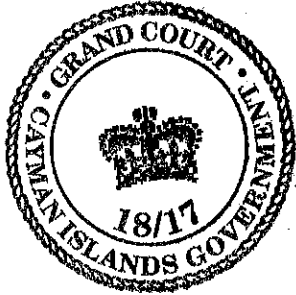


1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE

INDICTMENT NO: 14/2018



REGINA

v.

ODAIN LLOYD EBANKS

15 **Appearances:** Mr. Patrick Moran, Deputy Director of Public Prosecutions with
16 Mr. Gavin Dixon, Crown Counsel, for the Prosecution
17 Ms. Amelia Fosuhene, of Brady Attorneys, for the Defendant
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19 **Before:** Hon. Justice Marlene Carter (Actg.)

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21 **Sentence Delivered:** 11 April 2019

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23 **HEADNOTE**

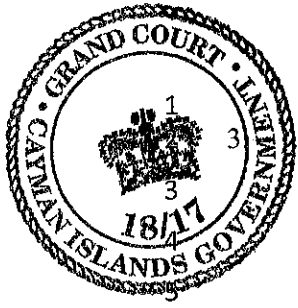
24 *Robbery; Unlawful Use of a Firearm; Consecutive Sentence*

25 **SENTENCE JUDGMENT**

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27 Revised from transcript of oral judgment given 11 April 2019 and Approved
28 for Release 29 October 2019
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30 **Facts**

- 31 1. On the 3rd March 2018 there was a robbery at the Czech Inn Grill. The robbery took place sometime
32 after 11:00 p.m. Both the owners of the restaurant - Mr. and Mrs. Zitterbart - as well as two of their
33 employees and their young son were present on the premises at the time of the robbery.
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35 2. One of the robbers was armed with a firearm which was discharged. The second was armed with a
36 CS canister pepper spray which was also discharged into the face of Mr. Zitterbart during of the
37 course of the robbery.



After the robbers had taken away the tray from the cash register as well as the cash and various documents, they fled in a Honda vehicle. The police were alerted and the evidence was that Officers Strachan and Garwood picked up the vehicle somewhere in the region of Countryside in Savannah, followed the vehicle in hot pursuit, lights and sirens activated, to Victory Avenue Prospect, where the robbers alighted from the vehicle.

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4. A firearm was used to shoot at the officers as they tried to pursue them. The can of pepper spray was left at Victory Avenue by one of the robbers.

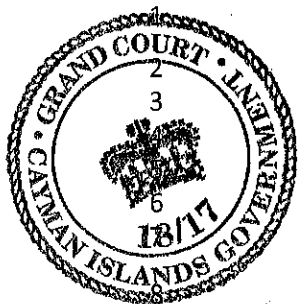
5. The defendant was arrested and was convicted by this court after trial.

(i) Robbery

6. Count 1: The prosecution and defence agree that the offence of robbery, attracts a maximum sentence of life imprisonment. In accordance with the *Cayman Islands Sentencing Guidelines*, a robbery of commercial premises is and falls within Culpability A, taking into consideration the production of a firearm used to threaten violence. In terms of harm, the offence sits at the level of Category 2, reflecting that there was some physical or psychological harm to the victim above the level of harm inherent in the offence of robbery.

7. I consider that some of the factors reflecting this level of harm are:

- (i) The physical harm caused to Mr. Zitterbart.
- (ii) One of the robbers was armed with a can of spray which he used during the robbery. Mr. Zitterbart was clear that the spray was deployed just as he opened the cash register and he was sprayed on the left side of his face.
- (iii) There is evidence as well of the discharge of the firearm during the course of the robbery. That one of the robbers pointed the firearm at Dahema Baker and also at George Zitterbart during the course of the robbery.
- (iv) It is clear just how frightened all of these victims were - the owners and the employees that evening.



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11 (v) There is the evidence of Mr. Gordon who was one of the employees. His evidence was:

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"I ran out of the door and ran straight to the back of the property. I did not stop. I ran very fast. As I ran out when I exited there was a man behind that door. I just got a glimpse of him. I did not stop to see who it was or take note. I was frightened. I didn't stop."

This court notes that Mr. Gordon still seemed very frightened when he gave evidence in this court, almost a year after the incident.

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11 (vi) There is also the statement that this court has considered of Dahema Baker which was a statement dated the 21st of March 2019 which details the psychological effect upon herself, her husband Mr. Zitterbart and as well their young child, who this court understands was nine years old at the time of this incident.

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16 (vii) There is also the factor of high or medium value of the goods which were stolen or intended to be stolen.

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19 8. So for all those reasons, I take as my starting point a sentence of nine years' custody with a range of seven to fourteen years for robbery.

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22 **Aggravating Factors**

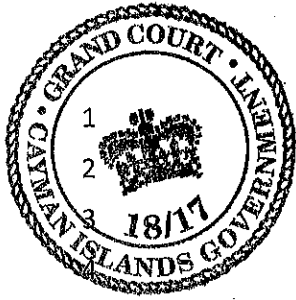
23
24 9. I consider the fact that the two robbers were each masked - clearly an attempt to conceal their identity - as a matter that I may consider to increase the seriousness of the offence. I also consider the following general aggravating features to be relevant:

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28 (i) The presence of a young child at the premises to indicate a more than usual degree of harm.

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30 (ii) The planning of the offence: the timing of the offence, the position of the get-away vehicle, the stealing of a vehicle earlier that day which was used as the get-away vehicle during the course of the robbery, are factors which support this planning.

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33 (iii) The defendant has 11 previous convictions, the most relevant of these being for handling stolen goods and possession of an offensive weapon.

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36 (iv) The Crown has also invited me to consider the defendant's failure to respond to a previous sentence as a general aggravating feature. This defendant was granted probation for 12



months as his sentence for those offences. In May 2012, there was a breach of that probation order. He was again placed on probation for two years. These are matters that I can consider in terms of general aggravating factors going towards the sentence for robbery.

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6 10. There are no mitigating factors for this Court's consideration except the defendant's relative youth.
7 The defendant was twenty-three (23) years old at the time of commission of the offence.

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9 11. **(ii) Possession of a firearm with intent to commit an offence**

10 Count 2: The possession of the firearm with intent to commit an offence, where the maximum is 20
11 years' imprisonment. It's agreed that the mandatory minimum sentence is 10 years' imprisonment, in
12 the absence of exceptional circumstances. No issue of exceptional circumstances has arisen in this
13 case. There are factors that may go to increase the seriousness of this offence, including the fact that
14 the firearm was loaded and was discharged during the course of the robbery.

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17 **(iii) Possession of a prohibited Weapon**

18 12. Count 4: Possession of a prohibited weapon contrary to *Section 79 of the Penal Code*. The maximum
19 sentence is 10 years' imprisonment. I consider here that the CS gas canister was found at a location
20 when the robbers fled from the vehicle at Victory Avenue in Prospect.

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23 **Social Inquiry Report (SIR)**

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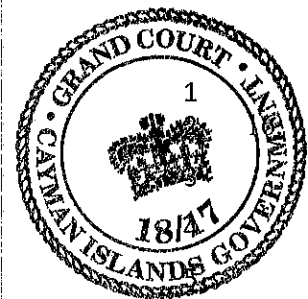
25 13. I have considered carefully the social enquiry report submitted to the Court. With regard to the SIR,
26 I note that this defendant seemed to have what I will describe as an unremarkable upbringing.

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28 14. I say that to mean that he was never involved in any matters before the court before he was 19 years
29 old, so, unremarkable to that extent.

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31 15. I note that he did not complete high school, yet he still managed to be employed in jobs where he
32 was able to command between \$11 and \$14 an hour. I note that he has no physical or mental concerns
33 of which this court should be particularly cognisant. In fact, it appears that the defendant might just
34 have been someone with a little too much time on his hands. He has not admitted the offences before
35 the court, of course it's a conviction after trial, but I note as well that there are no indications of
36 remorse.



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6 Both Counsel for the defendant and the SIR noted the defendant's feelings towards his young child
7 and the effect that a custodial sentence would have on that relationship and the child, in particular.
8 Of course, the graver the offences for which an offender is before the court, the less the court can
9 consider those as factors which would mitigate any sentence. The SIR also records that the officer
10 considered that the defendant was at a high risk for re-offending.

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14 **Victim Impact Report**

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16 17. As noted above, a statement by Mrs. Zitterbart was produced for this court's attention. I take it in the
17 manner of a victim impact report. I can say here she details feeling very unsafe after this robbery and
18 as well gives some detail as to the significant effects on her young son for having been present at this
19 robbery.

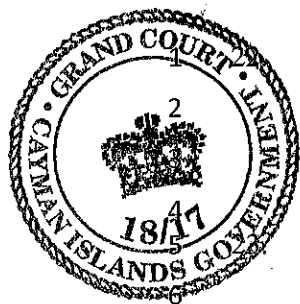
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22 **Court's Conclusions**

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24 18. With regard to Counts 1, 2 and 4 of the indictment, on those counts on the indictment, I find that a
25 concurrent sentence should be imposed, as they are all offences which are directly related to the
26 robbery.

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28 19. The *Cayman Islands Sentencing Guidelines* states that where a concurrent sentence is passed, in order
29 to reflect the over-all criminality involved, such a sentence should be appropriately aggravated by the
30 presence of associated offences and that the court can increase a sentence of the principal offence to
31 reflect the gravity of the defendant's conduct. Quite apart from this principle, on the facts of the
32 instant case, there were matters which this court could consider as increasing the seriousness of the
33 principal offence, as well as general aggravating features which would warrant an uplift to the starting
point of nine years. There are no mitigating factors identified, except the defendant's relative youth.

20. For these reasons, the sentence of this court on Court 1, robbery, is a term of 10 years' imprisonment.

21. On Count 2, possession of a firearm with intent to commit an offence, the sentence of this court is
ten years' imprisonment. This sentence on Count 2 will run concurrent to the sentence of robbery on
Count 1.



On Count 4, possession of a prohibited weapon, the sentence of this court is a term of three years' imprisonment to reflect that the CS canister was discharged during the course of the robbery. This sentence will run concurrent to the sentence for count 1.

Count 3, the unlawful use of a firearm. The maximum sentence is five years' imprisonment. The Crown has submitted that I should consider this a separate and serious offence from that reflected in counts 1, 2 and 3.

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24. Count 4: I recall the evidence of Officer Garwood. He stated:

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25. Counsel for the defendant has submitted to this court that the court should consider that this offence as well is all part and parcel of the robbery. I've listened to her submissions. I've read the cases which were referred to the court, these being the case of *R v McMahon*, 2010 EWCA Crim 716 and as well the *R v McKellar*, 2018 EWCA Crim 2208.

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27. In the case of *R v Seth Watler*, Court of Appeal CICA 34 of 2017, the Court of Appeal considered the fact that the offence with which the defendant was charged had been committed against someone who provided a service to the public and that this was a significant aggravating factor where a police officer had been punched once. In this court how much more so on the present facts where the officers were shot at with a firearm and had to scramble to take evasive action to avoid injury.

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28. I am mindful that this factor closely aligns to the aggravating factor identified above, of the weapon being discharged in the presence of police officers, and I am therefore careful not to double count in my consideration of the appropriate sentence. I do find, however, that a consecutive sentence is


1 warranted to mark the gravity of this offence. The appropriate sentence for the unlawful use of a
2 firearm is four years' imprisonment.

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4 29. This sentence will run consecutive to the sentence for robbery at count 1. For the avoidance of
5 doubt, had this court not had in mind the totality principle, as it sought to find the appropriate sentence
6 in this case, the sentence for Count 1 would have been closer to the high end of the sentencing range
7 to reflect the general aggravating factors present.

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9 30. With regard to the cases that I referred to above which were raised before this court, and with regard
10 to the submissions of defence counsel as to whether or not this court should impose a lesser sentence
11 based on the extent of this defendant's offending, the court having accepted that there was a joint-
12 enterprise and that the court has found him guilty based on joint-enterprise, I do not find that there is
13 anything before me which affects the sentence passed by this court in accordance with those matters.
14 I don't find that there is anything presented before the court or in the evidence which was presented
15 at trial which would cause me to find that there should be some difference or that the sentence should
16 be mitigated by the fact that Mr. Ebanks might not have been robber number one.

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18 31. The sentence of the court is that this defendant will serve a **term of imprisonment of fourteen**
19 **years**. Any time that the defendant has spent in custody prior to this sentence will count against the
20 sentence of the court.

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22 32. Mr. Ebanks, the court found you guilty previously and the court has now found that you should serve
23 a sentence of fourteen years' imprisonment. You are still quite a young man. I know that the social
24 enquiry report states that you are not minded to pursue any of the rehabilitative courses that might be
25 available to you, but can I suggest that you might want to avail yourself of them? Your counsel
26 has stated as well that she has advised you with regard to certain counselling that might be offered
27 and again I advise you to avail yourself of those.

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33 **Justice Marlene I. Carter**
34 **Acting Judge of the Grand Court**
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