EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. 1 of 2014

BETWEEN:

THE QUEEN

and

DOYLE GUISHARD also known as "Pierre"

SAMUEL HARRIS also known as "Smooch"

DENZIL WHEATLEY also known as "Pence"

Appearances:

Mr. Valston Graham, Senior Crown Counsel and Ms. Leslie Ann Faulkner, Senior Crown Counsel for the Crown
Mr. Dave Marshall for Doyle Guishard, Mrs. Valerie Stephens-Gordon for Samuel Harris and Mr. Michael Maduro for Denzil Wheatley

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2015: July 2nd
July 15th

JUDGMENT ON SENTENCING

Criminal Law – Sentencing – Aggravated Burglary

[1] BYER J.: On 1st May 2015 all of the accused were found guilty on the sole count on the indictment of Aggravated Burglary contrary to Section 212 of the Criminal Code of the British Virgin Islands 1997 as amended.

[2] The sentencing hearing was adjourned and heard on the 2nd July 2015 and judgment was reserved in the said sentence. This is now the decision on that sentencing which I intend to impose on these Defendants.

The Background Facts

[3] On the night of the 15th March 2013, Mr. Alnando Fahie while at home in his residence at Vanterpool Estate, East End, Tortola was surprised by the presence of two men who entered his dwelling brandishing weapons, one had a firearm that was pointed at his head and one had a steel bar. He was unable to identify the men as they were hooded; and in addition, he was subsequently instructed to turn over on his stomach. The location of money was demanded from him which demand was accompanied by violence administered to his forearm by the intruder who had the steel bar, which resulted in Mr. Fahie sustaining injury to his forearm. There was also evidence from another witness of seeing a third masked man on the outside of the dwelling standing by the gate.

[4] The men were able to make their escape from the premises with just over $200.00 in cash and two cell phones that were in working order at the time.

[5] A report was made to the police and despite Mr. Fahie's inability to identify his assailants, there was recovered during the investigation CCTV footage from the building adjacent to Mr. Fahie's property. This footage which was played for the Court and the jury, revealed the presence of three young men in the vicinity of Mr. Fahie's home at the time of the attack upon him. It was upon the viewing of this footage by Detective Constable Sean McCall that the three Defendants were positively identified by the officer. Further, during the caution interviews when the CCTV footage was shown to all three of the Defendants, Defendant Guishard identified himself on the tape.

[6] In addition, during the period when Defendant Guishard remained in police custody, the prosecution led the case that he authored a note of apology to the Virtual Complainant Mr. Fahie; apologising for the incident that had occurred at his home and purported to make an offer of compensation which was then touted at trial as an admission of guilt on his part.

[7] The Crown's case was one of joint enterprise and by the verdict delivered by the jury, who saw the tape and heard the evidence, it was apparent that they were sure of the guilt of all three Defendants on the sole charge on the indictment.

Crown's Submissions

[8] The Crown submitted to this Court that as with any sentencing exercise, the principles of sentencing must be bourne in mind; those being deterrence, rehabilitation, prevention and retribution.

[9] They sought to impress upon this Court that the aggravating factors far outweigh the mitigating factors in the case at bar, and in that regard, submitted that this was therefore a proper case for a custodial sentence.

[10] The following aggravating factors were identified by the Crown:

(i) Seriousness of Offences
(ii) Prevalence of Offence of Burglary
(iii) Weapons not recovered (firearm and steel)
(iv) Multiple offenders
(v) Injury caused to victim
(vi) The use of masks by the parties to conceal their identity
(vii) Defendants obtained a benefit *(money and cellular phones not recovered)*
(viii) Previous Convictions of related offences showing a pattern of repeat offending – (Denzil Wheatley and Samuel Harris)
(ix) Offence committed late into the night/early morning when the Complainant was in bed.
(x) Offence committed whilst on bail for similar offence (Doyle Guishard)

[11] The sole mitigating factor identified by the Crown was the age of the Defendants Guishard and Harris.

[12] Having said so, the Crown was however very quick to submit to the Court that the age of the offenders can be of little relevance when the offence is a serious one and sought to rely on the judgment of Ewbanks J. in ***R v Richardson and others***[1] and Byron CJ in ***Desmond Baptiste v The Queen***[2].

[13] The Court was also referred to several authorities locally, regionally and in the United Kingdom regarding the sentences that Courts have imposed for the offence of aggravated burglary; namely ***R v Shaunlee Fahie***[3], ***R v Seantroy Hanley, Selroy Hanley and John Harvey***[4], ***The Queen v Kareem Durante and Nicoy Scatliffe***[5], ***The Queen v Damian Hodge***[6], ***The Queen v Keno Allen***[7], ***Devin Maduro v The Queen***[8], ***The State v Tyrone Kadan and Jno Baptiste Stoute***[9] and ***The Attorney General's Reference Nos. 37 and 38 of 1997 (Jamie John Angus and Hilton Davies)***[10].

[14] The Crown submitted that the range for sentencing for matters of this nature fell between eight to ten years depending on such factors as the extent of the injuries, pleas of guilty and the circumstances surrounding the particular charge.

[15] They argued that although it was clear from the cases to which they had referred the Court, that usually the offence of aggravated burglary tended to be coupled with other offences like robbery, and in the ***Devin Maduro*** case, murder, they submitted that even though this particular offence was a single charge it still fell at the higher end of the scale of any sentence to be meted out. They submitted to this court that "...***the circumstances of the case demonstrate greater harm, greater culpability and greater seriousness of the offence; [and] these factors weigh against the accused men***" and any sentence given should reflect the same.

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[1] The Times February 10,1988 CA
[2] Criminal Appeal No 8 of 2003 SVG Unreported
[3] Criminal Appeal No 3 of 2008 (BVI)
[4] Criminal Case No 5 of 2009 (BVI)
[5] Criminal Case No 16 of 2008 (BVI)
[6] Criminal Case N0 13 of 2001 (BVI)
[7] No citation provided
[8] Criminal Appeal No 3 of 2005 (BVI)
[9] Criminal Appeal HCRAPCDCA2007/002
[10] [1998] Cr App. R 48

Plea In Mitigation

Doyle Guishard

[16] Counsel Mr. Marshall spoke on behalf of his client Mr. Guishard, who he says is now 27 years old.

[17] He agreed that the sentencing guidelines relied upon by the Crown were a fair representation of the law applicable to the offence as charged; but he disagreed with the Crown that this offence warranted a custodial sentence at the higher end of the scale, although he did agree that his client was aware that the seriousness of this offence required some custodial sentence.

[18] Counsel Mr. Marshall asked this Court to bear in mind in this sentencing exercise, that there are three things that should be kept in the forefront of the Court's mind as propounded by Byron CJ (as he then was) in the case of ***Desmond Baptiste.*** These were the particular circumstances of the offence committed, its effect upon the victim and the record of the offender.[11]

[19] He asked the Court to consider that those cases in which there was a higher tariff meted out, encapsulated circumstances like the ***Devin Maduro*** case in which the charge of aggravated burglary was accompanied by a charge of murder; or in the ***Tyrone Kadan*** case where those accused were facing some eleven additional offences. Mr. Marshall submitted that these specific factors in those cases must have affected the severity of the sentences given there but that there are no such circumstances in the case at bar which would warrant any such high tariff as stated in those cases or the warranting of handing down a punishment falling within the higher end of the scale.

[20] Counsel Mr. Marshall agreed that there were in fact some aggravating circumstances in this case as identified by the Crown. He agreed that it was a serious offence and that there is a prevalence of offences of this nature in the territory and that violence was used although he stated that such violence was not excessive and although he agreed that the virtual complainant was injured and that property was taken, he argued that the injury in the scheme of things was not serious and further that value of the items taken were negligible.

[11] Per paragraph 3 of ***Desmond Baptiste*** [op cit]

[21] Counsel Mr. Marshall agreed that indeed his client had some "run- ins" with the law but he had however been gainfully employed at the time of the incident and further, that any other convictions that he had were not in the nature of the offence before the court. Counsel made it clear that his client had no propensity for violence and therefore, what had occurred was out of character and even though his client expected a custodial sentence, one at the higher end of the scale was not warranted in these circumstances.

Samuel Harris

[22] Counsel Mrs. Stephens-Gordon spoke on behalf of Defendant Harris.

[23] Mrs. Stephens-Gordon submitted to this Court, like her colleague before her, that her client appreciated the seriousness of this offence and that it was inevitable that a custodial sentence would be imposed. She however, also like her friend Mr. Marshall, disagreed with the Crown that this conviction should be visited with a custodial sentence at the higher end of the sentencing range.

[24] Counsel Mrs. Stephens-Gordon informed the Court that her client is 25 years old, and that although he had a relationship with both of his parents, his father left the home when he was 5 years old to take up employment in the United States Virgin Islands. She told the Court that her client attended Primary School and then the Vocational School, but left at age 15 at which time he went to live with his father in the United States Virgin Islands for a short period.

[25] The Court was further informed that in his younger years, Defendant Harris was an ardent churchgoer and that he now aspires to attend night school to complete his studies and then undertake training in carpentry or roofing.

[26] Counsel submitted to this Court that the aggravating factors identified by the Crown were not excessive, but wished the Court to take into consideration that even though a firearm was used in the commission of the offence, the injury sustained by the Virtual Complainant was not effected by the use of the firearm; but rather a piece of steel, nor were any shots fired. She therefore

submitted that despite its gravity, that the circumstances surrounding this offence did not warrant a sentence at the higher end of the tariff as reflected in the cases relied on by the Crown.

[27] Counsel also asked the Court to consider in mitigation for her client, beyond his youth and the fact that he was 23 years old at the time of the incident, additionally his personal circumstances. It was submitted to this Court that Defendant Harris did not have a particularly "easy" upbringing with little or no male guidance or role model and barely saw his mother as she was always actively involved in making ends meet. Counsel has submitted that her client had no formal training and what schooling he did receive did not prepare him for the working world. Counsel submitted further that the periods that her client spent on remand which by her calculation was twelve months, should also be taken into account and that whatever sentence the Court was prepared to determine, she asked this Court to spare him a long period of incarceration so that he may be able to "*make something of his life".*

[28] Counsel assured the Court that once her client is given the opportunity, he will become a useful and productive member of society. Counsel acknowledged that it could not be disputed that her client had four previous convictions; one in 2011 for Burglary for which he served 5 months, and three in 2014 made up of two (2) charges for Assault on a Police Officer and one charge of carrying an offensive weapon for which in total he was sentenced to six months imprisonment.

[29] Counsel finally submitted that even though she is aware that the higher end of sentencing for offences of this nature appears to be 10 years, she was of the view that the lower end was six and a half years. Counsel asked this Court to consider that those cases that had sentenced for aggravated burglary and to which the Court was referred all had multiple offences charged as well. She therefore submitted that her client should not and could not be bracketed with such instances that would take it into the upper end, this being a sole charge and that in fact he should be given a moderate sentence to allow him to return to society to afford him the opportunity to live as a productive member.

Denzil Wheatley

[30] Counsel Mr. Michael Maduro appeared for Defendant Wheatley. Like his colleagues who appeared before him, Counsel Mr. Maduro appreciated that the offence for which his client stands convicted was a serious one with the obvious implication that his client would be facing a custodial sentence.

[31] Counsel informed the Court that his client is 38 years old; married with 4 children ranging from ages four to sixteen. Defendant Wheatley, like his co defendants went to primary school and then onto high school; but did not finish his high school education leaving in Form 3.

[32] Counsel also informed the Court that his client has previous convictions for walking equipped and criminal damage to which he pleaded guilty and was sentenced to nine months; and for unlawful conveyance of spirits, to which he also pleaded guilty and was sentenced to three months.

[33] Counsel submitted to this Court that the Court must take into consideration all the governing principles that are attributable to sentencing and relied on the judgment of Hariprashad-Charles J. in the case of ***Shaunlee Fahie***[12] in which she stated that whichever of those same factors that are determinative of the appropriate sentence will depend on the particular circumstances of each case.

[34] Counsel submitted to this Court that the case at bar had little or nothing at all in common with the cases cited by the Crown with regard to the factual matrices. He therefore submitted that his client did not fall within the higher end of the scale and as such should not be punished at the higher end of the scale. Counsel in support of this submission asked the Court like his colleagues to temper justice with mercy and take into consideration that his client was the caretaker of his four children although he readily admitted not their sole caretaker and that in taking into consideration the time spent on remand, that the sentence should take into consideration the impact that it may ultimately have on his family life.

[12] Op Cit para 10

THE COURT'S CONSIDERATIONS AND FINDINGS

[35] By Section 212 of the Criminal Code it states at subsection 1:

> "*A person commits the offence of aggravated burglary if he commits burglary and at the time has with him any firearm or imitation firearm, any weapon of offence or any explosive."*

Further, subsection 2 provides the following:

> "*Any person who is convicted of aggravated burglary is liable to imprisonment for life."*

[36] There can be no stronger indicia to this Court of the seriousness with which the offence of aggravated burglary is viewed by this Territory, than the stiff penalty attached to it of life imprisonment. A person who is found guilty of this offence therefore faces the real possibility of spending the rest of their life incarcerated, and the younger the offender, the longer of course that period translates to in real terms.

[37] However, it is also clear that with any offence there must be a range or tariff within the scope of the limits set by the legislature to which the circumstances of each case may be able to fall and 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."*[13]

[38] However, in order for the Court to embark on its mission of analyzing all the circumstances of a particular case, it must always have at the forefront of its mind that the objective of sentencing is "……*to punish the offenders to an extent and in a manner which is just in all the circumstances. To deter the offender or other persons from committing offences of the same or a similar character. To provide opportunities for rehabilitation of the offender. The Court also seeks to denounce the type of conduct in which the offenders are engaged in. The Court also seeks to protect the community from the offenders. Lawton LG identified*

[13] The Queen v Jason Leonard and Clifton Stoutt Criminal case 10 of 2007 per Hariprashad- Charles J. at para 47

these to be the cardinal factors of sentencing namely "retribution, deterrence, prevention and rehabilitation.""[14]

[39] Having said so, it will now be open to this Court to address its mind to which of these principles may play the ultimate role in the sentence meted out, taking into consideration not only the personal circumstances of the offenders but the nature of the offending as well.

[40] In this case, both Counsel for the Crown and the Defendants who are uncharacteristically ad idem; have recognized that sentences for offences of this nature must be custodial in nature. However, Counsel for all the Defendants have asked that that sentence, reflective of justice, be tempered with mercy and that the sentence reflect the circumstances of the crime itself.

[41] In considering those submissions, this Court is mandated to look at the aggravating and mitigating factors that exist in this case as have been highlighted by the Crown and to which all Counsels for the Defendants seem to be in agreement save and except the qualifications to some of those factors which they have put before the Court.

[42] Counsel for the Defendants while all agreeing that the offence for which their clients stand convicted was a serious one and could be considered an aggravating factor all sought to submit to this Court that the seriousness was at the lower end of the scale with relatively minor injuries being inflicted. Counsels agreed that a firearm had been used to threaten the Virtual Complainant but as Counsel Mrs. Stephens-Gordon stated the injuries inflicted were not caused by the firearm and there were no shots fired. Although, Counsel Mr. Marshall admitted that the aggravating factor existed regarding the obtaining of a benefit by the Defendants in that a sum of cash and phones were taken, he sought to mitigate that by saying that the benefit in fact was negligible. Although, all Counsel agreed that this offence for which their clients stood convicted seemed to be prevalent in the society from the mere fact that there were a number of judgments to which the Court was referred, they all asked the Court to consider that it was also obvious that that prevalence shown involved multiple charges inclusive of aggravated burglary and not as in this case, the sole charge.

[14] Stephenson-Brooks J in The State v Steven Wyke & Ors DOMHCR 2001/043 para 4

[43] When this Court therefore looks at the matters identified as the aggravating factors as set out at paragraph 10 herein, it is satisfied that some of them were not in fact capable of constituting an aggravating factor per se, but that in any event any adjustment for that consideration did not affect the overall end result that the aggravating factors outweigh the one mitigating factor of age of the younger two Defendants. In addition, when an assessment of the stated aggravating factors provided by the UK Sentencing Guidelines on Aggravated Burglary for Category 1 offences is undertaken, this Court is of the view that those factors exist in the case at bar. These included the factors raised by the Crown and were namely 1) the victim was at home; 2) there was violence used and threatened with a weapon (both the firearm and the steel which was used to inflict the injury); 3) prevalence in society; 4) the weapon was present on entry; and 5) that the Defendants all did this as part of a group. This Court therefore finds that despite Counsels' entreaties, the circumstances of this case place this offence for which these Defendants were convicted at the higher end of the scale or as the UK Guidelines name it, Category 1.

[44] This in this Court's mind therefore places it firmly within the starting point of ten years with a range of nine to thirteen years as stated in the Guidelines.

[45] However, as we are aware, Guidelines are not to be followed slavishly but are merely to be used as guidance by the Court to ensure that there is a "*measure of consistency in sentences of like offences"*.[15]

[46] It is however without a doubt that the Defendants have committed a serious offence that requires a custodial sentence. I therefore adopt the words of Ellis J. in the case of ***The Queen v Kevin Sprauve*** in which she said "a *strong message...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....the Court is conscious of the fact that there is a need to send a message out to all residents of 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 tolerated. At the same time, the Court must be prepared to temper justice with mercy*".[16]

[15] Per Hariprashad –Charles in ***The Director of Public Prosecutions v Shaunlee Fahie*** Op Cit at para 10
[16] Criminal Case 4 of 2014 at para 58

[47] In tempering justice with mercy, this Court must however ensure that the culpability of the Defendants is truly reflected in the final analysis of the sentence that is passed. These Defendants without conscience attacked a hardworking man in the sanctity of his home, inflicted injury on him and absconded with benefits for which they did not work as if it was their entitlement. I have heard all Counsel refer to the personal circumstances of all the Defendants and not one of them completed High School, and it appears that having a shortage of skills somehow gave them the impression that they would and could be entitled to the fruits of another's labour. Nothing comes easy. It takes hard work and diligence and even Mr. Wheatley a man of some years senior to Defendants Guishard and Harris fell into the error that pervades the young people of this society that they do not have to work for something if someone else has it. This perversion must be stopped.

[48] I must also note here before I indicate the intended sentence, that it was indeed instructive that neither Counsel for the Crown nor Defense Counsel sought to argue before this Court the variations of sentence that would usually apply in a case of joint enterprise as between participating Defendants. As such this Court was not in a position to therefore address its mind to any such considerations and I have not done so.

[49] I therefore find that these Defendants' actions require a custodial sentence of the appropriate length to reflect society's disdain for acts of this nature while at the same time ensuring that they are given an opportunity to return to society to make amends to it and take their rightful place as productive members. Bearing in mind therefore, the guidance provided by the regional and local authorities together with the Guidelines from the United Kingdom, I sentence the Defendants each of them to 8 years in prison.

[50] With regard to Defendants Harris and Wheatley their sentence will take into regard the periods that they spent on remand for this offence. In the words of the Privy Council in the case of ***Callachand & Anr v State of Mauritius (Mauritius)*** "*...any time spent in custody prior to sentencing should be taken fully into account...*"[17]. This principle of full credit being given for periods of

[17] 2008 UKPC 49

remand upon sentence being handed down was also considered and approved in the case from the Caribbean Court of Justice of ***Romeo Da Costa Hall v The Queen.***[18]

[51] Therefore in relation to Defendant Harris credit will be given for the time spent on remand as provided by the prison authorities and Counsel for the Crown which will be for the period 17th September 2013 to 14th July 2014, that is the period from when he was arrested until he was first granted bail. He will however not be given credit for the further period that he spent on remand for this matter being from the 7th February 2015 until the date of trial. Defendant Harris found himself in this position after his bail that had been granted in July 2014 was revoked for a breach of one the conditions. This Court is of the opinion that this Defendant put himself in this position by his own actions and in so doing he cannot then be entitled to benefit from his wrong doing.

[52] In relation to Defendant Wheatley he shall be given credit for all the time spent on remand in relation to this charge as provided by the prison authorities and Counsel for the Crown namely the period 17th September 2013 when he was arrested until the grant of bail on 14th July 2014 and again for the period from 10th January 2015 until the completion of his trial on the 1st May 2015 which was served as a result of his surety refusing to continue to act in that capacity which by all accounts was through no fault of his own.

[53] In so far as, Defendant Guishard was on bail for this offence for the duration of this period, he will not be entitled to any credit for any remand periods and his time shall run from today's date.

Nicola Byer
High Court Judge

[18] CCJ Appeal No CR1 of 2010 /BB Criminal Appeal No15 of 2008