

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Criminal No. BVIHCR 2018/0031

BETWEEN:

THE QUEEN

Applicant

-AND-

MICKHAIL HOWE

Defendant

Appearances: Annjel Flax, Crown Counsel for the Crown
Patrick Thompson and Reynela Rawlins, Counsel for the Defendant

2019: 16th and 20th September
8th November

SENTENCING REMARKS

BACKGROUND

- [1] **Smith J:** The Indictment in this matter was filed on 18th January 2019 and served on the defendant on 27th September 2019. The defendant was arraigned and the sentencing hearing commenced after the Indictment was amended to reflect the charge of attempted robbery contrary to Section 317 of the Criminal Code.
- [2] The defendant entered a plea of guilty to the amended indictment on 28th September 2019.
- [3] On 30th June 2018 at 12am, Marlene Gumbs herein referred to as "the complainant" was working with Curtis Gangoo and Carlton Blake herein referred to as "Carlton" and "Curtis" Both men were packing up for the night and the complainant was standing at the cash register when she said in her deposition that he saw a young man dressed in black. This man in black was stooping down behind Curtis and was seen to be pushing him. The complainant in her deposition said that she

though it was a joke until she saw a second man also dressed in dark clothing with his face covered with a mask.

- [4] The person wearing the mask had a gun which he pointed at Carlton who was outside of the van. He then ordered Carlton to enter the said van.
- [5] Once inside the van, the masked man pointed the gun at the complainant's head. The money made that night was in a pink "Kipling" bag belonging to the complainant. The gunman tried to grab the pink "Kipling" bag but the complainant held onto it resulting in a struggle between them.
- [6] During the struggle between the gunman and the complainant, he (the gunman) started to swing the gun at the complainant's head. A fight ensued, spilling outside the van with Carlton, Curtis and the complainant fighting the gunman and the other man with him.
- [7] The other man got up and fled in the direction of Shad's Garage. The gunman struck the complainant in her head with a piece of pipe and then with a brick but they continued to struggle for the bag containing the money.
- [8] Subsequently, Carlton was able to get the gun away from the gunman and passed it to the complainant, who ran off while the gunman was wrestled by both Carlton and Curtis. During the struggle the gunman lost his pants and was only in his boxer shorts. At this point the complainant continued running up the Long Bush Road towards the burger stand and was yelling "I got the gun, I got the money."
- [9] The complainant paused by Bellys Superette and realized that the gunman was now armed with a broken bottle. He approached the complainant and she ran into Stone's Night Club. On her way into the club she dropped the gun from her hand with the gunman in hot pursuit. He followed her into the club, where he was beaten by the club's patrons.
- [10] The complainant said in her deposition to the Magistrate's Court that it was at that point that she was able to recognize the gunman as Mikhail Howe herein referred to as the "defendant", a person

she had known as 'Mickey'. She said that he resided at Lower Estate and would hang out in the Long Bush area.

- [11] The complainant suffered hemorrhaging to her forehead, a broken left cheekbone and her left index nail was dislodged.
- [12] The defendant was apprehended and taken to the hospital where he was treated for an injury to his head.
- [13] He consented to participate in an audio interview. During this interview, he admitted to being a part of the robbery as the getaway driver. He stated that there was a gun but he did not have it. He claimed that he went looking for his accomplice and was beaten by the patrons of the club and that it was in the club that he lost his pants.
- [14] During the interview with the Police, he did not name his accomplice. However, he did confirm that he knew the complainant and that they had attended the same school.
- [15] He further confirmed that he did not like how his accomplice was handling the complainant and intervened and ran after him to stop.

Legal Framework

[16] Section 210 of the Criminal Code

"(1) A person is guilty of robbery if he steals and, immediately before or at the time of doing so, and in order to do so, he uses force on any person or seeks to put any person in fear of being then and there subjected to force. (2) A person who commits robbery is guilty of an offence and is liable on conviction on indictment to imprisonment for life."

[17] Section 184 (b) of the Criminal Code defines assault occasioning actual bodily harm as:-

"A person who commits assault occasioning actual bodily harm commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding seven years."

[18] Section 316 of the Criminal Code defines attempt as:-

(1) Where a person, intending to commit an offence, begins to put his intention into execution by an act which goes so far towards the commission of the offence as to be more than merely a preparatory act, but does not fulfill his intention to such an extent as to

commit the offence, he is deemed to attempt to commit the offence. (2) It is immaterial except in so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists on his own motion from the further prosecution of his intention."

[19] **Section 317 of the Criminal Code** defines punishment for attempt to commit an offence as:-

"(1) Any person who attempts or incites another person to commit an offence, commits an offence and is, unless any other punishment is provided in this Code or any other law, liable on conviction, (a) if the completed offence is punishable by imprisonment for life, or for ten years or more, to imprisonment for a term not exceeding seven years; (b) if any other case, to the same penalty as may be imposed for the completed offence itself. (2) A person charged with an attempt or incitement to commit an offence shall be charged under the section, whether of this Code or any other law, creating the offence under which he would be charged if the charge was of the complete offence. (2A) A person charged with an attempt or incitement to commit an offence shall be tried in the same manner as he would have been tried if he were charged with the complete offence. (3) A provision in any law, including this Code, as to the consequences which may or shall follow conviction for any offence or as to the procedure or any other matter applicable where a person is convicted of an offence, shall apply equally where a person is charged or convicted of an attempt or incitement to commit the offence."

Injuries to the Complainant

[20] The complainant attended at the Peebles Hospital emergency room the night of the incident where the doctor observed in the frontal region swelling with an abrasion over the swelling, the right premaxillary sternomastoid was tender. The X-ray revealed an oblique fracture of the left zygomatic arch. She also had a transient brain concussion and was treated admitted for neuro-observation, placed on analgesics, muscle relaxants and antibiotics. The doctor also stated that the complainant subsequently complained of occasional dizziness, blurred vision and headaches up to 2nd July 2018 but remained stable thereafter.

Personal circumstances of the Defendant

[21] The defendant is a Belonger of the British Virgin Islands and was aged twenty eight (28) at the date of the commission of the offence. The defendant is the father of two (2) minor children. He was employed at his mother's tyre shop prior to his incarceration. During the incident the defendant received head injuries and was tasered by the police. In 2016 the defendant suffered a head injury with brain concussion, depressed frontal bone fractures, multiple fractures to the facial bones and post-concussion syndrome. He continues to suffer from seizures.

[22] The Court realizes and recognizes that it should identify an appropriate 'benchmark' or starting point and that consideration should be given to the aggravating and mitigating factors present in the case.

[23] The benchmark should be scaled upwards or downwards having regard to the aggravating and mitigating circumstances.

[24] The Court will also consider any reduction for guilty plea or any other features(s) present in the case that would justify a further deduction.

[25] The Sentencing Guidelines also recommend that consideration should also be given to whether there are alternative methods of dealing with the offender that would achieve the same meaningful aims of punishment as a custodial sentence.

[26] **Aggravating Factors as found by the Court**

1. During the robbery the defendant masked his face
2. The complainant received severe injuries
3. The defendant has a previous conviction for burglary
4. The offence was committed at night

[27] **Mitigating Factors as found by the Court**

1. The defendant's expression of remorse (police interview)
2. The defendant is the father of two minor children
3. Persisting precarious health condition

Local Authorities

[28] The Crown has helpfully provided the Court with the following authorities for consideration. In the case of **The Queen v Tim Daley**¹ where the defendant entered a guilty plea to robbery and possession of a firearm with intent to commit an indictable offence, namely robbery. The defendant robbed Brewley's Superette, a place of business of six hundred dollars (\$600.00) using a weapon. He was sentenced to seven (7) years imprisonment and four (4) years imprisonment respectively.

¹ BVIHCR 2014/0005

The Court recognizes that the offences in the aforementioned case was of greater severity than the present case. In **Allan Wilson vs R** where the defendant entered a guilty plea to robbing a bus conductor of two hundred EC dollars (\$220.00) and was sentenced to ten (10) years imprisonment. On appeal against sentence, the Court of Appeal reduced the sentence to five (5) years. The Court of Appeal found that there were substantial mitigating factors namely, that Mr Wilson was a young man of 18 years old and a first offender. He co-operated fully with the police and pleaded guilty at the first available opportunity. The Court opined that the early guilty plea would account for a one-third (1/3) reduction of the sentence and the other strong mitigating circumstances should account for at least a deduction of a few additional years. In **R vs Stanley Bertie Jr²** the defendant was charged with one count of robbery. Along with another robber, he met the virtual complainant on the road in the early hours of the morning. The defendant and his accomplice knew that the complainant had in his possession the payroll for employees at Guana Island as the defendant has worked there previously. Along with the robber accomplice (who had a gun), he came upon the complainant and fought with him for the money. The defendant was knocked down by the complainant and held until the police arrived. The other robber fled the scene with the money. The defendant entered a guilty plea at the first available opportunity and was sentenced to seven (7) years imprisonment. He has no previous convictions. In the case of **R vs Donald Hanley³** the defendant was charged with one (1) count of robbery on 26th June 2018. He was aware that the complainant would have lottery monies and waited for her in a dark area near her apartment. The defendant entered a guilty at the first available opportunity and was sentenced to twenty-nine (29) months imprisonment and two thousand dollars (\$2000.00) in compensation.

- [29] In the case at bar, the defendant entered an early guilty plea and is liable for his full one-third (1/3) discount. By accepting guilt of the offence it reduces the impact of the crime on the complainant; saves her from having to testify; and is in the public interest in that it saves judicial time and public expense.

Sentencing Guidelines for Robbery

- [30] In constructing the sentence for this defendant the first step is to assess the harm to the complainant. The complainant suffered injuries in the course of the attack although it is accepted that the defendant was not the person who roughed up the complainant He must bear some

² BVIHCR 2006/0004

³ BVIHCR 2018/0002

responsibility for what occurred that night. The ECSC Sentencing Guidelines call for the sentencer to first establish the starting point for the offence.

- [31] The Court requires an assessment for the seriousness of the offence and its consequences by reference to the harm caused. In assessing this Court should include reference to the culpability of the defendant. Counsel for the defendant has drawn the courts attention to the fact that in his police interview, the defendant says that he did not strike the complainant and that he sought to prevent his accomplice from causing harm to the complainant Miss Gumbs his former school mate.
- [32] There is no victim impact statement from the complainant and there is no evidence before the Court that there was any impact on the viability of the business after the incident.
- [33] The Court is of the view that this offending falls into the most serious category since a firearm was used in the commission of the offence.
- [34] The table that forms a part of the ECSC Sentencing Guidelines sets the starting point as 60 percent of the maximum of seven years which is four years and two months (4.2) years with a range of 45% to 75% of the maximum sentence.
- [35] The Court finds the aggravating factors to be (1) the defendant previous conviction for burglary (2) the wearing of a mask (3) use of a firearm (4) the offence was committed at night. The mitigating factors are as enumerated in paragraph.
- [36] The four years and two months (4.2) years will be adjusted upwards to take into account the aggravating factors are set out above in paragraphs twenty six (26) and thirty four (34). Therefore the 4.2 years will be adjusted upward to reflect the fact that he wore a mask by one (1) year, adjusted upwards again to reflect the use of a firearm by one (1) year and again upwards to reflect his previous conviction for burglary by two (2) years bringing the sentence to eight years and two months (8.2) years.

[37] The sentence will be adjusted downwards to take into account the fact that he is a father of two minor children and by one (1) year on each mitigating factor bringing the time to six years and two months(6.2)

[38] I do not agree with Counsel that the fact that the money was returned to the complainant was a mitigating factors as it was as a result of the struggle that the complainant was able to hold on to the bag containing the nights takings.

[39] Six years and two months (6.2) is equal to seventy-four (74) months. One third (1/3) of seventy four months (74) will be twenty six months (26) bringing the total to fifty two months (52) months or four (4) years and three (3) months.

The Assault

[40] The Court will be guided by the UK sentencing guidelines for assault occasioning actual bodily harm. The fact that a weapon was used puts this offending at a starting point of twenty-six (26) weeks with a sentencing range of low level community order to fifty one (51) weeks custody (1 year). For the assault on Ms Gumbs the defendant is sentenced to 1 (one) year in prison to run concurrently with the sentence for the attempted robbery.

[41] These sentences are to take effect from when the defendant was first remanded on 30th June 2018.

**Ann-Marie Smith
High Court Judge**

By the Court


**Benjamin
Registrar**