IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT NO: 27/18

THE QUEEN

v.

AZEEM DELANO BURTON

Appearances:	**Mr. Scott Wainwright, Crown Counsel, Office of Director of Public Prosecutions for the Crown**
	Mr. Jonathon Hughes of Samson Law Associates for the Defendant
Before:	**Justice Marlene I. Carter (Actg.)**
Judge Alone Trial:	**11th October 2018**
Delivery of Decision:	**1st November 2018**

HEADNOTE

Criminal Law – Sentencing – Robbery
Newton Hearing - Level of Harm above that inherent in the offence

SENTENCE JUDGMENT

1. The Defendant is indicted on one charge of Robbery contrary to s.242(1) of the Penal Code (2018 Revision). The particulars of that offence are that he "stole a ring, wallet and contents, and an Apple iPhone 6 of unknown value, belonging to Simon Boxall and immediately before or at the time of doing so and in order to do used force on the said Simon Boxall."

2. The indictment, dated the 5th day of June 2018, was put to the Defendant on the 8th June 2018, and, in response he stated "Guilty, but only to the phone." Defence counsel on that date advised the Court that the facts of the Crown's case are in dispute and, therefore, a ***Newton*** hearing is requested. On the 11th of October 2018 the Court conducted the ***Newton*** hearing.

3. The Crown called the evidence of the complainant, Simon Boxall. The Crown also relied on the evidence of two other witnesses whose statements were taken as being read into the record.

4. This Court, having heard the evidence for the Crown, rejected the basis of plea set forth by the defendant. The matter therefore proceeded to sentence based on the version of the facts presented by the Crown.

5. The facts as accepted by the Court are as follows:

   i. On the 20th of May 2018, the Complainant went to the Country and Western Bar around 10:30 pm. After about two hours at the Bar during which time he had consumed two or three beers the Complainant felt unable to drive his car home.

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ii. The defendant was also at the Country and Western Bar. He was in the company of three other individuals.

iii. The Complainant spoke to two men outside of the Bar and asked them to drive his car back to his home at Prospect Point which was some 1 ½ to 2 miles away from the Bar. They agreed and one of the men drove the complainant's car while the other followed in their vehicle. The men parked the complainant's car at his home and left.

iv. As the men drove away and the Complainant was walking up his driveway a woman whom the complainant had seen in the company of the defendant at the Country and Western Bar approached him in the driveway and called out to him. She spoke to him and caused him to walk back down the driveway back to the car which the complainant had seen her and the defendant and the two others in at the Country and Western Bar.

v. When the Complainant got to the car, the Defendant exited the car and put his arm around the complainant's neck and waist from behind. As the Complainant struggled to get out of the Defendant's grip, he felt fists punching his head. He fell to the ground and while on the ground the Defendant continued to punch and also kick the Complainant. The Complainant briefly lost consciousness.

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vi. When the Complainant regained consciousness, he found himself in the middle of the road outside his residence. He had blood pouring out of his head. At that point the two men who had earlier helped the complainant home returned to the residence. They called an ambulance and the

Complainant was taken to the George Town Hospital where he remained overnight. The Complainant received four stitches to his head. His eyes were bruised and he had difficulty seeing out of them. He also had scrapes to his knees and hands.

vii. The Complainant later discovered that some items had been taken from him during the incident including one 14K gold signet ring valued at approximately $800.00; one iPhone 6 valued at approximately $500.00; together with his wallet which contained, among other cards, his credit cards, identification and insurance cards, and drivers' licence.

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viii. On the 26th May 2018, the Defendant contacted a police officer and spoke to him. He thereafter gave a statement under caution in which he admitted taking the complainant's phone and credit card after a fight.

6. Crown Counsel submits, in relation to culpability for a street robbery, that this offence falls within the B range of Medium Culpability and that the attendant level of harm is at Category 2. The Crown submits that the evidence of the sustained attack was violence over and above what was necessary to commit the offence. In light of these, the Crown invites the court to find that the correct starting point for a custodial sentence is 3 ½ years' custody with a sentencing range of 2 – 5 years.

7. Counsel for the Defendant does not dispute the level of culpability submitted by the Crown. However, Defence Counsel argues that the level of harm should be at Category 3 in all the circumstances. Counsel submits that the Crown did not provide any medical evidence to show serious or lasting harm which would go the issue of whether the force

used during the robbery was above the level of harm inherent in the offence of robbery. He went on to argue that the limited medical evidence presented to the court was not sufficient to assist the court to sustain that categorization.

8. In submitting to this court that the level of harm for this offence should be characterized at Category 3, counsel for the Defendant stated that the degree of force used by the Defendant in committing the robbery was inherent in the offence of robbery itself and no more than that.

9. The evidence of the Complainant before the court was that he was held from the back by the Defendant around his waist and neck, he then felt fists and blows to his head as the defendant punched him and, after he fell to the ground, he was kicked and punched until he lost consciousness.

10. It is obvious from Complainant's evidence that he lost consciousness for some minutes as the Defendant and his companions had left the scene by the time that he regained consciousness – at which time he found that he was bleeding, at the scene.

11. He was hospitalized overnight and received 4 stitches to the wound to his head. He also had bruising to his face and scrapes on his knees and hands. He described feeling "emotionally stumped".

12. The complainant's Victim Impact Report (VIR) is relevant here. The Complainant stated:

"I treated Azeem Delano Burton with respect and courtesy when I met him and feel I did nothing to provoke the vicious attack that he (and his friends perpetrated)....

I was badly beaten up and was unable to work for over a week following this attack. I then had to think about getting new bank cards, driver's license, insurance cards, etc. Most of the replacements cost money and all took time. In total with the new phone and the gold ring which had great personal value (because it was a gift from my father), new wallet, bandages, card replacement costs – I probably lost close to 2,000 CI dollars but that is not the greatest costs. What Delano Burton took from me is trust. I used to feel fairly comfortable going almost anywhere in Cayman, now I no longer feel safe. I find myself looking around for the possibility of another violent, aggressive person in my surroundings. This attack has caused me to change the places I go to, it has taken away my freedom and confidence. He crushed it."

THE LEVEL OF HARM

13. The Cayman Islands Sentencing Guidelines 2015 ("the Guidelines") for Robbery put the facts of the instant case into a categorization of a "street robbery". A "street robbery or mugging" is described as:

> *"Street robberies will usually involve some physical force (or threat) to steal modest sums, although in some cases there is significant intimidation or violence. The victim may or may not be physically injured."*

14. The Guidelines state that a Court must consider the following as it seeks to assess the level of harm.

> *"The level of harm is determined by weighing up all the facts of the case to determine the harm that has been caused or was intended to be caused to the victim. The victim relates both to the commercial organization that has been robbed and any individual(s) who has suffered the use or threat of force during the commission of the offence."*

15. Three possible 'categories' are set out in the Guidelines to assist in determining the level of harm that has been caused or was intended to be caused to the victim.

> *"**Category 1***
> - *Serious physical and/or psychological harm caused to the victim*
>
> ***Category 2***
> - *Some physical and/or psychological harm caused to the victim above the level of harm inherent in the offence of robbery*
>
> ***Category 3***
> - *Factors in categories 1 and 2 not present".*

16. In the recent judgment of the Cayman Islands Court of Appeal (CICA) in ***Christine Rae-Smith v R***[1] the Court of Appeal considered arguments relating to the degree of harm in Category 2 for robbery. Although that case related to an offence of robbery at commercial premises, the Court of Appeal's findings are relevant.

> *"As we have said, the level of harm is to be determined by weighing up 'all the factors of the case.' It is the harm which 'has been caused or was intended to be caused to the victim.' In other words, when assessing the degree of harm in any given case, and the appropriate category into which to place it, the judge is entitled to weigh up every aspect of the robbery in question, having regard to the harm which was caused or intended. If, weighting up all those aspects, he concludes there was some physical or psychological harm caused or intended above that inherent in any high culpability robbery, the case will fall into category 2. For, in our judgment, 'this offence' refers to any high culpability robbery; in other words (as presently relevant), any robbery in which a firearm or imitation firearm was used to threaten violence. If the judge concludes from all the evidence, that there was, or was intended to be, some physical or psychological harm above that inherent in any category A robbery, the case will fall into category 2 of harm. Equally if he concludes there was, or was intended to be, a theft of goods or sums of a high or medium value, the case will fall into category 2 of harm.*[2]

17. The CICA went on to uphold the trial judge's categorization of the harm at category 2.

[1] Criminal appeal 15 of 2017
[2] Ibid, at page 15, paragraph 56

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18. Extrapolating from these pronouncements, this court must consider whether there was some physical and/ or psychological harm caused to the victim above the level of harm inherent in any medium culpability street robbery.

19. Having carefully considered the evidence advanced by the prosecution as set out at paragraph 10 above I am satisfied that, in all the circumstances, the level of physical and psychological harm was above the level of harm inherent in a medium culpability street robbery.

20. There is no evidence that the Complainant was fighting back. He was in shock at what was occurring. The level of violence inflicted was out of proportion to what may have been necessary in order to take the personal items from the Complainant at this point.

21. I have also considered the psychological harm to the Complainant evident from the VIR referred to in paragraph 11 above.

22. Based on the foregoing, I have come to the conclusion that this is a medium culpability street robbery at a Category 2 level of harm.

AGGRAVATING AND MITIGATING FACTORS

23. I find the following aggravating factors to be present:

i. The sentimental value attached to the signet ring taken from the complainant.: The complainant described that the ring had been given to him by his father and had been made with gold from a Welsh mine in an area associated with his family and that for those reasons it meant a lot to him. This ring was never recovered.

ii. The level of violence used to commit the offence.

24. I consider the following to be mitigating factors:

a. The defendant's good character. He has no previous criminal convictions;

b. The genuine remorse shown by the defendant;

c. Early guilty plea;

d. The relative youth of the defendant: He is now 20 years of age, 19 at the time of commission of the offence.

THE CIRCUMSTANCES OF THE DEFENDANT

25. A Social Enquiry Report (SIR) dated the 23rd July 2018 highlighted a number of relevant facts regarding the defendant:

i. *Mr. Burton described his childhood as good.*

ii. *He disclosed that at age twelve (12) he suffered a traumatic experience when his best friend, whom he used to see on a regular basis and stay over at his house, died of a brain tumour. He explained that he felt that his world had stopped.*

iii. *He himself began abusing ganja and smoking cigarettes.*

iv. *By the time he was aged fifteen (15) he was expelled from school.*

v. *Having returned Mr. Burton stated that he begged to get back into education and was allowed to attend the Cayman Islands Further Education Centre (CIFEC) and informed this officer that he did not attend the graduation ceremony but passed examinations. He also had a placement at the Dolphin Centre as a photographer where he later worked.*

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vi. *Mr. Burton took up employment at the Dolphin Discovery Centre where he had his placements from CIFEC. He worked there for approximately one year and enjoyed the work. However, he moved on to become a handler of stingrays and maintained that employment from 2016 until he was remanded into custody on June 2018.*

vii. *The client does not have any savings from when he was in the community.*

viii. *Attitude towards offence: Mr. Burton stated that he feels "terrible, I think about it every day and should have controlled my anger".*

26. The Social Worker was of the opinion that the defendant was at medium risk of re-offending and that he could be addressed by the client undertaking rehabilitative programmes. However, she was concerned that *"Mr. Burton's immaturity alongside his anger issues can get in the way of him making a positive change."* She recommended that that the defendant could be placed on *"a probation order of sufficient length to take into account the severity of the offence with conditions."*

COURT'S CONCLUSIONS

27. The Guidelines do contemplate a non-custodial sentence for an offence of Robbery. The guideline makes clear that "robbery will usually merit a custodial sentence but that exceptional circumstances may justify a non-custodial penalty for an adult and, more frequently, for a young offender."

28. Counsel for the defendant has not advanced any exceptional circumstances relating to this offender to justify consideration of a non-custodial sentence.

29. I find, on the facts of this case, that there are no such circumstances and that a custodial sentence is merited in all the circumstances.

30. As outlined above, the mitigating factors outweigh the aggravating factors in this case. It is within this Court's discretion to "identify whether any combination of relevant factors should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range."

31. I consider the appropriate starting point to be 3 years' imprisonment.

32. Where a Defendant has pleaded to an offence the defendant is usually entitled to a discount in his sentence to reflect this plea. It is generally the case that the level of reduction will reflect the stage at which the offender indicated a willingness to admit guilt to the offence for which he is eventually sentenced. In the present case, the defendant pleaded guilty at the first reasonable opportunity.

33. However, in circumstances where, as in this case, a ***Newton*** Hearing was sought by the defendant and this court has rejected the defendant's account, the court should consider a reduction in the usual discount for the defendant's early guilty plea.[3]

34. The court has a wide discretion when determining the appropriate level of reduction to be discounted for a guilty plea upon a ***Newton*** Hearing.[4] The fact that the prosecution was obliged to call the Complainant to give evidence, and the Complainant was

[3] Cayman Islands Sentencing Guidelines at 10.5 at page 16
[4] *R v Martin* [2013] EWCA Crim 2565

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subjected to cross examination by counsel for the Defendant, are relevant matters to be considered in this regard.

35. I do remind myself of the submission by Counsel for the defendant that the defendant did not seek a ***Newton*** Hearing to escape responsibility, but only to air an aspect of the case that needed a hearing and to demonstrate the genuine remorse shown by the Defendant.

36. Taking all these matters into account, I find that there should be a reduction of the notional thirty-three and one-third percent discount for a guilty plea to a discount of 30 percent.

37. The sentence of the court is three (3) years' imprisonment discounted by 30 percent.

38. The defendant is therefore sentenced to a term of imprisonment of 2 years' and 1 month, and the time that the defendant has spent in custody awaiting sentence will be deducted from this sentence.

Dated this the 1st day of November 2018

Carter J.

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Justice Marlene I. Carter
Judge of the Grand Court (Actg.)