

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **CRIMINAL SIDE**

3  
4 **SCA0019/2020:**  
5 **Case No.: 01179/18 – Burglary**  
6 **Case No.: 01258/18 – Possession of Criminal Property**  
7

8  
9 **MARK KENNEDY BUSH**

10  
11 **v.**

12  
13 **REGINA**



14  
15  
16  
17 **Appearances:**

**Mr. Jonathon Hughes of Samson Law for  
the Appellant**

**Ms. Kerrie Ann Gillies for the  
Respondent/Crown**

18  
19  
20  
21  
22  
23 **Before:**

**Justice Roger Chapple (Actg.)**

24 **Heard:**

**12<sup>th</sup> November 2020**

25  
26  
27 **HEADNOTE**

28 *Criminal Law – Appeal from the Summary Court to the Grand Court – Appeal*  
29 *against Sentence.*

30  
31  
32 **JUDGMENT**

33 **ON APPEAL AGAINST SENTENCE**  
34  
35  
36  
37  
38  
39  
40  
41  
42

1 1. On 21<sup>st</sup> February 2020, this Appellant was convicted, following trial in the  
2 Summary Court before Magistrate McFarlane, of two offences, namely:

- 3  
4 a. Burglary, contrary to s.243 of the *Penal Code* (2018 Revision)  
5  
6 b. Possession of criminal property, contrary to s.135(1) of the *Proceeds of Crime*  
7 *Act* (2018 Revision)

8  
9 2. On 24<sup>th</sup> September 2020, having heard full mitigation, the learned Magistrate  
10 sentenced the Appellant as follows:

- 11 a. Burglary: 2 years' imprisonment;  
12  
13 b. Possession of criminal property: 9 months' imprisonment, concurrent;  
14  
15 c. 8 months' imprisonment, to run consecutively to the sentence of 2 years'  
16 imprisonment by way of partial activation of a suspended sentence (2 years'  
17 imprisonment suspended for 2 years) imposed on 5<sup>th</sup> December 2016 - these  
18 offences having been committed during the operational period of that  
19 suspended sentence.  
20

21 3. This resulted in a total sentence to be served of 2 years and 8 months, less credit  
22 for 45 weeks – as it expressed in the commitment warrant – “*for time spent of (sic)*  
23 *remand, also for time on electronic monitoring device.*”  
24

25 4. The Appellant now appeals to this court against sentence on the grounds that it was  
26 manifestly excessive or wrong in principle. There is no appeal against the  
27 convictions.  
28







1 12. The Appellant gave evidence at his trial. He denied any knowledge of, or  
2 involvement in, the burglary, expressing puzzlement as to how his DNA came to  
3 be deposited on top of a fence at the rear of the burgled premises and asserted that  
4 the items found at his home, said by the prosecution to have been stolen in the  
5 course of the burglary, were innocently acquired.

6  
7 13. The learned Magistrate considered the factors indicating lower culpability. As she  
8 observed:

9 *“There was no direct or other evidence adduced which shed any light on the*  
10 *defendant’s role in the burglary, nor was there any evidence that he became*  
11 *involved through coercion, intimidation or exploitation.”*  
12

13  
14 14. When considering whether there was any planning, she said this:

15 *“As it concerns the extent to which there was planning (if at all), it seems to me*  
16 *that category C is intended to reflect those cases where there is positive*  
17 *evidence that the burglary was almost entirely opportunistic, hence the*  
18 *reference to cases where there is “very little or no planning.” No such*  
19 *evidence was adduced in this case, nor any evidence from which I could*  
20 *reasonably infer that there was very little or no planning. The absence of such*  
21 *evidence is not in my view a positive indication that there was little or no*  
22 *planning, because the vast majority of burglaries by their very nature*  
23 *necessarily involve a degree of planning.”*  
24

25 15. The Magistrate similarly concluded that there was no positive evidence that this  
26 was a case of minimal force.



27  
28 16. Mr Hughes disagrees with the Magistrate’s approach, submitting that *“even at*  
29 *sentencing, the burden remains on the Crown and the absence of evidence should*  
30 *operate in favour of the defendant.”*

31  
32 17. Looked at overall, it is in my judgement clear that the factors indicating lesser  
33 culpability are in very large measure matters likely to be outside the knowledge of  
34 the prosecution or the court and, if relied upon, must be established by the defence.

35

1 18. It cannot be – and it is not – the position, as Mr Hughes contended, that if, for  
2 example, there is no evidence either way as to whether an offender was or was not  
3 “acting under the direction of others,” a court must conclude that he was. At the  
4 sentencing stage, a distinction is to be drawn between matters having to do with the  
5 essential ingredients of the offence, where the Crown continues to shoulder the  
6 burden of proof, and extraneous matters of mitigation, where the burden of proof  
7 rests with the defence. (See Archbold Criminal Procedure, Evidence and Practice,  
8 2020 edition at paragraph 5A-291 and particularly *R v Newton*<sup>1</sup>).

9  
10 19. The matters set out under the heading “lower culpability” are clearly extraneous  
11 matters of mitigation to be raised by a defendant, and the defence bears the burden  
12 of proof (of course, on a balance of probabilities)<sup>2</sup>

13  
14 20. There was no direct evidence as to the degree of force used by the Appellant to  
15 gain entry to the premises. All that is known is that the property was secured before  
16 the occupants left and, when they returned, according to one occupant, “*I observed*  
17 *that the back door was unlocked and could see that the window was open, which*  
18 *had been completely shut when I left.*” Another occupant added, “*We ensured that*  
19 *the doors were securely locked when we left.*”

20  
21 21. Plainly then, some force was used to gain entry. In my judgement, the learned  
22 Magistrate was entitled, on all the evidence, to place this burglary within category  
23 3B.

24  
25 22. There were no obvious mitigating features in this case and a number of aggravating  
26 factors, particularly:



---

<sup>1</sup> (1983) 77 Crim App R 13

<sup>2</sup> See *R v Guppy* (1995) 16 Cr App R (S) 25

1 a. The appellant's previous convictions. Putting aside, as one must, spent  
2 convictions, this Appellant was convicted of a number of offences on 5<sup>th</sup>  
3 December 2016, including two offences of handling stolen goods one of theft  
4 and one of burglary. Additionally, the instant offences were committed during  
5 the currency of both a Suspended Sentence Supervision Order and a Probation  
6 Order.

7  
8 b. This Appellant fell to be dealt with additionally for an offence of possession of  
9 criminal property – in the context of this case, effectively, handling stolen  
10 goods. If that was not to be dealt with by way of a consecutive sentence, then it  
11 was an aggravating feature of the burglary offence. The Appellant was in  
12 possession of property stolen from a burglary that took place, the likelihood is,  
13 within days after the burglary of which he was convicted.

14  
15 23. These aggravating features justify a substantial uplift from the suggested starting  
16 point of 2 years' imprisonment.

17  
18 24. The Appellant came into possession of stolen property sometime between April  
19 and June, having himself committed a burglary on 10<sup>th</sup> April. These are separate  
20 and distinct offences and on the face of it, consecutive sentences would have been  
21 appropriate. Even though 1 year and 4 months had passed between the imposition  
22 of the suspended sentences and these offences, it may be thought to have been  
23 lenient to activate only 8 months of the 2 year sentence, particularly given that the  
24 suspended sentence was imposed for, amongst other things, an offence of burglary.  
25 However, the Magistrate explained that she had in mind the principle of totality  
26 and reduced the overall sentence on that account.



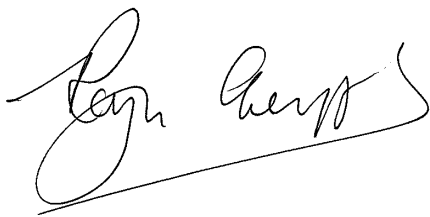
1        25.    It may be that other sentencers would have taken a different route to determine the  
2            appropriate sentence. There are often, as here, several permissible alternative  
3            methods by which to arrive at the appropriate sentence. If Mr Hughes were right  
4            that this was a category 3C offence, the aggravating features mentioned above  
5            would necessarily have resulted in a significant increase in the suggested starting  
6            point of 1 year's imprisonment. A consecutive sentence for the offence of  
7            possession of criminal property would have been justified, as would the activation  
8            of a greater proportion of the suspended sentence than Magistrate McFarlane  
9            determined.

10  
11        26.    The total sentence passed by the learned Magistrate was, in the view of this court,  
12            within the permissible range of sentences properly available to the lower court. The  
13            sentence passed, if it erred at all, did so on side of leniency. This court is unable to  
14            conclude that this sentence was either wrong in principle or manifestly excessive.

15  
16        27.    Accordingly, this appeal is dismissed.

17  
18  
19  
20

**Dated this the 3<sup>rd</sup> December 2020**



21  
22  
23  
24        **Justice Roger Chapple**  
25        **Acting Judge of the Grand Court**  
26

27  
28