

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2008/003

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

SHAUNLEE FAHIE

Respondent

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mr. Davidson K. Baptiste

Justice of Appeal [Ag.]

Appearances:

Ms. Candace Raphael De Jonge for the appellant

The respondent in person (with Mrs. Mary- Lou Creque amicus)

2009: September, 28;

2010: January 11.

Criminal Appeal – Review against sentence by the DPP – sentences too lenient having regard to the circumstances of the case and the offender – aggravated burglary s.212(2) Criminal Code 1997 – keeping an unlicensed firearm – Firearms (Amendment) Act 1993 – whether the judge failed to take into account all the relevant aggravating and mitigating factors – the exercise of the discretionary powers by the appellate court -

The respondent pleaded guilty to two counts of aggravated burglary and two counts of keeping an unlicensed firearm and was sentenced to three years imprisonment and two years imprisonment respectively to run concurrently. The appellant seeks a review of those sentences on the ground that they were unduly lenient having regard to the circumstances of the case and the offender. The appellant's case is that despite there being mitigating factors namely that the respondent was remorseful, that he pleaded guilty at the first opportunity and had no previous convictions, the judge failed to weigh all the relevant factors including the aggravated factors. Those comprised (a) the offences are highly prevalent in the Territory (b) the crime was premeditated by the respondent and his accomplice who were armed and masked (c) injuries were sustained by victims, requiring

hospitalization, violence committed to the occupiers of the vessel and damage to property (d) cash and valuable items were taken. The respondent with an accomplice, both seemingly intent on engaging in a crime spree, entered the premises of the Trade Wind Cruise Club situated at Harbour View Marina. They proceeded to the Club's office, then to one yacht and thereafter another. They were armed and masked and in each incident gagged and tied up employees, ransacked the office of Trade Winds, and also injured and traumatized occupants of the yachts. They then made their getaway with various valuable items and cash.

Held: allowing the appeal and substituting a sentence of three years on the firearms offences and of seven years on the aggravated burglary offences to run concurrently with time on remand being taken into consideration.

1. That the learned judge's sentence was manifestly too low and as such it can only be inferred that he failed to take into account all of the relevant facts and circumstances.
2. That the governing principles which guide the court in respect of sentencing have been settled and affirmed in several cases in this jurisdiction.

Desmond Baptiste et al SVG Crim. App. No. 8 of 2008 followed.

3. That the sentencing court in considering the appropriate sentence for a firearm offence should address its mind to (a) the type of weapon used and (b) the use of the weapon.

R v Avis [1998] Cr. App. R 420 followed.

4. That the very nature of the offence of aggravated burglary connotes a burglary accompanied by aggravating circumstances.

JUDGMENT

- [1] **GEORGE-CREQUE, JA:** On 6th October 2008, the respondent, Shaunlee Fahie pleaded guilty to two counts of aggravated burglary and two counts of keeping an unlicensed firearm. The charges arose out of what can only be described as a robbing spree undertaken by Mr. Fahie in the early hours (around 2:30 am) of 1st October 2007. On 24th October 2008, following a sentencing hearing, the trial judge sentenced Mr. Fahie to three years imprisonment in respect of the counts of aggravated burglary and two years in respect of the counts of keeping an unlicensed firearm. The sentences were all made to run concurrently. The DPP

seeks a review by this court of those sentences on the ground that they were unduly lenient having regard to the circumstances of the case and the offender.¹

The exercise of powers of review by the appellate court

[2] The imposition of a sentence unless specifically fixed by legislation involves the exercise of discretion by the sentencer. Accordingly, it is well settled² that an appellate court will only interfere with a sentence passed by the sentencing court if:

- (1) it is not justified in law;
- (2) it is passed on the wrong factual basis;
- (3) some matter has been improperly taken into account; and
- (4) where the sentence was wrong in principle or manifestly excessive.

In essence these are the same principles which govern the court in the review of the exercise of any discretion by any trial court or tribunal.

The facts giving rise to the charges

[3] Trade Wind Cruise Club carries on a yachting business at Harbour View Marina, in East End, Tortola. At about 2:30 a.m. in the morning of 1st October 2007, after its Operations Manager had secured the premises, Mr. Fahie along with an accomplice, masked and armed first met one of the Club's employees from whom they demanded keys to the office. The employee was taken to the office, tied up and gagged and the office ransacked. They then went to the yacht "Mistral" where another employee was accosted and forced back to the office where they demanded that he open the safe. A total of US\$350.00 was taken from the safe. A Toshiba Laptop Computer valued at US\$2,000.00 was also taken from the office.

¹ Section 51A of the Criminal Procedure Act, Cap 18 (as amended by sec. 2 (1A) of No. 3 of 2006 Laws of the Virgin Islands, allows the DPP, with the leave of the court, to seek review of sentences where it is considered that a sentence passed is unduly lenient.

² See: Newsome and Browne [1970] 2QB 711, 54 Cr. App. R. 485

- [4] They then proceeded to the yacht "Solitaire" where they tied up another employee, one Jennifer Mulling. There they took away a Compaq Presario Laptop Computer valued at US\$1,500.00, one Gateway Laptop valued at US\$1,400.00, accessories, personal documents and cash amounting to US\$1,800.00 and then made their escape.
- [5] Police were called. Two of the victims received injuries during the incidents and were taken to hospital and treated. The police investigations took them to Mr. Fahie's residence. Various personal documents of two of the victims were found there. The laptop computers along with a 9mm Luger handgun, with 13 matching rounds, and one Intratech 9mm firearm with 22 matching rounds and 9 rounds of .380 cartridges were also found in an abandoned vehicle adjacent to Mr. Fahie's residence. Fingerprints of the abandoned vehicle were found to be a match with fingerprint impressions taken from Mr. Fahie. A DNA profile from the Luger firearm also matched Mr. Fahie's.
- [6] It is not disputed that Mr. Fahie at the first available reasonable opportunity indicated his intention to enter a plea of guilty to the offences charged.

The legislated penalties

- [7] (a) The maximum sentence which may be imposed on a person convicted of aggravated burglary is life imprisonment, [section 212(2) **Criminal Code 1997**];
- (b) under the **Firearms (Amendment) Act 1993**, the maximum penalty on conviction on indictment for keeping a firearm is either a fine of ten thousand dollars or imprisonment for a term of ten years.

Sentencing principles

- [8] Counsel for the DPP contends that the trial judge failed to take into account all the relevant factors, including the aggravating and mitigating factors in exercising his

discretion under the legislative provisions in sentencing Mr. Fahie and accordingly erred by imposing a sentence that was unduly lenient and thus wrong in principle.

[9] The governing principles which guide the court in respect of sentencing have been firmly settled and affirmed in several cases in this jurisdiction. The objectives as set out in the case of **Desmond Baptiste et al**³ are:

- (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.

[10] Which of these factors will be predominant in determining an appropriate sentence will depend on the particular circumstances of each case. Quite apart from these however, certain common factors will also be brought into the equation such as the prevalence of the types of crimes in the society, as well as the general desirability of ensuring a measure of consistency in sentences for like offences. There is good reason for this. It affords a level of certainty by providing a yardstick for the sentencer. It may also have a deterrent effect on the potential offender, and thus promote a measure of confidence by the public in the criminal justice system as a whole.

[11] The sentencing scale will slide up or down depending on the aggravating factors and the mitigating factors to be taken into account based on the peculiar circumstances of each case. I now turn to consider the particular circumstances of this case in the light of the principles enunciated.

³ SVG Crim. Appeals No. 8 of 2008 (and others)

The firearm offences

[12] In **R v Avis and Others**⁴ it was said that the sentencing court in considering the appropriate sentence for a firearm offence should address its mind to the following questions:

1. the type of weapon used; and
2. the use made of the weapon.

[13] The respondent pleaded guilty to keeping two firearms. One was a Luger 9mm which carried live rounds of matching ammunition. This type of firearm is considered to be a high caliber weapon, and is not usually licensed to ordinary citizens but is basically utilized by the police force or such disciplinary organizations. It is not expected that the ordinary citizen would require such a high level of fire power. Yet the respondent, an ordinary civilian, was armed with such a weapon. It is fortuitous that the weapons were used only to intimidate the victims. However, the victims must have been terrified throughout their ordeal. Further, taking into account all the circumstances surrounding the obviously prolonged and premeditated use made of the firearms in not one but two incidents, adds to the aggravating factors which, on any view, are quite serious.

[14] The case of **The Queen v Terry Smith**⁵ was cited to the trial judge. Terry Smith during his trial for possession of a firearm with intent changed his plea to guilty. He was sentenced to 5 years imprisonment. The maximum sentence which could be imposed for possession of a firearm with intent is twenty years.

[15] In the **Desmond Baptiste** group of cases where sentencing guidelines were set by the court, Byron CJ at paragraph 32 of his judgment noted as follows:

“The concern of the public for the alarming incidence of firearm related crime is not reflected in the penalties imposed by the St. Vincent and the Grenadines legislature. The current set of penalties prescribed by the legislature in St. Vincent and the Grenadines appears to strike a somewhat lenient note. The maximum penalty in St. Vincent and the Grenadines for discharging a firearm is, on summary conviction, a fine not

⁴ [1998] Cr. App. R 420

⁵(Judgment) Case No. 21 of 2006

exceeding \$2,000.00 or imprisonment for a term not exceeding 12 months. In Saint Lucia for example the penalty for possession of a restricted weapon is, on summary conviction, a fine of not less than \$10,000.00 or imprisonment for a term of not less than three years.”

[16] It may be said that in the Virgin Islands firearms offences are viewed by parliament (which must be deemed to reflect society’s view) as being serious given the maximum custodial sentence of ten years which may be imposed. The court must accord this due regard. The type of firearm loaded with live rounds and the use to which they were put are, as I said, serious aggravating factors. The mitigating factors are that the respondent is a young man. He was remorseful. He pleaded guilty at the first opportunity and has no prior convictions. Weighing all the factors, I consider however that the sentence of two years is manifestly low and suggest a failure by the sentencing judge to have regard to all the aggravating factors and circumstances. I consider that the sentence in respect of each firearm offence should be increased to three years. Accordingly, I would substitute the sentence of two years with three years with time on remand taken into account in the computation of time in respect each of the firearm offences, the sentences to run concurrently.

The aggravated burglary offences

[17] The very nature of the offence connotes a burglary accompanied by aggravating circumstances. The trial judge was referred to a number of cases in the Territory in respect of sentences passed for similar or related offences such as:

- (1) **The Queen v Evans Joseph**⁶ who was sentenced to 6 1/2 years on a guilty plea for aggravated burglary;
- (2) **The Queen v Keno Allen**⁷ aggravated burglary with a knife - 8 years imprisonment on a guilty plea;
- (3) **The Queen v Jason Leonard and Clifton Stoutt**⁸- aggravated burglary – on a guilty plea, with prior convictions, 10 years in respect

⁶ BVI High Court Criminal Case No. 10 of 2005 (unreported)

⁷ Criminal Case No.1 of 2005 BVI (unreported)

of Leonard and 15 years in respect of Stoutt who was considered to be virtually beyond rehabilitation given his long string of prior convictions some involving similar type offences.

(4) **The Queen v Keenan Bethelmy**⁹ - for burglary the sentences imposed were five and ten years running concurrently.

[18] Counsel also referred to the case of **The Queen v Nicoy Scatliffe and Kareem Durante**¹⁰, who was sentenced during the same Assizes as the respondent, to five years on one count of robbery where Mr. Scatliffe and another, armed with firearms, entered a business establishment and robbed the cashier and patrons of \$1,000.00 and occasioned physical violence on one of the patrons. Counsel submits that the circumstances of the respondent's case was much worse and showed serious inconsistency in the sentencing by the judge. I agree.

[19] The instant case has several aggregating factors:

- (1) The offences are highly prevalent in the Territory.
- (2) The crime was premeditated by the respondent and his accomplice. They were armed with a high caliber pistol and were masked. They seemed bent on having a crime spree.
- (3) They committed violence in respect of the occupiers of the vessels and the offices and ransacked them. Injuries were sustained by the victims, requiring hospitalization. The victims were traumatized.
- (4) cash and items of considerable value were taken.

[20] The mitigating factors are only those I mentioned earlier. At the hearing of the appeal directions were given for the furnishing of a social inquiry report and also a

⁸ (Judgment) Criminal Case No. 10 of 2007 BVI

⁹ (Judgment) Criminal Case No. 11 of 2007 BVI

¹⁰ BVI HCR 2008 0016

report from the Prison as to the respondent's behavior and strides at rehabilitation. Only the social inquiry report was submitted. This showed that the respondent had a normal childhood, with educational opportunities and with parents who were good role models. That he would not think through the ramifications of his actions and wanted to achieve success and material wealth quickly and easily rather than by hard work as his parents did. He states that he is remorseful and has reflected on his actions and that he is using the time of his incarceration to positively redirect his entire attitude on life.

[21] When the circumstances of this offence are taken in the round in terms of the aggravating circumstances and the mitigating circumstances I am of the view that the learned judge's sentence was manifestly too low and as such it can only be inferred that he failed to take into account all of the relevant facts and circumstances. In my view the sentence below should be increased to seven years.

Conclusion

[22] For the reasons given, I would allow this appeal by the DPP and increase the respondent's sentences as follows:

- (1) On the firearms offences to three years, and
- (2) on the aggravated burglary offences to seven years all sentences to run concurrently with time on remand being taken into account.

Janice George-Creque
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Baptiste
Justice of Appeal [Ag.]