

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. 1 OF 2006

BETWEEN:

THE QUEEN

and

WILLIAM ALEXANDER PENN

Appearances:

Mr. Terrence Williams, Director of Public Prosecutions for the Crown
Dr. Joseph S. Archibald QC with him Mr. Thomas Theobalds for the accused.

2006: March 20
March 21

JUDGMENT ON SENTENCING

1. **HARIPRASHAD-CHARLES J:** After a trial which lasted for approximately two weeks, the accused, William Alexander Penn was convicted by a unanimous jury on three counts of burglary which took place between April 2000 and June 2002 on the Island of Virgin Gorda. The accused was acquitted on one of the counts. He is now before the Court for sentencing.

The facts in outline

2. The Island of Virgin Gorda in the British Virgin Islands is renowned worldwide for its pictorial beauty. Dramatic slopes plunge from Gorda Peak to the turquoise waters far below. Not many islands offer the range of exclusive resorts, some of them the last word in understated elegance. It is of small wonder that the island attracts visitors from all around the world. Some come for a relaxing holiday. Others like Mr. Michael Cummings, a retired physician from Arizona, USA found it ideal to buy his own home on the island. He lives most of the time in Arizona and some of the time in his home called "Euphoria" in Leverick Bay. Euphoria is

particularly significant because it is one of the premises that was burgled in the spate of burglaries taking place on the island.

3. Based on certain information that Mr. Cummings had previously received, he borrowed a surveillance camera and a 24-hour video recorder from Leverick Bay Villa Rentals and put plans into action. He placed the recorder in the lower bedroom, pointed to the door. He tested it to ensure proper functioning. He then placed \$5.00 change on the table and another \$30.00 to \$40.00 in a pouch on the dresser by the bed. He then wiped all fingerprints from everywhere in the room that he thought somebody might touch. He then left the room with the recorder on. The recorder was focused to capture the door and the table with the change. On or about 28 July 2000, he received a call from Villa Rentals. As a result, he noticed that a door in the Villa was not completely closed and the money on the table was gone. Upon further observation, he realized that the money on the dresser by the bed was also missing.
4. Mr. Cummings removed the tape from the VCR, viewed it and summoned the police. The video captured the image of a male person. The person was masked. The person swiftly picked up the monies that were on the table, came back in and headed to the bedroom area. The Prosecution's case was that the person captured on the tape was of the same shape and form of the accused. The person did not wear gloves. As a result, the police were able to obtain latent prints from the doorknob and other parts of the Villa which they subsequently compared with inked prints obtained voluntarily from the accused. The tape was subsequently handed over to Detective Constable Jerome Tittle.
5. Two other buildings namely La Cachette Villa main house and Paradise Beach Villa No. 14 were burgled in like manner over a two-year period. The Prosecution's case is that all of these premises were burgled by the same person - a person who is familiar with tourist activities and a person who steals only money so as to leave no evidence behind. According to the Prosecution, the person was a "smart" thief but not so smart because he wore no gloves. Consequently, the police were able to obtain latent prints from the crime scenes.

6. The Prosecution's case rests wholly on fingerprint evidence. Two expert witnesses, namely Sergeant George Mason, a fingerprint expert attached to the Forensic Department of the Royal Virgin Islands Police Force and Inspector Franklyn Williams of the Royal St. Vincent and the Grenadines Police Force gave expert testimony in the case. Sergeant Mason found that the latent prints obtained at the crime scenes correspond to the ink prints obtained from the accused. The accused maintained his innocence from the date he was taken into police custody for questioning. His defence was that he knows nothing about the burglaries and had he known, he would have gladly assisted the police. The defence also says that Sergeant Mason made an abominable error in his findings and the error was confirmed by his friend, Inspector Williams. The defence says that even though the science of fingerprint is infallible, the examiners are not and it is well recognized that because of errors of examiners, many accused have been erroneously convicted and subsequently, set free. That even Scotland Yard has made errors.

7. No doubt, the Jury, by their verdicts accepted the Prosecution's case.

Plea in mitigation

8. After the allocutus was put to the accused, he responded that he had nothing to say. Leading Counsel for the accused, Dr. Joseph Archibald QC did not have much to say either except to direct the Court's attention to section 22 of the Criminal Code, 1997 of the Laws of the Virgin Islands. Section 22 speaks to the kinds of punishments that the Court may impose on persons convicted under the Code.

9. The Court indicated that it would deliver a written judgment on sentencing the following morning. As sentence was about to be passed, Dr. Archibald QC craved the Court's indulgence to put in a more comprehensive plea in mitigation. I obliged. In a nutshell, he pleaded for leniency. Dr. Archibald QC succinctly submitted that the Court ought to take into consideration the following mitigating factors namely: (i) the accused is a young man of 35 in gainful employment; (ii) he is a single parent with two young sons; (iii) his criminal record is clean despite the fact that he had two criminal convictions more than 15 years ago. According to Dr. Archibald, the criminal offences of insulting language and obstructing a police officer in

the lawful execution of his duties are minor offences and for all intent and purposes, should be considered "spent" having been committed so many years ago when the accused was very young. Dr. Archibald also submitted that the fact that the Jury found the accused not guilty on one of the charges should be a factor to be considered. He could not produce any judicial authority to support this submission.

Sentencing guidelines

10. On 6 December 2004, our Court of Appeal of the Eastern Caribbean Supreme Court sitting in Saint Vincent and the Grenadines reserved judgments in 12 magisterial appeals and 2 High Court appeals against sentence so as to give some indication as to appropriate sentencing levels for a range of criminal offences including burglary. The Court was concerned with the alarming regularity that these serious matters came before the Courts in that jurisdiction. But what was even of graver concern to the Court was that the vast discretion left to judicial officers has resulted in widespread inconsistencies in the sentences meted out when sentencing offenders for those offences.
11. The Court proceeded to give some advice on appropriate sentencing but emphasized that the advice must be read subject to the need to have regard to the particular circumstances of the offence committed, its effect upon the victim and the record of the offender. In other words, a sentencing range should not obviate the need for the sentencer fully to consider the host of aggravating or mitigating factors that might accompany any particular crime. Their Lordships reminded us that the sentencing of an offender who has been found or who has pleaded guilty to an offence is a duty of the presiding judicial officer having regard to the principles and rules provided by statute and the common law.
12. No doubt, the objective of this advice is to promote greater consistency in the approach to sentencing. One of the cases in which such advice was given is the case of **Desmond Baptiste v The Queen**¹. Mr. Baptiste, aged 25 years was sentenced to eight years for burglary. He had a long record of previous convictions spanning a period of ten years involving theft, entering dwelling houses as a trespasser and stealing, unlawful possession and

¹ Criminal Appeal No. 8 of 2003 (St. Vincent & the Grenadines) [unreported].

possession of controlled drugs. He had pleaded guilty at the first available opportunity. On appeal to the Court of Appeal, the Court was handicapped because the record before them did not reflect the precise circumstances of the burglary for which Mr. Baptiste was convicted. What they did know is that he readily pleaded guilty at the first available opportunity and the items stolen were recovered. Mr. Baptiste however had an extended criminal record involving many offences of a similar nature. In passing sentence, the learned judge opined that:

“In view of the accused’s previous convictions and propensity to this sort of crime and the prevalence of crime in this society at present, there is a need for punishment with a view to rehabilitation, away from society.”

13. The Court of Appeal did not interfere with the sentence and dismissed the appeal.
14. In **The Queen v Terry Smith**², this Court sentenced Mr. Smith to 5 years imprisonment for burglary. In sentencing Mr. Smith, the Court observed that there appears to be no benchmark period in the approach to sentencing of an accused person in cases of burglary within the Eastern Caribbean Supreme Court. Sentencing guidance is therefore derived from English jurisprudence.
15. In England, where the offence is committed in respect of a building or part of a building which is a dwelling, the sentence is 14 years imprisonment. In respect of burglaries from dwelling houses, in **Brewster**³, Lord Bingham, CJ issued the following sentencing guidelines:

“Domestic burglary is, and always has been, regarded as a very serious offence. It may involve considerable loss to the victim. Even when it does not, the victim may lose possession of particular value to him or her....

The loss of material possessions is, however, only part (and often a minor part) of the reasons why domestic burglary is a serious offence. Most people, perfectly legitimately, attach importance to the privacy and security of their own home. That an intruder should break in or enter, for his own dishonest purposes, leaves the victim with a sense of violation and insecurity....Generally speaking, it is more frightening if the victim is in the house when the burglary takes place, and if the intrusion takes place at night...”

² Criminal Case No. 34 of 2004 (British Virgin Islands) –unreported (Judgment delivered on 4 February 2005).

³ [1998] 1 Cr. App. R. 210.

Generally speaking, domestic burglaries are the more serious if they are of occupied houses at night; if they are the result of professional planning, organization or execution; if they are targeted at the elderly, the disabled and the sick; if they are repeated visits to the same premises; if they are committed by persistent offenders; if they are accompanied by vandalism or any wanton injury to the victim; if they are shown to have a seriously traumatic effect on the victim; if the offender operates as one of a group; if goods are of high value (whether actual or sentimental) are targeted or taken; if force is used or threatened; if there is a pattern of repeat offending. It mitigates the seriousness of an offence if the offender pleads guilty, particularly if the plea is indicated at an early stage and there is hard evidence of genuine regret and remorse."

Court's consideration

16. A good starting point is section 211 (1) (4) of the Criminal Code 1997 of the Virgin Islands which states that 'any person who is convicted of burglary is liable on conviction to imprisonment for a term not exceeding 14 years. So the maximum sentence that a court could impose in a case of burglary is 14 years imprisonment.
17. This section is identical to section 217 of the Criminal Code of Saint Vincent and the Grenadines, the maximum penalty being imprisonment for 14 years.
18. It is widely recognized that the aims of sentencing are that of retribution, deterrence, prevention and rehabilitation. In the 12 cases from St. Vincent & the Grenadines, including the **Desmond Baptiste** case, Sir Dennis Byron, Chief Justice, delivering the judgment of the Court comprehensively examined the four classical principles of sentencing.
19. It is also not disputed that a wide discretion in choosing the appropriate sentence is given to a judge except in cases where the penalty is fixed by law.
20. It is plain that Parliament considered the offence of burglary as an extremely serious offence consequently the penalty. But, the decision whether a custodial sentence is required, and if so the length of such sentence, is heavily dependent on the aggravating and mitigating features and, usually to a lesser extent, the personal circumstances of the offender. The Courts also do take into consideration, the abhorrence with which the public regard those who burgle the houses of others.

21. In the instant case, the aggravating factors are:

- (1) Professional planning;
- (2) Commission of the offence at night;
- (3) The premises being occupied.
- (4) Persistent offender.
- (5) Targeting the vulnerable – in this case, the occupants were retirees and tourists.

22. The mitigating factors are identified as:

- (1) The age of the accused;
- (2) The accused does not have similar previous convictions;
- (3) No violence was involved.

Conclusion

23. It was revealed to this Court that the accused, William Penn, aged 35 is a National Basketball player who has represented this Territory in a number of tournaments both locally and internationally. He is a Boat Captain at the prestigious Little Dix Resorts. He receives a decent salary. The tourists love him. His employers love him. There is no explainable reason why he would chose a criminal life. He has said nothing to this Court. He has shown no contrition.

24. As I said before, this is a serious offence which more often than not, attracts a custodial sentence. Over the years, the police in Virgin Gorda have been faced with an uphill battle in trying to curb the incidence of burglaries which seemed to plague that island with alarming regularity.

25. I have taken into consideration the relatively young age of the accused, the fact that he has no similar previous convictions and the fact that two young sons will be separated from their father for some time. But the Court must send out a serious message to the public that criminal activities have no place in this Territory. Burglary leaves people feeling distraught and unsafe within the confines of their own dwelling. Unquestionably, it can destroy the tourist industry which is a substantial contributor to the economic prosperity of that island. Tourists will be

discouraged from returning to the British Virgin Islands. They will obviously choose other crime-free destinations.

26. Strangers visiting our shores are petrified when incidents of this nature occur especially when the Island is being portrayed to the wider world as a safe haven; where villas and resorts have doors with no locks.

27. Having considered all matters, the sentence of this Court is that you, William Alexander Penn be sentenced to eight (8) years imprisonment on each of the three counts. The sentences will run concurrently.

Indra Hariprashad-Charles
High Court Judge