

IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

(CRIMINAL JURISDICTION)

CRIMINAL CASE NO. 22 of 2007

THE QUEEN

and

HUBERT McLEOD

Appearances: Mrs. Grace McKenzie with Ms. Christilyn Benjamin for the Crown
The Prisoner in Person

2007: October 29th, November 1st and 6th

Judgment on Sentencing

(Criminal Law – Sentencing – Guilty Plea – Robbery – Criminal Code 1997 – s. 210 – Offender assisting the Crown in prosecution of offences arising out of the same circumstances of this offence – Whether sentence should be discounted – Principles to be applied)

[1] **Joseph-Olivetti J:-** The Prisoner, Hubert McLeod, pleaded guilty on Monday 29th October 2007 to the offence of robbery contrary to section 210 of the Criminal Code 1997 as amended ("the Code"). A sentencing hearing was held on 1st November and sentence was pronounced on 6th November. These are my full reasons for decision.

The Facts

[2] A summary of the pertinent facts as given by the Crown are as follows. On Friday 15th September 2006, sometime in the night, the Prisoner was at an upstairs apartment in Scatliffe Alley, Road Town, Tortola in the company of George O'Connor and Andrew Milton. O'Connor and Milton were talking about a planned robbery at Bobby's

Supermarket but the Prisoner did not hear the specifics of the plan. Andrew Milton told the Prisoner that he would rob Bobby's the following day.

- [3] On Saturday 16th September 2006, the Prisoner picked up Andrew Milton and Christopher Bailey from East End in the late afternoon and dropped them off at the Sunday Morning Well in Road Town. He returned in the late evening and picked them up and waited in the parking area next to the Sunday Morning Well for O'Connor. Eventually, O'Connor arrived and he drove them to Huntums Ghut. They then decided that it was time to do the robbery and that the Prisoner should drive to Main Street in the area of the Methodist Church and wait for them after the robbery.
- [4] The Prisoner then took the men to an apartment for them to change their clothes and returned later to pick them up. The men were all dressed in dark clothing and wearing gloves. He took them to Road Town. There the Prisoner dropped off Milton in the area of First Caribbean Bank and Bailey and O'Connor in the area of Jack's Electronics Store on Main Street. The Prisoner then drove to the area close to the Women's Prison on Main Street where he was told to wait. He noticed that O'Connor was carrying a .45 caliber handgun.
- [5] The Prisoner waited for about 45 minutes then Milton and Bailey came to the vehicle. The Prisoner did not wait for O'Connor. Milton instructed the Prisoner to take him and Bailey to Milton's sister's house in East End where they changed their clothing and divided the proceeds from the robbery. The Prisoner said he received \$400.00.
- [6] During the robbery the men stole from one cashier, cash in the sum of \$2,193.71 and cheques totaling \$290.69 and from another cashier cash in the sum of \$2,064.14 and cheques totaling \$358.07. A gold chain was also stolen from a customer during the robbery.
- [7] On 10th January, 2007 the Prisoner was informed by the Police that they were conducting investigations into an armed robbery at Bobby's Supermarket in Road Town on Saturday 16th September 2006 and he was cautioned. After being given the particulars of the robbery by PC Horne the Prisoner replied, "I was just the get away driver." He also gave a caution statement admitting to his participation.

Mitigation

[8] The Prisoner spoke on his own behalf. He expressed remorse for his actions and indicated that he acted out of fear for his safety and that of his family at home in Jamaica. (The Prisoner is 29 years old, single with 3 children who all live in Jamaica). He also called his former employer, Mr. Edread Williams who testified to the good character and industry of the Prisoner who had been employed with him for 5 years. The court was impressed with the obvious sincerity of the testimonial.

Crown's Submissions

- [9] The Crown submitted very useful cases as sentencing guidelines for robbery, in particular the local cases of **R. v. Kaz Kenroy Penn**¹ and **R. v. Stanley Bertie Jr.**, as well as the Caribbean case of **Allan Wilson v. The Queen**². They also submitted the local cases of **The Queen v. Sanjay Brisco**³ and **The Queen v. Tasha Huggins**⁴ and the UK decisions of **R. v. Gould**⁵, **R. v. Michael Shaun King**⁶, **R. v. P. and R. v. Blackburn**⁷ **R. v. Sivan et al**⁸ in relation to the sentencing of offenders who have assisted the Prosecution.
- [10] The Crown identified the aggravating factors in this case as: - (1) the seriousness and prevalence of this offence; (2) the Prisoner operated as part of a group; (3) the use of a firearm in the commission of the offence; (4) the offence was premeditated; and (5) money and items of jewelry stolen were not recovered.
- [11] The Crown pinpointed the mitigating factors as: - (1) the Prisoner has assisted the police in their investigations; (2) the Prisoner deposed at the preliminary inquiry and is to be a witness for the prosecution in the murder case concerning Elizabeth Rhule and the matter concerning the robbery of Bobby's Supermarket. The Crown submitted that the Prisoner's evidence is cogent and is an important part of the Prosecution's case; (3) the Prisoner was not present at the scene of the robbery and was only a secondary party to the offence; (4) his plea of guilty at the first reasonable opportunity; (5) the Prisoner has no previous

¹ Criminal Case No. 30 of 2006, British Virgin Islands

² Criminal Appeal No. 10 of 2003, St. Vincent and the Grenadines

³ BVI Magistrate's Court Case No. M876/2006

⁴ BVI Magistrate's Court Case No. M523/2005

⁵ (1983) 5 Cr. App. R. (S.) 72

⁶ [1986] Cr. App. R. 120

⁷ [2007] EWCA Crim. (22nd October, 2007)

⁸ [1988] 87 Cr. App. R. 407

convictions either here or in Jamaica; and (6) no one was injured during the commission of the offence.

- [12] Counsel emphasized that the information given by the Prisoner to the Police and his testimony will be crucial to the successful prosecution of the matters in which he will be called as a witness. It also appears that the Prisoner has been on remand since his arrest in October and has been kept at the expense of the Territory in a separate, secret facility aimed at protecting him as a prosecution witness. He has lived these many months in virtual solitary confinement.

Court's Consideration

- [13] The maximum sentence this Court can impose for the offence of robbery is life imprisonment as stipulated by section 210(2) of the Code. Punishment is always a matter for the court's discretion having regard to the particular circumstances of the case. I now have to consider what is a just sentence here.
- [14] In **King** which laid down general principles on sentencing offenders assisting the police the Lord Chief Justice said at page 120 '**no hard and fast rule can be laid down as to the amount by which a sentence can be reduced on a large scale informer by reason of the assistance he gives to the police. The court should first of all turn to the offences which the informer has admitted to assess their gravity and their number, thus enabling a starting figure to be reached'**.
- [15] The court then listed the factors which will result in a reduction of the starting figure. They are:- (1) the quality and quantity of the material disclosed by the informer; (2) its accuracy; (3) his willingness to confront other criminals or give evidence against them; and (4) the degree to which he put himself and his family at risk of reprisal.
- [16] The Court of Appeal in **Sivan** also listed factors to be considered when discounting sentence passed on a prisoner pleading guilty and assisting the police and the court. They are not dissimilar to those adverted to in **King** and are: - (1) the nature and effect of the information imparted; i.e. did it relate to trivial or serious offences? Was the information successful in bringing to justice persons who otherwise would not have been brought to justice? (2) the degree of assistance provided, i.e. was the prisoner prepared to give evidence if necessary to bring home the information which he had provided and to assist in

the conviction of other criminals? and (3) the degree of risk to which the prisoner by his actions exposed himself and his family.

- [17] The aggravating and mitigating factors have been properly pinpointed by the Crown and the mitigating factors are in the ascendancy. In addition I take into account the Prisoner's remorse and his explanation that he acted under duress at the part he played. I note that he has no prior convictions and I have also given considerable weight to the testimony of his employer. I note his willingness to give evidence on behalf of the Crown and the privations he has suffered as a result of having to be kept in protective custody. Clearly the fear for his safety is being taken seriously.
- [18] I am of the view that the Prisoner's significant assistance to the Crown as the Crown acknowledged merit special consideration. Ordinarily, this Prisoner had it not been for this factor would be looking at a prison term of about five years as although as the 'get away driver' he took no active part in the robbery itself, his role was part and parcel of the whole enterprise and was a crucial role although I recall that he stated that he acted out of some degree of duress. However, the observation of the English Court of Appeal in **Sivan** is apposite - "**the judge should tailor the sentence so as to punish the Prisoner but at the same time reward him so far as possible for the help he had given in order to demonstrate to other persons that it was worth while to disclose the criminal activity of others for the benefit of the law-abiding public in general.**"
- [19] In my judgment, having considered all the circumstances, the Prisoner's willingness to testify for the Prosecution and the invaluable help he has given ought to be reflected in his punishment and a suspended sentence will meet the justice of the case.

Conclusion

- [19] For the foregoing reasons I hereby sentence you, Hubert McLeod to 2 years imprisonment suspended for 2 years.⁹ In addition you are to pay compensation of \$400.00 to Bobby's

⁹ This term is dictated by the provisions of section 29 of the Code which does not enable a longer suspended sentence as it provides 'where a court passes a sentence of imprisonment for a term of not more than two years for an offence, it may order that the sentence shall not take effect unless, during a period

Supermarket (your part of the proceeds of the robbery) within 30 days, in default 3 months imprisonment. Time spent on remand must be taken into account in computing sentence.

Rita Joseph Olivetti
High Court Judge
British Virgin Islands

specified in the order, being not less than one year or more than two years from the date of the order, the offender commits in the Territory another offence punishable with imprisonment.'