

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 22 & 23 of 2017

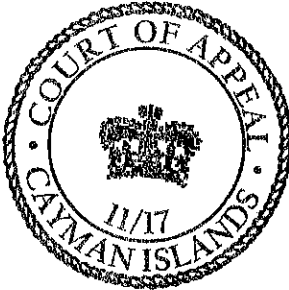
IND.043 & 044/2016

YC#0019 & 0020/2016

BETWEEN:

Jimmall William Facey

Appellant



- and -

Her Majesty the Queen

Respondent

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon. John Martin, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Date of Hearing: Monday 5th November 2018

Appearances: Ms. Keva Reid of McKinney Reid & Co for the Appellant
Mr. Greg Walcolm of DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 5th November 2018

Approved and Released 30 January 2019

MOSES, J.A.:

1. This is an application for permission to appeal against a total sentence passed on 6 September 2017 by Justice Quin of eight years' imprisonment on two counts of robbery, concurrent on each count.
2. These were serious armed robberies committed with an imitation firearm. What was particularly serious about them was that the target of these robberies was the same small

shop - a mini mart - situated in West Bay on this island, committed on two occasions about one month apart.

3. The first one took place on 19 March 2016 in the evening when the applicant, wearing a mask, appeared before the store clerk with the imitation firearm in his waistband. With that threat, he forced her to hand over money and some cell phones. The offence lasted but a short time but was clearly very terrifying.
4. The second offence occurred on 21 April 2016, a little bit later at 8:30. The store clerk was there and the applicant pointed the imitation firearm that he was carrying directly at the store clerk and took from her further cash \$434 and some cigarette wrappers.
5. The first offence was committed whilst this applicant was on electronically-monitored bail and that electronic monitor tracked his location throughout the robbery.
6. On the second he had defeated it with the aid of aluminum foil so that there was no record of where he was.
7. The results of these two robberies was that the store clerk, for reasons that we wholly accept, could not face continuing with her work and the owner of the store had to close the premises down.
8. The judge took the view that this was a very serious offence, committed as it was with an imitation firearm and causing the commercial and personal harm which we have identified. He therefore placed this commercial robbery in category 1 with a culpability of the highest at A and therefore falling within a category range of 12 to 20 years' custody with a starting point of 16.
9. In this application Ms. Reid contends that the judge erred in identifying the type of offence as of falling within that guideline. Her submission appears to be that this was of medium culpability. And, she saw fit to submit that there may have been self-serving exaggeration in the consequences as described either by the store clerk or the owner of the premises. This was a submission that never ought to have been made. There was absolutely no basis for saying that the impact was exaggerated. It was plain to us that the

judge was right to regard this case as falling within the highest category of commercial robberies. We only wish to emphasise that we do not in any way hold against her client the fact that these submissions were made in the way they were.

10. The substance of the application, however, rests on the nature and background of this applicant. There, there is more force in the facts on which the applicant relies. He is a young man, now only 18, born on 1 July 2000 and at the time of these offences only 16.
11. He has really a wretched background; both in relation to his family, the way he was brought up, and in relation to the difficulties he has faced while he was growing up. Of this there is ample evidence to be found in a Social Inquiry Report which looks at that very difficult family background, notes to his credit that he has matured physically and emotionally, but speaks of a number of interventions that might have been offered but could not lead to a successful result, partly because of the criminal activity to which we will turn later.
12. The psychiatrist who wrote some time ago in 2015 spoke of the possibility of some treatment for the attention deficit disorder and a mood disorder of the bi-polar type, off the island. That, however, never took place and didn't prove possible.
13. A more recent report from the psychologist of 20 April 2017 speaks of his difficulties with a learning disorder and difficulties with the ability to control himself, due to his problems in relation to his personality disorder. From a very young age this young man has been in trouble with the police and we have been shown offences dating back to 2013 of violence, consumption of drugs that continued right up to these far more serious robberies and have continued since. No one reading of this background can fail to have sympathy with the difficulties this applicant has faced. And it is in those circumstances that the guidelines in the United Kingdom which relate to the treatment of young offenders have particular force. Those principles are set out in the Sentencing Council's overarching principles and we would draw specific attention to those early pages between pages 4 and 6, looking at the overall approach that the courts have to take in relation to children and young people who are likely to benefit from opportunities to address their behaviour [see paragraph 1.6] and who may far more rapidly change and obtain benefit

from treatment [see paragraph 1.7] and for whom heavy punishments are likely to have far greater an impact [see paragraph 1.8]. All of that is particularly relevant to this young man.

14. We then turn to the approach of the judge. It is plain to us in his sentencing remarks that the judge had well in mind the difficulties which this young man had faced. He pointed out that had it not been for the age of this applicant and his difficulties, he could have placed a sentence of up to 20 years but he pointed out that he had spent a large period of his life in the judicial system and had had no support from his family, aggravated by the lack of mental health treatment he might have obtained at various crucial stages of his life, all of that, as the judge properly pointed out, that exacerbated the situation. He therefore halved what he identified as his starting point and gave for these two robberies a sentence of eight years.
15. This is challenged, both on the basis that we have already described; that the starting point was too high, by reference to other cases on the island where for what Ms. Reid described as more serious offences of robbery committed by adults, the main perpetrators with imitation firearms were given a sentence of 12 years' imprisonment. [See, for example, the case of *Tamasa v R*, a judgment of 6 March 2017 and the case of *Ray Smith v R*, a judgment of the President given on 31 July 2018.]
16. As will be readily recognised, these cases are of limited value as a precedent where the Court of Appeal is considering the sentence awarded by the trial or sentencing judge, and is therefore merely asked to identify whether they are too high.
17. In our judgment, the judge was clearly right to regard the starting point for an adult as being one of 16 years. In our view, he sympathetically and properly took into account the personal mitigation that plainly existed in relation to this young man, in halving that sentence. In our view, it is not arguable to the contrary and in those circumstances we refuse permission to appeal.

GOLDRING, PRESIDENT:

May we make one further observation? When we began this appeal, there was no copy of the applicant's previous findings of guilt before the Court. There was none available. There was, it seems in fact, no copy before the judge at first instance. We make it plain that it is incumbent on the prosecution at first instance, the respondent on appeal, to place before the Court the previous findings of guilt of any defendant or applicant on appeal. It is also incumbent upon the defence to do so if, as was the case here, mitigation is being advanced on the basis of the background of the applicant. We make that observation so that it is clear for the future.

