

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

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CRIMINAL CASE NO. 4 OF 2014

BETWEEN:

THE QUEEN

AND

KEVIN SPRAUVE

Appearances:

Mr. Valston Graham, Senior Crown Counsel for the Crown
Ms. Jennifer Jarvis for the Defendant

2014: July 18th

JUDGMENT

- [1] **Ellis J.**, Kevin Sprauve (“the Defendant”) was arraigned on an amended indictment filed on 15th May 2014 which charged him with three counts. Under count 1, he was charged with causing grievous bodily harm contrary to section 163 of the Criminal Code 1997 of the Laws of the Virgin Islands. In count 2, he was charged with aggravated burglary contrary to section 212 of the Criminal Code 1997 of the Laws of the Virgin Islands. Count 3 charged the Defendant with kidnapping contrary to section 195 of the Criminal Code 1997 of the Laws of the Virgin Islands.
- [2] The Defendant pleaded guilty to all three counts on the indictment. A sentencing hearing was conducted on 13th June 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 of the Case

- [3] Ms. Verna Smith (“the Complainant”) resides at Sea Cow’s Bay on the Island of Tortola. On the 2nd of December 2013, she retired to bed sometime just after 10:00 pm. The complainant was asleep lying on her stomach when she awoke and discovered the Defendant sitting on her back. The Complainant screamed out, **“Kevin, what do you want?”** The Defendant responded, **“Me have to kill you”**. He then placed an object next to the Complainant’s throat and told her, **“If you scream, I will cut your throat the same way they cut goat throat”**.
- [4] The Defendant then proceeded to stuff a piece of material in the Complainant’s mouth. He asked her for the location of her purse and she took him to it. He searched her purse and on discovering \$4.00 in cash said to the Complainant, **“This is what I pick your lock for - \$4.00, you should have a lot more money”**. The Complainant then told the Defendant that she can take him to the bank and get more money.
- [5] He asked her for the keys for the vehicle that was in her yard and she told him where to locate the keys. Holding an object to her neck, he led her to the vehicle. The Defendant placed her in the back seat of the car and drove the car with the Complainant’s hands still tied and her face covered with the pillow case. During the journey, the Complainant was able to undo her hands and lift the pillow case and she observed that they were in the Havers area on Tortola heading in a westerly direction.
- [6] The Defendant made a right turn off the Drakes Highway into the Cox Heath area. At that stage, the Complainant opened the car door and told the Defendant that she was not going anywhere with him. When he stopped the car, she opened the door and ran towards Drakes Highway. He ran after her, caught up with her and asked her to return to the car. She refused. The Defendant tried to get her back to the car but was unsuccessful as she resisted.
- [7] At that time, a vehicle was passing and the Complainant screamed for help. He let the Complainant loose and headed to the Complainant’s car. The driver of the passing vehicle stopped and the Complainant ran towards that vehicle for help. As she was trying to get into the vehicle, the Defendant, driving at a fast speed, drove the vehicle at her running over her right foot. Holding her right foot in her hand, the Complainant hobbled across the road and the Defendant turned the car around and struck the Complainant a second time hitting her on her left side. In the

process he also caused damage to the vehicle that had stopped to assist the Complainant.

- [8] After observing what took place, the driver of the passing vehicle then drove to the West End Police Station to seek assistance. The Defendant followed the driver for a while and then drove in a different direction. The driver of the passing vehicle returned with the Police to the scene, where the Complainant was met close to the sea. She appeared to be seriously injured. She was taken to the Peebles Hospital where she received medical treatment and was admitted to the Hospital. The Defendant was subsequently arrested and charged.

THE OFFENCES

Causing Grievous Bodily Harm

- [9] As indicated, the Defendant was charged with the offence of causing grievous bodily harm in respect of which section 163 of the Criminal Code 1997 provides that:

“Any person who unlawfully and maliciously by any means whatsoever for causing grievous bodily harm to any person commits an offence and is liable on conviction to imprisonment for life.”

- [10] The Defendant is also charged with the offence of aggravated burglary. Section 212 (2) of the Criminal Code 1997 provides that:

“Any person who is convicted of aggravated burglary is liable to imprisonment for life.”

- [11] These two offences carry 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 and rape which nearly always warrant custodial sentences.

- [12] Finally, the Defendant is charged with the offence of kidnapping. Section 195 of the Criminal Code 1997 stipulates that:

“Any person who kidnaps any person is liable on conviction to imprisonment for a term not exceeding 10 years.”

Authorities

- [13] Counsel for the Prosecution assisted the Court by providing many local and UK authorities on causing grievous bodily harm.
- [14] Counsel also referred the Court to the UK Sentencing Guidelines with respect to Wounding and Inflicting Grievous Bodily Harm with Intent, which are useful because the same maximum penalty operates with respect of this offence. The Guidelines categorize the seriousness of the offending in the following way:
- i. Category 1: Greater harm (serious injury must normally be present) and higher culpability- sentencing range 9 - 16 years imprisonment – starting point 12 years
 - ii. Category 2: Greater harm (serious injury must normally be present) and lower culpability; or lesser harm and higher culpability - sentencing range 5 - 9 years imprisonment - starting point 6 years
 - iii. Category 3: Lesser harm and lower culpability – sentencing range 3- 5 years imprisonment – starting point 4 years
- [15] The local authorities referred to include **Elton Beazer & Denroy Stevens v. The Queen**¹, **R. v Ovel Matthew**², **R v Samuel James**³ and **R v Danny Benjamin**⁴
- [16] In **Elton Beazer & Denroy Stevens**, the appellants were both charged with two counts of causing grievous bodily harm with intent. Both men attacked two bar maids at a bar in Virgin Gorda. The men used sticks and their fists to repeatedly beat the barmaids, beginning in the bar and ending in an adjacent marina. Both men pleaded guilty and were sentenced to seven (7) years on each count to run concurrently. Both men appealed their sentences. On appeal, the sentence of Beazer was reduced to 5 years imprisonment. The Court of Appeal upheld the 7-year sentence of Stevens.
- [17] In **R v Ovel Matthew**, the defendant was charged with unlawful and malicious wounding with intent and criminal damage. The attack arose out of a dispute he had with the virtual complainant (who was his girlfriend) with reference to her ex-boyfriend being in and repairing her jeep. Mr. Matthew punched the virtual

¹ Criminal Appeal No. 1 of 2001 (BVI)

² Criminal Case No. 28 of 2009 (BVI)

³ Criminal Case No. 33 of 2011 (BVI)

⁴ Unreported

complainant on her face and head, choked and kicked her and tried to run her over with her vehicle. He also choked and kicked her. This happened on a public road. She spent 3 days in the hospital. He pleaded guilty at the first available opportunity and was sentenced to 5 years imprisonment. He was also ordered to pay compensation for her injuries.

- [18] In **R v Samuel James**, the defendant was indicted for attempted murder but was found guilty of wounding with intent. The defendant using a machete, seriously inflicted injuries to his wife in the presence of their minor children. She suffered significant injuries to her mouth, neck, armpit, shoulder, hands and forearm. The defendant was sentenced to 12 years imprisonment.
- [19] In **R v Danny Benjamin**, the defendant was found guilty on two counts of wounding with intent to cause grievous bodily harm. He, along with the complainants, were patrons at a local bar. Following a confrontation with a patron, the defendant returned with a machete and attacked that patron. In the process, one of the complainants sought to disarm the defendant and received injuries to his head. The second complainant sustained injuries to his arm. The defendant was sentence to 10 years imprisonment on each count.
- [20] In respect to the offence of aggravated burglary, Counsel referred the Court to **R v Damian Hodge**⁵, **R v Keno Allen**⁶, **David Maduro v R**⁷, **R v Seanroy Hanley et al.**⁸, and **R v Shaulee Fahie**⁹.
- [21] In **R v Damian Hodge**, the defendant was found guilty of aggravated burglary - one count of robbery and one count of occasioning bodily harm. The defendant and another man armed with a gun robbed the owner and a patron of a local restaurant and bar. He was sentenced to 15 years imprisonment for robbery and 10 years imprisonment for aggravated burglary running concurrently.
- [22] In **R v Keno Allen**, the defendant was indicted on one count of aggravated burglary and one count of robbery. He entered the dwelling house of the complainant, used a knife from her home to intimidate her, tied her up and robbed

⁵ Criminal Case No. 13 of 2001 (BVI)

⁶ Criminal Case No. 1 of 2005 (BVI)

⁷ Criminal Appeal No. 3 of 2005 (BVI)

⁸ Criminal Case No. 10 of 2007 (BVI)

⁹ Criminal Appeal No. 5 of 2009 (BVI)

her of an undetermined sum of cash. He pleaded guilty to both counts and was sentenced to 8 years imprisonment on both counts.

[23] In **David Maduro v R**, the defendant armed with a shotgun and machete, burgled and entered the dwelling house where his wife was staying and inflicted fatal injuries to his wife, her younger brother and brother in law. He was convicted of two counts of wounding and sentenced to 7 years each and one count of aggravated burglary for which he was sentenced to 10 years. These sentences were confirmed by the Court of Appeal.

[24] In **R v Seantroy Hanley, Selroy Hanley and John Harvey**¹⁰, 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.

[25] **R v Shaulee Fahie**, the defendant pleaded guilty to two counts of aggravated burglary and two counts of keeping an unlicensed firearm. He was sentenced to 3 years imprisonment in respect of the counts of aggravated burglary. On appeal, this sentence was increased to 7 years for each count of aggravated burglary to run concurrently.

[26] The UK Sentencing Guidelines are also a useful guide. The Council has categorised the offence category in the following way:

- i. Category 1: Greater harm and higher culpability - sentencing range 9–13 years custody – starting point 10 years
- ii. Category 2: Greater harm and lower culpability or lesser harm and higher culpability- sentencing range 4–9 years custody – starting point 6 years
- iii. Category 3: Lesser harm and lower culpability - sentencing range 1–4 years custody – starting point 2 years

[27] In respect to the offence of kidnapping, Counsel submitted that there is wide variation in seriousness between one instance of kidnapping and another. At the top of the scale are carefully planned abductions where the victim is sued as a hostage and where ransom is demanded. The UK Guidelines prescribe that such

¹⁰ Criminal Case No. 5 of 2009 Judgment delivered on 3rd April 2009 (BVI)

offending will seldom be met with less than 8 years imprisonment. At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all. They very often arise as a sequel to family tiffs and lover's disputes and seldom attract a sentence in the range of 18 months and 24 months imprisonment.

- [28] Counsel submitted that the facts of this case place the offending within the middle of the spectrum. The relevant factors informing this submission include: (1) the facts do not disclose premeditated planning and the kidnapping arose to the limited cash the complainant had on hand; (2) this was not a case of kidnapping for ransom; (3) the complainant suffered significant injuries associated with the kidnapping; (4) an unidentified weapon was used and the complainant's hands were tied and her face covered during the ordeal; and (5) the period of detention was not considerable.
- [29] In the Eastern Caribbean Supreme Court, charges of this nature are a rarity. There are very few authorities or decisions readily available within our region which offer any definitive sentencing guideline for the case at bar. In **Director of Public Prosecutions v Jahmana Walters and Others**¹¹, four defendants were all found guilty on two counts of kidnapping. The Court sentenced Jahmana Walters, Ali Percival, Clayton Laws and Jermaine Riley to each serve 25 years imprisonment with hard labour on each count. Sentences to run concurrently.
- [30] In **the State v Webster Edmond**¹², at the end of the virtual complainant's testimony, Learned Counsel for the Defendant applied to the court for the indictment to be re-read to the defendant whereupon he pleaded guilty to Count 1 - Kidnapping, Count 4- Unlawful Sexual intercourse, Count 5 - Possession of Ammunition with intent to endanger life and Count 6 - Possession of a firearm with intent to endanger life. In respect to the kidnapping charge, the Court sentenced the defendant to four years reduced by 20% for the late guilty plea. The defendant was therefore sentenced to 3 years and 2 ½ months.
- [31] In that case, the learned Stephenson- Brooks J. very helpfully examined the English authorities, including **R v Spence and Thomas**¹³ in which Lord Lane CJ noted:

¹¹ Criminal Case No. 0045/2012 (SKM)

¹² Criminal Case No. 013 of 2012 (DOM)

¹³ (1983) 5Cr.App.R.(S.) 413

"In this case it was held that there is a wide possible variation in seriousness between one instance of kidnapping and another. At the top of the scale comes the carefully planned abductions where the victim is used as hostage or where ransom money is demanded. Such offences will seldom be met with less than 8 years imprisonment or thereabouts. Where violence or firearms are used, there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer than that. At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all. They very often rise as a sequel to family tiffs or lovers disputes and seldom require anything more than 18 months imprisonment, and sometimes a great deal less. "

- [32] In **R v Brown**¹⁴, the defendant kidnapped a young lady by forcing her into a car and causing minor injuries in the ensuing struggle. He was sentenced to five years on the kidnapping charge.
- [33] In **A-G's Reference**¹⁵, the offender was convicted of kidnapping and indecently assaulting a seven year old girl whom he enticed into his car. After assaulting her, he returned her to the street where he found her. In the Court of Appeal, Rose LJ indicated that a sentence in the order of eight or nine years would have been appropriate.
- [34] **R v Dzokamshure**¹⁶, the Appellant's relationship with a woman for six months had ended. Months later he went to her home, broke his way in, punched her, dragged her out and forced her into her car. Another man was seated therein. The appellant drove the car on the motorway and prevented her from answering a call on her mobile phone. Eventually, he stopped on a slip road and allowed her to get out. Previous good character. Guilty plea. The victim had indicated that that she did not want him to serve a custodial sentence and was unwilling to give evidence. Sentence of 18 months' imprisonment upheld.

¹⁴ (1985) 7 Cr App R (s) 15

¹⁵ [1999] 2 CR App R (S) 336

¹⁶ [2009] 1 Cr. App. R. (S.) 112

Defendant's Personal Circumstances and Plea in Mitigation

- [35] Counsel for the Defendant submitted to the Court that he is a believer. He completed his high school education and for 6 years worked as a customs officer stationed at the Territory's ports. Prior to this offence he was a self-employed landscaper, electrician and painter.
- [36] He is a 38 year old father of 3 children- a 13 year old son and two daughters aged 11 and 9. While the children do not live with him, he was involved in their lives and up until his arrest, he was taking care of their financial needs. He has 5 brothers and he assist in the support of one brother who is at college in the US. His mother is in poor health and he also assists her with her mortgage payments.
- [37] Counsel submitted that the Defendant is fully aware of his obligations to his family and he is contrite and remorseful about his actions. She told the Court that the Defendant's offending can be attributed mainly to his dependency on alcohol. The Defendant became an alcoholic after the unsolved murder of his brother in 2011. He began to drink heavily and smoke marijuana.
- [38] In relation to the actual offending, Counsel for the Defendant submitted that the Defendant had been drinking heavily all day prior to his offending. In fact, she indicated that he had been drinking the entire week without a break. Normally during such binges, the Defendant would retire to the Complainant's house to sober up. He was familiar with her house because he had been in an 11-year relationship with the Complainant's sister. He was therefore familiar with her residence. Counsel submitted however that the Defendant has no recollection of the events in question. In fact, she indicated that the Defendant had no memory of how he got to the Complainant's residence.
- [39] Counsel submitted that memory impairment is an unfortunate complication of the Defendant's alcohol dependency and she submitted that this is the major cause of his offending. She further submitted that the Defendant's actions do not disclose any premeditation and despite the serious harm caused to the victim, she submitted that he is not a fit candidate for the higher end of the sentencing scale.
- [40] The Defendant voluntarily admitted himself into the Sandy Lane Centre in 2011 and underwent a 20-day rehabilitation programme. Counsel referred the Court to a Report dated 29th May 2014, in which the Manager of that facility indicates that the Defendant was a resident client during the period June – July 2011. The Report states that the Defendant realised that he had a drinking problem which was

unmanageable. Following this programme, the Defendant admitted himself to the Pivot Centre in Connecticut USA for a further intense treatment. It appears that he spent 4 months at that Centre. Following his discharge, the Defendant relapsed.

[41] In a medical report dated 18th December 2013, Dr June Samuel, Consultant Psychiatrist, indicates that the Defendant was assessed as alcohol dependency disorder with memory impairment most likely related to chronic alcohol use. His liver functions were abnormal and his blood alcohol levels were very high and he was treated from withdrawal syndrome and found to have had a major depressive disorder. He was started on a course of medication and counselling. He was also found to have a below average medium term memory. In summary, the doctor concluded that he has primarily alcohol dependent disorder with secondary and memory impairment, which would continue to deteriorate with continued alcohol use. The doctor concluded that memory of incidents which happened while under the influence of alcohol are not likely to be retrievable.

[42] The practical effect of these difficulties was recounted in a letter written by Angela Isaac, the mother of the Defendant's son. She recounts that he began drinking heavily and that during these times, he would speak to her about something and then call again later the same day and tell her the same thing. When she confronted him, he would swear that he had not spoken to her prior. She recounts the several unsuccessful attempts at rehabilitation and she says that prior to the incident, the Defendant showed signs that he was talking out of his mind.

[43] She also states that he is close to his children and his family and that prior to this incident, he has never attempted to harm them or anyone else.

Aggravating and Mitigating Factors

[44] In respect to the offence of unlawful wounding with intent or causing serious grievous bodily harm, the UK Sentencing Guidelines recommend that the court should determine culpability and harm caused or intended by reference to the factors: (i) Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present); (ii) Victim is particularly vulnerable because of personal circumstances; (iii) Sustained or repeated assault on the same victim; (iv) Injury which is less serious in the context of the offence; (v) Significant degree of premeditation; (vi) Use of weapon or weapon equivalent (for example, shod foot, head-butting, use of acid, use of animal); (vii) Intention to commit more serious harm than actually resulted from the offence; (viii) Deliberately causes more harm than is necessary for commission of

offence; (ix) Deliberate targeting of vulnerable victim; (x) Leading role in group or gang; and (xi) Offence motivated by, or demonstrating hostility based on the victim's age, sex, gender identity (or presumed gender identity).

[45] Other aggravating factors increasing the seriousness of the offence include: (i) Location of the offence; (ii) Timing of the offence; (iii) Ongoing effect upon the victim; (iv) Commission of offence whilst under the influence of alcohol or drugs; (v) Abuse of power and/or position of trust; (vi) Exploiting contact arrangements with a child to commit an offence; and (vii) Previous violence or threats to the same victim.

[46] In the context of aggravated burglary, the aggravating factors listed by the UK sentencing guidelines include: (i) theft or damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value); (ii) Soiling, ransacking or vandalism of property; (iii) Victim at home or on the premises (or returns) while offender present; (iv) Significant physical or psychological injury or other significant trauma to the victim; (v) Violence used or threatened against victim, particularly involving a weapon; (vi) Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation); (vii) A significant degree of planning or organisation; (viii) Equipped for burglary (for example, implements carried and/or use of vehicle); and (ix) Weapon present on entry.

[47] In the case at bar, Counsel for the Prosecution submitted that that the aggravating features in respect to the offence of causing grievous harm and the offence of aggravated burglary include: (1) the seriousness of the offences; (2) the prevalence of offences; (3) the serious degree of harm or injury caused to the complainant; (4) the deliberate causing of more harm than is necessary for the commission of the offence; and (5) the use of a weapon or a weapon equivalent (motor vehicle).

[48] These factors were not disputed by Counsel for the Defendant. In addition, it is clear to the Crown that the following factors are also aggravating – (1) the timing of the offence of aggravated burglary. The facts reveal that the offence took place at night while the victim was at home and sleeping; (2) the facts also reveal that there was a repeated assault on the victim; (3) it is apparent from the victim's physical or psychological injury that there are ongoing effects on the victim who has been unable to return to normal functioning since this incident.

[49] The Crown Prosecution Service Legal Guidance for Kidnapping lists the aggravating features for this type of crime as:

- i. Where there are number of perpetrators;
- ii. Where the victim is very vulnerable;
- iii. What was the duration of the loss of liberty;
- iv. The use, brandishing or possession of weapons;
- v. Were other offences committed;
- vi. What was the extent of the concealment;
- vii. How unpleasant were the circumstances of detention;
- viii. What was the effect upon the victim and other persons such as the family of the victim;
- ix. Were there possible sinister motives of the perpetrator such as terrorism;
- x. Was there a ransom involved;
- xi. Were there threats intended to discourage the victim from reporting the offence.

[50] The mitigating circumstances are the absence of the above listed features.

[51] As noted earlier, Counsel for the Prosecution submitted that in respect of the offence of kidnapping, the particular facts and features in this case place the offending within the middle of the spectrum and the Court accepts the conclusions drawn by Counsel at paragraph 27 above. In the Court's view, an additional aggravating feature in case of this offence is the fact that there were other offences committed by this Defendant.

[52] It is common ground between the Counsel that the mitigating factors include (1) that the Defendant pleaded guilty at an early opportunity; and (2) that the Defendant has no previous convictions. However, Counsel for the Defendant also submitted that the Defendant's alcohol dependency syndrome is a mitigating rather than an aggravating factor which the Court must have regard to in sentencing. She referred the Court to the Defendant's medical/psychiatric report and to the conclusions drawn there. Counsel also referred the Court to a number of English authorities including **R v Dietschmann**¹⁷, **R v Tandy**¹⁸ and **R v Wood**¹⁹

¹⁷ [2003] UKHL 10

which she submitted support the view that a defendant's alcohol dependency should be taken into account by a sentence. They reflect that in order to be a viable defence, a defendant must demonstrate that he was no longer able to resist the impulse to drink, that the drinking was involuntary and led to an abnormality of mind at the time of the offending.

[53] Having reviewed these authorities, the Court is satisfied that they deal principally with the defence of diminished responsibility as it relates to the offence murder. None of these cases address the application of alcohol dependency as a mitigating factor in sentencing. Indeed, from all appearances the legal position remains that addictions will not usually mitigate a sentence where the offence is serious particularly where there is premeditation in the commission of that offence. Indeed, in many cases, intoxication is seen as an aggravating rather than a mitigating factor.²⁰

[54] However, within recent times, the courts have held that the Defendant's addiction may be relevant if it is likely to have an effect on the prospects of re-offending or rehabilitation. So that by itself, an addiction will not ordinarily be a mitigating factor²¹, nor will a history of addiction be a mitigating factor to sentence. The position was very helpfully reflected by the New South Wales Court of Appeal in **R v Henry (1999) 46 NSWLR 346**. At paragraph 206 of the judgment, Spigelman CJ made clear that an offender's drug addiction is not a matter in mitigation:

"I attach particular significance to the impact that acknowledgment of drug addiction as a mitigating factor would have on drug use in the community. The sentencing practices of the courts are part of the anti-drug message, which the community as a whole has indicated that it wishes to give to actual and potential users of illegal drugs. Accepting drug addiction as a mitigating factor for the commission of crimes of violence would significantly attenuate that message. The concept that committing crimes in order to obtain moneys to buy an illegal substance is in some way less deserving of punishment than the commission of the same crime for the obtaining of monies for some other, but legal, purpose is perverse."

¹⁸ [1989] 1 WLR 350

¹⁹ [2008] EWCA 1305

²⁰ An offender's intoxication can aggravate the crime because of the recklessness with which the offender became intoxicated and proceeded to commit the crime.

²¹ R v Valentini (1989) 46 A Crim R 23 at 25

[55] Notwithstanding that alcohol is not a prohibited substance, in the Court's view there is a similar potential for conveying the wrong message. Notwithstanding this, alcohol dependency/addiction may suggest a lower level of moral culpability and when crafting an appropriate sentence, it may be an appropriate factor for the court to consider when determining whether rehabilitation is a possibility. As such, the use of alcohol or drugs, the origins and the extent of the dependence, and the attempts made to overcome it may be relevant to a subjective assessment where such dependence or addiction might impact on the prospects of recidivism and rehabilitation.

[56] In the Court's view, this is the appropriate approach to be adopted when considering the Defendant's alcohol dependency.

The Sentence

[57] 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**²²:

(1) Retribution - in recognition that punishment is intended to reflect society's and the legislature's abhorrence of the offence;

(2) Deterrence - to deter potential offenders and the offender himself from recidivism. The Court notes that drug and alcohol addiction may trigger a high rate of 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.

[58] 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 persons who commit these serious crimes which threaten the safety, security and well-being of this Territory's citizens will not be

²² Crim. App. No. 8 of 2008 (SVG)

tolerated. At the same time, the Court must be prepared to temper justice with mercy.

- [59] 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 Counts 1 and 2, the maximum sentence is life imprisonment and in the case of the second count, it is 10 years. The Court has given this due regard. The Court has also taken into consideration the principles of sentencing as cited herein.
- [60] The Court has also taken into careful consideration learned Counsel's plea in mitigation as well as her plea for leniency. The Court has not ignored the fact that the Defendant has been diagnosed as suffering from alcohol dependency syndrome and has undergone at least two unsuccessful rehabilitation programmes. Nevertheless, there is clearly some potential for rehabilitation.
- [61] The Defendant chose not to address the Court, but Counsel indicated that he is regretful and willing to compensate the victim. Additionally, the Defendant has no prior convictions involving violence and has pleaded guilty at an early opportunity. The Court is satisfied that an appropriate discount of 1/3 must be applied in respect of the Defendant's guilty plea.
- [62] The aggravating and mitigating features identified at paragraphs 45-46 and 49-54 are relevant. The Court is mindful however that care needs to be taken to ensure that there is no double counting where an essential element of the offence might, in other circumstances, be an aggravating factor. Appropriate adjustments have therefore been made to suitably reflect the aggravating features in the offences for which the Defendant is before the Court.
- [63] The Court's task is to pass sentence that is reflective of an accused's culpability. Upon examination of the 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 and which outweigh the mitigating factors. The facts of this case disclose offending which is particularly callous with factors indicating greater harm. This Defendant came upon the Complainant when she was most unguarded, asleep and at home and it is apparent that he caused far more than was necessary to commit the offence. There was significant psychological and physical injury caused to this Complainant and this continues.

[64] The Defendant's offending demands custodial sentences of appropriate length to reflect the Defendant's culpability and the significant harm consequent upon the offending. Having considered all of the circumstances of this case, including the useful guidance afforded by the United Kingdom Sentencing Guidelines and the comparative local and regional authorities, this Court is obliged to impose a custodial sentence in respect of each count.

[65] The Court therefore sentences the Defendant as follows:

- i. In respect of count 1, the Defendant is sentenced to 8 years imprisonment.
- ii. In respect of count 2, the Defendant is sentenced to 8 years imprisonment.
- iii. Bearing in mind the conclusions drawn at paragraphs 27 and 49 above, in respect of count 3, the Defendant is sentenced to 2 years imprisonment.

[66] The Court sincerely hopes that the sentence will facilitate rehabilitation and will discourage recidivism. In that regard the Court orders that the Defendant undergo compulsory rehabilitation and treatment programme geared at dealing with his condition for as long as is considered necessary by an appropriate medical practitioner.

[67] On the facts of this case, the Defendant's offending is not distinct and independent. In the Court's view, a consecutive sentence would be artificial²³. The sentences are therefore to run concurrently.

[68] Counsel for the Prosecution has advised the Court that the Defendant has been on remand since 3rd December 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, 3rd December 2013.

Compensation Order

[69] Counsel for the Prosecution submitted that given the significant medical expenses incurred by the Complainant, coupled with the fact that she has been unable to

²³ R v Johnson [2005] EWCA Crim. 2281; Attorney General's Reference No. 21 and 22 of 2003

return to work since the incident, it is appropriate for the court to make a compensation order.

[70] Counsel informed the Court that the Virtual Complainant's views have been sought as it relates to compensation and understandably she would welcome compensation. He advised the Court that the Virtual Complainant has suffered and continues to suffer significant personal injuries. Counsel submitted that following her admission to the Peebles Hospital, the Complainant has undergone multiple surgeries. These include knee surgery to the left leg; surgery to revise the leg nerve; surgery to repair the knee ligament on the right leg; and finally, surgery on the lower leg bone to apply a long leg splint. She is still incapacitated and continues to receive medical therapy to enable her to walk again. In addition to physical treatment, the Complainant has undergone and continues to receive pastoral counselling.

[71] Counsel also submitted that the Complainant has incurred significant medical expenses associated with the injuries she sustained. The costs associated with the Complainant's medical care amount to approximately US \$25,000.00. It is anticipated that this amount is likely to increase as her recovery timeframe is still unknown at this stage. In addition, the Complainant has been unable to work since the incident (6 months) and her social security payments ended at the end of May 2014. The Court was also advised that there were damages sustained to the Complainant's motor vehicle but these were also not supported and unquantified.

[72] It is common ground that the Court has the discretion to make a compensation order in appropriate circumstances. The Court is satisfied that a compensation order is not an additional punishment on an offender but merely a means of giving effect to claims which the victim might otherwise pursue through civil proceedings. So that it is not necessarily wrong in principle to make a compensation order against a person who has been sentenced to imprisonment, provided that there is evidence that he has sufficient means, and the making of a compensation order (as opposed to voluntary payment of compensation before the trial) is not necessarily a mitigating factor.

[73] In **R v William John Dorton**²⁴, the English Court of Appeal made the following observation:

²⁴ (1987) 9 Cr. App. R. 514, considered and approved by the Court of Appeal Criminal Division in R. v M (Steven Robert) [2003] EWCA Crim 152

“In our judgment, it is not right, certainly not right in every case and certainly not right in this case, to regard the imposition of a compensation order as being by way of additional punishment. It is a speedy, summary and cheap method of ensuring that where funds are available to compensate a victim compensation shall be paid. Had the victim in the instant case not been given the benefit of a compensation order, she might well, if so advised, have brought civil proceedings against the appellant and have obtained a judgment that could have been satisfied from the equity in his flat, quite independently of any sentence that the Crown Court at Croydon might have imposed. It is of course right to say that restitution made in advance of sentence by a convicted person may be taken into account and indeed would be taken into account as a mitigating factor both palliating the offence and also as showing some contrition on the part of the offender. But, in the judgment of this Court, it is not right, at least in all cases, to regard a compensation order as being an additional punishment. It may indeed be painful for the offender to have to pay compensation, but it would be equally painful if, as stated earlier, the victim chose to bring civil proceedings. Indeed that would be more painful because then there would be costs for the offender to pay.”

- [74] In the United Kingdom, compensation orders are governed by sections 130 - 133 of the **Powers of Criminal Courts (Sentencing) Act 2000**. The UK Crown Court has unlimited powers but should have regard to the means of the offender. While the court's powers are very widely drawn, the general view is that compensation orders should only be made in straightforward cases. According to the UK Sentencing Guidelines Council, consideration should be given to the need for compensation order in respect to any personal injury, loss and damage occasioned.

“A court must consider making a compensation order in respect of any personal injury, loss, damage occasioned. Compensation should benefit, not inflict further harm on the victim. Any financial recompense from the offender for an assault or other offence against the person may cause distress.”

- [75] Where compensation for personal injury is sought, the courts require that there should be up-to-date and detailed information provided by the prosecution to the court concerning the extent of the injury. This will usually include medical reports. As a general rule, the more serious the injury, the more information will be needed by the court, including details of the injury itself, treatment, time lost from work and

the likely prognosis. In the case at bar, the Court has been provided with the Complainant's medical report dated 18th December 2013, which annexed notes of the operations undertaken. The report indicates that she sustained the following injuries to her lower limbs - to her right leg: a closed fracture of right fibula and tibia with deep abrasions to shin and thigh, deep wound to dorsum of the foot and heel; to her left leg: closed dislocation of the knee including anterior cruciate ligament, posterior cruciate, posterolateral corner, laceration of great toe. The report indicates that her left knee will be assessed after several months to determine if further surgery is indicated. As at December 2013, she was mobilising with a frame.

[76] Although details of the injuries were provided, only an off-the-cuff estimate of the loss and damages sustained has been indicated to the Court. The Complainant's estimate of the loss has not been supported by appropriate documentary evidence. In light of this, the Court granted an adjournment in order to facilitate the filing of further particulars so as to ascertain the full loss. Unfortunately, as at the date of this judgment, this has not been forthcoming.

[77] While the Court may have the discretion to make an award where information to make an assessment of the quantum is incomplete, the Court must be wary of making awards which do not reflect or which unduly inflate the loss and damage suffered. Moreover, while there may be a presumption in favour of a compensation, it is now settled law that such an order should not be made unless it is "realistic" in the sense that the court is satisfied that the offender either has the means available, or will have the ability to pay within a reasonable time.²⁵

[78] An enquiry into the means of this Defendant was therefore conducted, during which Counsel for the Defendant advanced that while the Defendant has no source of income and no cash resources (or indeed any other means) he is the owner of real estate which could readily be applied to satisfy any compensation order. However, following the grant of an adjournment in order for the Defendant to provide proof of this, Counsel for the Defendant submitted to the Court a land register in which the Defendant is noted as the joint proprietor of property located at Virgin Gorda and measuring 0.35 acres. The Court was advised that the property is jointly owned with a family member and there has been no indication of his position regarding the sale of this asset. In addition, no current valuation of the property was advanced. The Defendant proffered no further or additional proof of his ability to satisfy such an order.

²⁵ R v Bagga (1989) 11 Cr. App. R. (S.) 497)

- [79] The Court is satisfied that in considering the amount of any compensation order, the court must consider the ability of the defendant to comply with the order. The obvious reason for this is that there is no point in making an order if the defendant is unable to pay. The Court was also satisfied on the basis of **R v Mortimer [1977] Crim. L. R. 624** that a compensation order should not be made against the offender on the assumption that a third party will pay the compensation on behalf of the offender. The Court was further satisfied that a compensation order should not be made on the basis that the Defendant will raise the money by selling an asset when there may be difficulty in doing so.
- [80] In **R v Hackett (1988) 10 Cr. App. R. (S.) 388**, the English Court of Appeal held that in the normal case, a compensation order which assumes the sale of the matrimonial home should not be contemplated. The defrauded company was therefore left with their civil remedies because of all of the complications involved where property is jointly owned. Accordingly, the Court quashed the compensation order.
- [81] Just prior to rendering it sentence, Counsel for the Defendant advised the Court that he is now the sole proprietor of property and that it is available to satisfy a compensation order. Unfortunately, no valuation of the property was obtained. Moreover, in submissions filed just one day prior to the adjourned sentencing date, Counsel for the Prosecution advised the Court that the Complainant had reconsidered her position in that she would prefer to seek satisfaction through her civil remedies.
- [82] The Court is guided by the UK sentencing guidelines that compensation should benefit rather than inflict further harm on the victim. The Court is therefore obliged to consider the views of a complainant and where the victim does not want a compensation order, this should be respected. Further, as at the date of this judgment, neither the Complainant nor the Defendant has provided the Court with any further information which would properly assist the Court in arriving at an appropriate order. In the premises and on the basis of the authorities indicated, the Court will therefore decline to make a compensation order.

Vicki Ann Ellis
High Court Judge