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2
3 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
4 **CRIMINAL SIDE**

5 **INDICTMENT Nos. 12/2021 & 13/2021**

6
7 **THE KING**

8 **v.**



9 **KASNIQUE PATRICE AUSTIN-CUPID**
10 **&**
11 **RICHARD EDWARD NASH Jnr.**

12
13
14 **Appearances:**

Mr. Garcia Kirt Kelly for the Crown

15
16 **Mr. Jonathan Hughes of Samson Law for the**
17 **Defendant Austin-Cupid**

18
19 **Mr. Crister Brady of Brady Law for the Defendant**
20 **Richard Nash Jnr**

21
22 **Before:**

Justice McDonald-Bishop (Actg.)

23 **Date of Hearing:**

6th May 2022

24 **Delivery of Decision:**

17th June 2022

25
26 **HEADNOTE**

27 *Criminal Law – Robbery – Section 243(1)(b) of the Penal Code (2019*
28 *Revision) – Sentence – Whether there is a need to distinguish between the*
29 *two Defendants in determining the offence category as the Defendants’*
30 *roles in carrying out the offence were different.*
31

32
33 **SENTENCE JUDGMENT**

1 **INTRODUCTION**

2 1. The Defendants, Kasnique Patrice Austin-Cupid ('Defendant Cupid') and Richard
3 Edward Nash, Jr. ('Defendant Nash'), are before the court for sentencing in these
4 proceedings.

5
6 2. On 25th February 2022, they were convicted after a trial by a judge alone on an
7 indictment that charged them with the offence of Robbery contrary to s.242(1) of the
8 *Penal Code* (2019 Revision).

9
10 3. Section 242(1) of the *Penal Code* (2019 Revision) provides:

11
12 "242. (1) A person commits robbery if he steals, and immediately before or
13 at the time of doing so, and in order to do so, he uses force on any
14 person or puts or seeks to put any person in fear of being then and
15 there subjected to force."
16

17 4. The particulars of the offence are that on the 7th February 2020, at the Tortuga Liquor
18 Store located at Lime Tree Bay Road, George Town, Grand Cayman, Cayman Islands,
19 the Defendants stole the sum of KYD\$2,361.13 and US\$181.00 in cash from Ms Heigna
20 Andrade ('Ms Andrade') and immediately at the time of doing so, and in order to do so,
21 used force on her.

22
23 5. Ms Andrade was a cashier on duty at the liquor store with another cashier, Ms Beverly
24 Ebanks.

25
26 6. At the time of the robbery, Defendant Cupid was employed at the Tortuga Rum
27 Company and assigned to the liquor store. She had not gone to work on the day in
28 question.

29 **THE FACTUAL BACKGROUND**

30 7. For present purposes, the salient facts relating to the commission of the offence may be
31 outlined as follows.





- 1 8. At around 8:50p.m. on Friday, the 7th February 2020, two men armed with knives entered
2 the liquor store, while it was still open for business, but no customers were inside. The
3 two female employees were preparing to close the store.
4
- 5 9. CCTV cameras inside the store captured the men's entry, and the footage from these
6 cameras was admitted into evidence at the trial. The robbers wore facial covering by
7 way of disguise, long-sleeved clothing, and gloves.
8
- 9 10. The first man to enter the store (referred to as "Robber no.1" by the prosecution) was
10 dressed in a manner that assumes significance in this case. He wore light blue long pants
11 with distressed patterns, a black hooded long-sleeve top, black suede-looking shoes,
12 blue-coloured underwear with black bird-like figures, a belt with a white-coloured
13 centre, dark-coloured gloves, and a gold-coloured watch with a black face. The
14 prosecution's case was that this robber was Defendant Nash, otherwise called "Sickka
15 Dan", "Sikka".
16
- 17 11. The second man (labelled as "Robber no. 2" and whose identity remains unverified)
18 wore black-coloured clothing. He was never apprehended.
19
- 20 12. On entering the store, the robber, accepted by the court to be Defendant Nash, demanded
21 money and proceeded to physically assault Ms Andrade, who had fallen to the ground
22 in her attempt to run upon seeing a knife he held at her. Ms Andrade suffered bodily
23 injury from the attack. While Defendant Nash was attacking Ms Andrade, "Robber no.
24 2" held Ms Ebanks on the ground face down.
25
- 26 13. The robbers took the cash from the cash registers and then took the staff members to the
27 store area where the money from daily sales was secured in a safe. They did not get any
28 cash from the safe as there was none, and they immediately left the store.
29
- 30 14. After the men left the store, Ms Ebanks reported the incident to the police and her
31 supervisor.
32
- 33 15. From that night onwards, the police conducted a trawl of various CCTV cameras, both
34 private and government-operated cameras.
35



1 16. The footage from these cameras showed occurrences at and around the crime scene at
2 Lime Tree Bay Road, West Bay Road, and the Esterley Tibbetts Highway at the relevant
3 time.

4
5 17. From the footage of various cameras, a white van identified to be a Toyota Noah was
6 observed before the robbery travelling from the West Bay area. It stopped at Foster's
7 Republic in West Bay, and a lady driver, later identified and accepted to be Defendant
8 Cupid, alighted from it and went into the supermarket. She purchased several items,
9 including two pairs of dark-coloured gloves that resembled those the robbers were
10 wearing during the robbery. She re-entered the vehicle and continued her journey from
11 West Bay towards the direction of George Town. The van was sighted driving along the
12 roadway at various intervals until it was seen at some point just before the robbery
13 travelling along the Esterley Tibbetts Highway from the George Town direction. It had
14 passed Governor's Square earlier and then returned when it stopped at the Cost U Less
15 service entrance/exit. Three persons exited the van and ran into Governor's Square,
16 where the Liquor Store was.

17
18 18. Immediately after, two men dressed in dark-coloured tops entered the liquor store. The
19 third man in a reddish-coloured shirt stopped at the corridor near the liquor store. By
20 then, the white van was observed travelling toward Safe Haven Road. It turned onto
21 Pinehurst Road at a dark empty lot, parked with lights off, and waited.

22
23 19. Following the robbery, the robbers could be seen running towards where the van was
24 parked in the empty lot. Later, the lights of the vehicle came on at the same place where
25 it had stopped, and then it left Pinehurst Road. The van's movement was tracked using
26 the CCTV footage, and three digits of its license number were observed. The police
27 conducted checks regarding the identification of the vehicle that led them to Defendant
28 Cupid as the owner.

29
30 20. Further police investigations subsequently led to the arrest and charge of Defendant
31 Cupid. She was also interviewed by the police and answered questions in the presence
32 of her attorney-at-law. She admitted to the police that she owned the vehicle and had
33 possession of it on the night of the robbery.

1 21. In her first interview, she told the police that she had never left her house and that her
2 van had been parked at her home all night. However, in her second interview, upon
3 being confronted with evidence that she had gone to Foster's Republix before the
4 robbery, she then admitted to having left her house in the van on the night in question.
5 She, however, denied involvement in the robbery and that she knew Defendant Nash.

6
7 22. Following extensive police investigations, including examining CCTV footage of the
8 robbery and searches conducted at Defendant Nash's residence, Defendant Nash was
9 apprehended, interviewed, and subsequently charged. He said nothing upon being
10 cautioned by the police. However, in his interview, he denied knowledge of the
11 commission of the offence and any association with Defendant Cupid.

12
13 23. The police also obtained the Defendants' telephones, which they handed over for analysis
14 to Intelligence Analyst, Joanne Delaney.

15
16 24. Following the findings of Ms Delaney, evidence of relevant toll data and cell site
17 analysis, among other telephonic evidence, was deployed by the prosecution. This
18 evidence established that there was contact between the Defendants' cellphones on the
19 night of the robbery and within the locality of the crime scene. It also established, on
20 the examination of Ms Delaney, that the movement of Defendant Cupid's telephone
21 corresponded with the CCTV footage of the movement of her van within and around the
22 locality of the liquor store around the time of the robbery. The evidence also revealed
23 telephone conversations between the Defendants before and after the incident, which
24 proved that they were acquainted with each other, contrary to what they had told the
25 police.

26
27 25. The robbery was formally admitted at trial pursuant to s.34 of the *Evidence Act* (2021
28 Revision). However, it was heavily disputed that the Defendants were the perpetrators.
29 Defendant Nash was presented on the prosecution's case as the principal offender along
30 with Robber no. 2. Defendant Cupid was presented as a secondary party who
31 orchestrated the robbery and aided and abetted its commission.





1 26. The Defendants vehemently denied the allegations and put the prosecution to strict proof
2 in keeping with the incidence of the burden of proof. At trial, Defendant Cupid raised
3 an alibi defence. Defendant Nash remained silent. Therefore, the disputed question for
4 the court's consideration was whether the Defendants, acting together as part of an
5 unlawful joint enterprise as alleged by the prosecution, had committed the robbery.

6
7 27. The prosecution relied primarily on circumstantial evidence and invoked several other
8 principles of law to prove the allegations that the Defendants committed the offence.
9 The defence put forward the legal principles on which they relied to contest the
10 prosecution's case.

11
12 28. On the 25th February 2022, following the analysis of the evidence against the background
13 of the applicable law and the submissions of counsel, both Defendants were convicted.

14
15 29. The findings of facts and reasoning on which the verdicts are based are extensively
16 documented in a written judgment dated 25th February 2022. A substantial portion of
17 that Judgment was read into the record at the time of that hearing, with the concurrence
18 of counsel for the Defendants. In the interest of time, those findings will not be detailed
19 for present purposes.

20
21 30. It is considered enough to simply state that, on any view of the case, as the court accepted
22 it to be, it was satisfied to the extent that it was sure that the robbery was part of an
23 unlawful joint enterprise orchestrated by Defendant Cupid for monetary gain, to satisfy
24 an outstanding debt. Defendant Nash was evidently recruited by Defendant Cupid and
25 took on the role of principal offender, while Defendant Cupid aided and abetted its
26 commission and is, therefore, liable on all fronts, as a secondary party.

27
28 **ANALYSIS FOR SENTENCING**

29 31. According to s.242(2) of the *Penal Code* (2019 Revision), a person who commits
30 robbery is liable to imprisonment for life.

31
32 32. It is acknowledged that the maximum penalty is not to be imposed unless in the most
33 serious of offences and in relation to an offender who deserves such a penalty.

1 33. Guidance is also derived from the principle stated in the *Cayman Islands Sentencing*
2 *Guidelines* ('*the Guidelines*') that the court must not pass a custodial sentence unless it
3 believes that the offence is so serious that no other sentence can be justified.

4
5 34. I have also adopted the recommendation in the *Guidelines* that all available sanctions,
6 other than imprisonment, that are reasonable in the circumstances of each case should
7 first be considered. Therefore, a sentence of imprisonment must be regarded as a matter
8 of last resort.

9
10 35. The approach to sentencing prescribed in part 7 of the *Guidelines*, as well as the
11 particular guideline in part 4(g)(IV), which relates to sentencing for the offence of
12 Robbery, has been adopted. The specific guideline provides that robbery usually merits
13 a custodial sentence but that exceptional circumstances may justify a non-custodial
14 penalty for an adult and, more frequently, for a young offender.

15
16 36. Having regard to the approach I should adopt in accordance with the *Guidelines* and the
17 applicable law, I considered it prudent to request pre-sentencing reports to inform my
18 decision on the appropriate sentence. Accordingly, I have obtained Victim Impact
19 Reports (VIRs) for Ms Andrade, Ms Ebanks and Ms Jermala Janka – the latter being a
20 representative of the Tortuga Rum Company. I have also received Social Inquiry
21 Reports (SIRs) and Antecedent Reports concerning the two Defendants.

22
23 37. Having regard to the circumstances of the commission of the offence, the impact of the
24 offence on the victims, the personal circumstances of each Defendant, as garnered from
25 the reports, and the aims of sentencing, I am satisfied that the custody threshold is
26 reached in respect of this offence and both Defendants.

27
28 38. There are no exceptional circumstances to justify the imposition of a non-custodial
29 sentence on either of them. Neither is there any circumstance to justify the suspension
30 of the custodial sentence in relation to either of them. I formed the view that only a
31 sentence of immediate imprisonment would serve the ends of justice.



1 39. The robbery of a commercial establishment, to which one of the Defendants was
2 employed, with attendant physical harm to the complainant, is a serious offence that
3 warrants condign punishment.

4
5 40. The critical question, therefore, is what the length of the period of incarceration should
6 be.

7
8 41. In determining this question, I have borne in mind the purpose and the aim of sentencing,
9 and that there should be a balancing of these objectives to arrive at the appropriate
10 sentence, that is, a proportionate and just sentence.

11
12 **DETERMINING THE OFFENCE CATEGORY**

13
14 42. The first step in this aspect of the analysis is to determine the offence category. The
15 *Guidelines* recognise three categories of robbery. It is agreed that this is a Commercial
16 Robbery.

17
18 43. The prosecution has categorised it as a Sophisticated Commercial Robbery of a liquor
19 store, in that, it encompasses a high degree of planning and may also encompass a high
20 degree of premeditated force, actual or threatened. In relation to the degree of planning,
21 the prosecution referred to:

22
23 i. The timing of the offence - *Around the time when the business was*
24 *scheduled to close for the day.*

25
26 ii. The purchase of gloves.



27
28 iii. The use of disguises.

29
30 iv. The use of the service entrance to Cost U Less.

31
32 44. I am reluctant to share the view that these features identified by the prosecution render
33 the Robbery a sophisticated one. The steps taken to rob the store were not extraordinary,
34 even though they exhibited some degree of planning. In my view, it is best described as

1 a less sophisticated commercial robbery. In any event, the matters noted by Crown
2 Counsel have been considered in assessing the aggravating features in the commission
3 of the offence.

4
5 **DETERMINING THE SERIOUSNESS OF THE OFFENCE – I.E. THE LEVEL OF**
6 **CULPABILITY; THE CATEGORY OF HARM**

7
8 *The Prosecution's Position*

9
10 45. Mr Kelly for the Prosecution noted that the categorisation of the Harm would depend on
11 the court's view of the psychological harm that resulted.

12
13 46. He contended that the offence might be considered to be *Level A - High Culpability and*
14 *Category 1 Harm* on the basis of the use of knives to threaten violence and serious
15 physical/psychological harm caused to the victims.

16
17 47. Crown Counsel relied on the VIRs of Ms Andrade and Ms Ebanks, as well as the reaction
18 of Ms Ebanks to the CCTV footage of the robbery when giving evidence in open court,
19 to ground the argument that serious psychological harm was caused to them.

20
21 48. Crown Counsel heavily relied on the case of *R v Chall (Joginder)*¹, where, after
22 referencing some earlier decisions, the court opined that expert evidence is not a
23 necessary precondition for a finding of severe psychological harm. Their Lordships
24 cited *R v Dalton*²; *R. v Egboujor*³ and *R v Boyle*⁴ as authority for this proposition. Those
25 authorities have established that a judge's assessment of whether severe psychological
26 harm has been caused may be based upon expert evidence but may be reached without
27 an expert's opinion.



¹ [2019] 2 Cr. App. R (S) 44

² [2016] EWCA Crim 2060

³ [2018] EWCA Crim 159

⁴ [2018] EWCA Crim 2567

1 49. Crown Counsel further opined that there is no need to distinguish between the two
2 Defendants in determining the offence category. He relied on the case of **R v McMahon**
3 (**Richard**)⁵ to argue that it is not in all cases that the court must discriminate against
4 Defendants in a joint enterprise. He maintained that given the role of Defendant Cupid
5 in the commission of the offence, she ought to be treated equally with Defendant Nash
6 in terms of Culpability and Harm. In Crown Counsel's view, the Defendants share the
7 same *High Level of Culpability* and *Category 1 Harm*.

8
9 *The Position of the Defence – Kasnique Cupid*

10
11 50. Mr. Hughes, counsel for Defendant Cupid, disagreed. He contended that the court
12 should conduct an individual assessment of the role played by each Defendant and arrive
13 at an appropriate sentence in respect of each separately. He argued that treating the two
14 Defendants at the same Level of Culpability and Category of Harm is not sustainable
15 given the differentiation in their roles in the commission of the offence. The Culpability
16 of Defendant Cupid and the Harm resulting from her actions should be distinguished
17 from the actions of Defendant Nash. There is a clear distinction, he said, between the
18 Culpability of the robbers who entered the store, threatened violence and caused trauma
19 and that of the driver of the vehicle that took the robbers to and from the crime scene.
20 He relied on the case of **R v McKellar**⁶ in support of this contention. In Defence
21 Counsel's view, the Culpability of Defendant Cupid is less than Defendant Nash's.
22 According to Counsel, Defendant Cupid's Level of Culpability is 'Medium' as features
23 of 'Level A - High Culpability' and 'Level C - Lesser Culpability' are absent.

24
25 51. In respect of Harm, Mr. Hughes disagreed that the offence caused serious or severe
26 psychological Harm to the victims, as argued by Crown Counsel. Citing the case of **R v**
27 **Forbes**⁷, Mr Hughes maintained that for the offence to be classified as 'Category 1'
28 Harm, there must be significantly more harm than is inherent in the commission of the
29 offence. In the instant case, counsel said, there is no evidence that such significant harm
30 has resulted. Counsel pointed, particularly, to the VIR of Ms Ebanks, whom, he noted,



⁵ 2010] EWCA Crim 716; 2010 WL 1368664

⁶ [2018] EWCA Crim 2208; [2019] 1 Cr. App. R. (S.) 21

⁷ [2016] EWCA Crim 1388; [2016] 2 Cr. App. R. (S.) 44



1 took no time off from work after the incident and did not seek counselling. In counsel's
2 view, the offence should be categorised as 'Category 2' Harm.

3
4 52. Therefore, on behalf of Defendant Cupid, Counsel proposes that the offence is: '*Level B*
5 *– Medium Culpability*' and '*Category 2*' Harm. Pursuant to the *Guidelines*, a B2 offence
6 attracts a starting point of 5 years' custody and a sentencing range of 4 – 8 years' custody.

7
8 *The Position of the Defence – Richard Nash*

9
10 53. On behalf of Defendant Nash, Mr. Brady posited that the Culpability Level of Defendant
11 Nash is medium (i.e. Level B – Medium Culpability), on the basis of the production of
12 a bladed instrument, which was not used to inflict violence on any of the complainants,
13 but which could properly be said to have been used to threaten violence. Counsel further
14 contended that while there was force used, there was no use of the weapon in the
15 application of that force, and there is no evidence of permanent physical harm to Ms
16 Andrade from the physical blows. Finally, he argued that the court should not accept
17 the prosecution's position that serious psychological harm is caused, but he is prepared
18 to accept that, if anything, there could be said to be some psychological harm.

19
20 54. Mr Brady submitted that the Level of Culpability (at Level B) and the Category of Harm
21 (at Category 2) should place this offence for Defendant Nash at B2 with, as above, a
22 starting point of 5 years' custody and a sentencing range of 4 – 8 years' custody.

23
24 55. Therefore, in summary, for counsel:

25
26 a. The position of the Crown is that the offence may be considered as Level A - High
27 Culpability and Category 1 Harm. Therefore, as an A1 offence the *Guidelines*
28 provide for a starting point of 16 years' custody with a sentencing range of 12 – 20
29 years' custody.

30
31 b. Both defence counsel submitted that the offence should be viewed as a B2 offence
32 with a starting point of 5 years' custody and a sentencing range of 4 – 8 years'
33 custody.

1 56. Having considered the submissions of counsel, I will begin with my view regarding the
2 Level of Culpability.

3
4 57. I would categorise the offence as Level A – High Culpability. The two robbers were
5 armed with knives that were not concealed. In the VIR, Ms Andrade stated that
6 Defendant Nash had a long knife that he held towards her. Even though his action was
7 not said to have been accompanied by words or an overt act of violence, the production
8 of the knife was designed and calculated to threaten the witness with violence to render
9 her in a state of submission to facilitate the theft. Indeed, it was the production of the
10 knife that caused Ms Andrade to attempt to run, resulting in her fall. I am satisfied that
11 the knives were used to threaten violence.



12
13 58. Regarding my view of the Category of Harm.

14
15 59. I accept the principles adopted by Mr. Kelly for the Prosecution from the cases cited as
16 incontrovertible and highly persuasive. I find, however, that there is no basis for me to
17 find that there was severe psychological harm that could render the offence one of
18 Category 1 in terms of Harm.

19
20 60. While I am quite mindful of the reaction of Ms Ebanks in court upon seeing the footage
21 of the robbery, I find when her reaction in court is juxtaposed against the description of
22 her general response towards the incident outside of court, as disclosed in the VIR
23 relating to her, I find it difficult to conclude that she had suffered serious or severe
24 psychological harm. In the VIR, she indicated that she did not stop from work or seek
25 counselling. She indicated that she currently views every customer who attends the store
26 with suspicion, and she is particularly disappointed and upset by the fact that Defendant
27 Cupid, as an employee of the company and whom she had trusted, had orchestrated the
28 incident. I accept that she suffered some psychological harm, which could be little more
29 than the level inherent in the commission of the offence.

30
31 61. However, I accept that Ms Andrade is significantly more affected by the incident. In the
32 VIR relating to her, she indicated that as a result of the ordeal, she suffered a swollen
33 face, a black eye, a bump on the head, a cut on her left leg and bruises on her body,
34 particularly her chest. She also disclosed that she had been traumatised by the incident.



1 It has caused her to become paranoid at work, thinking that something will happen. The
2 SIR indicates that in the view of the reporting probation officer, Ms Andrade is
3 significantly impacted by the incident.

4
5 62. In my view, the physical attack on Ms Andrade would have substantially affected her
6 response to the offence and in readjusting to life after the event, especially at her
7 workplace. However, having regard to the VIR and SIR relating to her, I am equally
8 hesitant to conclude that the incident has caused serious or severe psychological harm.
9 Nevertheless, she has clearly suffered some physical and psychological harm over and
10 above the level of harm inherent in the commission of the offence. This would serve to
11 classify the offence more as Category 2 in terms of Harm.

12
13 63. I have also considered the VIR of Ms Janka for Tortuga Rum Company. I am prepared
14 to find that given that an employee of the company was involved in the robbery as a
15 perpetrator, the abuse of trust would have exacerbated any psychological feeling towards
16 the incident. This is particularly evident from the report on Ms Ebanks and Ms Janka.
17 However, there is nothing that would suggest serious or severe psychological harm
18 caused to anyone connected to the company. I would conclude that given the effect on
19 Ms Andrade, in particular, some psychological harm was caused above the level of harm
20 inherent in the commission of the offence.

21
22 64. Based on the foregoing conclusions, the offence may properly be classified as Level A
23 for Culpability and Category 2 for Harm – that is, an A2 offence.

24
25 **SHOULD THERE BE DIFFERENTIATION IN CATEGORISATION OF THE OFFENCE**

26 65. This categorisation of the offence as an A2 offence applies to both the principal,
27 Defendant Nash, and Defendant Cupid, the secondary party.

28
29 66. I see no reason to hold Defendant Cupid at a lesser Culpability Level than Defendant
30 Nash, given the leading role she would have played in the planning and execution of the
31 offence. Defendant Cupid was clearly a major participant in the joint enterprise as an
32 aider and abettor as well as counsellor and procurer. She was there from the inception.
33 Indeed, it would not be unfair to describe her as the mastermind, given the selected



1 location and her inside knowledge of the operations and layout of the liquor store. Her
2 role was not at all peripheral as that of the secondary party in the case of *McKellar*⁸, who
3 was merely the driver of the getaway car and a late recruit to the joint enterprise.

4
5 67. Therefore, Defendant Cupid stands on the same footing in respect of Culpability as the
6 principal offender because of her lead role in the joint enterprise. She is not being held
7 liable for any action that was not within the scope of the joint enterprise. She knew the
8 employees would have been present in the store, and she must have known that they
9 would have had to be subject to force and, at least, the threat of violence for money in
10 their custody to be taken from them. The use of knives to subject them to surrender must
11 have been within her contemplation and intention. In addition, Ms Andrade sustained a
12 fall in her attempt to escape upon seeing the knife held at her. It was in that vulnerable
13 state that she was attacked and further assaulted by Defendant Nash. Defendant Cupid
14 must take some responsibility for some of the physical and psychological injuries Ms
15 Andrade sustained that were more than the level of harm inherent in the commission of
16 the offence.

17
18 68. I appreciate that Defendant Nash had gone further and launched an unwarranted and
19 vicious attack on Ms Andrade, especially by kicking her in the face. This is considered
20 to have been over and above that which was inherent in the commission of the offence,
21 and which was, in my view, unnecessary for the execution of his unlawful act. However,
22 I have not factored the kicks to the face in categorising the seriousness of the offence
23 that could affect Defendant Cupid. This is treated below as an aggravating factor
24 specific to Defendant Nash alone, given what appeared to be its spontaneity.

25
26 69. For this reason, I see no basis to hold Defendant Cupid at a lower Level of Culpability
27 in treating with the offence category because she must be held jointly liable for all the
28 other consequences of the robbery that fall within the scope of the joint enterprise.

29
30 70. Accordingly, in respect of both Defendants, the offence falls at Level A for Culpability
31 and at Category 2 for Harm – that is, this is an ‘A2’ offence for both defendants.
32
33

⁸ *Supra*



1 **THE STARTING POINT/CATEGORY RANGE**

2
3 71. The starting point for this category of robbery is 9 years' custody, and the sentencing
4 range is one of 7 – 14 years' custody. Regarding both Defendants, I would begin with
5 the starting point of 9 years' custody.

6
7 72. In determining the adjustment to the starting point in arriving at the appropriate sentence,
8 regard is had to the personal circumstances of each Defendant, including any personal
9 conduct concerning the commission of the offence that has not been considered in
10 determining the offence category. The SIR and antecedent reports have proved useful
11 in conducting this exercise.

12 **GENERAL AGGRAVATING FACTORS COMMON TO BOTH DEFENDANTS**

13
14
15 73. Having been guided by the submissions of counsel, and the *Guidelines*, I have identified
16 the following aggravating factors common to both Defendants in respect of the
17 commission of the offence that would result in an upward adjustment from the starting
18 point.

19
20 i. Premeditation/planning: The robbery was not spontaneous or opportunistic.
21 Instead, it was planned as evidenced by the timing, the point of entry and
22 exit of the offenders (the service entrance of Cost U Less); the use of
23 Defendant Cupid's vehicle in the transportation of the perpetrators; the
24 movements of the motor vehicle before, at the time of the robbery and
25 thereafter; the purchase and use of gloves; and the use of other forms of
26 disguise.

27
28 ii. Attempt to conceal identity: To prevent detection and identification,
29 Defendant Nash wore a mask, a hood over his head, a long sleeve shirt and
30 gloves. This would have been to the knowledge and with the endorsement
31 of Defendant Cupid, who the court accepts was the offender who purchased
32 the gloves and transported Defendant Nash to the crime scene dressed as he
33 was.



1 iii. The location/time: An establishment within a commercial complex to which
2 members of the public were likely to be present and were, in fact, present,
3 given that the liquor store and neighbouring businesses were not yet closed.
4 It shows brazenness and scant regard for law and order on the part of the
5 offenders.

6
7 iv. Multiple perpetrators: The offence was carried out by a group, which
8 included two armed assailants who executed the robbery; one man who
9 remained outside near the store, no doubt as a lookout man; and Defendant
10 Cupid.

11
12 74. The Prosecution has raised the lack of remorse on the part of the Defendants as a factor
13 worthy of consideration against them in determining the appropriate sentence. However,
14 the fact that they have not accepted liability and expressed remorse is not treated as an
15 aggravating factor in the circumstances. The court must always be cautious in treating
16 with what appears to be a lack of remorse as an aggravating factor, as persons may have
17 different reasons for not showing remorse, including the fact that they could well be
18 innocent or ashamed of their conduct. Therefore, the starting point is not affected by the
19 lack of remorse in respect of both Defendants.

20
21 75. The aggravating factors that are accepted to be common to both Defendants have served
22 to cause an upward adjustment from the starting point to 11 years' imprisonment.

23
24 **SPECIFIC AGGRAVATING AND MITIGATING FACTORS (PERSONAL TO EACH)**

25
26 76. I will now consider the aggravating and mitigating factors relative to each Defendant
27 separately using the elevated sentence of 11 years' imprisonment (*caused by the common*
28 *aggravating factors*).

29
30 77. In determining the specific aggravating and mitigating factors relative to each
31 Defendant, their personal circumstances as disclosed in the pre-sentencing reports will
32 be considered, as well as any specific conduct attributable to them in the commission of
33 the offence and the harm that resulted.



1 **DEFENDANT CUPID**

2
3 Aggravating factors

4
5 78. Abuse of a position of trust/breach of trust: Defendant Cupid was an employee of the
6 liquor store at the time of the commission of the offence. She had inside knowledge of
7 the operations of the store and the location of the safe – all of which she used in the
8 execution of the unlawful joint enterprise. She also showed no regard for the safety and
9 well-being of her co-workers, who she knew would have been present at the time of the
10 robbery.

11
12 79. This is a weighty aggravating factor – which now results in a further upward adjustment
13 to the starting point to 12 years and 6 months.

14
15
16 Mitigating factors

17
18 80. I turn now to consider the mitigating factors.

19
20 i. No previous convictions: Defendant Cupid's Antecedent Record has
21 revealed that she has no previous convictions. This is a significant
22 mitigating factor in her favour, given her age at the time of the commission
23 of the offence.

24
25 ii. Previous good character: There is nothing from the Crown to rebut
26 Defendant Cupid's case at trial that she was hitherto a person of good
27 character. There is also nothing in the SIR to suggest otherwise except for
28 her consumption of ganja at social events. Although her character is related
29 to the status of her criminal record, it, nevertheless, demands separate
30 consideration in her favour as a mitigating factor.

31
32 iii. Care of young children: The Defendant has two young children, aged nine
33 and five. Her nine-year-old son has special needs. She has expressed
34 concern regarding her husband's ability to support their children while
35 working full-time. She has also reported that he has since lost his job. It is



1 indicated that Defendant Cupid prefers a suspended sentence given her
2 parenting commitments, particularly her son's disability.

3
4 81. The prosecution has accepted the care of her children as a relevant consideration in
5 mitigation of sentence but submitted in reliance on the case of **R v Nethersole (Kathryn)**⁹
6 that it ought not to be used as a "trump card" and should not "be seen as a licence to
7 commit serious offences and avoid custodial consequences".

8
9 82. The approach to be taken regarding impact of dependent children is set out by the
10 English Court of Appeal in **R v Petherick**¹⁰ and reiterated by the court in **R v Nethersole**,
11 in which their Lordships stated:

12
13 *"The court accepted that recognition that the sentencing of an offender engages not*
14 *only the offender's own Article 8 rights but also the Article 8 rights to family life of*
15 *those members of the family, including dependent children, must be considered.*
16 *Consistently with Article 8, a sentencing judge should consider as a relevant factor*
17 *the consequences for children if their sole carer is sent to prison, and should*
18 *consider whether the sentence contemplated is or is not proportionate when*
19 *balancing the impact of it on those children and the separation from their carer*
20 *against the seriousness of the offending and the legitimate aims such a sentence*
21 *serves. In a case where custody cannot proportionately be avoided, the effect on*
22 *children should be considered in the context of the length of the overall sentence to*
23 *be imposed, as the Court of Appeal expressly discussed at paragraph 24. Where the*
24 *court has insufficient information to enable it to carry out that balancing exercise,*
25 *then it must ask for additional information."*

26
27 83. Their Lordships further opined:

28
29 *"The interests of the applicant's children had to be balanced against society's*
30 *interest in the proper enforcement of criminal law, having regard in particular to*
31 *the seriousness of the offending, but sole care of children is not a trump card. It*
32 *cannot be seen as a licence to commit serious offences and avoid custodial*
33 *consequences."*

34
35 84. Defendant Cupid has stated that her husband has become the sole provider and caregiver,
36 and there is no reason to reject this. However, the likely effect of her incarceration on
37 the children will not be used as an excuse to suspend the custodial sentence as desired
38 by her or to significantly reduce the custodial sentence.

⁹ [2015] EWCA Crim 2174

¹⁰ [2012] EWCA Crim 2214

1 85. The Defendant would have known that she was committing a criminal offence, which
2 carried serious consequences, including a lengthy term of imprisonment if she were
3 caught. The thought of the effect on her children seemingly did not cross her mind.
4 Therefore, I, too, share the view, as the court did in *Nethersole*¹¹, that the care of children
5 cannot be seen as a licence to commit serious offences and avoid custodial consequences.

6
7 86. Despite the Defendant's seemingly reckless and selfish conduct in ignoring the impact
8 of her offending on her young children, there is every indication that she plays a
9 substantial role in their care and upbringing, especially the care of her son with special
10 needs. In the absence of direct evidence, I am prepared to accept that the children are
11 likely to be affected by a lengthy period of incarceration. Although there is no indication
12 in the SIR as to the impact the Defendant's detention is having or is likely to have on her
13 children, I am prepared to accept that the separation will have an adverse effect on them,
14 especially in the light of the sentence to be imposed. The longer the sentence, the more
15 likely they will be impacted, given their age and the special needs of her son. Therefore,
16 as the court did in *Nethersole*¹² (albeit with evidence before it), I will take this into
17 account and reduce the sentence by no more than six months, given that she was not the
18 sole carer and in light of the seriousness of the offence.

19
20 87. Having balanced the mitigating factors against the aggravating factors, I find that the
21 aggravating factors outweigh the mitigating factors.

22
23 88. However, the court is mindful that the *Guidelines* are intended to be merely a guide.
24 Having applied them, the court must still assess the sentence to determine whether it fits
25 the crime. The proportionality principle must ultimately be applied. The sentence that
26 best serves the ends of justice, bearing in mind the objectives of sentencing, must be
27 imposed. Therefore, with this in mind, I have considered other matters disclosed in the
28 SIR regarding Defendant Cupid's personal circumstances.



¹¹ *Supra*

¹² *Supra*



1 Risk of reoffending

2
3 89. The report has shown that Defendant Cupid was not actively engaged in organised
4 community activities or groups. According to the reporting officer for the SIR, there is
5 no evidence of constructive use of her leisure/recreation time in the community.
6 However, the SIR shows that she has engaged in academic and training programmes
7 since her incarceration awaiting sentencing. This is a positive sign that she is not beyond
8 rehabilitation. She is assessed to be at medium risk of reoffending after the assessment
9 of several criminogenic factors. Against this background, I believe that a sentence with
10 a strong focus on personal and general deterrence, punishment and rehabilitation is
11 critical to guard against the risk of recidivism. Of course, protecting the public from such
12 offensive behaviour must also factor in my contemplation, given that it was clearly
13 driven by financial needs, which are more than likely to continue for the rest of her life.

14
15 90. Having balanced the mitigating and aggravating factors, and having assessed her
16 personal circumstances, including her assessed risk of reoffending, it seems that a
17 sentence of 10 years 6 months' imprisonment is proportionate and just.

18
19 91. She is entitled to full credit for the time spent in custody while awaiting sentence for this
20 offence.

21
22 **DEFENDANT NASH**

23
24 Aggravating factors

- 25
26 i. Deliberate and gratuitous violence over and above what is inherent in the
27 commission of the offence: Defendant Nash violently attacked Ms Andrade,
28 which included kicking her in her face when she was defenceless on the
29 ground. His repeated kicks to her face caused her head to hit the ground
30 repeatedly, resulting in a lump on her head. When that was over, he then
31 dragged her by her hair in search of the safe where he believed the money
32 would have been kept. In the end, Ms Andrade sustained injuries, including
33 facial injuries, which led her to seek medical attention on the night of the
34 incident and after that. Even though her injuries may not have been



1 classified as permanent or serious, the kicks to her face (which always
2 symbolise derogatory conduct) were not only above the degree of force
3 inherent in the commission of this offence but were unwarranted, cruel and
4 degrading. This action on Defendant Nash's part adds another layer to his
5 culpability that was not taken into account in setting the sentence range. For
6 this reason, it is treated as an aggravating factor to avoid double-counting.

7
8 ii. Previous convictions: Defendant Nash's antecedent report shows two
9 previous convictions in the Summary Court – one for consumption of ganja
10 and one for wounding. Concerning the offence of wounding, he was
11 sentenced to 10 months' imprisonment, suspended for 2 years. This sentence
12 was in force at the time of the commission of the robbery. The offence of
13 wounding is similar in effect to the robbery in which he deliberately,
14 intentionally and physically injured one of the victims. This previous
15 conviction is treated as relevant for this reason, albeit it is noted that it does
16 not involve dishonesty. I will not add any weight to the drug-related offence.

17
18 iii. Unfavourable response to the previous sentence of the court: The first time
19 that the court gave Defendant Nash the benefit of a suspended sentence, he
20 breached it by reoffending with a more serious offence within a short time
21 of its imposition. In his social enquiry report, the reporting probation officer
22 states that Defendant Nash has demonstrated a high disregard for the
23 recently imposed court sanction and does not accept responsibility. She
24 noted that while his criminal history is low, there is a trend towards
25 escalation.

26
27 92. Starting at the aggravated sentence of 11 years' imprisonment, when the common
28 aggravating factors were assessed, these specific aggravating features would result in an
29 upward shift in the starting point to 12 years 6 months' custody.

30
31 Mitigating factor

32
33 93. One mitigating factor advanced by counsel on his behalf is his separation from his young
34 son, whose mother is also separated from the child. The child is presently in foster care.



1 I note, however, that Defendant Nash was not a sole caregiver, nor was he substantially
2 involved in caring for his child at the time of his incarceration. He did not live with the
3 child. The child may well be affected by the absence of both parents from his life, which
4 is rather unfortunate. However, again, regard is had to what the court said in *Nethersole*:

5
6 *"[t]he interests of the applicant's children had to be balanced against society's*
7 *interest in the proper enforcement of criminal law, having regard in particular to*
8 *the seriousness of the offending".*
9

10 94. The separation of Defendant Nash from his young son, while unfortunate, may not be as
11 impactful as in the case of Defendant Cupid, as he never lived with his son nor had the
12 care and control of him. Furthermore, his conduct overall during the commission of the
13 offence and his disregard for the sanctions of the court has shown, at minimum, scant or
14 no regard for his child's future well-being. The seriousness of the offence has rendered
15 any consideration of the impact of his incarceration on his child of very minimal
16 consideration given the force of society's interest to ensure the enforcement of the
17 criminal law in case of such serious offending. I am not prepared to make any allowance
18 for the care of his child as a mitigating factor because it is significantly outweighed by
19 the aggravating factors noted above and the assessment of his high risk of reoffending.

20
21 95. However, as in the case of Defendant Cupid, I have taken a step back to have regard to
22 the proportionality principle to ensure that any sentence to be imposed fits the crime.
23 Having done so, I considered particular features of his antecedent history as disclosed in
24 his SIR. I note that he was 24 years old at the time of the commission of the offence. He
25 was much younger than Defendant Cupid. He has had a reasonably stable upbringing
26 and a low history of criminality, even though he admits to using ganja and has a
27 conviction for wounding. The fact that he has only two previous convictions recorded
28 against him for offences in the Summary Court shows he is not a seasoned criminal.
29 Nevertheless, he is assessed at a high risk of reoffending because of certain high
30 criminogenic factors in his circumstances, including his low literacy level. He did not
31 finish his education.

32
33 96. I firmly believe that this fact, coupled with his age and low employment prospects, made
34 him easy prey to someone like Defendant Cupid, who has, from my observation of her
35 in court and in her police interviews, presented as a relatively intelligent, shrewd and



1 manipulative young woman. The telephone evidence also shows that after the robbery,
2 she was soliciting assistance from Ms Vicky McGaw for the Defendant Nash to obtain
3 a work permit. Given his deficits and dire employment needs, Defendant Cupid could
4 have easily influenced Defendant Nash to assist her with her unlawful venture.

5
6 97. It is of note that the reporting probation officer in the SIR has recommended that
7 Defendant Nash would benefit from continuing to attend literacy classes at prison in
8 order to improve his reading and writing skills. This exposure could assist him in being
9 a better person, which I hope he seizes the opportunity to become.

10
11 98. In light of my assessment of Defendant Nash's circumstances, I believe that the sentence
12 to be imposed must weigh heavily not only on the side of punishment or retribution but
13 also towards personal deterrence, rehabilitation and the protection of society. This is not
14 to say that I have ignored the need for the sentence to aim at general deterrence. In the
15 end, I have tried to balance all the purposes of sentencing as best as I can to arrive at the
16 most appropriate sentence in all the circumstances of the case and of the offender.

17
18 99. Having had regard to the nature of the offence and the personal circumstances of
19 Defendant Nash against the background of several cases helpfully brought to the court's
20 attention by Mr Kelly, I believe a just and appropriate sentence would be 12 years'
21 imprisonment within the established range of sentences for this type of robbery.

22
23 **CREDIT FOR TIME ON PRE-SENTENCE REMAND**

24
25 100. In relation to the sentence for robbery, Defendant Nash is entitled to full credit for the
26 time he has spent in custody on account of awaiting sentencing for that offence since the
27 revocation of his bail by this court on the 25th February 2022.

28
29 **CREDIT FOR TIME SPENT ON ELECTRONICALLY MONITORED BAIL**

30
31 101. The Defendant was also placed on a 12-hour electronically monitored curfew upon being
32 granted bail on the 16th April 2021. His bail was revoked on the 25th February 2022 in
33 the evening. It is agreed between counsel and accepted by the court that the Defendant
34 spent 312 days under the curfew order.

1 102. The *Guidelines* provide that the percentage of the total time spent on an electronically
2 monitored curfew to be deducted from the sentence is discretionary. Accordingly, I
3 would order that one-half of the 312 days spent on the electronically monitored curfew
4 be credited towards his sentence. This is on the basis that the restraint of his liberty would
5 not have affected him significantly, as, for most of the period, he should have been in
6 his bed. Therefore, he should be credited 156 days for restraint of his liberty while on
7 bail.

8
9 **THE SUSPENDED SENTENCE FOR A PREVIOUS OFFENCE**

10
11 103. The Crown has asked that the suspended sentence of 10 months for the offence of
12 wounding for which he was convicted in 2019 be activated pursuant to ss.24-26 of the
13 *Penal Code* (2022 Revision) and that he be ordered to serve it at the end of the sentence
14 imposed for robbery. Counsel for Mr Brady has intimated that there is no real objection
15 in principle to this submission but that the court could consider apportioning the
16 sentence.

17
18 104. Section 24 of the *Penal Code* (2022 Revision) provides different options to the court in
19 dealing with the suspended sentence. What is clear from s.24(1) is that the court, in
20 dealing with the question of activation of a suspended sentence, must order that it shall
21 take effect with the original terms unaltered unless it is of the opinion that it would be
22 unjust to do so given all the circumstances which have arisen since the suspended
23 sentence was passed, including the facts of the subsequent offence. It is noted from
24 *Archbold*¹³ that the principal reason for not activating a suspended sentence is the
25 relative triviality of the subsequent offence. The cases of *R v Moylon*¹⁴ and *R v Abrams*¹⁵
26 are cited in support of this principle. Also, the fact that the latter offence is of a different
27 kind from the offence for which the suspended sentence was imposed is not in itself a
28 ground for not activating the suspended sentence.



¹³ 1992 edition at paragraph 5-205

¹⁴ (1969) 53 Cr. App. R. (S) 10

¹⁵ (1980) 2 Cr. App. R. (S) 10

1 105. When the applicable law is applied to the circumstances of this case and the personal
2 circumstances of Defendant Nash, I have not found anything that would render the
3 activation of the suspended sentence unjust.

4
5 106. While I have had regard to his previous conviction and failure to comply with the
6 sanction of the court as aggravating factors in arriving at the sentence for the offence of
7 Robbery, no consideration was given to the previous offence and the complainant in that
8 case, who is entitled to justice. Defendant Nash has not yet suffered punishment for
9 wounding that complainant.

10
11 107. Furthermore, and even more compelling, is that he had only gone three months out of
12 the operational period before he reoffended by committing a more serious offence which
13 involved violence against the person. This shows an escalation in his offending and a
14 marked defiance of the court's authority that cannot be condoned. He must be made to
15 understand that the sanctions of the court must be obeyed.

16
17 108. For the foregoing reasons, I conclude that the interests of justice demand that he serves
18 the suspended sentence for wounding with the original terms unaltered.

19
20 109. In the circumstances, I would activate the suspended sentence and order that he serves a
21 period of 10 months' imprisonment for the offence of wounding imposed by the
22 Summary Court in 2019. This sentence is to run consecutively to the sentence of 12
23 years' imprisonment imposed on him for this offence of robbery.

24
25 **THE SENTENCE ORDERS**



26
27 110. Accordingly, the sentences of the court are as follows in relation to Defendant Cupid:

28
29 i. 10 years and 6 months' imprisonment.

30
31 ii. She is to be credited for the time spent on pre-sentence remand relative to
32 this offence.

1 111. Accordingly, the sentences of the court are as follows in relation to Defendant Nash:

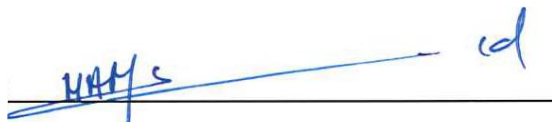
2
3 i. 12 years' imprisonment.

4
5 ii. He is to be given full credit for time spent on pre-sentence remand relative
6 to this offence.

7
8 iii. He is to receive credit of 156 days for time spent on electronically monitored
9 curfew whilst on bail.

10
11 iv. The suspended sentence of 10 months' imprisonment for the offence of
12 wounding imposed by the Summary Court in 2019 is activated and ordered
13 to run consecutively to the sentence of 12 years' imprisonment imposed for
14 the offence of robbery. (*The Summary Court is to be notified forthwith of
15 this order that the suspended sentence of 10 months' imprisonment is
16 activated and must be served.*)

17
18 **Dated this the 17th June 2022**

19 

20 **MCDONALD-BISHOP J**
21 **ACTING JUDGE OF THE GRAND COURT**