

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

3 **INDICTMENT NO: 0022 of 2021**

4
5
6 **THE QUEEN**

7
8 **v.**



9
10 **KURT LINDSAY WATLER**

11 **Appearances:**

**Mr. Kenneth Ferguson holding for Mrs. Nicole
Petit for the Prosecution**

12
13
14 **Mr. Crister Brady of Brady Attorneys at Law
for the Defendant**

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16
17 **Before:**

Justice Cheryll Richards Q.C.

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20 **Submissions on Sentencing:**

2nd September 2021

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22
23 **Sentence Judgment:**

23rd September 2021

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26 **HEADNOTE**

27 ***Criminal Law – Unlawful Wounding – Principles on Sentencing – Cayman***
28 ***Islands Sentencing Guidelines – Category of Offence - Use of Machete.***
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33 **SENTENCE JUDGMENT**

1 1. The Defendant is before the Court for sentencing following his guilty plea on the 6th May
2 2021 to the offence of Unlawful Wounding. While this was his third appearance before
3 the Grand Court for mention of the case, he had not been represented at the first mention
4 and the plea was entered as soon as assigned Counsel had the opportunity to take
5 instructions. The Defence submit, and it is accepted by the Prosecution, that his plea was
6 offered at the earliest opportunity and that he is entitled to full credit.

7
8 2. The particulars of this offence of Unlawful Wounding are that the Defendant, on the 9th
9 day of April 2021, at Bodden Town, Grand Cayman, unlawfully wounded Robbie David
10 Berry. The **Penal Code (2019 Revision)** provides in s.204 that the maximum sentence
11 for this offence is seven years' imprisonment.

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13 **SUMMARY OF FACTS**

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15 3. The facts may be briefly summarised as follows. In the afternoon of the 9th April 2021,
16 the Complainant was at Magpie Close in Bodden Town engaged in raking up a yard.
17 The Defendant, who is known to him, came there and a conversation took place between
18 them. According to the Complainant, the Defendant left and returned with a machete,
19 which he used to inflict wounds on him.

20
21 The Police arrived at the scene shortly thereafter and on arrival saw the Defendant
22 standing by a wall near to the said yard with the machete in his hand. It was about 2-3
23 feet long. As the Police approached, he threw the machete into the roadway. When the
24 Police engaged the Defendant in conversation, the Defendant shouted:



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“Yes officer I chopped him. I told the officer already I would rather go to prison than let anyone chop me up again.”

The Police retrieved the machete and arrested the Defendant on suspicion of Assault Causing Grievous Bodily Harm. He was cautioned and said:

“Yes officer I chopped him, he swiped at me with a rake and I chopped him with my machete. I made a report to the Bodden Town Police before about Robbie chopping me on my finger and believe me it wasn’t going to happen again.”

The Defendant showed the Police a large bruise on the left side of his stomach, and said:

“Officer he swiped at me here and I wasn’t going to let this happen again. I told Dr. McGill already that I would rather go to prison before letting anyone else chop me up.”

- 4. The Defendant was taken into custody and transported to the Detention Centre.

- 5. The Complainant was seen by the Police lying along the roadway with deep wounds to his left arm. He was bleeding from his arm and from his head. He was taken to the George Town hospital where he was admitted to the Critical Care Unit in serious but stable condition.

- 6. CCTV footage was obtained from the roadway cameras which showed the Defendant in possession of the machete but did not show the incident.



1 7. The Defendant was interviewed under caution on the 10th April 2021. He stated that on
2 the day in question he went to the yard where he saw the Complainant raking. He said
3 that the Complainant started an argument with him about some music CD's and swiped
4 at him with the rake to the left of his stomach which caused an injury. He said he ran
5 from the yard and the Complainant chased him with a shovel. He ran to his own yard,
6 retrieved his machete and returned with it to where the Complainant was. He saw the
7 Complainant holding a Guinness stout bottle in his hand from which he had been
8 drinking earlier. He felt threatened by this and started beating the Complainant with the
9 machete. He said that he had not called the Police about what was happening because he
10 had called the Police in respect of previous incidents and nothing was done about his
11 reports.



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13 **MEDICAL REPORT**

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15 8. Dr. Omar Felix has provided a medical report dated 27th April 2021. He states that he
16 examined the Complainant on the 9th April 2021 at 6:30 pm and found that he had the
17 following injuries:

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19 i. Multiple lacerations to chest, scalp and left forearm.

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21 ii. Open fracture of the left ulna.

22
23 iii. Left Haemopneumothorax.

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25 9. The Doctor described his condition as serious with injuries consistent with infliction by
26 a sharp object and which were not likely to be permanent.

27

1 10. Medical notes have also been provided which indicate that the Complainant also
2 received a one-inch laceration to the occiput or the back and lower part of the skull. On
3 arrival at the hospital, he was seen to be in painful distress. The wound to the chest was
4 described as a penetrating wound with bleeding from the intercostal artery and pectoralis
5 muscle. Attempts were made to insert a tube into his chest to try to stop the bleeding
6 but it could not be controlled. He was taken to the operating room for an emergency
7 thoracostomy to be performed.



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9 **ANTECEDENT HISTORY**

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11 11. The Defendant has an antecedent history of two previous convictions for offences of
12 Assault Occasioning Actual Bodily Harm. The first was in 1999 and the second and
13 more recent was on the 20th March 2017 when he was placed on probation for one year.
14 That offence appears to have been committed in 2015.

15
16 **THE SOCIAL INQUIRY REPORT**

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18 12. The Department of Community Rehabilitation has provided a Social Inquiry Report
19 (“SIR”) dated 11th August 2021. The Defendant is 52 years old. He has eight children
20 all of whom are adults. The youngest is 22 years old. He had been gainfully employed,
21 for some twenty years, in the car rental service industry, at a car dealership for three
22 years and a local store for a year. For the past eight years his employment status is
23 described as a self-employed labourer but he has not been gainfully employed.

24
25 13. By way of health issues he is an asthmatic. He reported to the Probation Officer that he
26 consumes ganja in the form of homemade tea to assist with his asthmatic symptoms. He
27 has been receiving treatment for the past eleven years for depression, which is said, by



1 the Probation Officer, to be a serious mental health disorder. He has been prescribed
2 two types of medication to deal with this - one of these is used to treat depression
3 associated with bipolar disorder.

4
5 14. One member of the community who has known him for over 20 years speaks to the
6 negative influence upon him from his associates and says that he has a long history of
7 excessive alcohol consumption which has negatively impacted his career and his
8 relationships.

9
10 15. In the SIR, under 'attitude toward offending', the Defendant told the Probation Officer
11 that he went back for the machete because he wanted to teach the Complainant a lesson.
12 He said he hit the Complainant but did not intend to cut him.

13
14 16. The Defendant was assessed using the LS/CMI instrument. His overall risk of
15 reoffending was assessed as high, with five of the eight criminogenic factors in the very
16 high or high category. In the very high category is his alcohol/drug problem.

17
18 17. His pro-criminal attitude/orientation was assessed as high. This, in part, is due to his
19 belief that violence is the answer to conflict. The Officer states that he has a long history
20 - dating back to fights while at school, and as an adult - of resolving conflicts with
21 violence, and verbal and physical altercations with former partners and their family
22 members.

23
24 18. He is described as demonstrating a degree of victim empathy and a willingness to engage
25 in intervention services. It is noted that he completed his Probation Order without
26 difficulty and did attend interviews as required for the preparation of this Report after
27 being warned against non-compliance.

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1 **THE SUBMISSIONS**

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3 19. Both Counsel referred to the *Cayman Islands Sentencing Guidelines* with respect to the
4 categorisation of this offence.

5 20. The Prosecution submits that the injuries sustained, including, as they do, a collapsed
6 lung, which required surgical intervention, and an injury to the head, are serious in the
7 context of the offence and constitute greater Harm. It is also submitted that there is higher
8 Culpability due to the use of a weapon and the repeated nature of the assault which
9 resulted in multiple injuries.

10
11 21. Offences of greater Harm and higher Culpability are category 1 offences. The starting
12 point is 5 years' imprisonment for such offences, with a sentence range of 3 to 6 years.

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14 22. Counsel on behalf of the Defendant submitted that this is a category 2 offence, being one
15 of greater Harm but lower Culpability on the basis that a greater degree of provocation
16 than normally expected, was present. In support of this argument, Counsel relies on the
17 following facts:

18 i. The Complainant used the rake to cause a wound to the Defendant;

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21 ii. There had been previous encounters between the two and the Defendant
22 feared reprisals from the Complainant who has a history of violent conduct
23 and mental health issues;

24
25 iii. The Defendant had in the past been a victim of a violent assault which has
26 affected his perception as to how to respond to such incidents.

1 **AGGRAVATING FACTORS**

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3 23. The Prosecution submits that the following are aggravating factors:

- 4
5 • The previous conviction in 2017 for Assault Occasioning Actual Bodily Harm;
- 6 • The repeated nature of the assault;
- 7 • The assault was by way of revenge.



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9 **MITIGATION**

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11 24. In mitigation, Counsel for the Defendant submitted that the Defendant has not had an
12 extended association with the criminal justice system and that the offences on his record
13 are 18 years apart. He is a man of middle years, being 52 years old and has lived a
14 relatively uneventful life. He has been able to maintain his medical treatment over the
15 years. He is remorseful, wishes to apologise to the Complainant and to have no further
16 incidents between them.

17
18 25. Counsel asked the Court to consider the Defendant's mental state, the effect upon him
19 of previous incidents where he was subjected to assaults and the fact that on this occasion
20 he was injured by the Complainant. The Defendant continues to believe that he is in
21 danger from the Complainant because of their past interactions. Counsel invited the
22 Court to accept the recommendations of the Probation Officer in respect of the
23 imposition of a suspended sentence. The Defendant is said to be willing to participate in
24 any community based sentence. He asks for mercy and is deeply ashamed that he has
25 not been a good example for his children and grandchildren.



1 ASSESSMENT

2
3 26. In the case of *R v. Smith (Grant Christopher)*¹, the English Court of Appeal considered
4 what is meant by the term “*serious in the context of the offence*”. The Court concluded
5 that in the context of an offence of Wounding with Intent it is meant to distinguish
6 between injury “*which is inherent or par in a standard section 18 offence and that which*
7 *will, by definition, go beyond what may be viewed as par for the course.*”
8

9 27. The case of *R v. Smith* was concerned with an appeal which focused on the approach
10 adopted by the trial Judge in sentencing for an offence of Wounding with Intent, contrary
11 to s.18 of the *Offences Against the Person Act* 1861. The appellant had pleaded guilty
12 to the charge of Burglary but was convicted by a jury in relation to the charge of
13 Wounding with Intent. In the course of an altercation, the victim received a final blow
14 to the back of the head which required three stitches. In his Sentencing remarks the
15 learned Judge concluded that this fell into the category of greater Harm and greater
16 Culpability. This was on the basis that the injury which was caused needed hospital
17 treatment, stitching and had considerable lasting effect on him.
18

19 28. In considering the matter, the Appellate Court noted that while the blow to the back of
20 the head was inflicted when the victim was prone and defenceless and necessitated three
21 stitches, the victim was able, following the blow, to rise from the bed and pursue the
22 Appellant out of the house. The Court concluded that given the great disparity in the
23 sentence of six years between categories 2 and 1, although it was a bad injury, standing
24 alone, it was not a category 1 offence.
25

¹ [2015 EWCA Crim 1482

1 29. The Court also expressed the view that the concept of “*sustained or repeated*” imports
2 some degree of persistent repetition. An assault may be sustained because it continued
3 over a significant period of time or be repeated because it involved multiple blows over
4 a short period of time.

5
6 30. In the instant case, the Complainant sustained a wound to his head, the fracture of two
7 bones in his forearm and significantly, a collapsed lung, which required emergency
8 surgery. These injuries amount to greater Harm.

9
10 31. In respect of Culpability, the use of a weapon, the machete, would place the offending
11 into the category of higher Culpability. Plainly it was also a revenge-based attack, with
12 the Defendant having left the Complainant’s yard to go to his home nearby to retrieve
13 his own machete before returning to the scene.

14
15 **PROVOCATION**



16
17 32. With respect to the submission of the Defence that there is lower Culpability as there
18 was a greater degree of provocation than normally expected, the Court has given
19 consideration to the definitions in the **Guidelines**. This states:

20
21 *“In many offences, it is possible that the issue of provocation will arise. The law*
22 *generally expects a person to be able to resist provocation but accepts that there*
23 *will be circumstances where the level of provocation justifies a reduction in*
24 *sentence. In assessing the degree of provocation where the guideline provides for a*
25 *greater degree of provocation than normally expected to be a mitigating factor,*
26 *account should be taken of the following factors:*

- 27
28 - *if the provocation (which does not have to be a wrongful act) involves*
29 *gross and extreme conduct on the part of the victim, it is a more*
30 *significant factor mitigating than conduct which, although significant,*
31 *is not as extreme;*
32 - *whether the victim presented a threat not only to the offender, but also*
33 *to children in his or her care;*



- *the offender's previous experience of abuse and/or domestic violence either by the victim or by other people;*
- *any mental condition which may affect the offender's perception of what amounts to provocation;*
- *the nature of the provocative conduct, the period of time over which it took place and its cumulative effect;*
- *discovery or knowledge of the fact of infidelity on the part of a partner does not necessarily amount to high provocation – the gravity of such provocation depends entirely on all the surrounding circumstances."*

33. Of the six factors listed above, in the context of the circumstances of the instant case, the conclusions are:

i. The provocation raised which is the swiping at the Defendant with the rake, does not appear to involve gross and extreme conduct on the part of the victim. The nature of the provocative conduct and the period of time over which it took place and its cumulative effect does not appear to be such a level so as to place in the extreme range. There is no medical information such as to suggest that the Defendant suffers from a mental condition which would affect his perception of what amounts to provocation. There is possibly only one factor for consideration which is the Defendant's previous experience of abuse by the victim.

ii. There was some provocation, given the injury from the rake which the Defendant received. The Defendant left the premises, went to his home and returned with a machete. He says that on his return the victim raised a bottle, and there is also some argument that there was possibly excessive self defence. However, the victim was being approached by a man armed with a machete. At that stage the threat must have come from the Defendant and not the victim. Overall the circumstances suggest a proactive, revenge-based response rather than one borne out of a high degree of provocation. Indeed

1 the Defendant expressed to the Probation Officer that he went back to the
2 scene because he wanted to teach the victim a lesson and make sure that the
3 victim understood that he would not let him take his life.

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5 iii. While the action was not planned, there was some element of pre-
6 meditation.

7
8 34. The conclusion is that the circumstances do not amount to a greater degree of
9 provocation than normally expected and that no lower culpability factors are present.

10
11 35. Consideration has also been given to whether the Defendant's Culpability is reduced
12 because of his mental health issues. The relevant questions in accordance with the *United*
13 *Kingdom Sentencing Council Guidelines for Sentencing Offenders with Mental*
14 *Disorders* have been asked by the Court. While non-psychotic illnesses such as
15 depression are listed in Annex 'A' thereto there is no evidence in the instant case of a
16 sufficient connection between any illness from which the Defendant suffers and the
17 offending behaviour and no evidence that at the time of the offending, the illness
18 impaired the Defendant's ability to make rational choices, understand the nature and
19 consequence of his actions or cause him to behave in a disinhibited way. The conclusion
20 is that his culpability is not reduced by reason of any illness.

21
22 **SENTENCE**



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24 36. The starting point is therefore is one of 5 years' custody.

25
26 37. The Court has considered the submissions of the Prosecution with respect to aggravating
27 factors. The factor of revenge has already been taken into account in the categorization
28 of higher Culpability. The victim suffered multiple injuries but details are not clear as to

1 whether the incident was over an extended period of time, and how prolonged it was. In
2 any event this would be a factor again placing the matter in the category of higher
3 Culpability. Care must be taken not to double count

4
5 38. The view is taken that there is a single aggravating factor of previous convictions for a
6 similar offence.

7
8 39. From a starting point of 5 years (60 months), the sentence is increased by 3 months for
9 the single aggravating factor (63 months).

10
11 40. The Court has taken into account all that has been said about the Defendant in mitigation
12 and in the SIR. This includes his personal circumstances involving a relatively crime
13 free life at 52 years of age, his genuine remorse, his immediate acceptance of
14 responsibility at the earliest stage when approached by the Police and the fact that there
15 was some degree of provocation which included the infliction of an injury upon him as
16 well as possible past assaults by the victim upon him. The SIR describes him as
17 demonstrating a degree of victim empathy and as feeling bad about the altercation and
18 the harm it caused the victim.

19
20 41. Significant weight is given by this Court to the Defendant's medical condition. It is
21 accepted that he has an eleven-year history of suffering from depression for which he is
22 stabilized by medication. The Report describes his history as possibly indicating trauma
23 or physical, mental and emotional difficulties that will require special consideration in
24 order to address his belief systems in the context of offending behaviours.





1 42. Indeed his early responses to the Police indicate that he saw his own actions as a
2 protective and pre-emptive measure to prevent further assault on himself. While this
3 does not constitute legal justification it does point to the possible traumatic impact of
4 past events upon his misguided approach to them.

5
6 43. With the significant level of weight which is given to his ongoing medical issues, in
7 mind, he is given a reduction which would not otherwise be given outside of these
8 circumstances.

9
10 44. All the mitigating factors taken together serve to reduce his sentence to one of 35
11 months' imprisonment. He is given full credit for his guilty plea reducing his sentence
12 to one of 23 months' imprisonment.

13
14 45. The *Cayman Islands Sentencing Guidelines* provides general guidance as to the aims
15 of sentencing, assessing the seriousness of an offence, the custody threshold and the
16 principle of proportionality. The Court reminds itself of this guidance including that in
17 sentencing an offender, the Court has to balance a number of competing interests and
18 objectives and to tailor the punishment to the individual circumstances of the offender
19 while ensuring that it is in line with the seriousness of the offence. A Court should
20 consider which of the aims which govern the sentencing process will be best served by
21 the sentence to be passed. The aims which are set out in the *Alternative Sentencing Act*
22 2008 Revision include deterrence, punishment, rehabilitation and restitution. A custodial
23 sentence should not be passed unless the offence is so serious that no other sentence can
24 be justified for the offence. Custody should be reserved for the most serious offences.
25 Even where the custody threshold is passed, custody can still be avoided in light of
26 personal mitigation or if there is suitable community intervention which would meet the
27 aims of punishment and rehabilitation.

1 46. In this case this is a serious offence in which the victim sustained serious life-threatening
2 injuries. The Defendant is assessed as being at high risk of re-offending - in part because
3 of his alcohol/drug addiction issues and his particular mind set. The custody threshold is
4 firmly passed. Nevertheless, he is described by the Probation Officer as being open to
5 diverse intervention options. He has completed a course of probation in relation to
6 previous offending successfully. He has accepted responsibility for his actions in relation
7 to this offence at the earliest stages. He is said to be in continuing fear of the Complainant
8 and possible reprisals. He is willing to undergo counselling to deal with his issues and
9 to participate in any programmes as directed.

10
11 47. The view is taken in this case that the sentence can properly be suspended and that there
12 is suitable community intervention which would meet both the aims of punishment and
13 rehabilitation.

14
15 48. The sentence imposed is thus:



16
17 i. Suspended sentence of 23 months' imprisonment suspended for two (2)
18 years.

19
20 ii. Pursuant to s.42 of the *Penal Code*, Community Service Order (CSO) of
21 240 hours of community service to be completed over the course of two (2)
22 years.

23
24 iii. Supervision Order for two (2) years with the following conditions:

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26 1. Not to enter the district of Bodden Town unless in transit to his
27 home or another area of the Island;

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- 2. Not to frequent any area where the victim Robbie Berry attends and to remove immediately from an area where the victim Robbie Berry is present.
- 3. To complete intervention programmes as identified by his assigned Probation Officer to include Anger Management and Changes programmes.
- 4. Engage in individual counselling with the Counselling Centre.

Dated this the 23rd day of September 2021



**Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court**