500. Some of the property was recovered and he paid the value of the remaining items to the owner. It was the appellant's first conviction for burglary, although he had previous convictions for theft, possession of cannabis and disorderly conduct.

He pleaded guilty and a pre-sentence report was requested (which was generally required by the court before it would consider a non-custodial sentence for burglary). Upon hearing that the report might take up to 6 months, the defendant elected to be sentenced straight away, and the Stipendiary Magistrate imposed a sentence of 15 weeks' imprisonment.

The Supreme Court (Dudley, A.J.) dismissed the appellant's appeal against sentence on the grounds that the starting point for domestic burglaries was a custodial sentence and that, since a pre-sentence report had not been available, the Stipendiary had been unable to consider the option of a community service order.

On further appeal, the appellant submitted that (a) the court should follow English authority which indicated that community sentences were appropriate for first-time domestic burglars; (b) it was unfair that he was deprived of the possibility of receiving a community sentence unless he was prepared to wait for a pre-sentence report; and (c) he wished to be able to maintain his current job in order to support his family, including his father, who had a serious heart condition.

The Crown submitted that (a) the English authority took into account the particular circumstances of that jurisdiction and was of limited assistance in the present case; and (b) in any event, the court was unable to award a community sentence unless satisfied that the person was suitable, and this required a pre-sentence report.

The court also considered the circumstances in which it was appropriate to award a community sentence for burglary.

Held, allowing the appeal:

(1) The sentence was excessive and a sentence of one month's imprisonment would be substituted, to allow the immediate release of the appellant as it had already been served. Although the present case was not necessarily in the lowest category of case, in view of the value of the items stolen, nevertheless it was appropriate to release the appellant, since it was his first conviction for burglary, the property was not ransacked, he had paid compensation to the victim and he was now the only breadwinner in his family since his father was seriously ill (para. 4; paras. 7–8).

(2) The court should have regard to the guidance given in the English authority. The initial approach was to consider, in the case of a first-time burglar, whether a community sentence was appropriate, not only in the lowest category of case, but also in the second and third categories described in that authority. The court should investigate the possibility of a community sentence in such cases even when no pre-sentence report was available (paras. 6–7).

Case cited:

(1) *R.* v. *McInerney*, [2003] 1 All E.R. 1089; [2003] 1 Cr. App. R. 36; [2003] 2 Cr. App. R. (S.) 39; [2002] EWCA Crim. 3003, applied.

M. Turnock for the appellant;
Mrs. S. Peralta, Crown Counsel, for the Crown.

1 **STAUGHTON, P.**: This is an appeal by leave of the Chief Justice against sentence.

2 On April 16th, 2005, Kenneth Martinez, who was 20 years of age (he is now 21) entered a flat in Gibraltar some time between 5 and 10 or 11 p.m. by means of an open window whilst the occupier was out. He made his way through a number of rooms and stole a number of items of property. They are listed in the indictment: one gold coloured ring with the inscription "Dad", one gold coloured ring with a Mercedes emblem, one gold coloured ring with Barcelona badge, one gold coloured ring with cannabis leaf, one gold coloured ring with lion's head, one gold coloured ring with coin, one gold coloured ring with horseshoe and horse's head, one gold coloured ring and lighter, one gold coloured Egyptian pendant, one silver coloured portable Panasonic DVD player, one pair of Nike sunglasses and one Siemens mobile phone. He took these items, or some of them, to a shop in order to discover their value and sold some of them at a pawn shop in Spain.

3 Two days later, he was taken to New Mole House and found to be

wearing two rings which were similar to those reported stolen. He was arrested. A search of his residence took place and more of the property was recovered. All told, it is said that £1,500 worth was stolen, although a different and lesser amount is alleged by the defence. £600 worth was recovered and so, on the prosecution's view, £900 was not recovered. The appellant says it is only £300 worth. He has since paid some compensation to the person deprived of the property. It is accepted that there was no disturbance of the flat, no ransacking of property. We understand that the value of the property which was not returned has been paid for by or on behalf of Martinez. Now in his previous record as it was revealed at the time, the Stipendiary was told that he had no relevant convictions except for one of taking a conveyance in May 2003, for which he was fined £150. But further incidents in his previous life were revealed: that in June 2004, he was convicted of possession of cannabis, for which he was fined £100; in January 2004, he was convicted of possession of cannabis; and in June 2003, he was convicted in the Magistrates' Court of disorderly conduct in the police station and fined £100. Then he was fined £75 in March 2003 for disturbance in the Magistrates' Court. Your client is holding his hand up, would you like to tell me what he has to say?

> *Turnock*: "My Lord, it is just that he is actually saying that he did not make a disturbance in the Magistrates' Court."
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> *Staughton, P.*: "I cannot hear."
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> *Turnock*: "He did not make a disturbance at the Magistrates' Court. It was at the police station, as I understand it."
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> *Staughton, P.*: "Then he was brought before the Stipendiary Magistrate, and there was an early plea of guilty for burglary. There was a request for a pre-sentence report. But that was not available, and so on the 15th of June or thereabouts he was sentenced . . ."
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> *Crown*: "July 6th, My Lord, the date of sentence was July 6th."
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> *Staughton, P.*: "July 6th, was it? Yes, well, thank you. July 6th, sentenced to 15 weeks' imprisonment."

4 A week later, on July 13th, the appeal was dismissed by Dudley, A.J. and on July 29th there was an application for bail before the Chief Justice, who granted leave to appeal, and also granted bail. In the result, he served 22 days until he was released on the Chief Justice's order. Had he not been let out on bail, he would by now have served his entire sentence, and I think a bit more. Now, the circumstances of his family were told by counsel to the Stipendiary. His father's health was very poor, he had a serious heart problem and his health was in danger. He wished to put the matter behind him, not only to spend time with his father in particular, but his father was the only breadwinner beside himself, and he

wished to be released. He had a good job, and he wished to assist his family, by that time he was the only provider for the family. He had a steady girlfriend, but that does not seem to be a good reason for stealing gold rings.

5 The Stipendiary Magistrate said that an appropriate sentence for a burglary of this nature would, in the ordinary way, be 5 months' imprisonment. He reduced it to 15 weeks because there was an early plea of guilty. Was this the right sentence? Burglary is all too frequently an offence which causes fear and outrage in many members of the public. But there is a wide range of burglaries. In recent times, it has been recognized that it is not in every case that an offence of burglary must be met with a custodial sentence. It is possible for burglary to be met with a sentence in the community, in certain circumstances, but a pre-sentence report would be regarded as a necessary requirement before a non-custodial penalty could be imposed for burglary, and there was no pre-sentence report in this case. One had been requested, then at a later hearing it turned out that it was not ready, and might not be for quite some time. We have been told that it may take up to six months for a pre-sentence report to be provided. That seems a very unfortunate situation. At all events, Martinez said that he did not want a pre-sentence report if it was going to take so long, and he would rather be sentenced straight away. That is what I understood. At all events, he was sentenced straight away by the Stipendiary.

6 The Court of Appeal in England has recently extended somewhat the circumstances when it is not necessary to impose a custodial penalty for burglary, in the case of *R.* v. *McInerney* (1). That was a decision in which the Lord Chief Justice, Lord Woolf, presided. It was the result of advice from the Sentencing Advisory Panel, dated April 9th, 2002, and directed at domestic burglaries where trespass was accompanied by theft or an intention to steal. It is evident that the court there took into account, as a significant feature, the overcrowding in the prisons in England and Wales, but it does not appear that that was an essential feature of the court's decisions. There is not, as far as we know, an overcrowding of the prison in this jurisdiction, but another feature, which does appear in this jurisdiction, is the unattractive and uncomfortable environment of the prison on the Rock. Now I look at the decision of Dudley, A.J. in this case. He said:

> "In the circumstances, I am of the view that *R.* v. *McInerney* is of limited assistance in this jurisdiction and that the entry point for a domestic burglary remains that of custody. That of course does not mean that there may not be exceptional cases of low level burglaries where the mitigating circumstances may make a community based punishment appropriate. In this case, that was not an option which

> was open to the learned Stipendiary. The appellant having dispensed with the pre-sentence report, community service was not something which could properly have been contemplated by the Stipendiary."

That is effectively the problem which faced Dudley, A.J. It leads, one has to say, to an unsatisfactory result. Martinez was deprived, it would seem, of the possibility of a community sentence unless he was prepared to wait up to six months for it. I refer to the decision in *McInerney*, under the heading "The starting points suggested by the Panel after a trial," there is in para. (a) ([2003] 1 All E.R. at 1097–1098):

> "For a low level burglary committed by a first-time domestic burglar (and for some second-time domestic burglars), where there is no damage to property and no property (or only property of very low value) is stolen, the starting point should be a *community sentence* . . . Other types of cases at this level would include thefts (provided they are of items of low value) from attached garages or from vacant property . . ."

7 Now, the Lord Chief Justice said that he would endorse the recommendation of the panel in that respect, the non-custodial approach recommended in para. (a). He then went on to say that in respect of rather more serious, but not very much more serious, matters they were taking a slightly different course. We do not think that this case was necessarily class (a) in that category because of the rather larger sums stolen than perhaps were envisaged in that learned judgment, but the Court of Appeal in England and Wales was prepared to extend to a further category of cases which might be within that situation. The judges in this jurisdiction should consider having regard to the decision in *McInerney* (1) and to the second and third categories which are referred to there. Hence they should have to consider whether a community sentence should be imposed even in that situation and if necessary, in our opinion, it should be considered whether a community sentence should be imposed when a pre-sentence report is not available, if that is allowed in the statute.

> *Crown*: "My Lord, I apologize to interrupt. There is statutory provision that the courts in this jurisdiction can only award a community service order if the court is satisfied that the person is suitable."
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> *Staughton, P.*: "Yes."
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> *Crown*: "That is in s.205."
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> *Turnock*: "I must concur, but there are two reports separately, My Lord. There is a pre-sentence report, which is prepared by the probation service, and there is also a community service report, and in this particular case neither of the reports was ready.

Staughton, P.: "Yes, well, that must be investigated for the future."

8 In this case, Martinez has spent 22 days in custody in this jurisdiction, and it may be that he has come to the conclusion that it is something to be avoided at all costs. We do not think it would be right to send him back to prison, so we reduce the sentence to one month which by now would have been served.

9 **STUART-SMITH** and **ALDOUS, JJ.A.**, concurred.

Appeal allowed.