

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. 4 OF 2012

BETWEEN:

THE QUEEN

and

ELRYS TODMAN

Appearances:

Mr. Valston Graham Senior Crown Counsel and Ms. Shantal Flax Crown Counsel for the Crown
Mr. Richard Rowe and Mr. Michael Maduro for the Accused

2014: 9th April
6th May

JUDGMENT ON SENTENCING

Criminal law- Sentencing – Burglary- criminal damage to property – extenuating circumstances - matters to be considered

[1] BYER J.: - On the 18th February 2014 Mr. Todman was found guilty by a unanimous jury of the following offences:

- (1) Burglary contrary to Section 211(1)(b) of the Criminal Code of the British Virgin Islands 1997.
- (2) Damage to property contrary to Section 265(1) of the Criminal Code of the British Virgin Islands 1997 as amended.

- [2] The sentencing hearing was adjourned and heard on the 9th April, 2014 and judgment was reserved in the said sentence. This is now the decision on that sentencing which I intend to impose on this Defendant.

The Background facts

- [3] On the 3rd February 2010 Kareem Scatliffe left his place of abode at Belmont Estate, West End after securing the said property. Upon his return at approximately 5:40 p.m., he found several signs suggesting forced entry. A report was made to the police. Broken window panes found outside of the window were found with the fingerprints of the Defendant thus linking him to the crime. The said fingerprints faced in a downward direction; suggesting that the prints were made by a person touching the window from the outside.
- [4] Investigations revealed that the Defendant entered the home of the Virtual Complainant, Julie Scatliffe, without her consent and that the point of entry was through a bathroom window, which was attached to Kareem Scatliffe's bedroom. Kareem Scatliffe is the son of the Virtual Complainant.
- [5] The Defendant was the former best friend of the Virtual Complainant's grandson, Kyle Abraham, who had moved overseas for school in or around 2008. The said friendship became estranged after his departure. During Kyle Abraham's tenure away, he returned home twice and was unable to socialize with the Defendant due to employment commitments. At no point in time during the said friendship did the Defendant ever have permission to access Mr. Scatliffe's bedroom or bathroom.
- [6] Upon entering the Virtual Complainant's home, the Defendant stole various pieces of jewellery, cellular phones, video games and related machinery. The stolen items were valued at a total of \$6,536.00. Property destroyed during the commission of the offence included a mesh window screen and a window louver pane. The sole recovered piece of stolen property was a Nokia cell phone which at the hearing was stated as being valued at \$235.00.

Social Inquiry Report

- [7] The Court, upon the application of the Defendant was assisted by the Social Inquiry Report prepared by Ms. Scherrie Griffin, Senior Probation Officer who gave viva voce evidence on the interviews that she had carried out with the Defendant, his parents and his doctors.
- [8] Ms. Griffin told this Court that the Defendant is under the distinct impression that he is not mentally ill. He has therefore stopped taking the medication prescribed for him during the currency of the trial. She also submitted that based on his level of dependency on his mother in particular, that he has been unable to reach the level of maturity and independence that he should have reached by this age level.
- [9] Ms. Griffin has told this Court that all indications are that unless there is an order in place by which the Defendant is made to continue his medication and sessions to assist with his psychological illness, that he will have no intention of continuing the same as he has indicated to her that he intends to convince his doctor that he doesn't need any medical intervention or attention.
- [10] The Officer also told the Court that having spoken to both of the doctors who assessed the Defendant, that the best situation for him would be that he be admitted to an inpatient facility to continue the necessary intensive treatment but unfortunately this Territory has no such facility.
- [11] Ms. Griffin also informed the Court that this Defendant is unemployed and has had no employment since 2010. She stated that there is no mental or physical impediment to him working but that he has just chosen not to work using the outcome of this case and the fact that he is required to take medication as the excuses why he has not looked for employment.
- [12] The Defendant has therefore been solely dependent on his parents for his upkeep and remains living at home in their care.

[13] The Court was informed that this Defendant has had limited educational advancement he being expelled from the Elmore Stoutt High School in Form 3 and that even though he was sent to the USA for continued schooling this never was completed.

[14] Generally, this Court was left with the impression from this Officer that the Defendant has been allowed in large measure, charge over his life at an age when he was unable to make those decisions and as a result he has become an adult who is almost entirely dependent on other persons and who refuses to take responsibility for his actions or his shortcomings.

The Plea In Mitigation

[15] Counsel for the Defendant, Mr. Rowe submitted to this Court that he was essentially in agreement with the guidelines upon which the Crown had submitted to this Court for a non custodial sentence. He asked this Court to consider that given the psychological challenges faced by the Defendant that structures should be put in place for the Defendant to ensure that the responsibility to remain outside of Her Majesty's Prison will lie with him and him alone. However, he asked this Court to consider that this Defendant should first and foremost not be incarcerated and not be exposed to the prison "a university of crime."

[16] Mr. Rowe also sought to ask this Court that if any compensatory order is to be made to the victims of this crime that it be made on the premise that a deduction be made for the recovered cell phone in the value of \$235.00.

The Crown's submissions

[17] The Crown has argued throughout their submissions that this Defendant should have a non custodial sentence imposed upon him. They acknowledge that burglary for which the Defendant has been found guilty is usually a custodial sentence however they were prepared to acknowledge that in this case there were extenuating circumstances which surrounded the psychological and psychiatric issues under which this Defendant suffers.

[18] The Crown identified the aggravating and mitigating factors in this matter to this Court as:

Aggravating factors:

- i. Theft of property causing a significant degree of loss to the victim,
- ii. Breach of trust as the Defendant was a trusted neighbour and friend of the family,
- iii. The Defendant has previous convictions for related offences {being criminal trespass};
- iv. The location burglarised was a dwelling house,
- v. Most of the stolen property was never recovered, and
- vi. There appeared to be some level of premeditation/planning.

Mitigating Factors:

- i. The Defendant suffers from a psychological disorder, and
- ii. His youthful age.

[19] The Crown also sought to add as an aggravating factor that crimes of this nature are prevalent in the Territory.

[20] The Crown submitted that if a non custodial sentence is to be imposed on this Defendant it must be made clear that it is only as a result of the psychological illness diagnosed by the medical practitioner and psychologist. They therefore argued that for this Defendant to be allowed to “benefit” from the departure of a custodial sentence that part and parcel of the sentence handed down by the Court should include a component that the Defendant was to be ordered to continue psychological and psychiatric treatment with the doctors who attend to him now, with a failure on his part resulting in immediate incarceration.

[21] The Crown also sought to submit to the Court that this was a proper case for a compensatory order being made in favour of the victims of this crime in the total amount of the items stolen.

[22] The Crown made no specific submissions in relation to the conviction for criminal damage.

The Court's Considerations and findings

Burglary

- [23] By Section 211(1)(b) of the Criminal Code “*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.*”
- [24] This section is also supported by Section 211(4) which states “*Any person who is convicted of burglary is liable on conviction to imprisonment for a term not exceeding fourteen years.*”
- [25] There is no doubt in this Court's mind that the offence of burglary in any of the normal situations would attract a custodial sentence and the more aggravating factors there existed the more likely that there would be a sentence handed down at the higher end of the tariff.
- [26] It has therefore been well recognized that “*the Courts seek to punish the offenders to an extent and in a manner which is just in all the circumstances. To deter the offender or other persons from committing offences of the same or a similar character. To provide opportunities for rehabilitation of the offender. The Court also seeks to denounce the type of conduct in which the offenders are engaged in. The Court also seeks to protect the community from the offenders. Lawton LG identified these to be the cardinal factors of sentencing namely "retribution, deterrence, prevention and rehabilitation"*”¹
- [27] However every sentencer must recognize that although there are guidelines given for the imposition of sentences, there is a great degree of discretion in the ability of a sentencer to mete out the punishment which is best suited to the crime/offence and the offender in every case.

¹ Stephenson-Brooks J in The State v Steven Wyke & ors DOMHCR 2001/043 para 4

- [28] In this case both Counsel for the Crown and the Defendant who are uncharacteristically *ad idem*, have asked this Court in coming to its decision to consider the imposition of a non custodial sentence.
- [29] In considering those submissions, this Court is mandated to look at the aggravating and mitigating factors that exist in this case as have been highlighted by the Crown and to which the Defendant's counsel seem to be in agreement. In doing so in this instant case, this Court considers that the aggravating and mitigating circumstances set out by the Crown can be adopted wholesale and it is therefore very clear that the aggravating factors outweigh the mitigating factors.
- [30] In this Court's mind however, the unfortunate circumstances of the diagnosed psychological and psychiatric issues of the Defendant are sufficient to outweigh the heavy balance towards the aggravating factors and although it cannot obliterate them, this Court is of the opinion that this extenuating circumstance is sufficient for this Court to address its mind as to whether it is appropriate to adopt the unusual consideration of a non custodial sentence.
- [31] In the St. Lucian case of The Queen v Wendell Williams² Cumberbatch J made the unusual order for inter alia probation for a young man convicted of burglary who was a first time offender and had shown some evidence to the Court of both being contrite and having made attempts to better himself educationally and to obtain gainful employment.
- [32] In the instant case, the Defendant has not shown to be either industrious or has he made any attempt to better his situation with a view to showing this Court an intention to make himself a productive member of this society. Instead "*a lazy and apathetic outlook has contributed to his present state*"³. He has instead developed an unhealthy dependence on his mother who from all accounts has spoilt this Defendant as the "baby" of the family.
- [33] Additionally, the correspondence addressed to this Court by the mother of the Defendant, and two other persons who informed this Court that they have known the Defendant for many years has not

² SLUCRD 2011/2136

³ Report of Senior Probation Officer

exhibited any information which would or could assist the Court in finding any intention on the part of this Defendant if given the chance, to make himself a better man.

[34] It is indeed unfortunate that this is the situation that presents itself to the Court.

[35] It would therefore appear that this Court must extrapolate from all that has been said about this Defendant by those persons who have treated him and diagnosed him with the disorder, that this Court must temper mercy with justice and help this Defendant even though he has no intention to help himself. While at the same time, attempt to protect society from his proclivities.

[36] In the United Kingdom provision is made specifically to impose sentences for hospital orders for those persons considered “mentally disordered defendants”. Our Mental Health Act Cap 191 does not however encapsulate a like provision and is only applicable to those persons who are found unfit to plea at trial or who are found not guilty by reason of insanity⁴. The Court’s choices in this jurisdiction are therefore limited by the legislation and the options that are available as alternatives to incarceration.⁵

[37] The Court wishes to make it clear that it has heard all the entreaties made to it to consider the giving of this Defendant a second or rather a third chance. This Court is however of the opinion that if this “chance” is to be realized that it can only be done in the context of stringent safeguards both for the Defendant himself and society.

[38] Having thus considered all that was said and the extenuating circumstances which exist with this Defendant, this Court is, as reluctant as it may be, prepared to give this Defendant this final chance. This will now stand as his third strike. There will be no more chances. I wish to however make it clear that this chance is not to be considered a “hall pass”. This Court ultimately has to apply the principles of sentencing to suit the circumstances and this Defendant. This Defendant must with the help of his immediate family embrace this chance and ensure that he utilizes it to the best of his ability. He will no longer be able to rely on what is essentially his disability if he disavows this opportunity to become a productive member of society.

⁴ Section 11 Mental Health Act Cap 191

⁵ Section 22 Criminal Code 1997

[39] This Court therefore in giving this Defendant this final opportunity imposes the following sentence for the offence of Burglary:

- i) a term of imprisonment for a period of two (2) years to be suspended for a period of two (2) years;
- ii) that the Defendant during that two (2) years period is to undergo continued outpatient treatment with Dr. June Samuels inclusive of adherence to all medicinal intervention;
- iii) that the Defendant is to enter a vocational programme identified by the Department of Social Development within two (2) months of this order and to obtain employment thereafter;
- iv) the Defendant is to undergo quarterly random drug testing at the Mental Health Department;
- v) a curfew is to be in force for this Defendant at his parent's home at Belmont Estate West End for a period of twelve (12) months to be observed from 6:30 p.m. to 6:00 a.m. every day.
- vi) to pay compensation to the Complainant in the sum of \$6,300.00 within six (6) months of this order in default twelve (12) months imprisonment.
- vii) Breach of any of the terms of this order (ii) to (v) will result in immediate incarceration of the Defendant to serve out the terms as indicated at part (i) of this order with the continuance of the psychiatric treatments to be conducted at Her Majesty's Prison for the duration of the sentence.

Criminal Damage

[40] As indicated, the Crown made no specific reference to this offence in making its submissions to this Court and all of the cases to which the Court were referred spoke to the offence of Burglary. The one indication from the Crown was with regard to the concession that any sentence given for this offence must run concurrently with any sentence for the conviction of burglary.

[41] By Section 265(1) of the 1997 Criminal Code:

“Any person who, without lawful excuse, destroys or damages any property belonging to another intending to destroy or damage any such property, or being reckless as to whether such property would be destroyed or damaged, commits an offence.”

[42] And further by Section 265(4)(b) of the 1997 Criminal Code:

“...A person who commits any offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding ten years.”

[43] In the case of R v Luis Ambrose and Juan Rosario⁶ Hariprashad-Charles J gave the Defendants who had pleaded guilty an order to pay compensation in the sum of the property damaged within six (6) months or in default six (6) months in prison. In R v Devon Dawson⁷ on a plea of guilty the Defendant was sentenced to two years imprisonment.

[44] In this case, the Defendant was found guilty by a jury of his peers. It was therefore accepted by the jury that the damage that was effected on the Complainant's home, was done in the carrying out of the offence of Burglary. It was therefore as a direct result of that offence.

[45] This Court was not provided with a figure attributable to the damage caused and the Court is not prepared to enter the realm of speculation and acknowledges that it would be quite improper to do so.

[46] This Court is therefore not in a position to make any compensatory order. The Court therefore orders as follows for the conviction of criminal damage:

- i) A fine in the sum of \$1,000.00 to be paid within two (2) months in default six (6) months imprisonment.
- ii) This period of imprisonment, if it shall become operational, is to run concurrently with any other period of imprisonment ordered herein.

The Order of the Court is therefore as follows:

Burglary

- i) a term of imprisonment for a period of two (2) years to be suspended for a period of two (2) years;

⁶ BVI Criminal case 4/2007

⁷ BVI Criminal case 2/2006

- ii) that the Defendant during that two (2) years period is to undergo continued outpatient treatment with Dr. June Samuels inclusive of adherence to all medicinal intervention;
- iii) that the Defendant is to enter a vocational programme identified by the Department of Social Development within two (2) months of this order and obtain employment thereafter;
- iv) the Defendant is to undergo quarterly random drug testing at the Mental Health Department;
- v) a curfew is to be in force for this Defendant at his parent's home at Belmont Estate for a period of twelve (12) months to be observed from 6:30 p.m. to 6:00 a.m. every day;
- vi) to pay compensation to the Complainant in the sum of \$6,300.00 within six (6) months of this order in default of which twelve (12) months imprisonment;
- vii) breach of any of the terms of this part of the order namely (ii) to (v) will result in immediate incarceration of the Defendant to serve out the terms as indicated at part (i) of this order with the continuance of the psychiatric treatments to be conducted at Her Majesty's Prison for the duration of the sentence.

Criminal Damage

The sum of \$1,000.00, to be paid within two (2) months in default or in default six (6) months imprisonment.

Nicola Byer
High Court Judge