Judgment 31/2011 **Benjamin Alexander Bryant v Law Officers of the Crown**
Court of Appeal – File No. 422 – 15th September, 2011

Theft (Bailiwick of Guernsey) Law, 1983 – appeal against sentence – insufficient credit given for guilty plea and sentence manifestly excessive in the circumstances – appeal allowed.

THE COURT OF APPEAL OF GUERNSEY

The 15th day of September, 2011 before The Hon Michael Jacob Beloff QC, presiding, Michael Scott Jones QC and Clare Patricia Montgomery QC

BENJAMIN ALEXANDER BRYANT

Appellant

-v-

THE LAW OFFICERS OF THE CROWN

Respondents

In the matter of the appeal, with leave, from the sentence of a total of six years youth detention imposed by the Royal Court on 17th January, 2011.

WHEREAS, on 12th September 2011, THE COURT, having heard from Advocate Miss Rachel Eeles and Crown Advocate G D McKerrell,

THE COURT this day ALLOWED the appeal and GAVE JUDGMENT in the attached terms.

J TORODE
Registrar of the Court of Appeal

Approved Judgment
14 October 2011

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION – APPEAL NO 422

12 September 2011

Before: **The Hon Michael Jacob Beloff QC**
Michael Scott Jones QC
Clare Patricia Montgomery QC

Between: **Benjamin Alexander Bryant** **(Appellant)**

v

Law Officers of the Crown **(Respondent)**

Advocate R Eeles appeared for the Applicant
Crown Advocate G McKerrell appeared for the Crown

Authorities and Text referred to: -
Ryder v Law Officers of the Crown 2009–10 GLR 293 at para 14
Pirito v. Law Officers 2007–08 GLR N [21]
Sentencing Guidelines Council: Definitive Guideline on Robbery

Jones, JA

Introduction

1. On 17th January, 2011, following a hearing in the Royal Court, the appellant was sentenced to a total of six years youth detention on three counts of robbery. On 29th March he applied to this court for leave to appeal out of time against sentence and, on 23rd June, his application was granted by a single judge.

2. The following narrative of the circumstances surrounding the offences with which the appellant was charged is drawn from the prosecution outline which was read to the Royal Court at the sentencing hearing.

First Offence

3. At about 2.00 am on Wednesday 9th June 2010, William McDonald, a 40 year old chef, was walking home after an evening out, during which he had been drinking. He had a bicycle but, as he felt *"fairly drunk",* he decided to push it rather than ride it. As he was making his way along the street, two hooded males approached from behind, and drew level with him. One grabbed his bike and Mr McDonald ran off, pursued by the two males. He was tackled to the ground, and one of the males demanded his money. The other said, *"We've got a knife".* Mr McDonald did not see

a knife, but he believed that his attackers had one. He handed over his money, about £20-£30, together with his mobile phone, and the two offenders then fled. He then walked home and contacted the police. He was able to provide some description of the males but, as he only caught a glimpse of their faces, he did not consider that he would recognise them again.

4. On 2nd July, a search took place at the appellant's address, following his arrest for what is described later in this Judgment as the third offence, and the stolen mobile phone was recovered inside a bag, which was hidden behind the kickboard under the oven in the kitchen. The phone was later identified by Mr McDonald. The money was not recovered.

5. On the same day, the appellant, who was two weeks short of his seventeenth birthday, was interviewed in connection with the first offence in the presence of his Advocate and an appropriate adult, and admitted to having committed this offence. He said he had been out with another male, whom he named, and explained that they saw Mr McDonald and decided to rob him. They followed him and did so. The appellant said that it was the other male who had chased the victim and tackled him to the ground and that, when he caught up, Mr McDonald was already handing over his phone and wallet. The appellant denied knowing about any knife being used or mentioned in the incident.

Second Offence

6. At about 4.20 am on Sunday 20th June 2010, Jack Dyer, a 20 year old male, left a barbeque party in St Peter Port, intending to walk home. During the course of his journey, he was approached from behind by two hooded males. One of them grabbed him by the shoulder and pinned him against a wall by the neck and throat, using what Mr Dyer described as *"quite a lot of force"* such that it hindered his breathing. Mr Dyer was able to see only the bottom part of that person's face and was able to give only a brief description to the police.

7. Whilst he was being held, the other male pointed a knife at him and the person holding him demanded that he empty his pockets. Mr Dyer did so, and handed over about £60 in cash and a mobile phone. Both offenders then ran off and Mr Dyer heard them laughing as they did so. During the incident, he felt worried and scared for his well being. Mr Dyer described the knife as having a wooden handle and a blade of about four inches in length. When he saw it, he feared for his life. He was not injured.

8. Mr Dyer remained in the area for five minutes or so, *"more out of shock than anything"*. He then went to a friend's house and returned to the area to see if he could see the males. When he could not, he decided to call the police.

9. On 2nd July, during the search already referred to, the mobile phone which was stolen in this robbery was found in the same location as the phone stolen from Mr McDonald, and was later identified by Mr Dyer as his. Again, the cash was not recovered.

10. The appellant was arrested for this offence on the same day and, in later interviews, admitted his guilt. He said that he and another male, whom he named, had been in his flat when the other male had seen a man walking past and had suggested that they rob him. They left the flat and ran after the male. The appellant admitted that it was he who had grabbed Mr Dyer and that he had recognised him from school. The appellant said that the knife was produced by the other male,

and that he had not been aware in advance that it would be produced. He admitted seeing the knife during the attack but, nevertheless, continuing to participate in the commission of the offence.

11. Later, after Mr Dyer became aware of the arrest of the appellant, he described himself as 100% sure that it was the appellant who had grabbed him, he having known the appellant for a period of about four years.

Third Offence

12. The victim of this robbery, Brynley Pegler, a 39 year old male, was visiting Guernsey with friends, having arrived on 1st July on board a private yacht. After mooring, he went out for lunch and consumed three pints of beer. In the evening, he went out for dinner and consumed more alcohol, before visiting a number of pubs and then a night club, where he continued drinking until about 1.45 am on 2nd July, when he decided to return to the boat. He describes himself as very drunk by that stage. He left the night club with two friends but decided that he wanted some fresh air, so he went for a walk alone whilst his friends returned to their vessel. Mr Pegler was approached by the appellant and his co-accused, Jamie Le Maitre. Both were wearing hooded tops and one asked Mr Pegler whether he was *"OK"*. Mr Pegler replied that he was and then one of the males demanded his wallet. Mr Pegler told him to *"fuck off"* and, with that, Le Maitre pulled out a knife from his jeans and said *"give me your fucking wallet"*. Mr Pegler again refused and began to struggle with Le Maitre, sustaining a knife wound to his left bicep. Because of his state of intoxication, Mr Pegler was not sure how he had received that injury, but Le Maitre later accepted that he was holding the knife at the time. The demand was again made to Mr Pegler to hand over his wallet, which he did. Both defendants then fled the scene. Mr Pegler lost his glasses in the incident and it was later established that the assailants had also taken his mobile phone.

13. Mr Pegler got to his feet and was able to hail a taxi. He showed the driver his injured arm and explained that he had been robbed at knifepoint. The taxi driver asked him whether he wanted to call the police or go to hospital. Mr Pegler indicated the latter, and the taxi driver took him to the Princess Elizabeth Hospital. There, he received treatment to the knife wound. It was noted that Mr Pegler had also sustained an injury to his left elbow and abrasions to the eye. He made a full recovery from the incident, but he has been left with a small scar on his arm.

14. The appellant and Le Maitre were arrested in relation to the third offence at 9.20 am on 2nd July, as they both exited from the appellant's home address. Over the course of that and the following day, Le Maitre was interviewed on five occasions and the appellant on three. It will become clear later in this Judgment why we consider it necessary to say something about the Le Maitre interviews. In the first two, he answered *"no comment"* to all questions. At the close of the second interview it was explained to Le Maitre that the appellant had implicated him in the commission of the third offence. In his third interview, Le Maitre made a prepared statement, in which he said that the appellant had demanded money from Mr Pegler and taken his wallet, whilst he had taken the mobile phone. He accepted that, during the commission of the offence, Mr Pegler was injured, but said that this had not been intended and he did not elaborate on how the injury had occurred. Le Maitre said that he wished to apologise to Mr Pegler, and that he was ashamed by his actions. He thereafter answered *"no comment"* to the majority of the remaining questions. In his fourth interview, Le Maitre made a second prepared statement, in which he

explained that, on the night of the third offence, he was with the appellant but had, himself, no intention of committing a robbery, rather that it had been the appellant's idea to do so after the drunken Mr Pegler had walked past. He said that it was a spur of the moment offence, that the appellant had the knife, that he did not know in advance that the appellant was in possession of it, and that the appellant had handed it to him. He explained that he then held onto the knife and did not know that he had injured the victim. Le Maitre said that he handed the knife back to the appellant during the incident, saying of the appellant, *"he used the knife during the offence"*. He narrated that he then took Mr Pegler's phone and left the scene, leaving the appellant there, still in possession of the knife, trying to get money from the victim who was on the ground. He blamed the appellant for causing the injury. In his fifth interview, Le Maitre was challenged about his second prepared statement but answered "*no comment*" to all questions. Further, CCTV footage was shown to him which had captured him and the appellant apparently following Mr Pegler, but he continued to answer *"no comment"*.

15. In his first interview the appellant gave an exculpatory account of his whereabouts and movements at the time of the third offence. He said, also, that he knew nothing about the phones found in his flat, but that Le Maitre had a key to it (thus suggesting that Le Maitre, not he, might have been involved in the robberies). In the second interview the appellant answered *"no comment"* to all questions. During that interview, the CCTV footage was shown to him and it was put to him that it demonstrated that he was not in bed at the material time, as he had claimed, but he maintained his "no comment" stance. In the third interview the appellant chose to speak to the police and explained that he had left his flat at about 2 am on the day of the third offence and accepted that it was he who could be seen in the street on the CCTV recording. He said that it was there that he had met Le Maitre, after having arranged to do so by telephone. He continued that they then started to walk back to his flat and came across Mr Pegler whom they followed. When Le Maitre's account was put to him, the appellant denied that he had had the knife. He said that Le Maitre had been carrying it and that he was aware of that fact but did not know why he was carrying it. He later said that it was his knife. He then gave a full account of the incident, volunteering that he had kicked the victim in the face during the robbery. He said that he did not know how Mr Pegler sustained his arm injury. When questioned further, he said that the kick was, in fact, a stamp. He said that the offence had been spontaneous and that it had been committed because they needed the money. At the end of the interview, when asked whether he wanted to say anything else, he replied *"no, just sorry"*.

Procedural History

16. The appellant was charged with all three offences on 3rd July 2010 and appeared in the Magistrate's court on 5th July, when he was remanded to secure accommodation. He was committed to the Royal Court on 24th September. He first appeared before the Royal Court on 21st October, on which date the case was adjourned for procedural reasons, as was a further hearing on 4th November. On his next appearance, on 25th November 2010, the appellant pleaded guilty as charged, and asked for two counts of receiving stolen goods and two counts of robbery to be taken into consideration. It was accepted by the prosecution that this was the earliest opportunity for the appellant to plead to the indictment, and that there was insufficient evidence to charge him with the two robberies which were to be taken into consideration.

Sentencing Hearing

17. The appellant appeared with his co-accused in the Royal Court on 17th June of this year and was represented by Advocate Eeles. Dealing with the first offence, Advocate Eeles explained to the court that the only evidence that the police had was the finding of the victim's mobile phone in the appellant's flat, some 24 days after the robbery. Nonetheless, the appellant admitted his full involvement in the offence to the police, because, she said, he wanted to make a clean breast of matters in order to draw a line under his offending behaviour and start to get his life back on track. Turning to the second offence, Advocate Eeles submitted to the court that, once again, the appellant had been, as she put it, *"extremely candid"* with the police about his involvement. Finally, on the matter of the third offence, Advocate Eeles drew the court's attention to the fact that, during his third police interview, the appellant made *"full and frank admissions"* to all three robberies.

18. During the course of the hearing in the court below, extensive reference was made to the Definitive Guideline on Robbery published by the Sentencing Guidelines Council ("SGC") in July 2006, about which we say more later in this Judgment.

19. In his sentencing remarks, addressing both accused, the judge expressed the view that credit for the guilty pleas was *"somewhat limited on the evidence, particularly that of forensics as it was rather compelling. On the other hand, Bryant freely admitted the TICs."* He continued in these terms:-

> *"The effective mitigation is limited. It amounts to the young ages of the Defendants, some credit for guilty pleas and for Le Maitre, lack of previous convictions. We reflect the ages of the accused, in accordance with legal authority, by selecting a somewhat lower starting point than for adults. Our discounts amount to around one third for Le Maitre and around one quarter for Bryant. The starting points must also take into account the aggravating features mentioned".*

20. The court then adopted a starting point of eight years for both the appellant and Le Maitre, the judge commenting that the third offence was *"very serious"*. In the result, the appellant was sentenced to six year's youth detention on each count to run concurrently. Le Maitre was sentenced to five years and six months youth detention for the third offence.

Grounds of Appeal

21. The grounds stated in the Notice of Appeal are that (i) insufficient credit was given for the appellant's guilty pleas and (ii) that the total sentence of six years was manifestly excessive in all the circumstance. At the hearing before us, Advocate Eeles elaborated the second of these, saying that it was founded on the proposition that the starting point of eight years was too high. It seems to us logical to address that argument first.

Notional Starting point

22. As we have noticed above, the Royal Court was addressed on that part of the SGC guidelines which deals with robbery. In the section which summarises the guidance given in respect of young offenders convicted of street robbery or *"mugging"*, a starting point is suggested of three years detention, with a sentencing range of one to six years where *"a weapon is produced and used to threaten, and/or force is used which results in injury to the victim"*. In cases where *"the*

victim is caused serious physical injury by the use of significant force and or use of a weapon", a starting point of seven years detention with a sentencing range of six to ten years is suggested. It is noted in the guidelines that the starting points are based on a first-time offender aged 17 years old who pleads not guilty. This appellant had an extensive record of petty crime, including a conviction on a charge of assault and a number of convictions of theft, none of which had attracted a custodial sentence.

23. As was recognised on all sides in the court below, and as this court has recently reiterated:-

> *"... ... we doubt whether the definitive guidelines can or should be adopted wholesale by the courts in Guernsey given the different considerations that may inform the sentencing process in this Island. Indeed in relation to offences against the person, in this case as in others, the Royal Court has had occasion to observe that there may be Guernsey-specific considerations that point to the imposition of heavier sentences in Guernsey for offences against the person than may be the case in England and Wales".* (Ryder v Law Officers of the Crown 2009–10 GLR 293 at para 14)

24. In her submissions in the hearing before us, Advocate Eeles accepted that attention should be focused on the third offence for the purposes of this appeal, on the view that it was the most serious. With regard to it, she argued that the SGC starting point was three years. Acknowledging the *"Guernsey specific"* considerations, and taking into account all of the relevant mitigating and aggravating factors, she cautiously contended for a starting point in this particular case of seven years.

25. We are unable to discern from the transcript of the sentencing hearing what matters the Royal Court took into account when arriving at a starting point of eight years, nor how these factors were weighed and a balance struck. Recognising, as we do, that sentencing is an art and not a science, we are of the view, nonetheless, that a sentencing court should give some insight into these matters in its sentencing remarks, in order that a convicted person may have an understanding of why a particular sentence has been pronounced and, in the event of an appeal, the Court of Appeal may understand the sentencing court's approach.

26. Doing the best that we can on the material before us, we observe, first, that the bands indicated in the guidelines are not watertight compartments. A seven year starting point, for example, is not a stark alternative to a three year starting point, and, in many cases, a combination of factors may properly lead a sentencing court to strike a figure somewhere between the two. A submission to that effect was made by counsel who appeared for Le Maitre in the court below. Here, in our judgment, the injury sustained by Mr Pegler could not properly be characterised as a *"serious physical injury"* but it was caused by the knife and, having regard to the circumstances in which it was sustained, it was only by chance that it was not more serious. In addition, the appellant accepts that he needlessly stamped on the victim's head while he was on the ground.

27. Having regard to the material which was before the Royal Court in this case, we are not persuaded that it can properly be said that the starting point chosen was such as to lead to a sentence that was manifestly excessive.

Discount

28. Advocate Eeles submitted that the appellant was entitled to the usual one-third reduction in sentence, in recognition of his having pleaded guilty at the earliest opportunity. She recognised that there may be exceptions to the rule that a plea of guilty will normally lead to a reduction in sentence, for example *"when an accused was caught red-handed, or where he had otherwise no real alternative but to plead guilty"*. (Pirito v. Law Officers 2007–08 GLR N [21]) She submitted that, in this case, however, the appellant would have been able to present a defence to a charge of robbery flowing from the circumstances of the third offence, had he not chosen to make a full admission at interview.

29. As we have recorded earlier in this Judgment, the judge in the court below remarked that *"credit for the guilty pleas was somewhat limited on the evidence, particularly that of forensics as it was rather compelling"*. Since the discount that was applied in the case of Le Maitre was around the full one-third, and in the appellant's case around one-quarter, that comment can only have been intended to refer to the evidence against the appellant. We can find no reference, however, in the prosecution outline or in the transcript of the sentencing hearing, to forensic evidence pointing to the guilt of the appellant on any of the counts which he faced. By contrast, on a charge of theft to which Le Maitre had pleaded guilty and on which he was sentenced on 17th June, there was fingerprint evidence linking him with the scene of the crime, and on a burglary charge for which he was sentenced on the same day, DNA evidence convincingly linked Le Maitre with the commission of the offence. Further, it is clear to us that the appellant was substantially more forthcoming to and cooperative with the authorities than was Le Maitre.

30. Given that the Royal Court considered it appropriate to apply the full discount to Le Maitre's sentence, we can identify no sufficient reason why it considered it appropriate not to give the benefit of the full discount to the appellant.

31. In our judgment, having regard to the nature and extent of the appellant's cooperation with the police from a very early stage in their investigations; to his asking to have four other offences taken into consideration, including two with which he could not properly have been charged; to his plea of guilty at the earliest opportunity in circumstances in which he might otherwise have put the authorities to their proof; and taking into consideration all of the information about the appellant with which we have been provided, we are satisfied that it was wrong in principle for the Royal Court not to have applied a one-third discount.

Disposal

32. For the foregoing reasons, we allow the appeal, we quash the sentence, and we impose instead a sentence of five years and four months youth detention, to run from 5th July 2010.

