

BRITISH VIRGIN ISLANDS
THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

BVIHCR: 2014/005

THE QUEEN

V

TIM DALEY

Appearances:

Mr. Valston Graham, Senior Crown Counsel for the Crown
Mr Patrick Thompson for the Defendant

2014: July 3rd

JUDGMENT

- [1] **Ellis J:** On an amended indictment filed on 15th May 2014, the Director of Public Prosecutions alleged that the Defendant, Tim Daley (1) on 10th September 2013 at Purcell Estate on the Island of Tortola in the Territory of the Virgin Islands, robbed Brewley's Superette, a business place of USD \$600.00 contrary to Section 210 of the Criminal Code of the British Virgin Islands; and (2) that on 10th September 2013 at Purcell Estate on the Island of Tortola in the Territory of the Virgin Islands, had in his possession a firearm with intent to commit an indictable offence, namely robbery contrary to section 27(b) of the Firearms (Amendment) Act 1993 of the Law of the Virgin Islands.
- [2] On 10th May 2014, the Defendant pleaded guilty to both counts on the indictment. A sentencing hearing was conducted on 22nd May 2014, and he is now before the Court for sentencing. The facts of the case are a matter of common ground between the Parties and are summarized below.

Agreed Facts

- [3] On Tuesday, 10th September 2013, Brewley's Superette opened for business with three employees on duty - Ms. Isherdai Tookanah, Mr. Carven Hughes and the store manager and Ms. Paulette Williams. Sometime at around 7:40 p.m., the Defendant entered the store premises dressed in a dark coloured t-shirt and a dark coloured cap with a red handkerchief covering his mouth and nose. The Defendant also carried a firearm in his hand.
- [4] At the time the Defendant entered the premises, Ms. Williams was at the cellular phone top-up machine; Ms. Tookanah was behind the counter where the cash register is located and Mr. Hughes was packing shelves. On entering the premises, the Defendant pointed the gun at Ms. Tookanah and said to her, "Miss, open the cash register". Ms. Tookanah did not comply and the Defendant continued to make the demand.
- [5] Ms. Williams thought that the firearm that the Defendant was carrying was an imitation firearm and decided to engage him. In response to his demand, she responded, "Open the machine?" She then retrieved a machete from behind the counter where she was located and confronted the Defendant by swinging it at him. The Defendant then step back, cranked the firearm and fired a shot in the direction of Ms. Williams. The bullet did not strike her but it struck the glass door of the drinks cooler located behind her.
- [6] Both Ms. Williams and Ms. Tookanah became fearful and ran to the back of the shop seeking safety. They left the cash machine unattended which enabled the Defendant to reach over the counter and open the cash machine by activating the eject button. He then took possession of a quantity of money which was inside the cash machine and fled the scene on foot.
- [7] On returning to the cash register, Ms. Williams observed that it was opened and that \$50 and \$20 denominations were missing.
- [8] A report was made to the police who later visited the Superette and conducted investigations. Officers observed that the cash register appeared to be disturbed from its original location and dusted it for latent fingerprints from the underside base of the counter and the register. A shell casing was also observed on the floor behind the counter and a projectile from inside the drinks cooler.

[9] On Friday 13th September 2013, the Defendant was arrested by the Police on suspicion of robbery and whilst in custody, he consented to the taking of his fingerprints for elimination purposes. These were compared to the latent fingerprints retrieved from the eject button on the cash register and the Police found sixteen ridge characteristics of the same sequence and relationship of the left middle finger. The Police concluded that the latent prints recovered from the register were made by the Defendant. The Defendant was formally arrested and charged for the offence of robbery.

THE OFFENCES

Robbery

[10] As indicated, the Defendant was charged with the offence of Robbery in respect of which section 210 (2) of the Criminal Code 1997 provides that;

"A person who commits robbery is guilty of an offence and is liable on conviction to imprisonment for life."

[11] The offence of robbery therefore carries the maximum penalty of life imprisonment. This penalty underscores the gravity of the offence and places it in the category of very serious offences such as murder, manslaughter, rape and grievous bodily harm which nearly always warrant custodial sentences.

[12] Both Counsels invited the Court to derive guidance from the UK Sentencing guidelines in respect of the offence of Robbery.¹ They agree that those guidelines have been cited by the Eastern Caribbean Court of Appeal and by this High Court. These guidelines contemplate that the offence of robbery covers a broad spectrum ranging from sophisticated bank robberies with multiple offenders to a street robbery or mugging.

[13] In the case of the latter, the guidelines characterize such robberies as those where the level of financial gain to the offender is likely to be relatively low and the victim may or may not be physically injured. They involved relatively minor physical force or although they may be intimidation. The sentencing range for this class is 18 months – 5 years. The next category involves the robbery of small businesses which typically are committed by a single offender using a real or imitation weapon to threaten the victims. Such businesses are usually targeted in the hopes of stealing significant amounts of property because of the lack of security systems

¹ Guidelines derived from R v Turner [1975] 61 Cr. App. R. 67 CA at page 91; R v Daly [1981] 3 Cr. App. R. (s) 340; R v Gould [1983] 5 Cr. App. R. (s) 72

and devices. The sentencing range in this category is 9 – 12 years or 7 – 9 years after a guilty plea.²

- [14] The other categories involve **(a)** violent personal robberies in the home where the sentencing range is 13 – 16 years or 10 – 12 years after a guilty plea; **(b)** less sophisticated commercial robberies committed by a single offender involving the use of a weapon to intimidate or threaten, and the sentencing range here is 13 – 16 years or 10 – 12 years after a guilty plea; and finally **(c)** professionally planned commercial robberies involving firearms and high value theft usually of banks and security vehicles. In this category the English Court of Appeal has recommended that the normal sentence should be 15 years if firearms were carried and no injury was done, with 18 years being the maximum for crimes which are not “wholly abnormal”. Recently, the Court of Appeal has held that 20–30 years with 15- 20 years after a guilty plea is the appropriate range for this category of offences.
- [15] This Court is satisfied that these Guidelines can appropriately be adopted not only because the maximum sentence for the offence is the same in the UK as in the BVI but because they recognize and apply the same sentencing principles which govern this Court. It is appropriate that any sentencer recognize that in assessing the seriousness of an offence, there will be levels of seriousness. In the case of robbery, the element of violence, the use of weapons and firearms, the nature and duration of the threat and intimidation, the extant injury to victims; the value of property taken and the degree of planning, organization and sophistication involved are key factors which must be weighed.
- [16] In the case at bar, Counsel have agreed that the offending involves the robbery of a small business and falls squarely within the second category and range mentioned. It was submitted that robberies of small business although serious, are not in the same category of seriousness as more sophisticated commercial robberies. In keeping with the adage that the sentence should be no longer than necessary to meet the penal purpose that the Court intended,³ Counsel for the Defendant submitted that as his offending amounts to a robbery of a small business where the sentencing range is 9-12 years with a sentence in the region of 7 – 9 years on a guilty plea. The Court accepts this contention.

² Attorney General's Reference (No. 7 of 1992) Lord Taylor CJ stated that the type of offence which involves somebody committing robbery at a small shop or other premises would normally attract a sentence of at least 7 years imprisonment on a plea of guilty.

³ Dwright Dookie v R Criminal Appeal No.1 of 2007 per Barrow JA

- [17] During the course of their submissions, both Counsel for the Prosecution and Counsel for the Defence cited a number of regional and local authorities. The Court is grateful for the comparative guidance afforded. However the Court found the following cases particularly relevant on the facts of this case. In **R v Seantroy Hanley, Selroy Hanley and John Harvey**⁴ the Defendants were indicted on 3 counts including robbery, aggravated burglary and criminal damage to property. The defendants used a firearm to rob a store of merchandise valued at \$7,000.00. All defendants pleaded guilty at the first available opportunity. The Court sentenced the first two defendants to 8 years (they were described as career criminals) and the third to 3 years imprisonment.
- [18] The Court also noted **Allan Wilson v R**. In that case, the Defendant pleaded guilty to robbing a bus conductor of EC\$220.00 and was sentenced to 10 years imprisonment. On appeal against sentence, the Court of Appeal reduced the sentence to 5 years. The Court of Appeal found that there were substantial mitigating factors namely, that Mr. Wilson was a young man of 18 years old and a first offender. He co-operated fully with the police and pleaded guilty at the first available opportunity. The Court opined that the early guilty plea would account for a one third reduction of the sentence and the other strong mitigating circumstances should account for at least a deduction of a few additional years.
- [19] In **R v Stanley Bertie Jr**⁵, the defendant was charged with one count of robbery. Along with another robber, he met the virtual complainant on the road in the early hours of the morning. They knew that the complainant had in his possession the payroll for employees at Guana Island as the defendant had worked there before. Along with the other robber (who had a gun), he came upon the complainant and fought with him for the money. The defendant was knocked down by the complainant and held until the police came. The other robber fled the scene with the money. The defendant pleaded guilty at the first available opportunity and was sentenced to 7 years imprisonment. He had no previous convictions.

Possession of a Firearm with intent to commit an indictable offence

- [20] Section 27 (B) of the Firearms (Amendment) Act 1993 provides that the maximum penalty on conviction on indictment for possession of a firearm with intent to commit an indictable offence is imprisonment for a term of twenty (20) years.

⁴ Criminal Case No. 5 of 2009 Judgment delivered on 3rd April 2009 (BVI)

⁵ Criminal Case No 4 of 2006 Judgment delivered February 2006 (BVI)

[21] Counsel for the Prosecution submitted that the sentencing guidelines for firearm offences originate from **R v Avis**⁶ which have been applied by the Eastern Caribbean Court of Appeal in **Kashorn John v Commissioner of Police**.⁷

[22] **R v Avis** was decided in December 1997 and in that judgment, Lord Bingham CJ offered guidance to sentencers about the levels of sentence which would be appropriate for a variety of offences taking account of the ambit of the Firearms Act 1968, as amended by the wide-ranging, recent statutory provisions of the Criminal Justice and Public Order Act 1994. It was suggested that by addressing a series of questions the sentencing court would provide itself with appropriate indications of the true extent of the defendant's culpability.

(1) What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.

(2) What (if any) use has been made of the firearm? It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm, the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.

(3) With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.

(4) What is the defendant's record? The seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence.

⁶ [1998]1 Cr. App. R. 420, also approved in *R v Wilkinson and Ors.*

⁷ Criminal Case No. 2007/086 (SVG) and *R v Shaunlee Fahie*

[23] The position taken by Bingham CJ in 1997 has repeatedly been referenced and mirrored in our Courts. There is a clear need to discourage the unlawful possession and use of real and imitation firearms and to give effect to the clear intention of Parliament to stamp out the burgeoning scourge in our peaceful societies. In that vein, Parliament has continually increased the maximum penalties for firearm offences. There can therefore be no doubt the offence before the Court is a serious one which warrants a custodial sentence.

[24] Bingham CJ's judgment has been described as a watershed because it clearly signaled that the previous sentencing judgments would render little assistance going forward. The learned Lord Chief Justice observed that

“...this Court has no hesitation in stating that henceforth those cases cannot properly be regarded as guidelines to the appropriate level of sentencing in firearms cases. At the present time, the use of firearms and in particular sawn-off shotguns is becoming ever more prevalent and the courts must not be inhibited from passing sentences designed to deter those minded to use a firearm for whatever purpose and in whatever context.”

[25] This position was endorsed in **Kenrick Marksman v Commissioner of Police**⁸ by Sir Dennis Byron C.J. who, in laying down guidelines for sentencing in firearm offences pointed out that;

“Firearm offences are on the rise... and it would be rare for a magistrate not to impose a custodial sentence for an offence involving the use of an unlicensed firearm...”

[26] By way of guidance, Counsel for the Prosecution cited the cases of **R v Terry Smith**⁹ in which the Defendant was charged with a three count indictment which included a charge for possession of a firearm with intent to put a person in fear. His original plea of not guilty was later changed to guilty after the trial commenced. The Defendant was sentenced to 5 years for possession of a firearm with intent to put a person in fear. In **R v Denise Lettsome**¹⁰ the Defendant was charged with multiple counts including possession of a firearm with intent to put in fear. Following a trial, the defendant was found guilty and sentenced to 5 years.

⁸ Mag. Cr. App. No. 41 of 2003 (SVG) 6/12/04

⁹ Criminal case No. 21 of 2006

¹⁰ Criminal Case No 4 of 2009

- [27] **In R v Shaunlee Fahie**¹¹ on appeal from the High Court in which the trial judge sentenced the defendant to 2 years imprisonment for the offence of keeping an unlicensed firearm (this offence carries a maximum penalty of either a fine of \$10,000.00 or imprisonment for a term of 10 years.) On appeal, the Court considered that notwithstanding the guilty plea and other mitigating factors, the sentence of two years was manifestly low. The Court held that the sentencing judge had failed to have regard to all the aggravating factors and circumstances and increased the sentence to three years.
- [28] Finally, Counsel cited the case of **Spence v R**.¹² In that case, the Appellant appealed against conviction of possession of a firearm with intent to endanger life contrary to s. 16 of the Firearm Act 1968. He was sentenced to 6 ½ years imprisonment. His appeal was dismissed.

Aggravating and Mitigating Factors

- [29] Both Prosecution and Defence Counsel agreed that the aggravating features in respect to the offence of robbery include (1) the fact that a real firearm was utilized in carrying out the robbery; (2) the fact that the firearm was discharged; (3) multiple offending – there was more than one offence committed by the offender; and (4) the robbery was committed at night. In addition, Counsel for the Prosecution also advanced the following aggravating factors, the prevalence of the offence of robbery in the Territory¹³ and the Defendant's use of a mask to conceal his identity.
- [30] Applying the guidance in **R v Avis**, the aggravating factors which operate in the case of the second count on the indictment would include the fact that (1) a genuine loaded firearm was utilized; (2) this firearm was utilized in furtherance of an indictable offence, robbery; and (3) was utilized to cause fear of violence in the employees at the Suprette and to ensure their cooperation.
- [31] In so far as mitigating factors are concerned, both Counsel agree that the following factors are relevant: (1) the Defendant pleaded guilty at the first available opportunity; (2) the Defendant's age/ youth at the time of committing the offence; (3) the Defendant was unaccompanied during the offence; and (4) there were no injuries suffered by the victims. Counsel for the Defendant also submitted that the fact that this was the Defendant's first offence involving violence, and the fact that

¹¹ Criminal Appeal No. 3 of 2008

¹² [2009] EWCA Crim. 2736

¹³ R v Shaunlee Fahie Criminal Appeal No. 3 of 2008

he clearly cooperated with the Police (voluntarily providing his fingerprints for comparison) and his expression of remorse as additional mitigating factors. Counsel for the Prosecution did not readily accept that this amounted to cooperation, but he did concede that the Defendant presented no difficulties to the Police.

- [32] Counsel for the Defendant submitted that the mitigating factors outweigh the aggravating factors and as such any sentence ought properly to be at the lower end of the scale.

Defendant's Personal Circumstances and Plea in Mitigation

- [33] Counsel for the Defendant advised the Court that he is a believer of the Territory, born on 30th December 1991. He would therefore have been 21 years old when he committed the offence. He has a one year old daughter but is unemployed. He comes from a close knit family who has expressed their absolute consternation and disappointment in his actions. Counsel indicated that there is nothing in his personal circumstances which would have indicated a propensity to commit such offences. He submitted that the offending is completely out of character for the Defendant.

- [34] Counsel for the Defendant urged the Court to impose a term which would allow the Defendant to have some hope of resuming his life while he is still a young man.

- [35] When he addressed the Court, the Defendant indicated his remorse and his clear understanding of the impact which his actions would have had on the store employees. He indicated that he committed these crimes because he needed to secure funds in order to feed and care for his daughter. He stated that that day a friend had promised him some funds which never materialized. In desperation he felt compelled to rob the Superette. He frankly conceded that he made the wrong decision and he apologized to the store employees and acknowledged that he would have taken away their sense of security.

- [36] Prior to his incarceration, he was a self-employed truck driver and would also have worked for his parents. It appears that this may not have been a satisfactory arrangement as the Defendant indicated that a big part of the reason for his offending was that he no longer wished to depend on them. He told the Court that he had not completed High School and that he had never held a real job.

- [37] The Defendant has been in custody since 16th September 2013 and has previous convictions which he secured as a juvenile in 2010, involving failure to observe

conditions of probation, damage to property and threatening language. In addition, he has a conviction for a minor road traffic offence. Counsel submitted that none of these convictions are for offences of violence. He argued that the unspent convictions are of limited weight and value.

The Sentence

[38] As the sentencer, this Court must compare the case at bar with cases from this jurisdiction involving this offence and this has been done. The Court has also born in mind that the main objectives of criminal sanction are as set out in the case of **Desmond Baptiste et al v R**¹⁴:

(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.

[39] In the Court's view, the Defendant has committed grave offences which warrant a custodial sentence. A strong message also has to be sent out that crime has no place in this Territory and those who seek to prey upon the hard working innocent citizens will receive the full brunt of the law. In sentencing the Defendant, the Court is conscious of the fact that there is a need to send the message out to all residents in this Territory that the use of firearms in order to commit serious crimes which threaten the safety, security and well-being of this Territory's citizens will not be tolerated. At the same time, the Court must be prepared to temper justice with mercy.

[40] The offences with which the Defendant has been charged have been deemed both by Parliament and by the courts to be of a most serious nature. It is therefore clear that the Defendant faces serious penalties. In the case of the first count, the maximum sentence is life imprisonment and in the case of the second count, it is 20 years. The Court has given this due regard. The Court has also taken into consideration the principles of sentencing as cited herein. Upon examination of the

¹⁴ Crim. App. No. 8 of 2008 (SVG)

facts in this case as established by the Prosecution and accepted by the Defendant, the Court finds that there are significant aggravating factors which operated.

[41] However, under the laws of this Territory, the Court has wide discretion in sentencing. In that vein, the Court has weighed the mitigating and aggravating factors (identified by Counsel and accepted and applied by this Court). The Court will give no weight the Defendant's previous convictions which were not relevant as they did not involve the use of violence. The Court has also taken into careful consideration Learned Counsel's plea in mitigation as well as the Defendant's personal statement of remorse and plea for leniency. The Court has not ignored the fact that the Defendant is a young man and that there is a potential for rehabilitation. He pleaded guilty at the first opportunity and has no prior convictions involving violence. He was also remorseful.

[42] In the Court's view, the dicta in **R v Wilkinson and Ors, Attorney General's Reference No 43 of 2009, R v Bennett 2009 EWCA Crim. 1925** is particularly correct. Here the Court observed that -

"The gravity of gun crime could not be exaggerated as guns kill, maim, terrorise and intimidate. Whenever a gun is made available for use or is used, the paramount consideration when sentencing is public protection. Deterrent and punitive sentences are needed and should be imposed. Possession of a firearm without more and without any aggravating factors beyond possession is a grave crime and should be dealt with accordingly."

[43] The courts have a role to play in ensuring that the citizens are protected from criminals. In that vein, sentences which are passed must be aimed at ensuring that the wrongdoer does not repeat the offence and that potential criminals get the message that society will not countenance such criminality.

[44] Having considered all of the circumstances of this case, including the useful guidance afforded by the United Kingdom Sentencing Guidelines (for sentencing range robberies of small businesses) and the comparative local and regional authorities, this Court is obliged to impose a custodial sentence in respect of both counts. Notwithstanding his expressed justifications, it is critical that the Defendant feels the Court's censure for his actions. The Court's sincerely hopes that the sentence will facilitate rehabilitation and will discourage recidivism.

- [45] Having considered all of these matters, the Court sentences the Defendant as follows:
- i. In respect of count 1 the Defendant is sentenced to 7 years imprisonment.
 - ii. In respect of count 2 the Defendant is sentenced to 4 years imprisonment.
- [46] On the facts of this case, the use of a firearm facilitated the primary offence of robbery, and is not distinct and independent of it. In the Court's view, a consecutive sentence would be artificial.¹⁵ The sentences are therefore to run concurrently.
- [47] Counsel for the Prosecution has advised the Court that the Defendant has been on remand since 13th September 2013. The Defendant is therefore entitled to be credited for the time spent on remand. The Court therefore orders that his sentences are to commence from the date when he was imprisoned on remand to wit, 13th September 2013.
- [48] The Defendant has stated that he is remorseful and that he has reflected on his actions. The Court sincerely hopes that he will use the time of his incarceration to positively redirect his life.



Vicki Ann Ellis
High Court Judge

¹⁵ R v Johnson [2005] EWCA Crim. 2281; Attorney General's Reference No. 21 and 22 of 2003