

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

IN THE HIGH COURT OF JUSTICE

Criminal No. BVIHCR 2017/0024

BETWEEN:

THE QUEEN

Applicant

-AND-

SYDNEY VARLACK MALONE

Defendant

Appearances: Mr. Herbert Potter, Crown Counsel for the Crown
Ms. Reynela Rawlins, Counsel for the Defendant

2018: July 14th, 20th
September 27th, 29th
October 1st

JUDGMENT ON SENTENCING

Agreed Facts

- [1] **Smith J:** Mr. Iain Walker the Complainant in this matter, at the time of the incident, 14th, 2016 was living in Manuel Reef, Tortola. He resided there along with his wife, Laura Walker and his two children, namely, Finnley Walker two (2) years of age and Zachary Walker, two (2) months of age at the time.
- [2] The apartment was a two (2) bedroom home with a separate detached cottage. The living room, the dinner room, and the kitchen were all located on the ground floor of the apartment. The main entrance door was located on the ground floor.

- [3] On the night of 14th December, 2016, at about 9:00pm, Ian Walker indicated that he secured all the windows and doors to the apartment, with the exception of one window, before retiring to bed. Roundabout 1:00am in the early hours of 15th December, 2016, both he and his wife were awoken by their young son Zachery. They went back to bed. At about 3:00am, after Zachery had fallen back to sleep, The complainant indicated that he was lying on his bed when his bedroom door began to open and he said that he got up from his bed, walked towards the door and pulled it open.
- [4] In his statement to the Magistrates' Court the complainant described the intruder as being a dark skinned male, wearing a black shirt over his head, who was met at the door. The intruder, who appeared startled by the complainant's presence, turned around and ran down the stairway towards the ground floor. The complainant further indicated that he pursued him, they fought and that he punched the accused several times. The accused threw various items at the complainant and made good his escape. He was later apprehended and taken into custody, charged and interviewed by the police. The accused remained on remand from 7th March, 2017 to today's date.
- [5] The matter was committed to the High Court on 14th July, 2017 and on 20th July, 2018, the accused through his counsel asked of this Court for a Goodyear Indication. The said indication of a range of ten to seven years was given on 24th September, 2018 by the Court.
- [6] The indictment was read to the accused on 24th September, 2018 and he entered a plea of guilty to one count of burglary. The Crown through Mr. Herbert Potter walked the Court through the sentencing guidelines and the attendant authorities, while Defence Counsel Ms. Reynela Rawlins put before the Court a brief plea in mitigation. Her plea was later bolstered by written submissions received by the Court on 26th September, 2018 and further oral submissions were made on 28th September, 2018. I thank both attorneys for their assistance to the Court in this sentencing exercise.
- [7] As I have already indicated, this matter came up for the Court to give a Goodyear Indication and this Court indicated a range of ten to seven years.

[8] Having given the Goodyear Indication the Court will now consider the range of seriousness of this case.

[9] I am duty bound to consider the aggravating and mitigating factors of the offence and the aggravating and mitigating factors which are relevant to the accused as well as to the offence.

[10] **Aggravating Factors**

- Committed at night
- Minor children in the house
- Violence used against the Complainant

[11] **Mitigating Factors**

- Guilty plea at the earliest opportunity

[12] I now turn to the aggravating and mitigating factor which directly relate to the accused as I find them.

[13] **Aggravating Factors**

- Accused has previous convictions for similar offences

[14] **Mitigating Factors**

- Offence committed while accused was under the influence of alcohol and he has "had issues with alcohol and drugs".
- Remorse

Prevalence as a Mitigating Factor to the Offence

[15] The Crown has asked that I consider the prevalence of burglaries in the Territory as a mitigating factor to the offence. I am not so persuaded without being furnished with specific figures and data to bolster this submission. Both the Crown and Defence Counsel referred the Court to the case of

DPP vs Shaunlee Fahie¹ where the Learned Justice of Appeal Janice George-Creque (as she then was) referred to the prevalence of burglary as being an aggravating factor of the offence.

- [16] Ellis J. in the case of **The Queen vs Raymond Harrison**² BVI ruled that *"Where an offence is prevalent, the court can place increased importance on the sentencing purposes of general deterrence and retribution and ultimately this may lead a Court to increase the sentence for that offence. In this way, this factor could be regarded as a circumstance of aggravation."* I am of the view that that in future the Court should be armed with independent current and accurate information and data in order to justify claims that a particular crime is prevalent in particular area.

The Law

- [17] Burglary contrary to section 211(1)(b) of the Criminal Code (No. 1 of 1997) of the Laws of the Virgin Islands provides that a person commits the offence of burglary if having entered a building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or attempts to inflict on any person therein any grievous bodily harm. **Section 211 (4) of the Criminal Code 1997** provides that any person who is convicted of burglary is liable on conviction to imprisonment for a term not exceeding fourteen (14) years.

The Authorities

- [18] The Crown in its submissions relied on the case of **R vs. Daren Cessford and Jay Lewis Maxwell**³. In that case the accused had 18 previous convictions three of which were domestic burglaries and he was sentenced to four and a half years. The next case relied on by the Crown was the case of **The State vs. Ronald Leatrade**⁴. In that case the accused while under the influence of drugs and alcohol burgled his female relative's home. A struggle ensued with the accused making good his getaway while taking the complainant's handbag.

¹ HCRAP 2008/003: Territory of the Virgin Islands

² (Crim Case No. 2 of 2013)

³ (1916) EWCA Crim. 1408

⁴ No. DOM29/2012

- [19] In the case of **R v James Zammutt Cook**⁵: Cook was thirty-seven (37) years old. On 19th January, 2018, he received sentences of 29 months for each of 3 separate dwelling houses. In one of the incidents, the home owner was at home and in bed when he became aware of a noise in the home. He opened the door to be confronted by the burglar who then ran away. Cook had previous convictions for burglary. No victim impact statement was given. Under an Attorney General reference appeal Cook's sentence was changed to 45 months.
- [20] **R v Martin Graham Collier**⁶: Collier was aged 42 and received seven years each for three counts of burglary. In the first of two burglaries of the same residence, the complainant came home to find her room ransacked and burglarized and her roommate who was home assumed it was the complainant in her room. Shortly after on returning home another day after midnight, the complainant and her boyfriend encountered the burglar inside the flat. The boyfriend gave chase but the burglar escaped. The third burglary took place two weeks later at the home of Marty Cook and her boyfriend who awoke to the intruder in the home. The intruder escaped but they found a knife on the daughter's bed. Collier had previous convictions for burglary. There was a sexual element to the burglary. Collier's appeal against sentence was dismissed.
- [21] **R v Brewster, Thorpe, Woodhouse**⁷: This case involved six appeals against sentence. Here we only deal with those where the offender was of a mature age and the home was occupied during the burglary. Thorpe aged thirty three pleaded guilty and was sentenced to four years. His co-accused received two years. The burglary was at night and the minor daughter of the complainant came home and heard voices inside and saw one of the burglars with a TV. She raised the alarm and they were caught. She became afraid to sleep alone. The burglar had previous convictions for burglary. No credit was given for a guilty plea entered on the day of trial. The appeal against sentence was dismissed. Woodhouse aged forty nine pleaded guilty to one count of burglary and received two years in prison. The facts were that at about 4:30 am, the complainant awoke to find the burglar in her bedroom. He told her he had walked in the open front door and then he left. Nothing was taken. The burglar was an alcoholic. His appeal was also dismissed.

⁵ [2018] EWCA Crim 1335

⁶ [2009] EWCA Crim 160

⁷ [1997] EWCA Crim 3421

- [22] The case of **R v Jason Leonard and Clifton Stoutt**⁸: On 15th May, 2006, Mr. Freeman retired to bed and awoke to find three masked men inside his home. One was armed. He was tied up while they searched the house. He managed to escape and scare them away. One left his slipper behind by which DNA evidence linked him to the commission of the offence. On that count for aggravated burglary, Leonard received ten years and Stout received fifteen years.
- [23] The case of **R v Keenan Kendell Bethelmy**⁹: Bethelmy pleaded guilty at the earlier opportunity to two counts of burglary with respect to two dwelling houses. He was sentenced to ten years and five years imprisonment, respectively. Both sentences were to run concurrently. The first home was that of the Territory's Chief Minister who discovered him running from his master bedroom. Finger print evidence led to the defendant. The burglar was interrupted while stealing a pair of 8 ½ Jordon sneakers. However, he stole jewelry belonging to the Chief Minister's wife valued at US\$ 2, 900.00. An hour later the second burglary was committed at the home of Lisa Scatliffe Simmonds. He was seen there but did not manage to steal anything. The defendant was twenty four years old. He entered the country about three days prior to committing the offences. He had previous convictions in Trinidad and Tobago and was deemed to be a prolific burglar. He showed remorse. For consistency, the Crown included the most recent High Court cases involving burglaries.
- [24] The **Queen v Tyrone George**¹⁰: Tyrone George was sentenced on 11th July, 2018 to four years each for two burglaries to which he pled guilty. In a burglary of Peter Reichenstein's home, Kinston, Tortola, the home was ransacked, food eaten and entry was made by breaking the kitchen window. The caretaker was fearful to be at home once she discovered the burglary. In the burglary of Karon Harrigan's home, a bath was taken, a towel used and the home was ransacked. A pair of slippers was stolen. George had cut himself and destroyed a glass door making his entry into the house. Blood was found throughout the house. DNA evidence led to George in both cases.
- [25] The defence relied on **The Queen v Gary Fleming No15/2010**, where the accused had ten (10) previous convictions relating to dishonesty and including two counts of burglary of a dwelling

⁸ No 10 of 2007, British Virgin Islands: Eastern Caribbean Supreme Court

⁹ [Crim. Case No. 11 of 2007] Territory of the Virgin Islands: Eastern Caribbean Supreme Court

¹⁰ [Crim. Case Nos. 22 and 23 of 2017] Territory of the Virgin Islands: Eastern Caribbean Supreme Court

home which he invaded twice in one day. He was sentenced to three years imprisonment on the first count and six years on the second count both sentences to run concurrently.

[26] The defence also relied of the cases cited above namely **Cessford and Lestrade** as well as the well-known case of **Desmond Baptiste v The Queen, St. Vincent and the Grenadines Criminal Appeal 8 of 2003** and **William Penn v The Queen Crim Appeal No 1 of 2006, British Virgin Islands** noting that in the latter two cases, the defendants were sentenced to either years in prison with both defendants having previous convictions for crimes of dishonesty.

[27] **Section 4 of the 2005 Criminal Justice (Alternative Sentencing) Act** states that the Court in determining sentence shall consider the following relevant matters such as the offence circumstances or facts; other offences; any course of conduct with similar offence; personal circumstances of victim; injury , loss or damage; remorse shown; reparation or restitution, guilty plea; co-operation with investigations; need to protect community; deterrence, adequate punishment; the character, antecedents, age, means and physical or mental condition of the defendant etc.

The Governing Principles of Sentencing

[28] The governing principles which guide the court in respect of sentencing have been firmly settled and affirmed in several cases in this jurisdiction.

The objectives as set out in the case of Desmond Baptiste et al are as follows:-

- (1) Retribution – in recognition that punishment is intended to reflect society's and the legislature's abhorrence of the offence and the offender;
- (2) Deterrence – to deter potential offenders and the offender himself from recidivism;
- (3) Prevention – aimed at preventing the offender through incarceration from offending against the law and thus protection of the society; and
- (4) Rehabilitation – aimed at assisting the offender to reform his ways so as to become a contributing member of society.

[29] Which of these factors will be predominant in determining an appropriate sentence will depend on the particular circumstances of each case. Quite apart from these however, certain common

factors will also be brought into the equation such as the prevalence of the types of crimes in the society as well as the general desirability of ensuring a measure of consistency in sentences for like offences.

- [30] There is good reason for this. It affords a level of certainty by providing a yardstick for the sentence. It may also have a deterrent effect on the potential offender and thus promote a measure of confidence by the public in the criminal justice system as a whole. The sentencing scale will slide up or down depending on the aggravating factors and the mitigating factors to be taken into account based on the peculiar circumstances of each case.
- [31] The Court has read the impact statement of the complainant and has noted its contents. It is indeed compelling however as previously stated, I view this type of burglary to be in the medium serious range and opportunistic in nature.
- [32] The accused therefore starts off with a sentence of ten years as per the Goodyear Indication, which is to be adjusted downwards.
- [33] The figure will be adjusted to reflect the one third reduction for the guilty plea. One third of ten years will bring the Court to three years and thirty three months. There will be a further reduction for the time spent in custody on remand, which has been one year and six months.
- [34] However, no further discounts will be given due to the aggravating factors of the offence and the previous convictions of the accused. This will bring us to a custodial sentence of one (1) year and eight (8) months.
- [35] The accused will therefore spend **one (1) year and eight (8) months** in prison with the stipulation that he undergoes counseling and treatment for his alcohol dependency.

Ann-Marie Smith
High Court Judge

By the Court


Registrar