

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(ANGUILLA CIRCUIT)
(CRIMINAL)
A.D. 2019**

AXAHCR 2019/0002

BETWEEN:

REGINA

v

JERARD PASCAL

Appearances:

Ms. Erica Edwards, Senior Crown Counsel, Attorney General's Chambers
of Counsel for the Crown

Mr. Devin Hodge (appearing amicus) of Counsel for the Defendant

2019: April 1
: May 6, 10
Issued May 22

Robbery – Guilty plea – Sentencing – Principles of sentencing – Approach to sentencing –
Discount for guilty plea – Time spent on remand – Imitation firearm – Pre-Sentence Report
– Rehabilitation – Risk of reoffending – Dangerousness - Concurrent or consecutive
sentences – Totality principle – Victim impact statement – UK Sentencing Guidelines –
Suspended sentence – Probation order

SENTENCING JUDGMENT

[1] **Innocent, J. (Ag.):** The defendant, Jerard Pascal, was arraigned on an indictment dated 5th March 2019 and filed on even date (the 'Indictment'), in which he was charged with four (4) counts of robbery contrary to section 258 (1) of the Criminal Code, Revised Statutes of Anguilla, Chapter C 140 (the 'Criminal Code'), and one count of possession of a firearm contrary to section 20 (1) (b) of the Firearms Act, Revised Statutes of Anguilla, C F30 (the 'Firearms Act').

- [2] The defendant, Mr. Pascal, was arraigned on 1st April 2019 and upon his arraignment he entered pleas of guilty to the first three (3) counts on the Indictment. His plea was accepted by the Crown and the fourth and fifth counts being robbery and possession of a firearm respectively were withdrawn by the Crown. The defendant, who was previously unrepresented, was assisted by Mr. Hodge who appeared amicus. The defendant was allocuted and he made certain representations to the court. The court invited both Counsel appearing in the matter to prepare and file written submissions on sentencing. The Crown was instructed to provide the court with a Pre-Sentence Report. The defendant's sentencing was then adjourned to 6th May 2019. The Pre-Sentence Report (the 'PSR') was filed on 15th April 2019 and the Crown's submissions were filed on even date. Mr. Hodge filed submissions on 29th April 2019. Accordingly, the defendant is now before the court for sentencing.

The factual matrix

- [3] It appears that the undisputed facts are that on the night of 2nd May 2017 two men entered the Spice of India Restaurant located at South Hill in Anguilla. The two men were at the time carrying firearms and dressed in black clothing. One of the men said "Everybody relax. This is a robbery, just give me cash." At the material time there were several patrons dining at the establishment along with employees and the owner. The two men then proceeded to divest the patrons of their valuables and personal belongings, and raid the till at the establishment.
- [4] The two men then made their way out of the establishment on foot and a shot was heard fired from outside. One of the witnesses saw one of the robbers running towards a parked vehicle. A report was made to the police. When the police were enroute to the scene of the robbery they encountered a dark coloured Toyota Alteza motorcar. The police officers approached the vehicle and questioned the driver.
- [5] Having been supplied with certain information the police proceeded to the home of the defendant's brother and encountered the same motor vehicle that they had

seen earlier that night. The police approached the vehicle and identified themselves. The defendant and another man exited the vehicle and ran away. The defendant's brother who was the driver of the vehicle remained in the vehicle and he was questioned by the police.

- [6] Several items were seen inside the vehicle including, among other things, a brown female handbag and black gloves. A dark blue ski mask and a Samsung cellular phone were seen on the ground outside of the vehicle.
- [7] The following day some of the patrons attended the Valley Police Station and identified some of the items that belonged to them to the police.
- [8] The defendant was taken into police custody where he gave the police two (2) caution statements. It is necessary to summarize the contents of both statements in this sentencing exercise for reasons that will become apparent in the course of this judgment.
- [9] In his initial caution statement, the defendant essentially denied that he had any involvement in the incident. In fact, he told the police that he was in the company of his family members, including his sister, brother and cousin in The Valley having drinks. After they left The Valley he said that his brother dropped him at South Hill to see his girlfriend. Later on when he was picked up by his brother he saw a man sitting in the front passenger seat and he sat in the back behind this man. After that they went to his cousin's home to drop off his phone which he had left in the car. When they got there his cousin entered the vehicle and left with them. The man who was sitting in the front seat got off at the Valley Bottom area and before he exited the vehicle he left his jacket in the car. From there they headed to his brother's house where the police subsequently arrived. He told the police that there was a purse in the back seat of the car which the man said belonged to his girlfriend and that he would return to collect it along with his other things.
- [10] In his second caution statement the defendant recanted his initial story and confessed to the commission of the subject offences. In a nutshell he told the

police that he asked his brother to drop him at lower South Hill in the junction to Spring Path. He told his brother that he was going to cool out for a while at a friend. He saw an opened restaurant. He approached the restaurant, ran in and robbed several of the patrons with a fake gun. After the robbery he ran out and called his brother to pick him up. He told the police that when they arrived home the police arrived and at that point he had already taken off the black jacket that he was wearing. He ran off and later that night he burnt the clothing that he had worn along with what he described as a "BB shooter" with gasoline. He said that the bag that he mentioned appeared to be a brown lady's bag. He told the police that he went behind the counter and came back and collected money from one woman at a table of four persons.

- [11] Interestingly, the defendant told the police his reasons for committing the offence in these words:

"Basically I robbed the place because I was hungry and I have a child to feed. My son does be over by me on a regular because my son mother does work security and she does be off once a week or twice a week, she can't afford to pay no baby sitters and I am not fully employ. My son don't eat cereal and my child mother don't bring no food or snacks when she come with him ---- I did what I did for me and my son to eat."

- [12] At the allocutus stage of the proceedings the defendant made the following statement to the court:

"I know that I made a mistake. At the time I felt that I had no choice. I was unemployed and could not turn to family and friends. At the time I was hungry most days. After I lost my job everything went downhill for me. At the time my child mother was working and I used to have my son on a regular and she never used to bring anything for him. I had to provide for him and myself, which I had no means of doing at the time. It was a stupid and desperate decision that I regret. I am sorry about their ordeal and how it went down. My intention was never to hurt anybody. All the items were

returned to their rightful owners. All the stuff that I know about have been given back to their owners. I am sorry your Honour. I apologize to everybody that was involved in the situation.

I was 23 years old at the time. My son is five years old and living with his mother. She is not on island right now. My son is with her overseas. I send money when I can.

I presently reside with my brother at my sister and her husband's house. I am presently employed as a carpenter. Sometimes I work with my father and Mr. Carl Reid.

I attended the Stoney Ground, Campus B and Campus A but did not complete CXC. I dropped out of school when I was in third form. At that time I was 13 years old."

The approach to sentencing¹

- [13] The court will adopt the following approach to sentencing. First the court will have to determine the seriousness of the offence having regard to the degree of harm caused by the defendant and the defendant's degree of culpability in the commission of the offence. The court will then seek to establish a suitable starting point or benchmark based on the seriousness of the offence. This starting point will then be adjusted to take account of the aggravating and mitigating factors in the case. This will establish a notional sentence which the court will adjust further by considering whether there are other factors indicating a reduction from the notional sentence or whether there should be any uplift in the notional sentence to satisfy any of the permissible aims of punishment.

¹ Lauren Aguilera and Ors v The State (Court of Appeal of Republic of Trinidad & Tobago) delivered 9th June, 2016

Seriousness of the Offence

- [14] In determining the degree of harm the court will have regard to the peculiar features of the case. The Crown, in their written submissions, referred the court to the UK Sentencing Guidelines. The Crown submitted that the commission of the subject offences fell within the category of a high degree of culpability (Band A) since it involved the commission of the offences with the use of a firearm. In addition, they say the degree of harm falls within category 1 in accordance with the UK Sentencing Guidelines as the commission of the offence had a serious detrimental effect on the business establishment which was forced to close its doors shortly after the incident. Therefore, they submit that the starting point as per the UK Sentencing Guidelines for the offence of robbery (Band A, Category 1) is 8 years custody with a category range of 7–12 years custody.
- [15] On the other hand, Mr. Hodge in his written submissions struck a note of caution as to the general application of the UK Sentencing Guidelines in this jurisdiction to establish the necessary benchmark for the commission of the subject offences. He argues that the UK Sentencing Guidelines are merely persuasive and ought not to be strictly adhered to.
- [16] I agree with this submission to a limited extent. I would qualify Mr. Hodge's argument by applying the notion that the UK Sentencing Guidelines are a useful guide to the sentencing court in establishing the sentencing range by comparative analysis to sentences handed down in this jurisdiction. It can hardly be said that a slavish adherence to the UK Sentencing Guidelines has been advocated by jurist in the Eastern Caribbean Supreme Court.
- [17] In any event, Mr. Hodge submitted that if the UK Sentencing Guidelines are to be adopted then the subject offences would fall within Category A with respect to the degree of culpability. He places the degree of harm in Category 2. Therefore, according to the UK Guidelines, Mr. Hodge places the benchmark for the offending conduct at 5 years imprisonment with a category range of 4 – 8 years custody. It

appears that Mr. Hodge's justification for this submission is based on the absence of serious physical and/or psychological harm caused to the victims and the fact that he disputes that there was any serious detrimental effect or economic loss to the business establishment and the victims in the manner alleged by the Crown.

The Degree of Harm

[18] In assessing the degree of harm the court took into account the following factors:

- (1. the theft of valuable personal property although not causing a significant degree of pecuniary loss to the victims;
- (2. the absence of physical or psychological injury to the victim; although the court cannot downplay the possible or likely fear instilled in those who were present at the time of the commission of the offence². Even though the defendant affirms that the firearm in question was an imitation firearm, it was nevertheless an unlawful weapon that was more than likely to instill fear in persons who would reasonably have apprehended that it was indeed a lethal weapon and capable of causing physical harm to them. Therefore, the court accepts that even in the absence of empirical proof of psychological harm the apprehension of danger and harm and the instilling of fear in the victims can be reasonably assumed in light of the circumstances surrounding the commission of the offence.
- (3. Although Mr. Hodge has sought to downplay the economic loss to the proprietor of the business establishment, I am of the considered view, especially based on the victim impact statement, that the business establishment, more likely than not, must have suffered a serious blow to its goodwill. The subsequent closure of the business may not have been directly related to the incident. However, I am of the view that it may have contributed to some extent.

² **258.** (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 puts or seeks to put any person in fear of being then and there subjected to force.

(4. No violence was used in the commission of the offence.

Degree of Culpability

[19] In assessing the defendant's degree of culpability in the commission of the offence the court took the following factors into account:-

- (1. The victims appeared to have been deliberately targeted. This was not a wanton act or a crime of opportunity. This is evident from the defendant's own version of events and the factual matrix of the case itself. The defendant armed himself with what he described as an imitation firearm. He had his brother to drive him to the location. He was accompanied by another assailant.
- (2. Therefore, and based on the foregoing, there appeared to have been some degree of planning, preparation and organization having regard to the manner in which the offence was committed. He utilized a vehicle driven by someone else to convey him to the location and thereafter to assist him with his getaway.
- (3. The defendant sought to evade detection and capture. He informed the police authorities that he had disposed of the clothing and the imitation firearm. He also admitted to running away when confronted by the police.

Benchmark

[20] In arriving at what the court considers to be a suitable starting point or benchmark sentence the court will strive to arrive at a sentence that is commensurate with the seriousness of the offence having regard to the defendant's degree of criminal culpability and the degree of harm caused in the commission of the offence.

[21] The court is mindful of the serious nature of the subject offence having regard to the penalty that Parliament has prescribed for the contravention of the same. The court is of the view that the only appropriate sentence in the present case is a custodial one. I have considered the sentiments expressed by Sir Dennis Byron in

the case of **Allan Wilson v The Queen**³ where he opined that robbery is an offence that should always warrant a custodial sentence.

[22] A custodial sentence is warranted in the present case in order to punish the defendant and to record society's abhorrence for these despicable acts as well as serving as a deterrent to the defendant and would be offenders. Offences of this nature are becoming more prevalent in the jurisdiction and a strong message condemning and deprecating such behavior must be sent to would be offenders that their actions will be met with stiff custodial sentences.

[23] In arriving at a suitable benchmark the court will also strive for consistency by having regard to the sentences passed by courts in this jurisdiction and the Eastern Caribbean for similar offences. The court is mindful of the proviso that sentencing guidelines are not cast in stone as **Baptiste JA** stated in the case of **Roger Naitram and Ors v The Queen**⁴ that:

“sentencing guidelines should not be applied mechanistically because a mechanistic approach can result in sentences which are unjust. Having taken the sentencing guidelines into account the sentencing court is enjoined to look at the circumstances of the individual case, particularly the aggravating and mitigating factors that may be present and impose the sentence that is appropriate. It follows therefore that a sentencing judge can depart from the guidelines if adherence would result in an unjust sentence -- -----.”

The court finds wisdom in this approach and will apply the same principles and approach in the present case.

³ Criminal Appeal No. 10 of 2003 ECSC (Court of Appeal)

⁴ HCRAP 2006/0005 ECSC (Court of Appeal) December 15, 2010 (Antigua & Barbuda)

[24] The court also took into account the sentiments expressed in the case of **Commissioner of Police v Jamal Grant**⁵ where at paragraph [16] of the judgment **Baptiste JA** said:-

“Reported previous cases may provide a bench mark, and it must be borne in mind whenever previously decided cases are being relied on that in some of the cases there may be unstated factors which have influenced the length of custodial sentence or the imposition of a fine. There is of course tension between preserving the width of the discretion which the legislature has created, and the need for the guidance of the appellate court to assist consistency. The sentencer also must apply to the facts before him/her in each case the classical principles of retribution, deterrence, prevention and rehabilitation; and decide which of them has the greatest importance in the case.”

[25] Ms. Edwards, Senior Crown Counsel, has drawn the court’s attention to the following local decisions emanating from the High Court in Anguilla. In **Regina v Joshua Price (unreported)** the defendant being one of two masked men entered a supermarket and robbed the cashier of several items including cash. The value of the items stolen was in the region of US\$1,845.00. The defendant cooperated with the police authorities and confessed to the commission of the offence. The defendant pleaded guilty to both counts of robbery. He was sentenced to 4 ½ years and 3 years imprisonment respectively on each count. The sentences were ordered to run concurrently and he was credited for all time spent on remand.

[26] The court was also referred to the decision in **Regina v Claushaun Richardson and Anor (unreported)** where the defendant Richardson armed with a firearm robbed a man of his jewelry and other items valued at about US\$10,000.00. The victim was threatened that if he went to the police he would be killed. The defendant hit the victim several times in the face with the gun. The defendant was

⁵ MCRAP 2019/0025 ECSC (Court of Appeal) July 14, 2010 (St. Vincent & the Grenadines)

convicted at trial and was sentenced to 8 years imprisonment for the offence of robbery.

[27] In the case of **Regina v Marlon Petty and Anors (unreported)** the defendant along with other men approached the victim and robbed him of his jewelry. The defendant had a gun in his possession at the time of the robbery. The victim was threatened. The defendant was sentenced to 10 years imprisonment for the offence of robbery. In **Regina v Morieux King and Claushaun Richardson (unreported)** another case involving robbery with a firearm at a business establishment the defendants were each sentenced to 4 years imprisonment. In the case of **Regina v Vernon Webster and Ors (unreported)** the defendant plead guilty to robbery with the use of a firearm and was sentenced to 7 years imprisonment on the count for robbery.

[28] Mr. Hodge also directed the court's attention to the case of **Regina v Joshua Price**. He argued that the case of Joshua Price is distinguishable from the case at bar to the extent that in Price as opposed to the present case, there was the direct application of physical violence with a firearm to the head of one of the victims and the stolen items were returned. No other sentencing guidelines from Anguilla were cited by Mr. Hodge.

[29] Unfortunately, quite apart from being of some vintage the cases cited above provided very little guidance to the court to the extent that very little detail is provided with respect to the approach adopted by the court and the method by which the sentences were arrived at. They contain very little details regarding issues of mitigation and the aggravating and mitigating factors present in the cited cases. Again, I am reminded of the cautionary note handed down by the Court of Appeal in the case of **Jamal Grant**.

[30] In the circumstances, I think it necessary to examine reported decisions from other jurisdictions of the Eastern Caribbean Supreme Court of Appeal in determining the

approach to establishing a suitable starting point. In **R v Kevon Frank**⁶, where the circumstances were slightly similar to that of the present case, the defendant on a plea of guilty was sentenced to 5 ½ years imprisonment. The court in that case adopted a starting point of 9 years imprisonment for the offence. The defendant received a 1/3 discount for his early guilty plea and a further reduction of 6 months on account of his mitigation.

[31] In **The Queen v Jason Duncan**⁷, where the circumstances were again similar to the present offence, save and except that the defendant in that case was armed with a knife, the defendant who pleaded guilty was sentenced to 6 years imprisonment. In **Jason Duncan, Cumberbatch J.** at **paragraph [3]** of the judgment stated that “**the presentence report painted a bleak picture of the defendant’s formative years**”. The personal circumstances of the defendant in that case were slightly similar to that of the defendant in the present case.

[32] In the **Queen v Tim Daley**⁸ Ellis J. applied the UK Sentencing Guidelines and classified the offence of robbery within two categories⁹. The court in **Daley** accepted that the offence fell within the lesser category of seriousness and within the range of 7– 9 years on a guilty plea. The defendant was sentenced to 7 years imprisonment on his guilty plea to robbery.

[33] As a further cautionary note I adopt the reasoning of the Court of Appeal of Trinidad and Tobago in the case of **Aguillera** Citation missing where at **paragraph 23** of the judgment the court made the point that:

“In the calculation of what constitutes a starting point, a strictly mathematical approach cannot be countenanced. A mathematical approximation of all of the relevant factors, may on the face of it

⁶ Case No. GDAHCR2016/0062 ECSC (Grenada) March 14, 2017

⁷ Criminal Case No. SLUCRD2011/1815 ECSC (Saint Lucia) January 22, 2013

⁸ BVIHCR 2014/005 ECSC (TVI) July 23, 2014

⁹ At paragraphs [13] – [16]

demonstrate structure and transparency, but it operates as an unacceptable fetter on the judge's sentencing discretion.

We endorse the position expressed in *R v Norfolk supra* (New Zealand), that the assessment of the starting point is not capable of exact arithmetical gradation or scaling. The two matters that are susceptible to more exact mathematical calculation are the appropriate discount for a timely guilty plea and credit for time spent in pre-trial custody.”

- [34] Having regard to the sentencing range for similar offences in the jurisdiction of Anguilla and the Eastern Caribbean, and also having regard to the seriousness of the offence, the defendant's degree of culpability in the commission of the offences and the degree of harm involved in the commission of the offences, I would adopt a benchmark of 9 years imprisonment.

The Notional Term

- [35] In determining the notional sentence to be imposed, I have taken into account the permissible aims of punishment, namely, retribution, deterrence, rehabilitation and protection.
- [36] The court is also mindful of the fact that the penalty prescribed by **section 258 (2)** of the **Criminal Code R.S.A c. C 140** is life imprisonment. Clearly, the statutory penalty in Anguilla stands in great disparity to the statutory penalty in the United Kingdom and other jurisdictions of the Eastern Caribbean where the statutory sentence is 30 years imprisonment. It is obvious that Parliament in its infinite wisdom has deemed the offence to be of a very serious nature warranting the imposition of such a stiff penalty for the commission of this offence.
- [37] The court is also mindful of its discretionary powers with respect to sentencing which entitles the court to impose any lesser penalty or sentence as prescribed by statute for the commission of the subject offence. I am fortified in that view by the provisions of **section 41** of the **Criminal Code R.S.A c. C140**.

38] In fixing the notional term the court will shift the benchmark upward or downward having regard to the aggravating and mitigating factors that are present in the case. In the present case, I am of the view that the aggravating factors outweigh the mitigating factors. This, to my mind, warrants an uplift from the benchmark adopted by the court. In the circumstances, I would shift the benchmark upwards by 1 year. Accordingly, the notional sentence will be 10 years imprisonment.

[39] In the present case the court is not minded to impose a term of imprisonment more than commensurate with the seriousness of the offence because there was no violence used in the commission of the offence, and no evidence was presented to lead one to the conclusion that there exists the need to protect the society from serious harm from the defendant. I arrive at this conclusion based on the PSR which suggest that the likelihood of any harm by the defendant to the public can be stemmed by way of intervention.

Aggravating Factors

- [40] The prosecution has outlined the following aggravating factors in the commission of the subject offence, namely: -
- (1. The seriousness of the offence;
 - (2. The location of the offence. The offence occurred at a business establishment'
 - (3. The defendant attempted to conceal his identity;
 - (4. The defendant attempted or took steps to conceal his identity and to dispose of evidence.
- [41] Incidentally, Mr. Hodge in his written submissions did not direct the court's attention to any aggravating factors present in the case. In his oral submissions to the court he indicated that he has adopted the aggravating factors relied on by the Crown.

Mitigating Factors

- [42] The prosecution has also highlighted the following mitigating factors, namely: -
- (1. The defendant's guilty plea.
 - (2. The defendant's cooperation with police authorities.
 - (3. The remorse shown by the defendant.
- [43] Mr. Hodge, on behalf of the defendant, has directed the court's attention to the following mitigating factors:
- (1. The defendant having entered a plea of guilty at the earliest opportunity.
 - (2. The defendant's acceptance of culpability in the commission of the offence.
 - (3. Unequivocal expressions of remorse.
 - (4. The defendant has no previous convictions for similar offences.
 - (5. Cooperation with the police authorities regarding his involvement in the commission of the offence.
 - (6. The stolen items were recovered and returned to their rightful owners.
 - (7. No physical violence was used and no physical harm caused during the commission of the offence.
 - (8. All the offences being of a similar nature arose out of a single transaction or event.
- [44] Clearly the court took into account the defendant's guilty plea as a factor which entitles him to credit.
- [45] I cannot adopt the position that Mr. Hodge has described as the "unequivocal expressions of remorse" shown by defendant. In considering the question of remorse as a mitigating factor I took cognizance of the fact that the defendant had repeatedly lamented his concern for his child in his caution statement, in open

court and in the PSR. However, the PSR tells an entirely different story in relation to his parental responsibilities towards the child.

[46] The PSR reiterates the defendant's sentiments that he was sorry and shameful for committing the index offences. However, I am of the considered view that his rationalization for committing these offences is alarming to say the least and is of great concern to the court.

[47] Despite the defendant's lack of significant antecedent history and given the fact that this is the defendant's first interaction with the criminal justice system for this type of offence, the court is not minded to treat the defendant entirely as a person of good character based on what has been canvassed in the PSR.

[48] The Court also took into account the following factors in fixing the notional term:

- (1. The value of the items stolen.
- (2. The prevalence of these types of offences in the island.
- (3. The harm caused to the virtual complainant. Business people need to be protected from suffering loss at the hands of perpetrators of this kind of criminal conduct.
- (4. The need for rehabilitation of the offender.
- (5. The need for both subjective and general deterrence.

Defendant's Personal Circumstances

[49] The court has taken into account the personal circumstances of the defendant. Mr. Hodge in his written submissions has pleaded the defendant's personal circumstances in mitigation of sentence.

[50] Mr. Hodge made reference to the circumstances surrounding the defendant's previous offending as a juvenile. The court, in passing sentence, will not take this into consideration for obvious reasons. The court also notes that the defendant had been acquitted on the subject charge. Nevertheless, I appreciate Mr. Hodge's

argument that the circumstances related to this initial brush with the law may very well have amounted to a traumatic encounter with the criminal justice system bearing in mind the defendant's age at the time. Mr. Hodge laments that the defendant had at first been remanded to Her Majesty's Prisons for a period of 1 week and thereafter spend 9 months on remand at the Valley Police Station.

Mr. Hodge further suggests that this initial encounter with the criminal justice system at a relatively young age "triggered a downward spiral in his life" from which recovery therefrom has been challenging for him.

- [51] The PSR highlights the defendant's personal circumstances, a substantial amount of the detail contained therein is relied on by the defendant as the basis of his plea in mitigation. I have sought to look at the PSR in a fair and balanced way; and also in a manner that is most favourable to the defendant. However, there are certain revelations contained in the PSR that raise serious concerns which the court cannot ignore. It appears that not only does the defendant have a tendency to embroider the truth, but also it seems that there are certain antisocial traits behavioural challenges that are discernable from the behavioural history chronicled in the PSR. Therefore, I am forced to consider the question of the defendant's rehabilitation and the likelihood of the risk of his reoffending and the need to protect the public from harm from the defendant.

Rehabilitation

- [52] The matters contained in the PSR highlight the obvious need for the defendant's rehabilitation. Therefore, any sentence imposed must reflect this permissible aim of punishment.
- [53] The defendant is now 25 years old and was 23 years old at the time the offences were committed. The court is advised that he has no previous convictions for any similar offence. The defendant has not benefited significantly from any formal schooling. He appears to be greatly disadvantaged on the employment market. The PSR instructs that he left secondary school without any formal certification and since leaving school he has not engaged in any academic programs.

Mr. Pascal has benefitted from intermittent employment but has very minimal employment prospects.

[54] The PSR gives a vivid account of the defendant's early childhood development. However, it paints a bleak portrait of the defendant's progress from childhood to adulthood and chronicles a progressive leaning towards deviant conduct throughout the period of his social development.

[55] Whereas I am exceedingly sympathetic towards the challenges experienced by the defendant in the course of his early childhood into his early adult life I cannot merely perceive it as palliating the wrongful nature of the acts committed by the defendant. As I see it, the PSR underscores the dire need for the defendant's rehabilitation.

Prevention

[56] The defendant by his own admission clearly engaged in the unlawful acts for financial gain. When this aspect of the case is juxtaposed with the fact that the defendant is virtually handicapped on the employment market, the inescapable conclusion is that it is more likely than not that this defendant may resort to similar conduct in the future.

[57] In assessing the defendant's likelihood of reoffending, the PSR makes reference to his previous offending in 2015 and 2016 albeit for dissimilar offences. The last such conviction occurring just over a year prior to the commission of the subject offences. I am also mindful of the fact that the defendant does not possess formal educational certification. His employment history has been described by the PSR as unstable and intermittent.

[58] The defendant came from a disorganized social setting; this relates especially to his formative and impressionable years. His family structure and social environment can be described as unstable.

[59] The PSR states that during the community investigation stages it was the general consensus of the community where the defendant resides that the defendant is a nuisance. The defendant's sister with whom he resides also described the defendant's disruptive behavior in the community.

[60] In the circumstances, the writer of the PSR concludes that "given the presented factors Jerard Pascal presents a high risk of reoffending without intervention".

Alternative sentencing

[61] Mr. Hodge has also impressed on the court the defendant's desire that the court treat with him otherwise than by the imposition of a custodial sentence. In a nutshell, Mr. Hodge makes the suggestion that the court ought to consider the imposition of a suspended or partially suspended sentence, a probation order along with other ancillary orders focused at the defendant's rehabilitation.

[62] The question that the court must consider in this instance is whether the permissible aims of punishment in the case of this offender can be met by some other form of punishment other than incarceration.

Suspended Sentence

[63] **Section 45** of the **Criminal Code** gives the court the power to suspend a sentence. Section 45 provides:

"45. (1) Subject to subsection (2), where a court passes a sentence of imprisonment for a term of not more than 2 years for an offence, it may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year or more than 2 years from the date of the order, the offender commits in Anguilla another offence punishable with imprisonment.

(2) A court shall not deal with an offender by means of a suspended sentence unless it is of the opinion that—

(a) the case is one in which a sentence of imprisonment would have been appropriate even without the power to suspend the sentence; and

(b) the exercise of that power can be justified by the exceptional circumstances of the case."

[64] The power to pass a suspended sentence is indeed discretionary and is circumscribed by the section 45 (2) (a) and (b) of the Criminal Code. However, section 45 (1) of the Criminal Code speaks to a sentence of not more than 2 years imprisonment. Clearly, the sentence to be imposed exceeds the statutory limit of 2 years imprisonment for the commission of the offences. Therefore, the court is not empowered to order a suspended sentence pursuant to section 45 (1) of the Criminal Code. However, the provisions of section 45 (2) of the Criminal Code empowers the court to impose a suspended sentence even without the power to impose a suspended sentence once the two limbs of subsection 2 are satisfied. Therefore, I shall go on to consider whether the conjunctive limbs of section 45 (2) have been satisfied.

[65] I am of the view that the provisions of section 45 (2) (a) have been satisfied. This is clearly a case where a custodial sentence would be justified. However, the difficulty arises with respect to the provisions of section 45 (2) (b). I have agonized long and hard over the submissions made by Mr. Hodge in relation to the imposition of a suspended sentence.

[66] However, having taken into account the defendant's personal circumstances, the matters contained in the PSR and the submissions made in mitigation by Mr. Hodge I am of the view that a suspended sentence is not the appropriate sentence to impose in the present case. I am guided by the dicta of **Ramdhani J. (Ag.)** in the case of **Director of Public Prosecutions v Elvis Richardson**¹⁰ at **paragraph [57]**:

"I would consider that a suspended sentence might be suitable in cases where a custodial sentence is appropriate but where such sentence might have the effect of derailing the stability and future prospects of a man of good character in a case of strong mitigating factors."

¹⁰ SKBHCR 2013/0030 ECSC (St. Kitts) December 6, 2013

Adopting the above cited approach, I do not think that given the defendant's employment history and the minimal role that he plays as a father can justify the imposition of a suspended sentence in the present circumstances.

Probation Order

[67] Given the circumstances surrounding the commission of the subject offence and for reasons already stated herein, I do not think that a probation order would be the appropriate punishment in this case.

[68] **Section 12 of the Probation Act R.S.A. c. P96** (the Probation Act) outlines the matters that the court ought to consider when deciding whether a probation order is appropriate. The section provides:

“12. In determining whether to make a probation order, the Court may consider the contents of the pre-sentence report, the victim impact statement, if any, and the following—

(a) the nature and seriousness of the offence, including any physical or emotional harm done to the victim;

(b) any damage, injury or loss caused by the offender;

(c) the need for the community to be protected from the offender;

(d) the prevalence of the offence;

(e) the presence of aggravating circumstances relating to the offence and the offender;

(f) the presence of mitigating circumstances relating to the offence and the offender;

(g) where appropriate, any diminished responsibility of the offender;

(h) a plea of guilty and any assistance the offender gave to the police;

(i) a voluntary apology, compensation or restitution provided to the victim by the offender;

(j) the offender's plea in mitigation;

(k) any comments made in relation to the pre-sentence report; and

(l) any other matter the Court thinks is appropriate.”

[69] Having taken all of the considerations mandated by **section 12** of the **Probation Act** into account, I am of the view that a probation order is not the appropriate sentence in the present case. First, I hold this view on the basis that the aggravating factors in the present case far outweigh the mitigating factors. The seriousness of the offence perpetrated with the use of a firearm at night in a business establishment in an island that relies on tourism for its economic sustainability can hardly be said to be commensurate with a probation order. Second, I have taken into account the matters contained within the PSR and the recommendations made therein. I have balanced out all of the factors including the matters pleaded in mitigation by the defendant and I have resolved that this is an inappropriate case for the making of a probation order.

[70] In arriving at the conclusion that a custodial sentence is the only appropriate sentence in the present case notwithstanding the matters pleaded by way of personal mitigation advanced by Mr. Hodge on behalf of the defendant, the court is guided by the decision of **R v Richardson Anors, The Times February 10, 1998** where **Eubanks J.** in giving the judgment of the Court of Appeal said that the time had come to reiterate that some crimes were so heinous that a plea of youth, a plea that the crime was a first offence or that the defendant had never been to prison before, were of little relevance. Those who took part in them, even if they pleaded guilty, even if they were young, even if they had no previous convictions, even if the injured were neither aged nor infirmed, nor brutalized in the presence of young children, would know that they would inevitably be subjected to immediate and long sentences.

Concurrent or Consecutive Sentences

[71] Mr. Hodge has asked that the sentences for the three offences run concurrently. In determining whether the sentences should run consecutively or concurrently the court will apply the principle of totality which can be succinctly explained in this

way. It requires a sentencer who has passed a series of sentences each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is just and appropriate.

[72] Therefore, where the court has decided on the sentence for each offence it should not simply carry out an arithmetic exercise and pass the sentence that the addition produces. The court should consider the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences. The correct approach therefore would be where the totality of the sentences does appear to be excessive and some adjustment is necessary, it is usually preferable to make an adjustment by ordering the sentences to run concurrently, rather than by reducing the length of the individual sentences and allowing them to remain consecutive.

[73] In applying the principle of totality, the question to be posed is whether the sentence for one offence can comprehend and reflect the criminality of the other offence. Therefore, if the sentence for one offence can comprehend and reflect the criminality of the other, then the sentences ought to be concurrent; otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the totality of the two offences. If not, then the sentence should be at least partially cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality.

[74] Whether the sentence for one offence can comprehend and reflect the criminality of the other calls for the identification and an evaluation of relevant factors pertaining to the offences. The nature of the offence and the particulars of the offender are relevant. Also, factors relating to the victim or victims should be considered. The nature of a crime is a critical factor. The court accepts that as a matter of general principle that where two offences committed during the course of

a single episode are of a completely different nature and each individually involved significant or extreme gravity, it is likely that some accumulation will be necessary to address the criminality of the two. While there is no legal prescription against consecutive sentences in such circumstances, the Court is mindful that in adding up the sentences for each offence, it must consider if the aggregate length is just and appropriate given the maximum statutory sentences prescribed.

[75] The present case involved the commission of three separate and distinct offences perpetrated against several victims. However, based on the nature of the offences and the factual matrix of the present case I find that the separate offences can be properly considered as forming part of the same episode or series of events. Therefore, the offences can properly be considered as part of the same transaction.

[76] The court finds that in adding up the sentences for each offence, the aggregate length may not be just and appropriate given the maximum statutory sentences prescribed and the fact that there were no aggravating features such as violence in the commission of the subject offences. The court finds that having the sentences run concurrently is sufficient to reflect the criminality of the defendant's offending conduct.

Discount for Guilty Plea

[77] Mr. Hodge has impressed on this court that given the defendant's early guilty plea he is entitled to a full discount of one-third of the notional term that the court is minded to impose. He submitted that the defendant has pleaded guilty at the earliest opportunity.

[78] The issues that arise are first, whether the defendant entered the plea at the earliest opportunity and second, what discount from the notional sentence is he entitled to.

[79] The defendant was initially indicted jointly with another defendant on an indictment filed on 12th December 2018. On 18th March 2019 this initial indictment was withdrawn by the Crown and separate indictments were filed on 5th March 2019 in respect of each of the two defendants. Although the matter had been set for arraignment on 18th March 2019 there appeared to have been inadequate service of the new indictments on the defendant. In the circumstances, the matter was adjourned to 1st April 2019 for arraignment. It appears that given the nature of the committal procedure in the Magistrate's Court the defendant could not have entered a plea at that stage. Therefore, I find that the defendant's guilty plea was entered at the earliest and first available opportunity.

[80] In the circumstances, the defendant will be credited for his early guilty plea to the extent of a discount of 1/3 from the notional term which is equivalent to 3 years and 3 months.

Further Deductions

[81] The court is of the view that the defendant's personal circumstances and the remorse shown by him warrant a further deduction from the notional term imposed. I will therefore discount a period of 1 year from the notional term.

Mr. Hodge asked the court to take into account the defendant's cooperation with police authorities and his eventual confession. As far as the question of the defendant's cooperation with the police authorities is concerned the court does not find this to warrant any further discount from the notional sentence.

Discount for time spent on remand

[82] The defendant was arrested on 2nd May 2017 and remained in police custody until he was denied bail by the Magistrate's Court on 8th May 2017 and remanded into custody. The committal proceedings concluded on 2nd August 2018. The defendant was subsequently admitted to bail by the High Court on 13th February 2019. Accordingly, the defendant spent a period of 1 year, 5 months and 9 days

on remand. In the circumstances, the defendant will be credited for all time spent on remand.

- [83] The court having recognized the urgent need for the rehabilitation of this offender sees the necessity for his enrollment in the rehabilitation programs available at the prison. I am advised that there are several such programs offered at the prison. There is also the need to make this defendant a more productive member of society; and in this regard the defendant will be required to undertake such courses of study that are available at the prison in order to ensure that he obtains suitable certification prior to his release.

Order

- [84] Therefore, the defendant is sentenced to 5 years and 9 months imprisonment in respect of each count in the indictment to run concurrently. He shall be credited for all the time spent on remand. The defendant shall be enrolled in all the rehabilitation programs offered at the prison and shall successfully complete the same. The defendant shall be enrolled in and successfully complete an educational program offered by the prison.

**Shawn Innocent
High Court Judge (Ag.)**

By the Court

Registrar