



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 INDICTMENT Nos: 39, 67, 68/19
5
6
7

8 THE QUEEN
9

10 v.
11

12 CARLOS JAMEEL BUSTILLO
13
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16
17

18 **Appearances:** Mr. Greg Walcolm for the Crown
19 Mr. Rupert Wheeler for the Defendant

20 **Before:** Justice Marlene I. Carter (Actg.)

21 **Date of Hearing:** 16 December 2021
22

23 **Date of Sentence:** 13 January 2022
24
25

26 **HEADNOTE**

27 *Criminal Law – Sentence - Conspiracy to Commit Burglary - Possession of Unlicensed*
28 *Firearm – Delay in production of Psychological Report – Effect on Sentence*
29

30 **SENTENCE JUDGMENT**
31

- 32 1. The Defendant is before the court to be sentenced for the offences of conspiracy to commit burglary
33 contrary to section 243(1)(a) of the Penal Code (2019 Revision) and possession of an unlicensed
34 firearm contrary to section 15(1) and 15(5) of the Firearms Act (2008 Revision).
35

36 **Summary of Facts**

- 37 2. These offences arise out of the following facts which came principally from the evidence of the
38 complainant in the case, Jamar Timothy who described events that took place on the evening of the
39 25th of April 2019 into the early morning hours of the 26th of April 2019.



- 1 3. On the 25th of April 2019, Timothy was driven to the Defendant's home in West Bay on two
2 occasions, first during the day and thereafter during the night-time hours. During his visits to the
3 Defendant's home, Timothy and the Defendant discussed a plan to burgle premises for financial
4 gain. The discussion was initiated by the Defendant. At that time Timothy was unaware that a
5 firearm would be involved in the plan to burgle the premises.
6
- 7 4. After Timothy's last visit to the Defendant's home on the night of the 25th of April, the Defendant
8 and another male picked Timothy up from his home in a vehicle driven by the Defendant. The
9 three of them travelled into George Town to an open lot across from the residence situated at No
10 877 West Church Street in George Town in pursuance of the plan to burgle premises.
11
- 12 5. When they arrived at the open lot at approximately 1 a.m. on the 26th of April, Timothy saw a
13 firearm in the Defendant's possession. The Defendant discharged the firearm in Timothy's
14 presence and then handed it to the other male. Timothy and the other male then left the vehicle and
15 went in the direction of the apartments across from the lot in pursuance of the plan to burgle the
16 premises. The Defendant remained in the vehicle.
17
- 18 6. Whilst heading towards the apartments Timothy saw that there were residents at the apartment and
19 decided to abandon the plan to burgle the premises. Timothy was shot twice by the other male
20 using the same gun that had earlier been in the possession of the Defendant. The other male ran to
21 the vehicle and was driven away from the location by the Defendant.
22
- 23 7. The Defendant turned himself into police custody and was interviewed twice on the 1st and 3rd of
24 May 2019. The Defendant admitted that he planned to burgle the premises between the 25 and 26th
25 April 2019.
26
- 27 8. The Defendant admitted that he had possession of a firearm which he discharged on the 26th of
28 April 2019 however he stated that he had only taken possession of the firearm as he was in fear of
29 the other male. The Court rejected that evidence at trial and found the Defendant guilty of
30 possession of the unlicensed firearm.
31
- 32 9. The Defendant pleaded guilty to the offence of conspiracy to commit burglary on the 15th of
33 November 2019 and was found guilty after trial of the offence of possession of an unlicensed
34 firearm on 12th February 2021.



1 *The Psychological Report and Delay*

2 10. The court ordered that a Social Inquiry Report (“SIR”) be prepared as part of its consideration on
3 sentence in this case. The SIR was filed in April 2021 and at a sentence hearing on 6th May 2021
4 the court ordered a further psychological report largely arising from recommendations in the SIR.

5
6 11. The court has not received the psychological report up to the date of sentence. In December 2021,
7 this court proceeded to a sentence hearing without the benefit of the psychological report. This
8 decision was taken after hearing submissions from the Crown and from the defence. The court was
9 mindful that even at that stage over 6 months after the report was ordered but more importantly 10
10 months after the Defendant had been found guilty at trial, there was no indication when the report
11 would be prepared or could be ready for the court's consideration given. The court noted that up
12 to that date the Defendant had not even received a date of appointment still less been seen by a
13 psychologist.

14
15 12. The court weighed the further time that would pass awaiting a report (unknown at that point) against
16 the need for the Defendant to know what the court’s sentence was for a very serious offence. In
17 the interest of fairness, the court formed the view that the better approach at this stage was to
18 proceed to sentence with the caveat that it would view the Defendant’s circumstances in the best
19 possible light based upon the assumption that the report would have been a positive report. These
20 are matters that would go the mitigation of Defendant’s sentence. The court respectfully adopts
21 the approach of McDonald Bishop J. in *R v Andy Barnes*¹. In that case the court was faced with
22 the unexplained delay in the production of the ordered psychological and psychiatric reports of two
23 years.

24
25 13. At page 24 of the judgment the learned judge stated:

26
27 *“I have additionally found that the inordinate delay in obtaining the pre-sentence*
28 *reports from the date of his conviction is a special feature in his case that ought*
29 *not to be overlooked in the interests of justice. The difficulties brought about by*
30 *the Covid-19 pandemic reportedly affected the pace at which*
31 *psychiatric/psychological assessments were being conducted on the island. The*

¹ Sentence Judgment. R v. Barnes (Andy Errol). Ind. 59/2016 Coram: McDonald-Bishop J. (Actg.). Date: 15th July 2021

1 *Defendant would have been almost two years in his sentence had he been*
2 *sentenced shortly after the trial ended in September 2019, as was the court's*
3 *intention. However, nearly two years later, the court had to proceed to sentencing*
4 *him without the benefit of a psychological report, which was requested.*

5
6 *There is no satisfactory explanation from the State as to why the report was not*
7 *available for the court, even though the psychologist interviewed the Defendant.*
8 *Thus, the court had to proceed with the sentencing without further delay, as it is*
9 *acknowledged that the Defendant would have been increasingly affected by the*
10 *proverbial 'sword of Damocles' hanging over his head, the longer the delay.*

11 *.....*

12
13 *I consider it only fair and in keeping with the interests of justice to give the*
14 *Defendant the benefit of the delay in the production of the psychiatric report and*
15 *the absence of the psychological report. Therefore, I would act on the premise that*
16 *the psychology report would have been favourable to him to mitigate the sentence.”*

17
18 **The offences:**

19
20 **Conspiracy to Commit Burglary**

- 21 14. The maximum sentence for the offence of burglary is 14 years imprisonment. Applying the
22 Cayman Islands Sentencing Guidelines for Burglary it is appropriate that the court bears in mind
23 that the Defendant was found guilty of the charge of *conspiracy to commit burglary*, and that the
24 offence of burglary was not in fact committed. The court will therefore apply an appropriate
25 reduction to reflect these factors.
- 26
27 15. The Crown has submitted that the Defendant’s offending should be categorised as being one of
28 high culpability on the basis that the Defendant was aware that his co-conspirator was armed with
29 a firearm and that this represented a threat of violence by a firearm or imitation firearm. Regarding
30 harm, the Crown’s submission is that the court should find that harm is at category one, on the basis
31 that intended victims were present at the premises which were intended to be burgled. The Crown
32 therefore argues that the appropriate starting point for an offence of burglary in these circumstances
33 under the Cayman Islands sentencing guidelines is five years custody with a sentence in range of

1 three to seven years custody. The Crown further submits that there are several aggravating factors
2 present in this case which should warrant an increase in the identified starting point.

3
4 16. These the Crown identified as: (i) the failure of the Defendant to respond to previous sentences -
5 the Defendant committed this offence while being subject to a probation order and a suspended
6 sentence for a similar offence (ii) the Defendant has previous convictions including a conviction
7 for the offence of burglary and (iii) that this offence of burglary is a prevalent offence in this
8 jurisdiction and can result in a significant change in the residential culture of the islands where
9 persons may have to become used to living with burglar bars and fences.

10
11 17. The Crown submitted that there are few mitigating factors for the court's consideration. The
12 mitigating factors identified by the Crown relate to the Defendant's personal circumstances, his
13 difficult childhood and the early diagnosis of certain mental disorders as identified in the social
14 inquiry report submitted to this court. The Crown therefore concluded that based on the number of
15 aggravating features identified that there should be an increase in the starting point for sentence.

16
17 18. On the matter of the discount that should be accorded the Defendant for his guilty plea the Crown
18 submitted that the Defendant should not be accorded the full 1/3 reduction for his guilty plea as the
19 plea was not entered at the first available opportunity. The Crown further submitted that the
20 evidence against the Defendant in relation to this offence was overwhelming. The Defendant
21 pleaded guilty on the 15th of November 2019. The indictment in the matter was filed on the 11th
22 of July 2019.

23
24 19. Counsel for the defence submitted that the court should find that the offence of conspiracy to
25 commit burglary should be treated as of being medium not high culpability as suggested by the
26 Crown. Counsel submitted that there was a threat of violence by a firearm which firearm was not
27 produced. He argued that there was no actual threat made only a potential threat of use of the
28 firearm.

29
30 20. Counsel submitted further that the court should find that harm should be a category 3. Counsel
31 invited the court not to speculate about what level of harm may have been intended to be caused
32 and stated only that the court should find that there was some form of threat and questioned whether
33 that form of threat would be sufficient to say that psychological harm may have occurred.

34



1 21. Counsel submitted that with a category 3 culpability, category three harm the starting point for the
2 offence burglary should be two years imprisonment with a range of four years to a community-
3 based sentence. Counsel agreed that there were aggravating factors present, the Defendant's
4 previous conviction for burglary and the fact that this was an offence that was committed at night.

5
6 22. On the issue of the extent of the discount for the Defendant's guilty plea, counsel submitted that
7 the court should accord the Defendant the full discount because the Defendant admitted the offence
8 in interview and because the guilty plea was entered immediately after the successful application
9 to dismiss count 3 on the indictment.

10
11 Possession of unlicensed firearm

12 23. The offence of possession of an unlicensed firearm is contrary to section 15 (1) and 15 (5) of the
13 Firearms Act. Section 39 of the Firearms Act provides that the minimum sentence of 10 years
14 imprisonment should be imposed in relation to this offence unless the court can identify exceptional
15 circumstances for not imposing such a sentence. The Crown's position is that there are no
16 exceptional circumstances in relation to this offence or of the offender which should cause the court
17 to deviate from the set mandatory minimum sentence for the offence of possession of an unlicensed
18 firearm.

19
20 24. The Crown submits that this Defendant was in possession of the firearm as part of a conspiracy to
21 commit burglary and that the Defendant must be taken to have been aware that his Co-conspirator,
22 who was the enter the identified premises, would be in possession of the firearm and that this
23 represented a threat of using the firearm in the furtherance of the offence of burglary. The
24 Defendant has also admitted to discharging the firearm during the course of the night while
25 pursuing the intended offence. Counsel submitted that the court should not find that the Defendants
26 childhood diagnosis of attention deficit disorder along with other mental challenges is sufficient to
27 provide the exceptional circumstances as contemplated by section 39 of the Firearms Act.

28
29 25. The Crown's submission is that the court should maintain a starting point of 10 years imprisonment
30 and consider the aggravating factors which would warrant an increase to that starting point. The
31 aggravating factors to be considered being the same factors which were identified above in relation
32 to the offence of conspiracy to commit burglary. The Crown submits that a further aggravating
33 factor regarding this offence was that the Defendant was in possession of the firearm which was
34 ultimately used to shoot and seriously injure the complainant in this case.



1
2 26. The court has also considered the submissions of counsel for the Defendant which were substantial
3 on this issue of the sentence that should be imposed for possession of the unlicensed firearm.
4 Counsel's main arguments centred on the issue of exceptional circumstances. Counsel argued that
5 contrary to the Crown's assertions, exceptional circumstances were present in this case relating
6 both to the offence and to the offender which would justify the court not imposing the mandatory
7 minimum sentence of 10 years imprisonment in this case.

8
9 27. Counsel noted the factors which should together be found as sufficient to amount to the exceptional
10 circumstances contemplated by the legislation:

11 1. The brief period that the Defendant had the gun in his possession. The Defendant had the
12 firearm in his possession for a very short period of time after it was passed to him by another
13 male.

14
15 2. That the court has elected to proceed on the basis that the psychological report ordered by
16 the court would have been as favourable as possible to the Defendant. In light of this, the
17 Defendant therefore relied on his history as set out in the SIR and as well the history from
18 the juvenile assessment reports of May 2000 and 2014 to submit that there should be a
19 significant discount to the mandatory minimum sentence on his behalf.

20
21 3. In this regard the Court notes that the Defendant's psychological challenges were evident
22 from a very young age. The Defendant was diagnosed with attention deficit disorder as a
23 child. He was later diagnosed as having interpersonal problems, cannabis use disorder,
24 oppositional defiant disorder, and conduct disorder. These problems may have been the
25 cause of him being excluded from school at quite a young age. The psychological
26 assessment of the 1st of May 2014 recorded that the Defendant was of below average range
27 and learning and had a learning disability in reading. It was also noted that he had
28 difficulties in adhering to rules, a propensity to negative influences in the community and
29 serious problems in his home life.

30
31 4. The Defendant also relies on his age at the time of offending. He was 21 years old at the
32 relevant time. It was also submitted and agreed by the Crown that this Defendant has no
33 previous convictions for firearm related offences.



1 5. The Defendants troubled family history as stated in the SIR, referred to in detail later in this
2 judgment. This history coupled with the issues identified in the psychological assessment
3 referred to above were highlighted as having in part led to this Defendant being
4 institutionalised. There is no issue that the Defendant in his early life spent long periods in
5 the Bonaventure Boys' Home, Eagle House and later at Northward.

6
7 6. The Defendant has certain medical issues from which he has suffered from a young age.
8 The Defendant has suffered problems with his legs since his birth, breathing difficulties,
9 and obesity. In addition, in 2017 the Defendant lost the use of his right eye when he was
10 the victim of an attack.

11
12 7. Referring to these personal circumstances, medical and psychological issues, counsel for
13 the Defendant submitted that Her Majesty's Prison Northward could not adequately
14 accommodate the Defendant's medical needs and pointed to a period while the Defendant
15 was on remand when the prison authorities were unable to assure the Defendants attendance
16 at the George Town Hospital for appointments relating to the Defendant's eye and his
17 hepatitis condition. Counsel for the Defendant noted that these issues had resulted in the
18 Defendant missing appointments which caused the Defendant significant mental distress.

19
20 28. Counsel submits that these matters taken together should lead the court to find that there are
21 exceptional circumstances. The issue of the delay in the conclusion of these proceedings, was also
22 to be considered in the court's holistic approach to the issues surrounding exceptional
23 circumstances.

24
25 **Social Inquiry Report**

26 29. The SIR notes that the Defendant's father passed away before he was born. The Defendant was
27 then raised primarily by his grandmother who also lived with the Defendant, his mother, and his
28 siblings in the same home. As far as the Defendant was concerned when his mother subsequently
29 remarried, she seemed to devote all her love to her new husband and her love for her children
30 disappeared. During the ages of twelve and fifteen the Defendant resided at the Bonaventure Boys'
31 Home. At fifteen, he returned to the family home but subsequently left the home to live with a
32 cousin.

1 30. As far as the Defendant was concerned, the lack a father in his life who would have been able to
2 guide him, was a major factor in him getting into a criminal lifestyle from an early age. The
3 Defendant was not very successful in primary school. When he moved to secondary school, he
4 was expelled because of his behaviour. After his expulsion, the Defendant seemed to spend his
5 time as quoted in the SIR “*chilling smoking and not listening*”. He was again placed in the
6 Bonaventure Boys’ Home where he was able to resume some educational classes. However, the
7 Defendant never completed his high school education.

8
9 31. The Defendant has no particular skill or vocation and has only been employed in various menial
10 jobs during the course of his young life. The Defendant continues to have quite a strained
11 relationship with his mother. He is currently in a relationship which, it has been submitted to this
12 court, is a steady one.

13
14 32. In his early life he was diagnosed with attention deficit disorder and has been on medication for
15 this disorder although the Defendant disagreed with this early diagnosis. When he was a teenager
16 a psychological assessment diagnosed the Defendant as having interpersonal problems, the stomach
17 disorder, cannabis use, disorder oppositional defiant disorder and conduct disorder. It was largely
18 based on this early assessment and the probation officer’s own evaluation of the Defendant which
19 led to the court being persuaded that it could benefit from an updated psychological report
20 concerning this Defendant.

21
22 33. The Defendant was assessed as very high risk of offending based on factors such as his criminal
23 history, education and employment, companions, his pro criminal attitude and/or orientation and
24 anti-social pattern.

25
26 **Court’s considerations**

27
28 *Sentence: Possession of Unlicensed Firearm*

29 34. The court has carefully considered the submissions of counsel for the Crown and of Counsel for
30 the Defendant and as well as the available material in the form of the Social Enquiry Report,
31 psychological assessments of the Defendant, the Cayman Islands Sentencing Guidelines and



1 relevant authorities including *Parsons v AG*²; *R v Reuben Hydes*³, *R v Manderson*⁴ and *Jackson*
2 *and Ryan Ebanks v R*⁵.

3
4 35. Regarding the sentence for possession of unlicensed firearm, I have reviewed the dicta in the cases
5 above relating to exceptional circumstances. I am mindful that each case turns on its own facts.
6 The court must make a careful assessment of the relevant matters relating to the offence and to
7 offender to assess whether there is anything relating thereto could lead the court to find that the
8 mandatory minimum sentence for the possession of an unlicensed firearm of 10 years imprisonment
9 should not be imposed.

10
11 36. In *Parsons*, the defendant suffered from attention deficit hyperactivity disorder, depression and
12 adjustment disorder. There was evidence in that case from a psychiatrist that incarceration would
13 increase the defendant's risk for further "*depression, damaged self-efficacy and would destroy any*
14 *hope of rehabilitation*". However, in considering whether these were in the circumstances of that
15 case sufficient to amount to exceptional circumstances, the Smellie C.J as he then was noted:

16
17 *"Nor, in my view, does the subjectively harsh effect that imprisonment will likely*
18 *have upon this appellant...present exceptional circumstances. Each offender will*
19 *be implicated in a subjective and unique way to a sentence of imprisonment. The*
20 *appellant's condition is not such as to make him "unfit to serve a [7] year*
21 *sentence"."*

22
23 37. I have considered all relevant matters raised in this case. As counsel for the Defendant accepts
24 each matter raised may not in and of itself in this case cause such a finding. I have considered the
25 matters individually and holistically. While it is clear to the court that the Defendant has mental or
26 emotional challenges as well as physical and/or medical issues and these have all been considered,
27 these is no basis upon which this court finds that there are exceptional circumstances made out in
28 relation to this Defendant.

29
30 38. For the offence of possession of an unlicensed firearm, the court will take as its starting point a
31 sentence of 10 years imprisonment. The Defendant does not have any previous convictions for

² [2012] (1) CILR 388

³ Ind. 32 of 2017 (Coram. Carter J. (Actg.). Date 29.08.2018

⁴ Sentence Judgment. *R v. Manderson (Jordan) and Jackson (Austin)*. Ind 20/15; *R v. Lewis (Julia)* Ind. 16/2014
Coram: Mettyear J. (Actg.) Date: 09.02.2016

⁵ Crim. App. 6 of 2020

1 firearm related offences. However, he does have previous convictions. The Defendant committed
2 this offence while he was subject to orders of probation and to a suspended sentence order. The
3 court would have been minded to find that an uplift was warranted, to increase that starting point
4 to 11 years imprisonment to reflect these aggravating features. However, in the court's
5 commitment to mitigate sentence occasioned by the lack of the psychological report and to make
6 allowances as if that report had been as favourable to the Defendant as it could have been, the court
7 will treat this as a further mitigating factor. The aggravating factors thus do not outweigh the
8 mitigating factors to lead to an uplift to the starting point. The sentence of the court is therefore 10
9 years imprisonment.

10
11 39. There are other factors which affect the final sentence that the court must impose in this case

12
13 40. The time that the Defendant has spent in custody prior to him being granted bail from 30th April
14 2019 to 18th of March 2020 shall be deducted from his sentence, agreed at 325 days

15
16 41. The Defendant has been subject to a bail condition. He was subject to a curfew which has required
17 him to wear an electronically monitored bracelet between the hours 6 pm – 7 am.

18
19 42. Section 12 of the Cayman Islands Sentencing Guidelines

20
21 *“The court must consider whether credit should be given for time spent on bail*
22 *where conditions have been imposed which curtail the liberty of the Defendant.*
23 *This is most likely to be relevant where a Defendant has been subjected to a curfew,*
24 *especially where compliance with that curfew can be verified through electronic*
25 *monitoring.”*

26
27 43. The court has considered the total length of time that the Defendant has been subject to a curfew.
28 This is for the period 18th March 2020 to present. The hours of the curfew were from 6pm -7am.
29 There has been no breach of the curfew. This was a nighttime curfew which may be considered
30 less of a curtailment of liberty than being kept indoors during the day. Had this court not adopted
31 the approach below the court would have, in line with other local authorities⁶ accorded the
32 Defendant a reduction in sentence of 180 days of the 667 days that he has been subject to the EMT.

⁶ See *R. v. Nicholas Patrick Tibbetts. Ind. 71/15: Coram: Dobbs J. (Actg.), Date: 16.12.2016*



1
2 44. I refer again to the approach in *Barnes*, where the court sought to use the premise that the
3 psychological report not received before sentence would have been favourable to *Barnes* to mitigate
4 the sentence.

5
6 45. The Crown has suggested that in order to mitigate any fairness/prejudice to the Defendant caused
7 by the delay occasioned by the lack of the ordered psychiatric report in the instant case the court
8 could order that instead of a discount for that time that the Defendant has been on bail with the
9 EMT that the Defendant be accorded the full discount for the number of days so spent. I agree
10 with that approach although in the circumstance of this case this will be a significant reduction.
11 The reduction will reflect the fact that the significant length of time that the Defendant has worn
12 the monitor will be treated as being a severe curtailment of liberty. The sentence will be further
13 discounted to reflect this time which amounts to 667 days.

14
15 *Sentence - Conspiracy to Commit Burglary*

16 46. I find that if this had been a sentence for the commission of the offence of burglary, on the facts of
17 this case, I would have found that the case reflected high culpability and category 3 harm. This
18 accords with a starting point of 3 years custody with a sentencing range of 1-5 years custody. In
19 the circumstances of this case the starting point of 3 years would have been raised to 3 ½ years
20 considering the aggravating and mitigating features present. This was a conspiracy to commit
21 burglary. The appropriate sentence for this offence is 2 years custody. The Defendant will be
22 accorded a discount of 20 percent for his guilty plea. While the court appreciates that the guilty
23 plea was made after the hearing of an application to dismiss another offence charged on the
24 indictment, and that there may have been admissions at interview, it cannot be said that the
25 Defendant pleaded at the first available opportunity.

26
27 47. The sentence of 2 years after the discount for the guilty plea is reduced to 19 months' imprisonment.
28 This sentence for the offence of conspiracy to commit burglary is to run concurrent to the sentence
29 for possession of the unlicensed firearm.

30
31 48. I note here the Probation Officer's assessment of this Defendant in the SIR:

32
33 *"Based on the information garnered it is strongly believed and is accepted that Mr*
34 *Bustillo has the potential to be a productive and accomplished citizen. To achieve*



1 *thisR , he will need to demonstrate the necessary determination and commitment*
2 *to make the changes by adopting a pro social lifestyle. It is only by embracing this*
3 *approach that Mr Bustillo will be able to significantly reduce his pro criminal*
4 *thinking and behaviours.”*

5
6 49. I hope that this Defendant realises that he can still contribute to this society and that his future is
7 within his own hands.

8
9 **Final sentence:**

10
11 50. Sentence for possession of unlicensed firearm: 10 years imprisonment.

12
13 51. Sentence for conspiracy to commit burglary: 19 months’ imprisonment to run concurrent to the
14 sentence for possession of unlicensed firearm

15
16 52. Time spent on remand pre-trial of 325 days to be deducted from the sentence as time served

17
18 53. Time spent on electronically monitored bracelet agreed at 667 days to be deducted from sentence
19 as time served.

20
21
22 

23 **Madam Justice Marlene I. Carter**
24 **Judge of the Grand Court (Ag.)**