

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 20/15

IND 105/2014

C06742/14

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

James Romano Whittaker

Appellant

BEFORE:

**The Rt Hon Sir Bernard Rix, Justice of Appeal
The Hon John Martin QC, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal**

Appearances: Patrick Moran Dpty DPP/Crister Brady (Brady Law)

JUDGMENT

Revised from transcript of oral judgment given on 4 November, 2016 and Approved
Released 10 January, 2017

RIX, JA

1. On 31 August 2015, the appellant, James Romano Whittaker, was convicted on an indictment containing a single count of robbery. The count alleged that in November 2014 he had robbed two victims — one a man and one a woman — of various items of their personal property, namely a handbag and its contents belonging to the woman and an iPhone belonging to the man.
2. The appellant's trial was presided over by Mr Justice Quin as a judge alone. On 10 September 2015, having heard submissions on sentence after handing down his judgment on conviction, the learned judge imposed a sentence of ten years' imprisonment.

3. The essential facts of the case are that in the early hours, about 1:00 am in the morning of Saturday 22 November 2014, the victims of the robbery were sitting on the seawall at the front of the Charles Building on North Church Street enjoying the view over the sea. The appellant approached his victims and demanded money. When told that they did not have any, he produced a knife with which he threatened the man. He placed the blade of the knife against the man's neck. The appellant was wearing a hoodie in an attempt to conceal his face and his identity, although, before the end of the robbery, the hood had slipped and he was subsequently identified by each of the victims at separate identity parades.

4. The appellant entered the man's car where he found the woman's handbag and the man's phone. The woman was extremely afraid and persuaded the man to leave the scene. From the comparative safety of the car, the man — who, unlike the woman, does not seem to have been all that frightened — threatened the appellant with an unpleasant second meeting sometime in the future.

5. The appellant did not have a good record, by any means, although this was his first conviction for any offence involving violence. He had something over 30 previous convictions, most of them for burglary. Those convictions stretch back into his youth. He was 35 years old at the time of his sentence.

6. The terms of imprisonment where imprisonment was imposed for his previous offences range upwards from a few months to a standard run of two years' imprisonment for burglary, sometimes rising to three years. His maximum previous sentence on any single count was three years, although in 2009 he was sentenced for a whole series of offences for a total sentence made up essentially of three years and a consecutive sentence of two years for a total of five years' imprisonment. Since his release he has offended again and been sentenced again, but not to more than 12 months' imprisonment. His last sentence, that sentence of 12 months' imprisonment, was partly suspended, to the extent of four months, for two years. He had recently been released from that sentence and a period of suspension was running at the time of the robbery offence in question in this appeal. He was at that time also on police bail charged with a further offence or offences. He was also at the time of the robbery subject to an electronic tag and curfew and he had removed the electronic tag from himself that evening of the robbery. That night of the robbery he went out equipped with a knife.

7. Those are essentially the circumstances of the robbery and the circumstances relating to this particular appellant.
8. We would add to those circumstances the fact that he was addicted to drugs and no doubt sought, in his offending, the means to sustain that addiction; and also that he had twice in the last decade been given the opportunity of undertaking drug courses, from which he does not seem to have derived any real benefit.
9. The judge's sentencing remarks referred repeatedly to the United Kingdom (strictly speaking the England and Wales) Sentencing Guidelines Council Definitive Guideline for Robbery promulgated in 2006, but not to the Chief Justice's 2002 Guideline for Robbery here in the Cayman Islands. The judge remarked, in paragraph 16 of his sentencing remarks, that on Crown counsel's submission as to the correct categorization of this offence of robbery, the UK Guidelines would recommend a starting point of four years' imprisonment with a sentencing range of two to seven years' imprisonment.
10. The judge referred to defense counsel's reliance on the difficult background of the appellant, who lost his mother when he was only nine years old, was abandoned by his father at the age of 13, and had started offending thereafter in his teenage years. The judge said in these circumstances that there were few, if any, mitigating factors in this case. He referred to the fact that the defendant was on bail and subject to an electronic tagging as another aggravating factor. He also referred, as a matter of aggravation, to the danger that violent robberies of such a kind in the centre of George Town by its waterfront could affect the important industry in these islands of tourism.
11. On behalf of the Crown, Mr. Moran has submitted that this reference by the judge was intended to create, of his sentence, a deterrent sentence. We do not agree. The judge did not, in terms, state that he was increasing a sentence which he had otherwise arrived at on the ground of the importance of deterrence as a separate matter, but no doubt he took these factors into account as a matter of aggravation, as we do.
12. Crown counsel relied before the sentencing judge, as the judge refers in his sentencing remarks, to the case of Barrett 2 CILR Note 16. There this court

reduced on appeal a sentence of 12 years' imprisonment to one of nine years' imprisonment. That case involved the robbery of a petrol station by an offender of previous good character who had used an imitation firearm in the robbery and had pointed it at his victim.

13. The judge ended his sentencing remarks, having set out the material to which we have referred, by stating that he had taken into account all that had been submitted before him by counsel on behalf of both the appellant and by Crown counsel, and having read the detailed social inquiry report and the victim impact report made by the woman victim, he concluded that in his view a sentence of ten years' imprisonment was appropriate. However, he did not explain how he had got to the sentence of ten years.

14. On this appeal, Mr. Crister Brady, on behalf of the appellant, submits that the judge had handed down a manifestly excessive sentence. He submitted that six years ought to have been the appropriate sentence. He would have liked to have relied, as he did in his written submissions, on the recent 2015 Cayman Islands Sentencing Guidelines for robbery, which, depending upon the category range of harm that one selected, would have either suggested as a guideline a starting point of four years' custody and a category range of two to five years' custody, or on another view of the importance of the woman's victim impact statement, a starting point of five years' custody and a category range of three to eight years' custody. However, Mr. Brady acknowledged, in the light of Mr. Moran's written submissions, that the 2015 Cayman Islands Guidelines were not in force at the time of the Appellant's sentence, even if they were to come into force a mere three to four weeks later in October 2015.

15. Nevertheless, Mr. Brady, on behalf of the appellant, submitted that in reliance on the Barrett case, on which Crown counsel had found it himself before the sentencing judge, that if the appellant in that case had been sentenced to nine years, on a reduction from the sentencing judge's 12 years, then, in the absence of a firearm in this case, the sentence should be three years lower. Further, alternatively, he submitted, taking the UK Guidelines as an analogy, that this case, although being aggravated towards the top of that guideline range of two to seven years, was not quite at the top, and thus he arrived at his figure of six years.

16. Mr. Moran, on the other hand, on behalf of the Crown, submitted that this was as serious a case of street robbery without actual injury as he could imagine. He would have wanted to submit that it was such a case as required a sentencing judge to start at the top of a guideline range and aggravate the offence still further by the many aggravating features to which he referred in his submissions. He produced a list longer than that of the judge himself in his sentencing remarks, but we will briefly refer to them.

17. He submitted this feature was aggravated by the location of the offence, right on the waterfront in the heart of George Town; also by the planning of the offence, in as much as the appellant had armed himself with a knife before going out, so it could not be called a spur of the moment street robbery; that it was aggravated by the timing of the offence, at night; also aggravated by an attempt to conceal the assailant's identity by the wearing of a hoodie; aggravated by the effect that the robbery had had on the woman, who in her victim impact statement had said that as a result of the robbery she was afraid to go out alone and that had had a significant effect upon her life. It was aggravated by the Appellant's previous convictions, by his failure to respond to his previous sentences, by the increase in the seriousness of his offending as he moved from burglary to robbery, and that it was also aggravated by the breach of the suspended sentence and by the offence taking place whilst on bail.

18. We bear in mind all those aggravating features which can fairly be made, although we also bear in mind that there is a danger of seeking to pile Pelion on Ossa, or Ossa on Pelion, in seeking to aggravate the offence serially by each of those aggravating features, some of which overlap. Nevertheless, as we have said, we take them and bear them in mind.

19. As for guidelines, we bear in mind that the 2015 Cayman Islands Guidelines were not in force and do not have retrospective effect, as is indicated by -- at any rate from United Kingdom jurisprudence in the case of Boakye 1 Cr.App.R.(S) 2. We bear in mind, nevertheless, the United Kingdom Guidelines of 2006, not because they apply as a matter of law in the form of guidelines to this jurisdiction, which they do not, but because they have been regularly recognised as being helpful in the sentencing of robbery by sentencing judges in this jurisdiction and because the sentencing judge himself appears to have borne them seriously in mind in his sentencing remarks in which he mentions them three times and at the behest of Crown counsel.

20. We also bear in mind the earlier 2002 Chief Justice's Cayman Islands Guidelines on robbery, even if the sentencing judge did not mention them at all in his sentencing remarks.

Those are the guidelines of the present Chief Justice, Chief Justice Smellie, which reads as follows:

"For robbery, a first offence involving the use of a firearm could attract a tariff of 14 years.

Otherwise for a first offence of an aggravated nature, 8 years will be imposed."

21. In his submissions before us today, Mr. Moran, on behalf of the Crown, has placed strong reliance upon those Guidelines and we take them into account.

22. In all of these circumstances, we consider that the unreasoned imposition of a ten-year sentence is manifestly excessive. The Chief Justice's Guidelines would justify a sentence of eight years for a first offence of an aggravated nature. The question arises of course of what is taken into account when one speaks of a robbery of an aggravated nature. This was certainly a robbery of an aggravated nature. It is possible to conclude that the eight years spoken of as a minimum in those Chief Justice's Guidelines could, in an individual case, be aggravated further. We allow that that is the case. However, bearing in mind the prevalence of the use of the United Kingdom Guidelines, which had introduced a more nuanced and categorised approach to sentencing, we consider that even in a case aggravated as this one is (to the extent that this one is), but we also take into account the personal mitigation of the appellant by reference to his difficult life as a child and an adolescent, a sentence of eight years, which is not only at the top of the range of two to seven years, which Crown counsel accepts by reference to the UK Guidelines is referable to a case such as this, at any rate, by way of an example, we emphasise that it is not a matter of law in this jurisdiction. We accept that the top of that range of seven years could, on the facts of this case, justify going outside that range to the eight years which the Chief Justice's Guidelines would otherwise impose.

23. Therefore, for these reasons, both by reference to the facts of this case, to the Chief Justice's Guideline of 2002, and with a glance at the United Kingdom Guidelines of 2006, we consider that this sentence of ten years should be reduced to one of eight years. To that extent, this appeal is allowed.