In the Supreme Court of St. Helena

Citation: SHSC 35/2021

Criminal

Sentence

Attorney General

-v-

Sergio Villatoro Bran

Sentence dated 22nd September 2023

The Chief Justice Rupert Jones

1. On the 16 June 2023, the Defendant, Sergio Villatoro Bran, pleaded guilty to 5 counts under s.20 of the offences against the Person Act 1861: that he unlawfully and maliciously wounded each of: Philip Yon; Sophie Crowie; Cassidy Beard; Tegan Knott and Kimberly Bennett.

2. I have adopted much of the prosecution sentencing note in my following remarks for which I am grateful to Mr Johnson KC for setting out and which is largely not in dispute. I am grateful to him and Mr Jackson and those instructing them both, the public solicitor's office and the Attorney General's chambers, for their continued assistance throughout this case. I am also grateful to those involved in the investigation of this case. I am aware of the ongoing public interest in this case.

The investigation into Dr Bran

3. The Defendant, Sergio Villatoro Bran is a Guatemalan national who worked as an orthopaedic surgeon at Jamestown General Hospital from 2015, becoming the resident Orthopaedic Surgeon on St Helena in 2016, the following year, a post deemed necessary due to apparent medical need. He performed approximately 600 surgeries over some 5 years, upon a population of about 4,500 people.

4. On 5th February 2021 the Defendant was suspended due to serious concerns raised about his working practices.

5. A Disciplinary and Capability Panel was convened and the matter was reported to the St. Helena Police Service by the Health Directorate on 24th March 2021, who commenced an

investigation. The criminal investigation focused on cases where only arthroscopy was envisaged but where additional, more invasive surgery was carried out, without any form of consent.

6. That investigation led to the 5 charges of unlawful wounding in May 2021, relating to operations on the five victims between January 2019 and August 2020, all having occurred while the Defendant was in a high position of trust as the island's only orthopaedic surgeon and within the wider context of other complaints.

7. As is now accepted from his guilty pleas, the Defendant adopted a reckless approach when it came to obtaining informed consent and when assessing the risks of surgery to his patients.

8. Mr Carlos Soto, also originally from Guatemala, was the General Surgeon at St Helena Hospital from 2013 to March 2019 and the Defendant's line manager. He explains how consent is ordinarily obtained for operations on the island. Consent is originally discussed in consultation with the patient, when the pros and cons of the proposed surgery are explained, all of which is recorded in the notes. On the day of surgery, a consent form is completed, where the exact surgery is detailed.

9. He says – "*sticking to that is a must…because it is elective surgery that is carried out on diagnosis only. This type of surgery should not be done as exploratory or to fix what is found…Once in surgery, there is a checking list and it has to be read out loud for all surgical staff to hear what exactly the patient has consented for… If there is doubt in any way that a further injury or condition is found once in surgery then the correct procedure should be to stop surgery, bring the patient out of theatre so it can be discussed with the patient and their consent obtained. This is why it is very important to do as much pre op diagnosis to prevent these situations.*"

10. This approach to obtaining consent was formalised in a Health Directorate Policy for Consent, the first draft of which was published in September 2018 when the Defendant was in post. The policy includes the following:

> *"During an operation it may become evident that the person could benefit from an additional procedure that was not within the scope of the original consent if it would be unreasonable to delay the procedure until the person regains consciousness (for example because there is a threat to the person's life) it may be justified to perform the procedure on the grounds that it is in the person's best interests. However, the procedure should not be performed merely because it is convenient."*

11. In addition, the Saint Helena General Hospital consent form, in the "Statement of Patient" section which is signed and dated, it reads, "*I understand that any procedure in addition to those described on this form will only be carried out if it is necessary to save my life or to prevent serious harm to my health.*"

12. The Defendant was arrested and interviewed on 6th May 2021, in relation to 9 allegations of causing grievous bodily harm with intent. He made no comment in police interview, referring instead to his previous misconduct interview and a prepared statement, in which he had sought to justify the surgery and treatment he undertook.

13. On 27th May 2021, a team of police officers arrived from the UK to assist in the criminal investigation.

14. On 12th August 2021, former Chief Justice, Charles Ekins ruled that bail conditions which, in effect, prevented the Defendant from leaving St. Helena were disproportionate and further ruled that nothing should be done to prevent him the Defendant leaving the island, which he did later that day. That decision was successfully appealed to the Court of Appeal, who allowed the appeal on 29th September 2021. However, by that time the Defendant had left St Helena for Guatemala where he has resided for the last two years – outside the jurisdiction of the St Helena Court.

15. When Mr Wyatt took over as Orthopaedic Surgeon on the island in mid-September 2021 after the Defendant's suspension, he took a dozen or so of the 44 patients off the Defendant's surgery waiting list as, in his view, their operations were not required. Given the lack of MRI facilities on the island, he highlights the central importance of thorough clinical evaluation. By the time of his witness statement dated 29.12.21, he had already seen patients requiring revision surgery previously operated upon by the Defendant.

16. 3 months into his tenure, there were fewer than 10 such patients but Mr Wyatt observed, "*I dread to think of the full number, I think this is the tip of the iceberg at the moment*". In at least two cases, the risks of revision surgery were too great to operate – he says "*personally and professionally this is a profoundly upsetting situation."* After 3 months' tenure, he had multiple concerns about the Defendant's former practice, including not obtaining the correct diagnosis, not deciding on the correct operation, performing operations poorly, failing to instigate proper rehabilitation and mismanaging patient expectations. He also observed that the Defendant failed to take and keep adequate notes, including notes concerning operative risks.

The five counts to which the Defendant has pleaded guilty

Count 1 - Philip Yon

17. Before coming to St Helena, Mr Yon lived on Ascension Island for 20 years where he played a lot of football, which gave him knee pain. Without any offer of x-rays or physiotherapy or inquiry into what treatment if any he had on Ascension Island, Mr Yon was diagnosed by the Defendant with a meniscal tear in June 2020 and told he would need

arthroscopic surgery, which he was led to believe was the only option. This was a misdiagnosis as in fact he had a problem with his synovitis and, in the course of carrying out a synovectomy, which is a significantly different open operative procedure involving the removal of soft tissue, it appears the Defendant also cut through one or more of his veins. His knee bled and swelled profusely after the operation and so had to have a further surgical procedure.

18. The Defendant later sought to justify not offering him physiotherapy on the basis that Mr Yon had the same on Ascension Island, something which Mr Yon specifically denies he had, nor was it discussed with the Defendant. Mr Yon expected to undergo arthroscopy on 30th June 2020 with two small incisions to carry out a meniscal repair only.

19. He was not told about the risk of nor was his consent sought to address any other medical problems if found, or the implications of possible further surgery – "*at no time before the operation did Dr Sergio say to me he would look around my knee and fix what he found..I wasn't told that could be a possibility and what the implications of that could be…I would have wanted the opportunity to discuss any further work and how long it would have taken to repair*."

20. Yet when he awoke from surgery, the Defendant told him he had done additional work, which Mr Yon had not consented to. He went on to develop significant complications, including the need for further surgery and a longer recovery. He now gets pain in his knee from normal activities such as crossing his legs.

21. Independent expert and consultant orthopaedic surgeon, Mr Alun Wall, confirms that Mr Yon was misdiagnosed, there was no attempt at reasonable conservative measures, the operation was inappropriate and that the Defendant should not have performed the surgery he did without consent, which was absent. There is no evidence that Mr Yon provided a generalised consent, nor consented to the Defendant using arthroscopy as a diagnostic tool. There is no mention in the medical notes of the synovectomy performed, which was a more invasive procedure and so, while a limited synovectomy may have been appropriate medically, there is no evidence that Mr Yon consented to this. The operation should not have proceeded. Additional risks were never explained and Mr Yon was not facing an emergency situation where his consent could be deemed.

<u>Count 2 – Sophie Crowie</u>

22. Sophie Crowie, a police officer on St. Helena, was referred to the Defendant in 2020 with complaint of a painful knee. No x-rays, scans or pre-operative physiotherapy was offered when, according to expert opinion, it should have been and may well have avoided an operation altogether. The Defendant made a mis-diagnosis of a meniscal tear. He said he would address it with arthroscopy, involving 3 small holes in her knee, and she would walk out of hospital the same day. Ms. Crowie consented to this procedure but no more. She is

explicit that the Defendant never informed her that he would or might perform any further operation on her knee and she would not have consented to that.

She says – "*Should I have known that he would have to cut my knee I would never have consented to the operation because I do not like hospitals, and the way he explained the key hole procedure to me, this was less invasive and had a short recovery period, and I would still have my mobility, and this was why I only agreed to have key hole surgery*." If any further repair was required, she would expect to be woken up and her separate consent sought.

23. Ms. Crowie's evidence about her expectations and the lack of a proper consent procedure is supported by evidence from the former general surgeon Mr Soto, who points out that, in Ms Crowie's case, "*It's a completely different operation…on discovery of a new pathology in an elective situation mandates a separate informed consent process*."

24. She woke up after her operation in severe pain. It transpired that, following the misdiagnosis, the Defendant had performed another operation on her knee which included a significant additional open incisions, leading to a far longer recovery period even if successful. This was a complete surprise to her. Her condition then deteriorated and when she complained of her ongoing symptoms, the Defendant didn't take her seriously and was dismissive.

25. Her knee is now worse than it was. She had to go to the UK for specialist treatment. Her patella was still out of alignment and she had painful internal scar tissue which may necessitate a further operation. She states, "*I used to be able to walk, walk upstairs, run and swim amongst other things that I used to love to do, but I can't do any of that anymore, The main impact is that I cannot do the job that I love, which is a uniformed police officer. I have had so many tears and suffered so many emotions, not just physically but mentally too. The whole experience has left me absolutely devastated, and since learning about Doctor Sergio being investigated into the procedures that he carried out has also impacted on my mental health a lot more than I already am dealing with. I put all my trust and faith that he would be able to repair my knee, and allow me to have a normal life, but in fact he has made my knee a lot worse and my quality of life too.*"

26. When interviewed by the police about her case on 22nd June 2021, the Defendant contended that he not only offered arthroscopy but explained that, if during that procedure he found other damage which required further surgery, he intended to carry it out and that Ms. Crowie specifically agreed to that approach. However, Ms Crowie states:

"*He never in any of the appointments or whilst I was at hospital before the operation tell me that he would carry out any other form of operation on my knee, other than what I had agreed to, which was the key hole surgery, and having 3 holes in my knee, and as I have already explained, if he had said that he would perform any other surgery, I would never have agreed to the operation…It was still my expectation that Sergio would*

only carry out Key Hole surgery. If further damage was found that fell outside this I expected to be woken up, spoken to about it and from this information been able to make an informed decision if I wanted the operation done. I did not agree for Sergio to just go ahead, cut my knee and cut further tendon without my consent. At no point at all did Sergio talk about cutting my knee, it was all around keyhole and this would be port incisions only to allow for camera exploration."

27. Mr Alun Wall is of the opinion that the Defendant failed to undertake appropriate pre-operative investigations or use appropriate measures prior to surgery and that the consenting process was woefully inadequate. There is no evidence of any discussion that a further procedure may need to be performed, let alone one with substantially increased risks of complications. The lateral release and medial plication operation should never have been performed in the absence of consent. There is no evidence of a generalised consent being given and Sophie Crowie was not at risk of life or limb such that consent might be deemed.

Count 3 – Cassidy Beard

28. Miss Beard had a history of pain in her right knee and, after cortisone injections did not work, the Defendant said the next option was to have keyhole surgery. On 1st July 2019, without any x-ray or ultrasound or offer of physiotherapy, a diagnosis involving the medial synovial plica (a membrane near the patella) was made and consent given for arthroscopic knee surgery to remove the plica – "*He also told me that he expected that I would be able to walk out of the hospital after the operation and that my recovery time would be only a few weeks. Based on what Dr Sergio said I consented to the surgery because I believed only two small incisions would be made in my knee, so no or very little scarring to my knee. That was important for me."*

29. However during the operation on 3rd September 2019, the Defendant made a diagnosis of lateralisation of the patella and proceeded to perform a lateral release and medial plication operation, which involves a separate incision to the medial aspect of the knee and shortening of the tendons. This was news to Miss Beard, who awoke to see an additional 2cm incision on the inside of her knee and an explanation that in fact her kneecap was rotated.

30. There is no evidence within the notes made available, nor from the consent form, that this operation was consented to. Mr Wall opines this is a completely separate operation which involves substantial rehabilitation postoperatively, with a separate knee incision. The surgery should not have progressed during this 'sitting' and she should have been counselled at a separate stage regarding any proposed operation to realign the patella. The operation she actually had usually requires 6 months post-operative physiotherapy, as opposed to 6 weeks for the operation she consented to.

31. Miss Beard continued to have problems with her knee over 3 months later – "*I don't believe my knee problem is solved and it gives me pain. I have stairs at work and home and*

my knee has given out a lot when I climb steps. I have been trying to do Boot Camp to strengthen my knee. It feels different in the winter, and I have a constant tingling sensation."

Count 4 – Tegan Knott

32. In September 2018 while working as a waitress at the Mantis Hotel, Jamestown, Ms Knott fell on some stairs and injured her right knee. She initially saw Dr Soto who obtained x-rays and pain relief and referred her to the Defendant. Two weeks later, he said "I think you have a meniscus tear but to confirm this I will need to do keyhole surgery". Ms Knott asked if could be done in the new year as she was due to get married in December. She was concerned at the proposition of having keyhole surgery just to confirm a tear but eventually consented as she believed what the Defendant had told her.

33. On the day of her operation, 7th November 2019, the Defendant explained he would make two pinhole incisions and put a camera in to look at her knee. He marked where the incisions would be and drew a smiley face on her knee. The operation took place with an epidural and sedation, the Defendant giving her a thumbs up as she was taken back to the ward. After it, the Defendant told her there was a small complication, it wasn't a meniscus tear but her kneecap and he had to tighten ligaments to move it. In fact, without consent the Defendant had carried out a lateral release with medial plication, involving an additional 5-7cm incision and other invasive procedures.

34. Ms Knott had been told to expect the weekend off but was now told she needed two weeks off and physiotherapy. She states, "*A nurse took the bandage off to clean it and I was really upset to see that I had a scar down the centre of my knee, about 5-7 centimetres long that I was not expecting.*" She went home and cleaned off the smiley face with nail polish remover. She says, "*I would have liked to have been consulted with what was found during the keyhole surgery and been given the opportunity to make an informed decision, after doing my own research which is what I did prior to the surgery."* Over two years later, the additional scar was still tender to the touch and is something Ms Knott felt self-conscious of and concerned about.

35. Mr Wall's opinion is that the medial plication should not have proceeded and should have occurred at a later date after adequate consent. This was not an emergency situation.

Count 5 – Kimberly Bennett

36. After the birth of her daughter in 2014, Ms Bennett (aged 25 at the time of her operation) developed a large vein behind her left knee and, in October 2019, pain in her left hip and knee. The following month, the Defendant diagnosed cartilage damage and said she required an operation for micro fracturing which would cause the body to grow cartilage. No x-ray or scan or alternative treatment such as conservative treatment or weight loss was offered.

37. On the day of her operation, 7th January 2020, the Defendant explained this would be done by keyhole surgery which would mean 3 small incisions and she would be back on her feet in 10-15 days. Consent was given for left knee arthroscopy for a microfracture procedure. The consent form also states consent was given for meniscal repair, yet at no point was meniscal repair discussed with Ms Bennett and it was subsequently documented that the menisci were "okay".

38. In fact without consent, despite her being conscious during the operation, the Defendant carried out a lateral release of the patella with medial plication, with a separate 5-7cm incision and additional surgery. After surgery he told her it didn't go as he hoped and he had to open up the knee and release the tendons, as well as the micro fracturing and it would be 10-12 weeks before full mobility would return. She states:

> *About eight months after the surgery I was still having pain and problems with the knee. I could not walk up or down steps or kneel without pain and so I made another appointment to see Dr Sergio. I told him about the problems and he said that I should not kneel as I could shatter the kneecap and it could take about a year for my knee to fully heal…*
>
> *Had I known that the recovery period was more than the 10-15 days l would not have consented to the operation. Had Dr Sergio fully explained the options and outcome I would have considered whether to have surgery at all. I am worse off now than before the surgery. I have developed back pain which has been x rayed and I have been told I have scoliosis. There have been many times that I have just sat and cried with the pain and the fact that I am unable to carry out activities as I have in the past. If it wasn't for my sister who was helping me at the beginning I do not know how I would have coped. I cannot drive and recently had a driving lesson but could not operate the clutch without pain so have given this up. My left knee is still numb along the outside and makes a popping sound when active. I have a long scar that goes down the centre of my kneecap from just above to just below it which I had not been told I would have either prior or during the operation when I was awake. When I get home from work I have to sit down and rest as my knee is so painful and swells up.*

39. Mr Wall points out that such problems with movement of the patella are quite common in young females and are usually treated conservatively with physiotherapy to build up the quadriceps muscles and improve the tracking of the patella. He concludes the Defendant should have abandoned the procedure and sought her consent for the significantly different surgery carried out.

40. Counts 1 to 5 share the following common features:

(a) knee surgery carried out by the Defendant which was significantly more invasive than that to which consent had been obtained, where patients were wholly unaware of what had been done to them until they awoke from general anaesthetic;
(b) where the risks of the surgery carried out and viable alternatives had not been explained adequately or at all, and where no generalised consent to carry out any additional surgery if required had been sought or given; and
(c) cases involving longer recovery periods and / or further corrective surgery and/or long term complications as a result such as continuing pain in the joint and restrictions in movement and activities that the victims can pursue. Each of the victims has explained in their personal statements more about the effect of the offences upon them.

The Approach to Sentencing – s.20 unlawful wounding – Sentencing Guidelines

41. The Sentencing Guidelines from England and Wales dated 1 July 2021 are applicable for s.20 unlawful wounding. While these guidelines were not drafted with these sorts of offences in mind, the court must nonetheless apply them unless it is contrary to the interests of justice. I agree with the Prosecution and Defence that adopting the language of those factors the following features were present in relation to the harm categorisation:

(a) The injuries were "*serious in the context of the offence*" (a factor indicating greater harm). Setting aside for a moment the Defendant's motivation, each case involved the use of a knife to make either an additional 5- 7cm incision or to remove soft tissue. Such injuries have directly led to much longer periods of recovery and other complications, as set out above.

(b) The victims were "*particularly vulnerable because of personal circumstances*" (a factor indicating greater harm) – they were completely reliant upon the Defendant for information and advice and either unconscious or semi-conscious when surgical decisions were made. Many struggle to come to terms with what happened to them, as set out earlier.

In relation to culpability - although I do not accept there was a "*deliberate targeting of vulnerable victims*" (a factor indicating higher culpability) it is beyond doubt that the patients were in a vulnerable position and the Defendant was reckless as to the lack of consent of those patients placed in his care who were wholly reliant upon him, failed to comply with policies and professional duties and his actions were reckless as to the complications caused which he would reasonably have known of.

Additional aggravating factors include:
(c) There is in each case a significant breach of the high degree of trust placed in the Defendant by his patients. He was working in the public sector as the only orthopaedic

surgeon on the island. Whatever his underlying motivation, his clinical decision making in every case involved a questionable initial decision to use keyhole surgery followed by a decision during operations to engage in more invasive surgery without any form of consent, when he must have been aware of standard consenting procedures and policy on the island. The abuse of trust is serious. This amounts to an aggravating factor.

(d) In so far as not catered for in the decision upon the category of offending above, other aggravating factors may include the ongoing effect on victims – there has been a permanent effect on the victims and restricting their activities - and abuse of power/or position of trust, for the same reasons already cited.

42. His guilty pleas indicates that the Defendant accepts he was reckless, at least, to the additional harm he caused in doing so, given his failure to seek consent, offer non-surgical alternatives and behave in accordance with his professional policies and duties.

43. It is accepted that the alleged conduct is not at all in the same category of seriousness as that of a surgeon carrying out surgical procedures which he knows will definitely not assist a person medically, such as performing an operation which cannot possibly have any medical benefit or carrying out a sexual assault upon a surgical patient. This was the principal reason behind charging s.20 offences, which can be committed recklessly, rather than s.18 offences. While it is submitted in this case that the Defendant may have ultimately wished to cure his patients, it is accepted he acted recklessly – he was aware of the risk the victims had not consented but unreasonably took that risk while knowing that his actions would lead to longer recovery periods with risks of complications.

44. There is a previous conviction here which, while dissimilar in some ways, did involve an abuse of power and was committed while under investigation. While it is of little relevance to this part of the exercise, and does not form part of the aggravating factors, it cannot be said he is of totally good character. On 21st March 2021, the Defendant was charged with a separate matter of dishonesty and his passport was seized. During the period of his suspension on 15th March 2021, he had entered Jamestown General hospital and asked a junior member of staff to dispense a 100ml vial of Botox, saying it was prescribed for a patient, which he then took himself, saying he had used it for a sports injury to his thigh. He admitted this and accepted he had obtained Botox in this way on a previous occasion. He pleaded guilty to obtaining property by deception contrary to s.15 Theft Act 1968 on the morning of 6th May 2021 and was fined £2,100 by the Magistrates' Court. This is an example of the Defendant having a reckless disregard for his duties and the responsibilities of his role, in order to obtain a benefit for himself.

45. The Defendant is otherwise a person with no other recorded convictions.

46. Balancing the factors above, I agree with the prosecution and defence that each of the five cases falls within Category 2 for harm and Culpability B (medium), with there being no factors (statutory or other) indicating higher culpability.

47. The starting point for a B2 offence is two years' custody, with a range of 1 – 3 years' imprisonment.

48. That starting point is applicable to an offender of good character for a single offence after trial, so appropriate adjustments should be made. Given the number of offences and considering totality, I accept that an appropriate starting point would be close to the top end of that bracket of three years' (or thirty-six months) imprisonment for each offence to run concurrently with each other.

Mitigation

49. First, the defendant has pleaded guilty to these offences on the first occasion the indictment was put to him and I give him close to the maximum 30% discount for this.

50. There is significant further personal mitigation.

51. The Defendant was working on island as a doctor from 2015 and providing a recognised service as a medical practitioner with some satisfied patients.

52. I am told that he set up orthopaedic department and introduced own equipment and his contract extended.

53. There have been a number testimonials from satisfied patients on St Helena and I have read a number of very positive character references from a full range of people on St Helena.

54. I also take into account his character – he is otherwise of good character with no convictions for violence.

55. I also take into account professional references I have received from Guatemala on the medical and charitable work he has carried out in that jurisdiction and in Latin America.

56. There has been the serious effect (personal and professional) of Covid during his time in practice and on island in 2020 and 2021 and an effect on his health after arrest.

57. I also take into account that the Defendant has been under investigation or subject to prosecution for 2.5 years and there was at least six months delay in arranging the plea hearing following the severance hearing last November. He has had to work remotely instructing the Public Solicitor from his residence in Guatemala throughout that time.

58. He has fully cooperated with the prosecution and attended all hearings remotely throughout the time since he left the island two years ago in September 2021.

59. Most importantly, he has complied fully with my order in July of this year that he must return from Guatemala to St Helena to attend court in person for sentencing. He has voluntarily travelled across the world at his own expense to stay in St Helena for the week before awaiting sentence and in circumstances where he was not subject to an extradition order. His cooperation throughout from Guatemala and voluntary return to face sentencing is very much to his credit.

Total sentence of imprisonment

60. Having regard to the reduction for mitigation and the totality of sentencing, I am therefore satisfied that the least sentence I can pass is one of 23 months' imprisonment (one year and 11 months) on each of the five counts on the indictment, such terms to run concurrently with each other.

Suspending Sentence

61. Section 224A(1) of the Criminal Procedure Ordinance permits me to suspend sentences of two years' imprisonment or less on the condition that, during the period specified in the order, being at least one year but not more than 2 years from the date of the order (referred to as "the operational period"), the offender does not commit another offence in St Helena which is punishable with imprisonment.

62. I have carefully considered whether I can suspend sentence in this case. The Sentencing Council Imposition of Community and Custodial Sentences is relevant. Applying the principles therein:

a) It is accepted that the custody threshold has been passed; and

b) It is unavoidable that a sentence of imprisonment be imposed; but

c) I am satisfied that the Defendant does not present a risk/danger to the public in St Helena – in particular he has been suspended from medical practice, and but for his return for sentencing and carrying out its terms, will not be, staying on island. I am satisfied that any risk/danger to the public can be satisfied by making a recommendation

that he be prohibited for life from practising medicine or holding any medical licence in St Helena (and I will return to the additional orders in due course).

d) There is a realistic prospect of rehabilitation in the sense that outside the medical context there is no evidence he presents a risk of any danger to the public.

e) He has a history of good compliance with court orders as set out above.

f) This is not a case where appropriate punishment can only be achieved by immediate custody given the other orders and recommendations I will also be making in addition to the suspended sentence.

g) There is strong personal mitigation as set out earlier.

h) Immediate custody will result in significant harmful impact upon others (his family, wife children and mother, if he is imprisoned on St Helena half way across the world away from them).

i) In conducting this exercise, I have noted the effect of immediate imprisonment on Saint Helena in current prison conditions upon the defendant himself. In *R v Fairclough* :[2021] EWCA Crim 1214 the Court of Appeal approved the sentencing court taking into account the likely effect of that sentence on the defendant and anyone else likely to be directly affected by it and to factor in the conditions in prison brought about by the Covid pandemic when considering the length of any custodial sentence. Although I do not take this into account in the context of length of sentence or whether to suspend sentence, I do note the prison conditions on St Helena due to the current overcrowding, and the long periods that people would be in their cells and isolated. In St Helena, the cells have no natural light, are poorly ventilated and can get very hot, at present there would be 4 to a cell due to the overcrowding – the prison is currently at capacity and full. This should be less of a problem from the end of October 2023 as there will be 6 new beds created but the prison will still be overcrowded. It had a certified normal

capacity of 18 persons but that was increased to 24 on 6.10.22 as a temporary measure, so even with 6 new beds being created in October 2023 it will be overcrowded.

Suspended Sentence of imprisonment

63. Would you stand up Dr Bran? In light of everything I have considered therefore the least sentence I can **pass is one of 23 months' imprisonment (one year and 11 months) on each of the five counts on the indictment, such terms to run concurrently with each other. I suspend each of the terms of imprisonment on the condition that during the period of one year from the date of this order ("the operational period"), you do not commit another offence in St Helena which is punishable with imprisonment.**

64. **For the reasons set out in the appendix to my written version of these remarks, and as counsel submit, I am satisfied that I am not able to impose a condition on the terms of your suspended sentence that you also perform any community service.**

65. **Nonetheless, I make the following additional orders.**

Additional orders

66. Having taken into your financial circumstances, I order you to pay compensation in the maximum sum of £2,000 for each offence to each of your five victims – see section 125(1A) of the Criminal Procedure Ordinance. That is a total of £10,000.

67. I also order you to pay £5,000 to the prosecutor in respect of prosecution costs – a fraction of the full cost of this prosecution– see section 123 of the Criminal Procedure Ordinance.

68. The total sum of £15,000 is to be paid within 7 days.

69. Finally, I am satisfied that another effective punishment I can also impose upon you to protect the public is this. In light of your serious medical malpractice and

criminal convictions for recklessly causing harm to 5 of your patients in knee surgery over a period of two years between January 2019 and August 2020, I make a recommendation that your licence to practise medicine be removed and that you be prohibited from acting as a medical practitioner or doctor in Guatemala for life.

70. The Attorney General has undertaken to communicate this recommendation to the bodies that authorise, regulate and license medical practitioners in Guatemala.

71. The Attorney General has also undertaken to notify the judicial authorities and police authorities of Guatemala of your criminal convictions and sentence in St Helena so that they may take any further appropriate and lawful action as a consequence in that jurisdiction.

72. I direct that a copy of these sentencing remarks should be translated before they are sent to each of the relevant bodies in Guatemala.

The Chief Justice Rupert Jones

22nd September 2023

Appendix – can a Community Service Order ('CSO') be imposed together with or as a condition of a suspended sentence of imprisonment?

1. I am not aware of any court in the past combining a CSO with a suspended sentence, it has always been accepted that it is not possible and no guidance has previously been issued by any previous CJ or the Court of Appeal on the point.

2. S.224A(3) of the Criminal Procedure Ordinance prohibits the making of a probation order for another offence where a suspended sentence is passed.

3. S.224(E)(1) empowers a court to make a community service order ('CSO') of between 40 and 240 hours as a direct alternative to custody, where a probation officer considers it suitable, where appropriate provisions can be made and where the defendant consents.

4. In practice on St Helena, suspended sentence orders operate like the old "standalone" suspended sentences in England & Wales, which could not have any other conditions attached to them. Where the Chief Magistrate on the island wishes to sentence akin to a suspended sentence with conditions attached, he first decides the appropriate custodial terms and then imposes a community order expressly as a direct alternative.

5. The Criminal Procedure Ordinance is not entirely clear on the power of the Court to impose a suspended sentence order with conditions. The power granted under s.224(A)(1) and the prohibition under s.224(A)(3) arguably implies that the only condition which can attach to a suspended sentence order is that no further offence must be committed in St Helena during its currency.

6. The situation with probation is simple:

   s.235(1) only allows a probation order if no fine or imprisonment should be imposed; s.224A(3) prohibits a probation order being imposed for a different offence when suspended sentence is imposed.

7. With a CSO, it is not as clear:

   s.224E (1) provides 'If a person of or over 14 years of age is convicted of an offence punishable with imprisonment, the court by or before which he or she is convicted may, <u>instead of dealing with him or her in any other way</u> (but subject to subsection (2)) make an order ("a community service order") requiring the person to perform unpaid work……'

8. It might be argued that a CSO cannot be combined with a suspended sentence as it can only be imposed <u>instead</u> of dealing with the defendant in any other way.

9. Unlike probation orders there is no specific power to attach conditions to a suspended sentence - the sole condition referred to in the legislation is not to offend as per s.224A(1).

10. Section 6 of the Criminal Procedure Ordinance however states as follows: Any court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.

11. Probation orders are not sentences hence the need for a specific prohibition on combining it with a sentence.

12. The law is silent on the status of a CSO on St Helena - it is an order and if breached the defendant can be dealt with in any way he could have been had the order not been imposed. It is that last part that causes difficulty with combining it with a suspended sentence – a defendant might not offend and so is not in breach of the suspended sentence but he may not perform the hours. It is not possible to revoke the CSO in those circumstances and deal with the offender in any way he could have been dealt with had the order not been imposed as the suspended sentence already deals with him for the offence. The court could only fine for the breach. It is this that may give the best guidance that the court cannot or should not combine a CSO and suspended sentence.

13. Only fines and imprisonment are referred to as sentences in the legislation. The power to impose a CSO was added to the legislation after the power to impose a probation order was enacted - it might be that no-one actually thought about the status of a CSO. The Interpretation Ordinance is silent on it as well.

The Chief Justice Rupert Jones

22nd September 2023