[2020 Gib LR 272]

GILBERT v. R.

COURT OF APPEAL (Kay, P., Smith and Elias, JJ.A.): October 6th, 2020

Sentencing—robbery—robbery in dwelling—where offender pleaded guilty to burglary of dwelling-house and robbery but offence was continuing event involving forced entry to home and demands for money followed by taking victim to cash point where £100 taken and threats to kill made, sentencing judge right to follow guidelines for robbery in dwelling—sentence reduced on appeal from 5 years 4 months' imprisonment to 4 years 4 months

The appellant pleaded guilty to burglary of a dwelling with intent to steal and robbery.

The appellant went to the victim's apartment at 5 a.m. and banged on the front door. The appellant was aware that the victim was elderly and lived alone. The appellant forced his way into the property and overpowered the victim, demanding money and pushing him onto the floor. As the victim tried to get up, the appellant punched him in the face. The victim

said that he would have to go to a cash point to take out some money. The appellant and the victim went to a cash point where the victim realized that he already had some money in his wallet. The appellant took £100 in total. He threatened to kill the victim if the victim reported the matter to the police.

In an impact statement, the victim said that he believed he was coping but he feared that the appellant would kill him when he came out of prison and that he felt anxious in quiet places and feared for his safety.

The appellant had a previous conviction for wounding, as well as other convictions. He was on bail when he committed the present offences.

The appellant pleaded guilty in the Supreme Court to one count of burglary of a dwelling with intent to steal contrary to s.399 of the Crimes Act 2011 and one count of robbery contrary to s.398 of the Act. He was sentenced on the victim's account as advanced by the prosecution. The sentencing judge (Yeats, J.) observed that although they were not binding on the Gibraltar courts, it was usual to follow the Sentencing Council's Guidelines for England and Wales.

The sentencing judge rejected the submission that the offences should be considered separately as a burglary of a dwelling followed by a street robbery and relied on the guidelines for robbery in a dwelling. The offence was assessed as falling within Category B (*i.e.* of medium culpability) and the harm as Category 2.

The judge considered the following to be the aggravating factors: (a) the victim was an elderly man living alone who had been chosen by the appellant because of his vulnerability; (b) the appellant had a previous conviction for an offence of violence, although it was now spent; (c) the appellant was on bail at the time of the offence; (d) the offence was committed in the early hours of the morning; (e) it was a prolonged offence, starting in the victim's home and ending some distance away at a cash point; (f) the appellant was under the influence of drugs or alcohol at the time; and (g) the appellant had threatened to kill the victim if he reported the incident to the police. The judge considered there was little mitigation.

The judge considered that the appropriate sentence before a discount for an early guilty plea was 8 years. After deducting one-third for the guilty plea, the appellant was sentenced to 5 years 4 months' imprisonment.

The appellant appealed against his sentence, submitting that (a) the judge was wrong to treat the offences as one prolonged robbery rather than two discrete offences of burglary and robbery, which would have resulted in the robbery being treated as a street robbery with a lower range of sentence; (b) the judge should have assessed harm as Category 3, which would have produced a lower sentencing range, as the sum stolen was only £100 and there had been no or minimal physical or psychological harm to the victim or damage to property; and (c) the sentence was manifestly excessive.

Held, ruling as follows:

(1) The judge was entirely right to sentence the appellant on the basis that the offending was one offence of robbery in a dwelling. Although

there was no appropriation of property in the dwelling, the judge had to sentence for the whole of the criminality which occurred both in the dwelling and on the street. It would have been entirely artificial to separate the offences of burglary and robbery for the purposes of sentence. This was a continuing event which began with the forced entry into the flat, followed by demands for money with physical violence. This was followed by a visit to a cash point where the money changed hands and the threat to kill was made. The sentencing guidelines could not provide an option which precisely matched every set of facts. The guidelines for robbery in a dwelling were the closest available to the judge to reflect the totality of what had happened (paras. 12–13).

(2) The judge had been entitled to assess the harm as Category 2. The court did not accept the submission that there was no or minimal physical or psychological harm to the victim. As the judge observed, the victim's experience was harrowing. He reported being afraid that the appellant would kill him when he came out of prison and feeling afraid when alone in quiet places. Although the victim did not specifically say that he felt afraid when at home, being alone in quiet places would include being at home at night. To feel insecure in one's own home was a serious matter. The judge's reasoning in arriving at the range of 4 to 8 years with a starting point of 5 years could not be faulted (para. 14).

(3) The judge sentenced the appellant at the very top of the appropriate range on the basis that there were many aggravating factors and very little by way of mitigation. In the court's view there were indeed many aggravating features which were listed by the judge in his sentencing remarks. Some were more serious than others. Perhaps the most serious was the fact that the victim was known to be an elderly, vulnerable man living alone. The offence took place in the early hours of the morning. It was prolonged, lasting about 30 minutes. The threat to kill was particularly nasty and appeared to have been a significant cause of the appellant's continuing emotional problems. The other matters listed by the judge were plainly relevant but perhaps carried rather less weight. The judge's approach to mitigating factors was correct; there was very little to be said by way of mitigation. Although the judge's approach was unimpeachable, he erred in placing the sentence at the very top of the bracket. This was by no means the very worst case of a Category B2 robbery in a dwelling. The judge's choice of Category 2 for the harm caused was justified and correct but there were features of the case which were consistent with a lower category of harm: the amount of money stolen was low, there was no real damage or destruction to the victim's home and no weapon was involved. Consequently, the judge should have assessed the offence as meriting 6 years 6 months' imprisonment after a trial. It was common ground that the judge was right to give a maximum one-third discount for the early guilty plea. The appropriate sentence was therefore 4 years 4 months' imprisonment. To that extent the appeal would be allowed (paras. 15–18).

K. Colombo and *S. Mahtani* for the appellant;
M. Zammitt for the respondent.

1 **SMITH, J.A.,** delivering the judgment of the court: On April 7th, 2020 in the Supreme Court of Gibraltar, the appellant pleaded guilty to one count of burglary of a dwelling with intent to steal, contrary to s.399 of the Crimes Act 2011, and one count of robbery, contrary to s.398 of the same Act. Yeats, J. sentenced him to five years four months' imprisonment for robbery and imposed no separate penalty for the offence of burglary. He now appeals against that sentence.

2 At about 5 a.m. on August 1st, 2019, the appellant, who is aged 44, went to an apartment on the Varyl Begg Estate where the victim, a man aged 77, lived alone. The appellant was aware that the occupant was elderly and lived alone. He shouted and banged on the front door. The victim got out of bed, went to the door, put on the security chain and opened the door. The appellant reached through the gap, undid the chain and forced his way into the flat. He overpowered the victim shouting "Give me some money." He then pushed the victim towards the bedroom and onto the floor. As the victim tried to get up, the appellant punched him in the face. The victim said he would have to go to a cash point to get some money. They left the flat together and went to a cash point at Watergardens. On arrival, the appellant nudged the victim who took out his wallet and realized that he already had some money. He took it from his wallet but, in his nervous state, he dropped some of it on the floor. The appellant picked that up and then snatched the rest of the money from the victim's hand. He took £100 in all. As he left, the appellant threatened to kill the victim if he told the police. The appellant then went to New Mole House Police Station where he used the stolen money to pay a sum due on a warrant on behalf of his partner. The victim reported the matter to the police and the appellant was identified from CCTV footage. He was arrested and remanded in custody.

3 In an impact statement, the victim reported that he believed he was coping but was in fear that the appellant would kill him when he came out of prison. He felt anxious when in a quiet place and feared for his safety. The sentencing judge observed that this was understandable given that the victim had been woken in the early morning, threatened and assaulted by an intruder and forced to a cash point.

4 The appellant told a probation officer that on the night in question he had had some drinks which he believed had been spiked and he did not remember committing the offences. However, he later gave his own version of events in which he said that he had asked for money which had been given voluntarily; no violence had been used or threatened. The appellant subsequently pleaded guilty to both offences when the sentencing judge

expressly rejected this alternative count and sentenced on the basis of the victim's account as advanced by the prosecution.

5 The appellant had a previous conviction for wounding, an offence which occurred in 2011. He was sentenced to 46 weeks' imprisonment. That conviction was spent at the time of the instant offence. Although the sentencing judge was not aware of it, the appellant had other convictions, one of which related to possession of a bladed article. The appellant was on bail at the time of the current offences, although he was subsequently acquitted of the charge for which he had been arrested and bailed.

6 The judge observed that, although they were not binding on the Gibraltar courts, it was usual for them to follow the Sentencing Council's Guidelines for England and Wales. It is accepted that he was right to take this approach which required him to make determinations as to the appellant's culpability and the harm caused by the offences.

7 He rejected the submission made on behalf of the appellant that the two offences should be considered separately as a burglary of a dwelling followed by a street robbery to reflect what had happened at the cash point. The judge said that the offence of robbery should include what had happened at the flat because it was the threats and violence which occurred there which had forced the victim to go to the cash point and hand over the money. He said that he proposed to rely on the guidelines for offences for robbery in a dwelling.

8 The judge assessed the offence as being Category B, that is of medium culpability, on the basis that none of the characteristics of high or lesser culpability was present. He made it clear that he was not choosing Category C, lesser culpability, because he considered that to overpower a person in his own home, pushing him to the ground and punching him in the face is not the use of minimal force. He then assessed the harm as Category 2 on the basis that none of the Category 1 or 3 characteristics was present. He made it plain that the reason he had chosen Category 2 was that the harm inflicted on the victim was not minimal. By reference to the guidelines for robbery of a dwelling, that assessment gave rise to a bracket of four to eight years' imprisonment, with a starting point of five years.

9 The judge then numerated what he considered to be the aggravating factors of the offence. He mentioned first that the victim was an elderly man living on his own and that he had been chosen by the appellant due to his vulnerability. Second, the appellant had previous convictions for an offence of violence, albeit that this was now spent. Third, the appellant was on bail at the time of the offence. Fourth, the offence had been committed in the early hours of the morning. Fifth, it had been a prolonged offence, starting in the victim's home and ending some distance away at the cash point. Sixth, the appellant was under the influence of drugs or alcohol at the time. Seventh, the appellant threatened to kill the victim if

he reported the incident to the police. The judge expressed the view that these aggravating features were such that they might lead a sentencing court to consider moving into a higher category range for the offence.

10 The judge then considered the mitigating factors as urged by counsel for the appellant but it is apparent from his remarks that he was unimpressed by these. These included the fact that the appellant had five children of whom four were dependant on him. It was claimed that the appellant believed that the victim owed his partner some money. There was no evidence to confirm this and, if it were so, this was a remarkably inappropriate way of asking for payment. The other submissions in mitigation related to the appellant's apparent good behaviour in prison while on remand and the fact that he was receiving help for his problems of anxiety.

11 The judge said that, in his view, the appropriate sentence before giving a discount for an early guilty plea, was eight years. After deducting one third for that reason, he passed a sentence of five years four months.

12 On behalf of the appellant, Mr. Colombo, who appears with Mr. Mahtani, submits that the judge was wrong to treat the appellant's offences as one prolonged act of robbery rather than two spatially and temporally discrete offences of burglary and robbery, as indicted by the Crown. This, he submits, would have resulted in the robbery offence being treated as a street robbery with a lower range of sentence than that which applied to robbery in a dwelling. He submitted that there was no appropriation of property while in the dwelling, so the offence of robbery was not complete. Plainly that is so but, as the President pointed out during argument, the judge had to sentence for the whole of the criminality which occurred both in the dwelling and on the street. Mr. Colombo submitted that the judge could have taken into account what had happened at the flat when sentencing for street robbery. However, he did admit that, if the judge were to have applied the street robbery guidelines, he might also have imposed a consecutive sentence for what had happened in the flat.

13 We have no hesitation in rejecting this ground of appeal. It would be entirely artificial, in our view, to separate the offences in this way for the purposes of sentence. This was a continuing event which began with the forced entry to the flat, followed by demands for money and physical violence used to press home that demand. This was followed by a visit to the cash point where the money changed hands and the threat to kill was made. The sentencing guidelines cannot provide an option which fits precisely every set of facts. The guidelines for robbery in a dwelling were the closest available to the judge to reflect the totality of what had happened. The judge was entirely right, in our view, to sentence on the basis that this was one offence of robbery in a dwelling.

14 Second, Mr. Colombo submits that although the judge was justified in assessing culpability as Category B, he had been assessing harm as Category 2. In his submission, the correct category was Category 3 which would have produced a sentencing range of two to five years with a starting point of three years. In support of this submission, Mr. Colombo points out the sum stolen was only £100 and that there was limited damage to the property. That was so, but he also submits that there was no or minimal physical or psychological harm to the victim. We cannot accept that. As the judge observed, this man's experience was harrowing. He reported being afraid that the appellant would kill him when he came out of prison and that he felt afraid when alone in quiet places. That, in our view, is a serious matter. Although the victim did not specifically say that he felt afraid when at home, we consider that being alone in quiet places would include being at home at night. To feel insecure in one's own home is a serious matter. We consider that the judge was entitled to assess the harm as Category 2. It follows that, in our view, the judge's reasoning in arriving at the range of four to eight years with a starting point of five years cannot be faulted.

15 Mr. Colombo's second ground of appeal is that the sentence is manifestly excessive. We begin by observing that that is a difficult submission to pursue where the judge has correctly assessed the category within the appropriate guideline. However, the fact is that the judge has sentenced at the very top of the appropriate range. He did so on the basis that there were many aggravating factors and very little by way of mitigation.

16 There were indeed many aggravating features in this case which were listed by the judge in his sentencing remarks. In our view, some were more serious than others. Perhaps the most serious is the fact that the victim was and is known to be an elderly, vulnerable man living alone. The offence took place in the early hours of the morning. The incident was prolonged; it appears to have lasted about half an hour in all. The threat to kill was particularly nasty and appears to have been a significant cause of the appellant's continuing emotional problems. The other matters listed by the judge were plainly relevant but perhaps carried rather less weight. We think that the judge's approach to mitigating factors was correct. There was very little to be said by way of mitigation. In particular, the judge was rightly unimpressed by the claim that the appellant felt remorse. The appellant's false account to the probation officer claiming that the victim had handed over the money voluntarily gave the lie to any claim of remorse.

17 Although we consider that the judge's approach was unimpeachable, we do think that he erred in pitching the sentence at the very top of the bracket. This was by no means the worst case of a Category B2 robbery in a dwelling. The judge's choice of Category 2 for the harm caused was

justified and in our view correct but there were features of the case which were consistent with a lower category of harm. The amount of money stolen was low, there was no real damage or destruction to the victim's home and no weapon was involved.

18 Consequently, we are of the view that the judge should have assessed the offence as meriting six years six months' imprisonment after the trial. It is common ground that the judge was right to give a maximum discount of one third for the early guilty plea. In our view, therefore, the appropriate sentence was one of four years four months' imprisonment. To that extent the appeal will be allowed.

Order accordingly.