

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

Claim No. BVIHCR 2022/0018

BETWEEN:

THE KING

And

TEFFINY SMITH

Prisoner No. 1

TYANN SMITH

Prisoner No. 2

Appearances: Ms. Kellee Gai-Smith, Principal Crown Counsel for the Crown
Ms. Stacy Abel, Counsel for the Prisoners Nos. 1 and 2
The Prisoners present

2023: June 28th

RULING

TEELUCKSINGH J.

Preliminaries

- [1] On 17th January, 2023, Prisoner No. 1, Teffiny Smith and the Prisoner No. 2, Tyann Smith were arraigned and both pled not guilty to the Count of Assisting Offenders contrary to the Criminal Code No. 318 of the Criminal Code 1997, No. 1 of 1997 of the Laws of the Virgin Islands. That day, Defence Counsel sought a Goodyear Indication of sentence relative to both Prisoners but subsequently withdrew the application on 17th March, 2023 when both Prisoners were re-arraigned and they pled guilty to the Count.
- [2] On 28th April, 2023, Principal Crown Counsel Ms. Kellee Gai-Smith appeared, Defence Counsel Ms. Abel appeared. The Prisoners Nos. 1 and 2 appeared. An agreed summary of facts was read into

record. Prisoners Nos. 1 and 2 maintained guilty pleas to the Count of Assisting Offenders. Prisoners 1 expressed remorse to the Court and requested leniency as part of her plea in mitigation. Witnesses were also called to testify as part of the plea in mitigation namely, Mr. Willis Potter, Ms. Alvera Maduro-Caines and Mrs. Tamika Gilbert-Smith. The matter was thereafter adjourned.

- [3] On 1st May, 2023, Principal Crown Counsel appeared. Defence Counsel Ms. Abel appeared. Prisoners Nos. 1 and 2 appeared. On that day, Prisoner No. 2 expressed remorse and requested leniency. It is noted that oral submissions were made by both the Defence and Prosecution relative to sentencing.

Summary of Agreed Facts

- [4] On Tuesday 20th April, 2021, a search warrant was executed at a residence located at Zion Hill pursuant to an investigation into a robbery and murder which took place at another location. Prisoner Nos. 1 and 2 were present at the said residence when it was searched by Detective Constables Remy and Augustine. In one of the rooms that was occupied by Prisoner No. 1 and her boyfriend (one of the principal offenders), Detective Constable Augustine announced that he had found 'something' and pointed to a corner of the closet. The item found in the closet appeared to be a black 'banana clip shaped' magazine.
- [5] Detective Constable Augustine showed the item to Prisoner No. 1, and cautioned her as to the nature of the item and as to its ownership, to which she responded "*not mines I don't know about it.*" She was then arrested, again cautioned and transported to the Road Town Police Station.
- [6] It was while conducting the search, the Police observed CCTV cameras installed around and inside the premises. In one of the bedrooms, they observed a television erected on the wall displaying live CCTV feed and a DVR beneath the CCTV display monitor. The CCTV was seized by the Police and same was taken to the Redus building where it was examined by Detective Sergeant David Moore.
- [7] On 20th April, 2021, Prisoner No. 1, Teffny Smith, was informed of her right to legal representation and was interviewed under caution by Detective Constables Malone and Simon. Prisoner No. 1

denied knowledge of the magazine that was found in the closet. She explained that when she returned home with her sister (Prisoner No. 2), she opened the closet but did not observe the said magazine. Prisoner No. 1 admitted that she knew what a bullet was but denied seeing any when the search was conducted.

(8) Later that said day, the Police executed a search warrant at the residence of the parents of both Prisoners located at Freshwater Pond. Nothing pertaining to the warrant was found at that residence.

[9] Detective Sergeant Lavia Lennon and Detective Constable London spoke to Prisoner No. 2 at the Police Station and informed her that they wished to conduct an interview under caution with her. Prisoner No. 2 was given an opportunity to consult her legal representative, Attorney-at-Law, Mrs. Valerie Gordon.

[10] Prisoner No. 2 was interviewed under caution and the said police officers showed her the CCTV footage retrieved during the investigation in which she identified herself and her sister, Prisoner No. 1, in the said footage as they were moving a bag from the bedroom to the living room and then later outside the house. Prisoner No. 2 admitted that the bag was long and it was in the closet of the bedroom but indicated she was unaware of the bag's owner. She admitted that she held the bag for her sister. Prisoner No. 2 admitted she took the bag, placed it underneath the house but never realized that it was a gun until the police came and found the magazine. She denied knowing that the gun was used in the commission of a robbery and murder.

[11] On 28th April, 2021, Detective Constable London in the presence of Detective Sergeant Lavia Lennon formerly charged the Prisoner No. 2 for the offence of Assisting Offenders. She was cautioned and made no response. Prisoner No. 2 was then served with a copy of the charge.

[12] At 11:15am that same morning, Detective Constable London visited the Criminal Investigation Department and informed Prisoner No. 1 of her intention to conduct an interview with her and informed her of her right to legal representation. Prisoner No. 1 indicated that she had already consulted with her attorney. The interview commenced at 11:24am during which Prisoner No. 1 complained of feeling unwell resulting in the said interview ending at 11:46am. Prisoner No. 1

received the requisite medical attention. In that interview, Prisoner No. 1 stated inter alia that on 20th April, 2023, both her and Prisoner No. 2 arrived at the residence in West End where she lived with her boyfriend. The door was locked so Prisoner No. 1 climbed to the window to gain access to the house. Prisoner No. 1 went to the closet in the bedroom where she observed a bag. She panicked as she was aware that it was a gun and did not want the police to believe she was the owner. It was in those circumstances that she and her sister moved the gun. She stated that the door to the bedroom was not locked and other persons living in the said house, also had access.

[13) On 2nd May, 2021, Detective Sergeant Lavia Lennon and Detective Constable London visited the Road Town Police Station where they met Prisoner No. 1. The Police Officers spoke to her about continuing her interview under caution when she felt better, to which she agreed. The interview continued where this Prisoner admitted to seeing the bag on more than two occasions. She said she knew it was a firearm because the bag was opened in the closet. She denied touching or inspecting the firearm. Prisoner No. 1 was shown the CCTV footage where she identified herself walking down the stairs in the living room and then outside with the bag. On being questioned about her actions in the video, Prisoner No. 1 explained that she had been informed that the house had been raided by the Police and there had been an arrest and *"...when I reach home I see the house wasn't raided and when I looked in the closet the gun was still there so I wanted to get rid of it because I did not want it to be there while I was there and I asked the police to come and meet me there with the gun in the house. I panicked and hid it."*

[14) Prisoner No. 1 stated that Prisoner No. 2 was only there at the residence on her request as she, Prisoner No. 1, did not intend to stay in the house. Prisoner No. 1 said that she requested help from her sister Prisoner No. 2 to move the gun who obliged as it was heavy. Prisoner No. 1 stated she did not know if her sister had knowledge of the contents of the said bag. She told her boyfriend (one of the principal offenders) and another man as to the location of the said gun.

[15) Detective Sergeant Lavia Lennon formally charged Prisoner No. 1 for the offence of Assisting Offenders. Prisoner No. 1 was cautioned and made no reply. She was then served with a copy of this said charge.

Count on the Indictment

- [16] The Prisoners pled guilty to the Count of Assisting Offenders contrary to Criminal Code No. 318 of the Criminal Code 1997, No. 1 of 1997 of the Laws of the Virgin Islands, the maximum penalty is 10 years imprisonment. The arrestable offence in the case at bar is possession of a prohibited weapon, contrary to Section 16 A(1) of the Firearms Ordinance Cap 126 (as amended). Section 16 A(5) of the said Ordinance states, a 'prohibited weapon' means any firearm or other device listed in the Third Schedule and includes a replica of such prohibited weapon.

Sentencing Principles and Law

- [17] The Court refers to locus classicus case of **Desmond Baptiste**¹ in which the principles of sentencing have been set out:
- {i) Retribution - the Court must reflect society's abhorrence of particular type of crimes through punishment
 - {ii) Deterrence - specific to the offender and generally to any likely offender or persons who may be like minded to commit similar crimes
 - {iii) Prevention - to protect the public from offenders who persist in continuing crimes by separating them from society
 - {iv) Rehabilitation - to engage offenders in activities designed to assist them in their re-integration into society
- [18] There are no Sentencing Guidelines of the Eastern Caribbean Supreme Court - in relation to the offence of Assisting Offenders. This Court finds the cases dealing with this type of offence to be instructive.
- [19] This Court refers to the case of **Mark Groom**². The facts are that on 19th September, 2007 at least four men were involved in a major robbery of a jeweler's premises in Blackburn. The robbers, who included John and Geoffrey Groom, used a sledgehammer to break open the front door of the shop and to break one of the display cabinets. Large amounts of cash and jewelry were stolen. One of the bandits, John Groom, subsequently telephoned, his brother who was the appellant, Mark Groom,

¹ SVG Crim App. 2003/0008

² (2010) EWCA Crim 282

and asked him to pick him up. Geoffrey Groom made a similar request of the appellant, Steven Barton. Both of the appellants complied with the requests which were made within 10 minutes of the robbery. When the appellants were arrested, Mark Groom declined to comment and Barton denied knowing anything about the robbery.

- [20] At the time of the appeal, Steven Barton, was 27 years of age, had three previous convictions for three offences. He had received community sentences for causing grievous bodily harm in 1998 and for damaging property in 2008. He was also sentenced to nine months in a young offender institution for being carried in a stolen vehicle which subsequently caused the death of a person. The pre-sentence report noted that there was a medium risk of the appellant Steven Barton reoffending. The sentencing judge had before him a letter from the appellant and seven (7) character references.
- [21] Mark Groom, aged 36, had ten (10) previous convictions for 14 offences, none of which were for similar offences to the matters before the Court of Appeal. He had served a number of short custodial sentences. The pre-sentence report noted that he accepted that he should have refused to take his brother any further when he found out that the brother had been involved in the robbery.
- [22] Both appellants contended that the sentences were manifestly excessive as the judge adopted too high a starting point and failed to give sufficient credit for the pleas. It was pointed out that they acted out of a 'misplaced sense of family loyalty.' In that case, the offence which had been committed by those assisted, was one of armed robbery. It was a very serious instance of such a case, as was shown by the fact that the sentencing judge adopted a starting point of 10 years' imprisonment for each of the robbers.
- [23] The Court noted that another aggravating feature, was that the appellants not only knew what the offenders had done but by driving the offenders in the way they did, the appellants were also assisting them in a very significant way in avoiding apprehension and arrest. The Court of Appeal stated "It has been repeatedly said in these courts that those who assist people who commit serious crimes in this way cannot expect short sentences...." In view of the Court of Appeal, the judge must have

taken as a starting point a sentence of somewhere in the region of more than four years' imprisonment.

- [24] The appellants in the case of Mark Groom relied on the case of Robinson³ where the Court dismissed an appeal against a sentence of four years' imprisonment imposed on the appellant who had assisted a bandit in the belief that he was not guilty of murder. The assistance was provided over an extended period where the appellant had been living with the offender for about ten days and was shielding the offender from police enquiries. The Court was of the view that the sentence of four years' imprisonment on a plea was severe but not manifestly excessive.
- [25] The Court of Appeal sought to distinguish the facts of the Robinson case from that of Mark Groom (supra) as the offender in that case was being sought for murder, secondly, the assistance which was given was much greater and much more prolonged than that in the case of Mark Groom. This indicated to the Court of Appeal that the judge's starting point was too high.
- [26] In the judgment of Robinson, Latham LJ explained that the person charged with Robinson was called Gordon, who was a man of previous good character. He received a sentence of 18 months' imprisonment and the appeal court regarded this sentence as very lenient for giving some form of assistance to the offender, similar to that which was given by the appellants in the case of Mark Groom. Taking into account all the circumstances, the Court of Appeal in Mark Groom (supra) concluded that the appropriate sentence was two years' imprisonment and found 'that had the judge's attention been drawn to the case of Robinson she would probably have taken a similar view. To that extent the appeals of each appellant were allowed.' It is noted that both appellants in Mark Groom case on pleading guilty, had been originally sentenced to 3 years 2 months less time spent on remand by the trial judge and on appeal, the sentences were then reduced to two years imprisonment.

³ [2008] 2 Cr. App. R (S)

- [27] In the case of the **Queen v Jay Archibald**⁴, the Prisoner was charged with one Count of Assisting one Andrew Milton, Dennis Campbell and Christopher Bailey, they having committed an arrestable offence, namely, the murder of Dorcas Elizabeth Rule, contrary to section 318 of the Criminal Code No. 1 of 1997 of the Laws of the Virgin Islands.
- [28] Andrew Milton also called 'Ratty', Dennis Campbell and Christopher Bailey and George O'Connor were named as suspects in the murder of the deceased. It is noted that Milton and Campbell were subsequently convicted for the murder of the deceased. The men were at large after the murder and they were featured on wanted posters. The prisoner in that case admitted that he saw those posters and was aware that the men were wanted relative to the murder and he allowed them to stay at his home in Road Town. The prisoner admitted he took the wanted men to an abandoned property in Fish Bay. He pled guilty and assisted the Crown in the prosecution of the matter. The trial judge sentenced the appellant to 1 year suspended for 1 year and considered the prisoner provided significant assistance to the Crown in the prosecution of the matters.
- [29] The trial judge in **Jay Archibald** (supra) referred to the English Court of Appeal case of **King**⁵, which outlined general principles on the sentencing of offenders who assisted the police. In that case, the judge said at page 120 "*... no hard and fast rule can be laid down as the amount by which a sentence can be reduced on a large scale informer by reason of the assistance he gives the police. The court should first of all turn to the offences which the Informer has admitted to assess their gravity and their number thus enabling a starting figure to be reached.*"
- [30] In that case of **King**, the Court enumerated the factors which would result in a reduction of the starting figure namely, (1) quantity and quality of the material disclosed by the Informer (ii) its accuracy (iii) his willingness to confront other criminals or give evidence against them and (iv) the degree to which he put himself or his family at risk of reprisal.

⁴ Criminal Case No.18 of 2007

⁵ (1986) 83 Cr App R 46

It was noted in Jay Archibald that the Court of Appeal in the case of Sivan also listed factors to be considered when discounting a sentence passed on a person guilty to an offense of assisting the and Court in the prosecution of other offences. They were similar factors to those in King. (1) nature and effect of the information imparted that is, did it relate to trivial or serious offences? Was the information successful in bringing to Justice persons who otherwise would not have been brought to justice? (ii) the degree of assistance provided that is was the person prepared to give evidence if necessary to bring whom the information which he had provided and to assist in a conviction of other criminals and (iii) degree of risk to which the prisoner by his actions exposed himself and his family.

[31] It is noted that in this case before me, it was indicated that both Prisoners did not intend to give evidence in the prosecution of the principal offenders.

[32] In the case of Regina v John Thomas Donald and R v Lesley Donald⁶ the Appellants - husband and wife, were convicted of assisting an offender, the wife's brother, contrary to section 4(1) of the Criminal Act 1967. That section stipulates "where a person has committed an arrestable offence any other person who, knowing or believing him to be guilty of the offence or some other arrestable offence does, without lawful authority or reasonable excuse, any act with intent to impede his apprehension or prosecution, shall be guilty of an offence."

[33] It is noted the wording of this section of the UK legislation is similar to that of section 318 of the Criminal Code No. 1 of 1997 of the Laws of the Virgin Islands.

(34) The Appellants in that case were convicted of assisting the brother of Lesley Donald, who was considered a principal offender in a robbery, knowing he had committed the offence, in their home, with the intention of impeding his apprehension or prosecution.

⁶ (1986) 83 Cr App R, 49

- [35] Both Appellants appealed against the conviction on the basis that at a time of their trial there had been no prior conviction of the brother as principal. There was also no admission of his involvement in the robbery and there was no admissible evidence to prove their knowledge of the principal's guilt.
- [36] In that case the Court of Appeal held that there was no authority for the proposition that the Prosecution should not have proceeded as they did in the case. Furthermore, no submission had been made at the trial that it was wrong for the Appellants to be tried in the absence of the brother nor was there a submission made at the end of the prosecution's case. It was ruled that there was strong evidence before the jury that the brother was one of the men who had taken part in a Robbery, an arrestable offense and accordingly the appeal was dismissed.
- [37] In the case of **Charles Francis Matthews**⁷, the Appellant was convicted of assisting an offender who was wanted by the police in connection with a serious armed robbery, by allowing the offender to stay in his home for a period of three to four weeks. After a plea of not guilty, the appellant was found guilty after trial and was sentenced to 12 months in prison. It was held the sentence was neither wrong in principle nor excessive.
- [38] In the case of **Collin Raymond Cooke**⁸, the offender was convicted on 5th May, 2017 on an indictment alleging two counts. He was convicted of Conspiracy to commit robbery as per Count 1 and of Count 2 namely, Assisting an Offender. On the same day he was sentenced to seven years in prison on Count 1, and 30 months to be served concurrently on Count 2. The offender's son Colin Cook Jnr. was convicted of Count 2 having been acquitted of Count 1 and was sentenced to 30 months imprisonment.
- [39] The offender was a close friend of the victim who would only invite people he knew to his home. The offender had visited the victim's home on a number of occasions. He also knew that the victim kept cash at home.

⁷ (1982) 4 Cr Ap R (S) 233

⁸ (2017) EWCA Crim 1272

- [40] On 5th May 2015, Paul Cook, another son of the offender, was released from prison. On the day of his release, he went to an address where he met his father. A witness heard them discuss a plan to go to the victim's home to rob him. The offender described the victim as 'a large well-built man who would not be overpowered by just one person.' The next day, the victim was stabbed 27 occasions. The house had been searched and no cash was found in the house nor on the person of the victim although he had withdrawn a substantial sum from a bank shortly before his death. Paul Cooke stayed at various addresses in the South area after the murder before surrendering to the police. He later returned into prison for breach of licence conditions. The offender and Collin Cooke Junior had assisted him by finding and paying for accommodation and by disposing of his mobile phone so he could not be located in the period after the robbery and before the discovery of the body.
- [41] On 11th of June 2015, after the discovery of the victim's body the offender was arrested on suspicion of Murder. He told the police that Paul, his son, was responsible and returned after the robbery with bruises on him. This offender denied playing any part in the murder of the victim although the mobile phone evidence connected him in an area close to the victim's address. He denied going to premises and said he had been selling drugs. There were no charges initially were brought against the offender and he was treated first as a witness but then later in 2015 Paul Cook was arrested and charged with the victim's murder. In September 2016. He pleaded guilty and was sentenced to life imprisonment with a minimum term of 28 years 6 months. Thereafter this offender and Colin Coke Junior were arrested. This Offender maintained he had nothing to do with the murder.
- [42] The Court held that the offender did play a leading role in the conspiracy to rob as he provided vital information to his son in relation to an offence of robbery. He had abused his position and had betrayed his position as a close friend of the victim and was providing his son with information and encouraging him to commit the said robbery.
- [43] The Court agreed that the sentence of seven years on Count 1 was unduly lenient. The trial judge did not indicate how he arrived at the figure and Court of Appeal concluded that 'such failure to do so, it may have led him in the passing a sentence which was unduly lenient.' The Court noted that the offender presented further criminality which should have been reflected in a consecutive

sentence. The offender's action in assisting his son by providing accommodation and other matters over period of days after the robbery, did not in themselves impede any policing queries because the body had yet to be discovered and no investigation was taking place at that time.' The Court held at para. 34 that "*... it was from the evidence at a trial that at the time offender was assisting his son he in some way knew what had happened in the flat and that his son was responsible for it and with that knowledge he positively assisted in keeping his son away from the view of the authorities who might find a body and start an investigation.*" The Court of Appeal held that those actions should have been met by a consecutive sentence for count 2. The passing of a concurrent sentence in the court was also a feature of what was overall an unduly lenient sentence.

- (44) The Court of Appeal quashed the sentences and imposed a sentence of ten (10) years imprisonment with respect Count 1 and 18 months imprisonment in relation to Count 2. The sentences were to run consecutively giving an overall sentence of 11 years and 6 months in place of the seven years imposed by the trial Judge.

Analysis

- [45) This Court has given due consideration to all the written and oral submissions and the case authorities cited by both Crown and Defence attorneys.

Prisoner No. 1: Teffiny Smith

- (46) Both Crown and Defence Counsel submitted that an Aggravating factor of the offence in this matter is seriousness of the offence. Having regard to the nature of the offence committed, the Prisoner had knowledge that it was a gun that she moved. Furthermore, the gun was never recovered by the police and still at large. This Court finds that there is no evidence to prove that this Prisoner knew that the firearm was allegedly used in commission of a murder and robbery. Another Aggravating factor of the offence was the vital steps taken by Prisoner No. 1 to assist the principal offenders when she moved the gun from the closet in the bedroom to outside the house to further conceal it.

[47] Both Counsels agree that there are no Mitigating Factors of the Offence and there are no Aggravating Factors of the Offender.

[48] With respect to the Mitigating factors of the Offender, Defence Counsel submitted that this Court should consider Prisoner No. 1's personal circumstances at the time of the commission of the offence, namely, this Prisoner was young, pregnant and in a relationship with one of the principal offenders who had been arrested by the police in connection with possession of the prohibited weapon. Crown Counsel accepted that Prisoner No. 1 was 8 years at the time of her arrest, however contended that while the pregnancy of the Prisoner was unfortunate, this did not necessarily translate that she was "vulnerable"¹¹

[49] Pursuant to these submissions, this Court agrees with Crown Counsel to the extent that her pregnancy at the time of the commission of the offence, did not make her "vulnerable". However, this Court is further of the view that the combination of the age of Prisoner No. 1 and her personal circumstances are such that youth and relative immaturity will be considered as a Mitigating Factor of this offender. This Court considers that Prisoner No. 1 had just attained 18 years old at the time of the commission of the offence, she was a student, her strong affiliation with the Principal offender- (her boyfriend at the time), no doubt influenced/ affected her decision to assist him by concealing the firearm from the police. The Court finds that in light of these circumstances, Prisoner No. 1 due to her personal circumstances, displayed a lack of maturity in her decision not to immediately contact the police on discovering the gun in a bedroom she shared with the principal offender.

[50] Both Counsel agree that other Mitigating factors of the offender are as follows: genuine remorse displayed by Prisoner No. 1; she cooperated with the police in that this Prisoner admitted her involvement in the commission of the offence during her interviews with the police, her good character/no previous convictions or pending matters and displayed potential for rehabilitation.

(51) This Court agrees that total time spent in custody (pre-conviction), will be deducted from the sentence to be served by Prisoner No. 1.

Prisoner No. 2- Tyann Smith

- [52] Both Crown and Defence Counsel submitted that Aggravating factors of the offence in this matter would be seriousness of the offence, having regard to the nature of the offence committed. This Court agrees with Crown Counsel that taking into account all the circumstances, it can be inferred from the size and weight that this Prisoner had knowledge that it was a gun that she moved. This Court however finds that there is no evidence to prove that this Prisoner knew that the firearm was allegedly used in the commission of a murder and robbery. Furthermore, another aggravating factor of the offence was that the gun was never recovered by the police and is still at large. Another Aggravating factor of the offence was the vital steps taken by Prisoner No. 2 to assist her sister and the principal offenders when she helped to move the gun from the closet in the bedroom to outside the house, to further conceal it.
- [53] Both Counsel agree that there are no Mitigating Factors of the Offence and there are no Aggravating Factors of the Offender.
- [54] With respect to the Mitigating factors of the Offender, there was genuine remorse displayed by Prisoner No. 2; cooperation with the police during the course of the investigation; her good character and potential for rehabilitation. At the time this Prisoner was young (20years} and immature which affected her decision-making process as she got herself involved in assisting Prisoner No. 2 (her sister} to move and conceal the firearm.
- [55] It was agreed that total time spent in custody (pre-conviction}, will also be deducted from the sentence to be served by Prisoner No. 2.

Credit for guilty plea

- (56) As part of submissions, Crown Counsel contended that both Prisoners did not plead guilty to the offence of Assisting Offenders at the first reasonable opportunity, that is, on arraignment. According to Crown Counsel, the Prisoners are therefore entitled to a discount of twenty five percent for their guilty pleas made on a subsequent date and not the usual one third discount. Crown further argued that even if at one stage both Counsels were unable to agree on the facts, that should not have

affected the timing of the plea to the Count on the Indictment at the first reasonable opportunity, namely, the arraignment stage.

(57] Defence Counsel argued that the Prisoners should be credited with the full one third discount and that the delay in the guilty pleas were attributed to a dispute in the agreed facts. It was in these circumstances that the Defence was not seised of all the relevant information to make an informed decision and this affected the timing of the guilty plea to the count on the Indictment. In determining, what constitutes the first reasonable opportunity to plead, this Court found the following authorities were instructive.

[58] (i) Sentencing Guidelines (UK)

"First Reasonable opportunity"

1. The critical time for determining the maximum reduction for a guilty plea is the first reasonable opportunity for the defendant to have indicated a willingness to plead guilty. This opportunity will vary with a wide range of factors and the Court will need to make a judgement on the particular facts of the case before it.
2. The key principle is that the purpose of giving a reduction is to recognise the benefits that come from a guilty plea both for those directly involved in the case in question but also in enabling Courts more quickly to deal with other outstanding cases.
3. This Annex seeks to help Courts to adopt a consistent approach by giving examples of circumstances where a determination will have to be made.
 - a) the first reasonable opportunity may be the first time that a defendant appears before the court and has the opportunity to plead guilty.
 - b) but the court may consider that it would be reasonable to have expected an indication of willingness even earlier, perhaps whilst under interview.

Note: For a) and b) to apply, the Court will need to be satisfied that the defendant (and any legal adviser) would have had sufficient information about the allegations

- c) where an offence triable either way is committed to the Crown Court for trial and the defendant pleads guilty at the first hearing in that Court, the reduction will be less than if there had been an indication of a guilty plea given to the magistrates' court (maximum reduction of one third) but more than if the plea had been entered after a trial date had been set (maximum reduction of one quarter), and is likely to be in the region of 30%.

- d) where a defendant is convicted after pleading guilty to an alternative (lesser) charge to that to which he/she had pleaded not guilty, the extent of any reduction will have to be judged against the earliness of any indication of willingness to plead guilty to the lesser charge and the reason why that lesser charge was proceeded with in preference to the original charge."

[59] (ii) *Case authorities of other jurisdictions*

[60] The Trinidadian case of **Lauren Aquillera, Shawn Ballai ale Jarvis, Evans **Ballai** ale Tiny ale **Bully****⁹ is instructive. Defence Counsel submitted that the trial judge in that case, erred in failing to apply a one-third (1/3) discount for the appellants' guilty pleas, by concluding that they were motivated by tactical reasons because of the strength of the prosecution case and that they were entitled instead to a reduced discount of twenty-five percent (25%).

[61] The Court of Appeal in the **Lauren Aquillera** case viewed the position in New Zealand as instructive and stated at paragraph 31 of its judgment that the position in New Zealand had been that a scale discount for a guilty plea should be given without regard to the strength of the prosecution case *'this was because the discount had to be predictable for Defence Counsel and their clients and also easy for judges to apply in busy court lists. This approach also avoided unnecessary complexity in resolving disputes over the strength of the prosecution case that could distract from the utilitarian value of the discount...'*

[62] The Court of Appeal in **Lauren Aquillera and Ors** continued in paragraph 31: "The Supreme Court of New Zealand in **Raymond Everest Hessel v R**¹⁰, however, disapproved of this heavily structured approach in favour of a more open-ended evaluation of the full circumstances of each individual case. This meant that a consideration of the strength of the prosecution case could not be automatically excluded as it might in some cases be conceivably relevant as part of the judge's evaluation of the surrounding circumstances of the guilty plea and what it signified. The Supreme Court also made several pertinent observations about some relevant factors that may be weighed in assessing the true value of a guilty plea.

⁹ **Crim App. Nos. 5, 6, 7, 8 of 2015**

¹⁰ **[2010] N.Z.S.C. 135**

McGrath J. who delivered the judgment of the Supreme Court said:

"...[65] In summary, the policy reasons for giving credit for guilty pleas in sentencing do not justify an approach which treats as irrelevant, or of peripheral relevance, the circumstances in which the plea is entered and what they indicate about acceptance of responsibility for the offending. The credit given should also legitimately reflect the benefits provided to the system and to participants in it. Overall, the sentencing task remains one of evaluation that leads to what the judge is satisfied is the right sentence for offending in light of the offender's acknowledgement of guilt and all other relevant circumstances....

[70]...There are, however, strong reasons of principle for requiring that the allowance which can and should be given should be the result of evaluation of all the circumstances in which the plea is entered. When it is entered, is only one of those circumstances....

[72]...Far the reasons given in this judgment, we consider that the heavily structured nature of this approach involved an inappropriate departure by the Court of Appeal from the statutory requirement of evaluation of the full circumstances of each individual case. As well, the particular approach carries the unacceptable risk of pressuring persons to plead guilty to offences charged when they were not guilty.

[73] There is no abjection in principle to the application of a reduction in a sentence for a guilty plea once all other relevant matters have been evaluated and a provisional sentence reflecting them has been decided on. Indeed there are advantages in addressing the guilty plea at this stage of the process (along with any special assistance given by the defendant to the authorities). It will be clear that the defendant is getting credit for the plea and what that credit is. This transparency validates the honesty of the system and provides a degree of predictability which will assist counsel in advising persons charged who have in mind pleading guilty.

[74] But, as we have emphasised, the credit that is given must reflect all the circumstances in which the plea is entered, including whether it is truly to be regarded as an early or late plea and the strength of the prosecution case. Consideration of all the relevant circumstances will identify the extent of the true mitigatory effect of the plea.

[75]...Whether the accused pleads guilty at the first reasonable opportunity is always relevant. But when that opportunity arose is a matter for particular inquiry rather than formalistic quantification. A plea can reasonably be seen as early when an accused pleads as soon as he or she has had the opportunity to be informed of all implications of the plea. (emphasis mine)

[76] At the other end of the range, there may be cases in which there are significant benefits from a plea, warranting a sentence reduction, even though the plea comes very late. After a trial has commenced some real justification should be required before any allowance is made but there are from time to time instances where an allowance is justified. (emphasis mine)

[77] All these considerations call for evaluation by the sentencing judge who, in the end, must stand back and decide whether the outcome of the process.

[63] The Court of Appeal in Trinidad continued at paragraph 33:

"...We agree with the general reasoning in **Hessell v R** supra and reiterate what we consider to be some key points for judges to bear in mind during sentencing, when dealing with a guilty plea:

- (i) Remorse may be sometimes demonstrated by a guilty plea but it is not necessarily exemplified by it;
- (ii) If after a thorough and robust evaluation by the judge, a defendant's remorse is manifest, sentencing credit may be given to it, separate and apart from the guilty plea; while a guilty plea may be an admission of responsibility, in the face of an inevitable conviction, there may in reality be very little remorse for which separate sentencing credit can properly be given - see **Najeeb Dawood v R [2013] NZCA 381**;
- (iii) Precisely when a plea of guilty is entered, is only one of several circumstances that must be evaluated by the judge;
- (iv) The usual discount of approximately one-third (1/3) may be properly reduced if it is clear that the plea is motivated by tactical considerations. In this regard, the strength of the prosecution case may, on occasion, be a relevant factor to be evaluated in considering all the circumstances in which the plea is entered. When a judge considers that this might be a relevant factor, he ought to invite counsel on both sides to address him on the issue. When the judge has found that the prosecution case is a strong one so as to justify a reduction in the usual discount of approximately one-third (1/3), he should give brief reasons for so concluding. Such a reduction in the usual discount must be approached with caution and requires particularly careful justification and an explanation in the reasons which is clearly expressed. In **R v Caley and Others [2012] EWCA Crim. 2821**, Hughes LJ said at para. 24:
"... the various public benefits which underlie the practice of reducing the sentence for a plea of guilty apply just as much to 'overwhelming' cases as to less strong ones...judges ought to be wary of concluding that a case is 'overwhelming' when all that is seen is evidence which is not contested...even when the case is very strong indeed, some defendants will elect to force the issue to trial, as indeed is their right. It cannot be assumed that defendants will make rational decisions or ones which are born of any inclination to co-operate with the system, but those who do,

merit recognition. When contemplating withholding a reduction for a plea of guilty in a very strong case, it is often helpful to reflect on what might have been the sentences if two identical defendants had faced the same 'overwhelming' case and one had pleaded guilty and the other had not ..

See also **R v Paul Wilson**¹¹;

- (i) It may on occasion be tempting for sentencers to avoid a reduction in sentence for a plea of guilty when the statutory maximum sentence is low or there is some other inhibiting factor and the resulting sentence is considered to be insufficient. This temptation must be resisted. The sentence, cannot remedy perceived defects or shortcomings by the refusal of the appropriate discount: see **R v Caley** *supra* per Hughes LJ at para. 25. The cautious and careful approach outlined in para. (iv) above and in this paragraph reflects the need to give significant weight to the distinct and far-reaching public benefits which result from a guilty plea.*
- (ii) Whether a defendant pleads guilty at the first reasonable opportunity is always relevant - this is, however, a matter for particular inquiry rather than formalistic quantification;*
- (iii) We remind trial judges of the methodology explained in **Nadia Pooran v The State** (which adopted the reasoning in the decision of **Terry Daly v The State** Cr. App. No. 1 of 2012 per Yorke-Sao Hon J.A.) for calculating the appropriate level of discount (usually in the order of approximately one-third (113), and at what stage to do so - see paras. 19-26; and*
- (iv) With respect to (vi) *supra*, we consider that the first real opportunity to plead guilty is upon arraignment. While there is an earlier technical opportunity to plead guilty available at a preliminary enquiry, in the absence of case management rules and given the current state of Court lists, this is not a first opportunity when viewed from any reasonable pragmatic point of view ..*

[64] After considering the aforementioned cases, the Court of Appeal in **Lauren Aquillera and Ors** **(supra)**, examined the strength of the prosecution case which was premised not only on oral and written admissions but also on the circumstantial evidence of the witnesses. The Court of Appeal concluded in that case that *the trial judge acted well within the parameters of the discretion entrusted to him in concluding that because of the strong prima facie quality of the prosecution evidence, the pleas were (at least in part), tactical in nature and attracted a reduced discount of twenty five percent (25%) no basis upon which to interfere with the exercise of the Judge's discretion."*

¹¹ [2012] EWCA Crim. 386

[65] In another judgment **The State v Simon Peter Charles Ovid**¹², therein the Honourable Justice Mark Mohammed, (now Justice of Appeal), quoting from the Sentencing Handbook published by the Judicial Education Institute stated as follows:

"In determining the amount of reduction of sentence, the Court may take into account the stage in the proceedings for the offence at which the offender indicates his intention to plead guilty and the circumstances in which this indication was given."

[66] Additionally, in the **Ovid** judgment (supra), at page 18, lines 26 - 27, the Honourable Justice Mohammed directed his mind to international judgments, which he considered to be instructive in addressing the issues before him. Justice Mohammed considered the case of **Caley and Ors. v R**¹³ where at paragraph 19 therein, the Honourable Court expressed that a reduction of about a quarter is to be applied in circumstances where a plea of guilty is indicated after a plea and case management hearing.

[67] In this case before me, on 17th January, 2023, Prisoner No. 1 and Prisoner No. 2 were arraigned and initially both pleaded not guilty. Defence Counsel requested a Goodyear Indication. It is noted that both Crown and Defence were unable to agree on the Summary of facts. There was a change of plea about two months after arraignment.

[68] On 17th March, 2023, Defence Counsel withdrew her submission for the Goodyear Indication as there was no agreement on the facts. Prisoners Nos. 1 and 2 pled guilty.

[69] In light of the foregoing persuasive authorities, this Court is of the view that to qualify for the full one third discount of a guilty plea, the first reasonable opportunity for both Prisoners to have pled guilty, was at the stage of arraignment. This Court observes from its record that both Prisoners were ably represented on that day by Defence Counsel. Even though at one stage, there was a dispute over the agreed facts by Counsels, that ought not to have prevented the Prisoners from pleading to the Count on the Indictment.

¹² CR No. 59 of 2006 (Trinidad and Tobago) at page 14, lines 24 - 29

¹³ [2012] EWCA Crim 2821

- [70] This Court is therefore of the view that a more appropriate discount to be applied in relative to the timing of the guilty pleas of both Prisoners that is, two months after arraignment, will be twenty five percent.

Starting point

- [71] In the case of **Lauren Aquillera and Ors** (supra) reference was made to the New Zealand case of **R v Tauer and others**¹⁴ that Court defined the starting point as "...the sentence which is appropriate when aggravating and mitigating factors relative to the offending are taken into account but which excludes any aggravating and mitigating factors relative to the offender."
- [72] These authorities were cited and approved in the Jamaican Court of Appeal case of **Meisha Clement**¹⁵ in the Court's discussion as to the calculation of the starting point of sentences.
- [73] The Court of Appeal in the case of **Mark Groom** (supra) stated "*...the starting point for considering these offences is that it is a paramount duty of citizens not merely to assist in the apprehension of criminals but also not to take any steps to help them avoid being brought to justice....*", Factors which were considered by the Court in that case as important in determining the starting point in cases of assisting an offender are, first, the nature of the offence committed by the offender who is being assisted; second, the knowledge that the person assisting has of these offences; and third, the steps that he or she has taken to assist the offender.
- [74] The Court in **Mark Groom** case (supra) continued "*...In our view the appropriate starting point for these offences bearing in mind the seriousness of the offences committed by the offender, the knowledge of the appellants and the substantial assistance given by them, would have been three years' imprisonment...*"

PRISONER NO. 1 • Teffiny Smith• calculation of sentence

- [75] To establish the starting point, aggravating and mitigating factors relative to the offending are to be taken into account.

¹⁴ (2005) NZLR 372

¹⁵ (2016) JMCA 26

Aggravating factors of the Offence

- Seriousness of the offence as a prohibited weapon was involved
- the Prisoner had knowledge that it was a gun that she moved
- the gun was never recovered by the police, still at large
- steps taken by Prisoner No. 1 to assist the principal offenders when she moved the gun from the closet in the bedroom to outside the house to further conceal it and in so doing avoided apprehension of the principal offenders by the police for that offence of possession of a prohibited weapon

Mitigating factors of the offence: None

[76] Having regard to the aggravating and mitigating factors of the offence and the case authority of **Mark Groom (supra)**, this Court is of the view that the appropriate **starting point** will be 3 years imprisonment.

[77] In relation to Prisoner No. 1, this Court next considers the aggravating and mitigating factors of the offender which may result in the upward or downward adjustment of the sentence.

[78] In considering the **Aggravating Factors of the Offender** - there are none and so there is no adjustment of sentence at this stage.

[79] In considering the **Mitigating Factors of the Offender**, this Court considered in particular, the submissions and plea in mitigation made by Defence Counsel inclusive of the evidence of the witnesses and the statements of the Prisoner No. 1.

Mitigating factors of the Offender

- **Remorse**

Prisoner No 1 stated to the Court "... I apologize I am deeply sorry to my family and to the court for the decision I have made I look forward to better myself to live for my daughter to become a better person for my daughter."

- **Youth and immaturity** • recently attained 18 years and was secondary school student at the time of commission of offence. Combination of factors: age, her intimate relationship with one of the principal offenders, and being pregnant at time, potentially affected decision making resulting in immature judgment in concealing the gun to evade lawful arrest of principal offenders.
- **Cooperation with police** • admission to police in interview as to her involvement in the offence
- **Good character** • no convictions
- **Positive attributes** • as per testimony of Mr. Willis Potter, Ag. Principal of the Virgin Islands School of Technical Studies.: "...*Teffny has always been a very responsible young lady, very community minded. She was always well disciplined. She never pose a problem at school. She carries herself well considering the circumstance and tries to maintain a positive attitude amidst the gossip and conversations behind her back so she worked tirelessly and was able to achieve the highest score GPA at the end of her schooling and was thus valedictorian...*"

Prisoner No. 1 was also described by Mr. Potter as a team player in that she *"would take part in any other event if we needed someone she would usually volunteer herself."* Mr. Potter described an incident where she signed up for a three thousand (3000) metre race which was a long distance race even though she was considered a short distance runner. Prisoner No. 1 explained to Mr. Potter that the reason for her signing up for the race was *"wedon't have anybody so I will do it."*

Mr. Potter indicated " *this to me that this young lady has a will to help in any circumstances where she can be helpful.*" Mr. Potter testified that over the course of the three years of interacting with Teffny at the Elmore Stoutt High School Court she has proven herself to be *"reliable and dependable..."*

Testimony of mother, Mrs. Gilbert-Smith:

".. I am proud they have taken responsibility and been honest."

She testified that Prisoner No. 1 is a "go gettef as" *she grow up fast she usually is taken to be the eldest child because of how she approaches things so with her work and with going through life she is just ready and eager..."*

- **Potential for rehabilitation**

Prisoner No. 1 is shown to be ambitious, and demonstrates self-development through continued education. She has a desire to improve herself " *...When I came out on bail I decided to do better in my life. I graduated from school as valedictorian. I applied for college I graduated from my school."*

She also stated " *...I look forward to better myself to live for my daughter to become a better person for my daughter..."*

She informed the Court that she had applied to college to do Business Administration. She intended to apply to college part time and that her goal was to go abroad to college, to graduate and work for her grandfather's business. She expressed a desire to open her own business, a restaurant.

Having considered **the Mitigating factors of the offender** this will result in a downward adjustment of the sentence by 2 years, so that thus far the sentence will be 1 year.

NEXT STEP - Credit for guilty plea

[81] Prisoner No. 1 did not plead at the first reasonable opportunity, at arraignment, so that there will be a 25 percent discount for her guilty plea. That calculation will be 25 percent x 1 year= 91 days. Then 1 year minus 91 days = 274 days.

NEXT STEP - Time spent on remand pre conviction

[82] In considering time spent in custody pre-conviction, Counsels indicated that records reveal that Prisoner No. 1 was in police custody at the police station between 28th April, 2021 to 2nd May, 2021. Additionally, this Prisoner was remanded in custody to the Prisons, East End between 27th May, 2021 to 31st May, 2021. This Prisoner was moved to His Majesty's Prison, Balsam Ghut from 31st

May, 2021 to 13th October, 2021. Total period of time spent in custody (pre conviction} to be deducted from the sentence= 143 days. In further calculating, 274 days -143 days= 131 days.

NEXT STEP- Totality Principle

[83] This principle is inapplicable as there is only one Count in the Indictment.

NEXT STEP - ANCILLARY ORDERS ETC

[84] None will be ordered.

Sentence for Prisoner No. 1 is calculated to be 131 days imprisonment.

PRISONER NO. 2- Tyann Smith - calculation of sentence

[85] To establish the starting point, aggravating and mitigating factors relative to the offending are to be taken into account.

[86] **Aggravating factors of the Offence**

- Seriousness of the offence as a prohibited weapon was involved;
- the Prisoner had knowledge that it was a gun that she moved
- the gun was never recovered by the police, still at large.
- steps taken by this Prisoner to assist the principal offenders to evade apprehension by the police when she and her sister (Prisoner No. 2) moved the gun from the inside to the outside the house to further conceal it.

Mitigating factors of the offence - None

[87] Having regard to the aggravating and mitigating factors of the offence and the case authority of Mark Groom (supra), this Court is of the view that the appropriate **starting point** will be 3 years imprisonment.

[88] In relation to Prisoner No. 2, this Court next considers the aggravating and mitigating factors of the offender which may result in the upward or downward adjustment of the sentence.

Aggravating factors of the offender

[89] In considering the Aggravating Factors of the Offender- there are none and so there is no adjustment of sentence at this stage.

[90] In considering the **Mitigating Factors of the Offender.** this Court considered in particular, the submissions and plea in mitigation made by Defence Counsel inclusive of the evidence of the witnesses and the statements of the Prisoner No. 2.

(91) Mitigating factors of the Offender

- **Remorse**
Prisoner No. 2 stated "*I would like to apologize for my immature behaviour.*"
- **Youth and immaturity**• 20 years old at the time of commission of offence. Combination of factors: age, relationship with Prisoner No. 1 (her sister) so that her decision to assist in concealing the gun so that the principal offender could evade lawful arrest, reflected immaturity on the part of this Prisoner.
- **Cooperation with police**- admission to police with respect to the extent of her involvement in the offence
- **Good character**- no convictions
- **Positive attributes**•
 - **as per testimony of** Mrs. Maduro-Caines that Prisoner No. 2 Tyann Smith is the mother of her son's child and has grown to be "*...a very excellent mother, she not only takes care of her son who is about four months now, my son also has his son prior that she takes care of as well. I have seen changes in her.*"
 - Testimony of mother, Mrs. Gilbert- Smith said that Prisoner No. 2 "*...is truly a big sister she would look out for her siblings and put herself last. It is unfortunate that both of them has fallen in this situation still it is fortunate that it has been both of them in this situation as a joint support...*"

• **Potential for rehabilitation** •

- Prisoner No. 2 stated to this Court *"...On the day the incident happened I should not have allowed myself to do such an immature move, the past two years has been very overwhelming to my family and myself I would like to get this case over with during the past two years I used this incident to change myself and turn to God and become a Christian."*¹¹
- She indicated *"... I am at home, I just got a baby boy I am trying to start a business and I am looking for some sort of employment."*

This will result in downward movement of the sentence by 2 years - so that the sentence will thus far be 1 year.

NEXT STEP - Credit for Guilty Plea

- [92] Prisoner No. 2 did not plead at the first reasonable opportunity, that is at arraignment, so that there will be a 25 percent discount for her guilty plea, that is 25 percent x 1 year = 91 days. So that will be 1 year minus 91 days = 274 days.

NEXT STEP - Time spent on remand pre conviction

- [93] In considering time spent in custody pre- conviction, Crown Counsel indicated that records reveal that Prisoner No. 2 was in police custody... She was arrested and went into police custody on 28th April, 2021 to 29th April, 2021 where she granted bail. Prisoner No. 2 was in custody at Prisons in East End from 27th May, 2021 to 31st May, 2021. She was thereafter transferred to His Majesty's Prisons at Balsam Ghut from 31st May, 2021 to 13th October, 2021.

- [94] Total period of custody (pre conviction) is to be deducted when calculating the sentence is 125 days. In further calculating, that will be 274 days minus 125 days = 149 days.

NEXT STEP-Totality Principle

- [95] This principle is inapplicable as there is only one Count in the Indictment.

NEXT STEP - ANCILLARY ORDERS ETC.

- [96] None will be ordered.

Sentence for Prisoner No. 2 is calculated as 149 days imprisonment.

Suspended sentence

- [97] This Court considered the submissions of Defence Counsel that a non-custodial sentence should be imposed on both Prisoners pursuant to Criminal Justice (Alternative Sentencing) Act of the Virgin Islands. This Court is respectfully not of the view that a bond, a fine, probation or a community service order is an appropriate sentence particularly because of the serious nature of this offence.
- [98] This Court further considered section 29 of the **Criminal Code** of the Virgin Islands which allows for the imposition of a suspended sentence and **the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019 Practice Direction 8 C No. 3 of 2019**.
- [99] Para. 3 of the said Practice Direction states - "The Court may consider the following non exhaustive list of factors in exercising its discretion whether to suspend a sentence.
- a. Can appropriate punishment be achieved by immediate custody?
 - b. Does the offender present a risk or danger to the public or victim?
 - c. Has there been a history of poor compliance with orders?
 - d. Is there a realistic prospect of rehabilitation.?
 - e. If sentencing a person under 21, is there a realistic prospect that incarceration will so affect an offender as to turn that person more towards criminality and less toward rehabilitation?
 - f. Is there a strong personal mitigation?
 - g. What will be the impact custodial sentence on dependent relatives, employees and the community?"
- [100] After considering the submissions of both Counsel, the facts of this particular case and the circumstances of the Prisoners and the aforementioned Practice Direction No. 8 C No. 3 and section 29 of the Criminal Code of the Virgin Islands, this Court is of the view that the appropriate punishment in this case will not be achieved by an immediate custodial sentence. The Prisoners do not impose a risk or danger to the public. There is a realistic prospect of rehabilitation and a strong personal mitigation in favour of the Prisoners. This Court finds further that a custodial sentence imposed on the Prisoners will have a deleterious effect on their infant children. This Court is of the view that both Prisoners who at the time of the commission of the offence were under the age of 21 and even at

the date of the sentencing, are young persons, there a realistic prospect that incarceration will have a negative impact on them (their prospect for rehabilitation). It is in these circumstances that a suspended sentence will be appropriate relative to both Prisoners.

FINAL SENTENCE

[101] Prisoner No. 1 is sentenced to a term of 131 days imprisonment. This sentence is to be suspended for a period of 1 year on the condition that the Prisoner does not commit any criminal offence punishable by imprisonment. If the prisoner commits any such offence, she is to be brought back to Court for sentencing to serve 131 days imprisonment.

[102] Prisoner No. 2 is sentenced to a term of 149 days imprisonment. This sentence is suspended for a period of 1 year on the condition that the Prisoner does not commit any criminal offence punishable by imprisonment. If the prisoner commits any such offence she is to be brought back to Court for sentencing, to serve 149 days imprisonment.

**Angelica Teelucksingh
High Court Judge**



By the Court


Registrar