JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 30/09

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE DUKHARAN, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

DAVE BROWN v R

Miss Melrose Reid for the appellant

Miss Paula Llewellyn, Q.C., Director of Public Prosecutions
& Mrs. Tracy-Ann Johnson, Crown Counsel, for the Crown

5th October 2009

ORAL JUDGMENT

PANTON, P.

1. The appellant in this matter Mr. Dave Brown pleaded guilty before Mr. Justice Roy Jones in the Clarendon Circuit Court on the 26th February 2009 to the offence of house breaking with intent, the particulars being that in the night of the 16th October 2008 in the parish of Clarendon he entered the dwelling house of Rufus Vassel with intent to commit a felony therein. The charge was laid under section 41(a) of the Larceny Act.

2. Upon the plea having been entered, and entered in the presence of his attorney Mr. George Clue, learned counsel for the Crown purported to relate the facts to the learned trial judge. It is to be noted that a preliminary examination had been conducted in this matter, in the Resident Magistrate's Court, depositions taken and the appellant committed to face trial before the Circuit Court. In relating the facts, it is obvious that learned counsel for the Crown was short in her narrative. Thereupon, Mr. Clue, the appellant's attorney, indicated that he was hoping that the antecedents would have been ready so that the proceedings would be shortened. The antecedents were not ready and he further indicated that he was going to ask another attorney to deal with the sentence the following day.

3. On the following day, the 27th February, the attorney who had been named as the one to hold for Mr. Clue was not in attendance. However, there was yet another attorney who was holding for that attorney. Thereupon, the antecedent history of the appellant was revealed to the court through Cpl. Sonia Blackwood. The antecedents indicated that Mr. Brown was born in the parish of Clarendon - there was uncertainty as to his date of birth. He was an unemployed individual who had grown up with his father, never attended school and was sent to a place of safety. According to the antecedents, he has never worked. He has two (2) previous convictions for unlawful wounding and for house breaking and larceny. The unlawful wounding was recorded in December 2006 and the house breaking and larceny in August 2007. In respect of that

house breaking and larceny he was ordered imprisoned for 12 months. This information was communicated to the court as coming from a Probation Officer and from the police records. Mr. Brown duly admitted the two (2) previous convictions.

4. The learned trial judge then listened to a plea in mitigation by learned counsel Mr. Hopeton Clarke in which he indicated that the appellant was in unfortunate circumstances and he pleaded for mercy. He indicated that there had been remorse and contrition on the part of the appellant. The learned trial judge then proceeded to impose a sentence of four (4) years imprisonment. After the plea in mitigation, the accused man stated that he was in fact born on the 5th December 1985 and, in an exchange with the judge, he said that he really had learnt something while in prison but that sometimes he had been to prison for nothing. He also indicated that he never meant to hurt the complainant in this case and he made a statement suggesting that he lived at the house, which statement clearly could not have been so.

5. The single judge who considered this application for leave to appeal granted leave to appeal against sentence indicating that it is a matter for consideration as to whether the sentence of four (4) years imprisonment on a plea of guilty might not be manifestly excessive in the circumstances, notwithstanding the applicant's previous conviction for an offence of dishonesty

and also indicating that there was no evidence of the use of a weapon neither was there any loss of property.

6. We have heard counsel, Miss Reid on behalf of the appellant and indeed, initially, Miss Reid had applied for leave to argue against the conviction based on the statement in the exchange between the appellant and the learned trial judge after the plea of mitigation. We granted leave but after exchanges between the Bench and Miss Reid and after consulting with the learned Director of Public Prosecutions and having seen the depositions Miss Reid withdrew the challenge to the conviction, a move with which we agreed.

7. In respect of sentence, Miss Reid focused on the question asked by the learned trial judge of the appellant, as to whether he had not learnt a lesson from the time that he had spent in prison. Indeed, the point that Miss Reid was making and has made is that the learned trial judge allowed the two (2) previous convictions to influence him unduly, and she made reference to cases decided by this Court in the 1960's. Cases such as ***R v Wesley Findlator*** (1966) 9 JLR 486; ***R v Trevor Smith*** (1968) 11 JLR 46 and ***R v Linford Hearon*** (1966) 9 JLR 416. We have considered the cases referred to by Miss Reid and note that in these cases the learned trial judges had made errors in principle so far as their understanding of their sentencing powers was concerned. In this case, notwithstanding the passionate plea by Miss Reid, we cannot find it possible to say that the learned trial judge, Mr. Justice Jones, had erred in principle and had imposed a sentence which was manifestly excessive. The entering of a dwelling

house at night, in any country, is a very serious matter. One's dwelling house is one's castle and in Jamaica there is a very serious problem in terms of violation of rights such as the householder would have had in this case. In this situation, we cannot say that it is manifestly excessive to impose a sentence of four (4) years imprisonment. What we will do however, bearing in mind that leave to appeal against sentence was granted, is order that the sentence runs from the very day that it was imposed and this we are sure will assist the appellant in approaching the authorities as soon as the law permits with a view, if of good behaviour, to be released early with attention being given to him with a view to rehabilitation.

8. In the circumstances, the application for leave to appeal against conviction is refused. The appeal against sentence is dismissed. The sentence is ordered to run from the 27th February 2009.