

**IN THE SUPREME COURT OF GRENADA
AND IN THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CRIMINAL)**

GRENADA

CASE NO. GDAHCR2020/0033

BETWEEN:

THE KING

And

DESRON THOMAS

Appearances:

Mr. Jordan Marshall, Crown Counsel for the Crown
Mr. Ruggles Fergusson KC of Counsel for the Defendant

2024: December 13; 16; 20;
2025: January 23.

SENTENCING JUDGMENT

- [1] **INNOCENT, J.:** Before giving consideration to the question of the appropriate sentence to impose in the present case, the court thinks it necessary to chronicle the procedural history of this matter. In this way, the sentencing exercise will be placed within its proper context.
- [2] The defendant was arrested on 18th October 2018. It appears from the record of the proceedings that the matter had proceeded through the Magistrates' Court by way of paper committal. The defendant was committed to stand trial 11th February 2020.
- [3] By an indictment dated and filed 21st August 2020, the defendant was charged with the single count of Manslaughter by causing death by unlawful harm contrary to section 232(2) of the Criminal Code as enacted by section 41 of the Criminal Code

(Amendment) Act, 2012 and section 237 of the Criminal Code relative to events that occurred on 12th October 2018.

- [4] The defendant was arraigned on 2nd October 2020 and he entered a plea of not guilty to the single count of Manslaughter contained in the indictment. The matter was adjourned on several occasions thereafter owing to outstanding procedural and evidential matters affecting both the defendant and the prosecution respectively.
- [5] On 24th March 2021, the defendant filed a request for sentence indication seeking an indication from the Court as to the likely maximum sentence that would be imposed on him if he pleaded guilty at that stage of the proceedings. The defendant also filed his submissions relative to the request for sentence indication on even date.
- [6] An order was made on 26th March 2021, for the production of a Social Inquiry Report to the Court along with the defendant's antecedent history. The matter was then adjourned to 18th June 2021 for the hearing of the sentence indication. It appears from the record that the Social Inquiry Report remained outstanding for some time. The Social Inquiry Report was eventually submitted to the Court on 22nd November 2021. A record of the defendant's previous convictions dated 16th February 2021 was also placed before the Court.
- [7] When the matter came on for hearing on 18th June 2021, the Court ordered the parties to file an agreed statement of facts on or before 30th June 2021. The matter was adjourned to 2nd July 2021 for the court's consideration of the sentence indication.
- [8] There appears to be no record of what transpired on 2nd July 2021 or whether there were any court proceedings in the matter on that date. However, the record of proceedings reflects that the matter came on for hearing on 18th January 2022, and was adjourned to 27th January 2022, upon the prosecution giving the Court the undertaking that the statement of agreed facts would be filed in short order.

- [9] When the matter came on for hearing on 27th January 2022, the prosecution informed the Court that the defence and prosecution were unable to agree on the facts that would form the basis of the plea on the hearing of the sentence indication. The Court then adjourned the matter to 25th February 2022 for the hearing of the sentence indication.
- [10] On 25th February 2022, the record of proceedings shows that the prosecution and defence were still unable to file a statement of agreed facts. Consequently, the matter was adjourned to 7th November 2022 for trial.
- [11] It is not possible to glean from the record of the proceedings what transpired on 7th November 2022 or whether there were any proceedings in the matter on that date. The record only reflects that the matter again came on for hearing before this Court as presently constituted on 8th February 2024. There is no indication on the record as to what transpired in the case between 7th November 2022 and 8th February 2024.
- [12] When the matter came before the Court on 8th February 2024, the defendant did not appear not having been notified of the day's proceedings. It appeared to the Court at that stage that there has been some inclination towards seeking a sentence indication and the court invited counsel in the matter to address it relative to this outstanding issue. Counsel for the defendant with the concurrence of counsel for the prosecution indicated that the defendant was still disposed to pursuing the application for sentence indication. Accordingly, the Court gave directions for a Goodyear hearing and the matter was adjourned to 23rd February 2024. It appears that the matter did not proceed on 23rd February 2024.
- [13] However, on 22nd February 2024, the defendant filed a certificate confirming instructions to his legal practitioner to seek a sentence indication. An agreed statement of facts was filed by the parties on 16th February 2024.
- [14] However, the matter again came on for hearing on 1st March 2024. On this occasion, the court noted that in its view, and having reviewed the matter, there was a serious

question of fact arising in relation to the issues of causation, and the lawfulness or justification of the conduct giving rise to the charge of Manslaughter which was entirely a matter for a jury; and that in all the circumstances of the case, it would not be appropriate for the court to consider an application for sentence indication in relation to the defendant although it was open to the defendant voluntarily chose to do so, was his right. The matter was then adjourned to 25th March 2024 for report and or fixture for trial.

[15] On 25th March 2024, the defendant appeared and the matter was adjourned to 3rd May 2024 for further case management. For reasons unrelated to the present matter there was an interruption in court proceedings which resulted in the matter not coming on for hearing for some time until 13th June 2024. On that date counsel appearing for the Crown informed the court that a Notice of Additional Evidence relative to the additional report of Dr. Alvarez was filed on 28th May 2024 and served on counsel for the defendant. The matter was then adjourned to 17th June 2024. On 17th June 2024, at the request of counsel the matter was adjourned to 24th June 2024. On 24th June 2024, the matter was adjourned to 18th July 2024 for the hearing of the sentence indication. The prosecution was ordered to file its submissions by 15th July 2024.

[16] The defendant's application for a sentence indication was heard on 18th July 2024 and the court reserved its decision to 17th September 2024. On 17th September 2024, the court gave its oral reasons for having made the decision to defer giving a sentence indication at that stage of the proceedings. The reasons for the court's decision were ostensibly that the question of causation arising in the case needed to be resolved and that it appeared from the agreed statement of facts filed that there was still a dispute between the parties relative to that issue which could only be resolved at trial before a jury. In the circumstances, the matter was adjourned for trial to 25th November 2024. The court left it open to the defendant to renew his application for a sentence indication at any later stage of the proceedings.

- [17] The prosecution subsequently filed a new indictment on 2nd December 2024. This new indictment contained two counts; the first count charged the offence of Manslaughter and the second count charged the defendant with the offence of intentionally and unlawfully causing Grievous Harm contrary to section 207 of the Criminal Code as enacted by section 34 of the Criminal Code (Amendment) Act. The prosecution inevitably withdrew the initial indictment filed on 21st August 2020.
- [18] At this juncture in the proceedings, counsel appearing for the defendant sought leave of the court to have the defendant arraigned on the new indictment. The defendant was arraigned, and upon his arraignment entered the plea of not guilty to Manslaughter and a plea of guilty to Grievous Harm. The Crown accepted the plea of guilty to Grievous Harm and withdrew the count relative to the offence of Manslaughter. The parties were directed to file an Agreed Statement of Facts setting out the basis of the plea together with written submissions by 12th December 2024. The matter was adjourned to 13th December 2024 for sentencing hearing.
- [19] On 13th December 2024, the sentencing hearing was adjourned to 16th December 2024 due to the unavailability of counsel for the prosecution. On 16th December 2024, the court heard the oral submissions of respective counsel on sentencing. The court also had the benefit of counsels' written submissions. The court having made certain inquiries from counsel on both sides relative to certain issues concerning the appropriate sentence to be imposed adjourned the sentencing hearing to 20th December 2024. On 20th December 2024, the court having heard further submissions from counsel on both sides relative to sentence reserved the court's sentencing decision until 23rd January 2025.

The basis of the plea

- [20] The agreed statement of facts filed by the parties on 12th December 2024 sets out the basis of the defendant's plea to the offence of Grievous Harm. A summary of the agreed facts that is relevant to the sentencing exercise are set out below.

- [21] At the material time, that is, on 28th June 2018, the deceased, who was then 72 years old, resided in a galvanized shed located on a beach in Palmiste in the Parish of Saint John.
- [22] The defendant at that time was in the company of his friends at Gouyave attending the fishermen's birthday celebrations. They all drank and partied during their attendance at the celebrations. Sometime between 9 pm and 10 pm that night, the defendant left the company of his friends. The defendant's friends later met up with him after the celebrations had culminated walking up a stretch of road wearing only his trousers. One of his friends inquired about his whereabouts during his absence and the defendant responded that he had come out in Dougaldston behind some girl.
- [23] The friend who had made the inquiries of the defendant concerning his whereabouts was pulled aside by the defendant and they had a conversation. It appears from this conversation that the defendant had fabricated the story that he had gone off to see a girl. In fact, the defendant had come from his home. Prior to this, the defendant had visited the deceased to purchase cigarettes. While attending at the deceased's home for that purpose a dispute arose concerning the correct change that the deceased was supposed to hand over to the defendant. When the defendant confronted the deceased about the insufficient change, the deceased struck the defendant on his hand with a stick. The defendant disarmed the deceased and struck him on his head with the stick. The defendant threw the stick into the sea and returned to Gouyave.
- [24] On 29th June 2018, the deceased was discovered in the shed at Palmiste Bay. The individual who made the discovery noticed what appeared to be blood on some blocks that were resting against the shed. A call was made out to the deceased who did not respond. Upon entering the shed, the deceased was seen sitting on a chair with his hands and head reposed on a table. There appeared to be blood all over his face, head and upper garments. The deceased however appeared conscious. When he was asked what had transpired, the deceased said: "the light going" and

nothing more. The police were summoned to the scene; and upon their arrival, the deceased was breathing but was speechless.

[25] The investigating officer who visited the scene noticed that the deceased had what appeared to be partially dried blood all over his head. There was a wound over the deceased's left eye and two separate wounds to the top of his head. The deceased appeared partially conscious however, he was not ambulant and speechless.

[26] The deceased was subsequently taken to a medical facility where he was examined by a medical practitioner. Upon examination, the deceased presented with bleeding from multiple scalp lacerations. There were full thickness lacerations to the scalp measuring 6 cm, 4.5 cm and 4 cm respectively. He also had a superficial laceration to the left eyebrow. The deceased was conscious but under the influence of alcohol. His wounds were sutured and an x-ray of the skull was performed. He was admitted to the surgical ward. The deceased subsequently passed away on 12th October 2018 while still admitted to a medical facility.

[27] The question of what caused the deceased's death has substantial implications for the sentencing exercise particularly as it relates to the unlawful conduct attributed to the defendant. The nature and extent of the unlawful conduct attributed to the defendant, as will be seen shortly, will significantly affect the court's assessment of the defendant's degree of culpability in the commission of the offence.

[28] Given the basis of the plea as established by the agreed facts in this case, there is no necessity in the court going further to consider the question of causation relative to the offence of manslaughter. Clearly, the prosecution having accepted the defendant's plea to the lesser offence of intentionally and unlawfully causing grievous harm, have conceded that the defendant did not cause the deceased's death.

[29] In any event, it would appear that the perennial impasse between prosecution and defence throughout the course of these proceedings, specifically as it related to the agreed facts seemed to have had its genesis in the difficulty in resolving whether

the defendant had indeed caused the deceased's death by unlawful harm. The impasse already described, without any doubt, was the root cause for the delay in the disposition of this case.

- [30] What is relevant to the sentencing exercise, in so far as it interrogates the defendant's degree of culpability, is the nature and extent of the injuries inflicted on the deceased by the defendant. This issue will become more apparent later on in the court's sentencing remarks.
- [31] Simply for the sake of exposition, the court will highlight some of the features of the post mortem examination of the deceased man. These features of the post mortem examination will be contrasted and compared with the answers given by the defendant in his interview under caution statement with the police investigators. This comparison and assessment, in the court's view, will better enable the court to discern those matters that are relevant not only to establishing the defendant's degree of criminal culpability in the commission of the offence, but will also enable the court to make a better assessment of the aggravating and mitigating factors present in the commission of the offence. Therefore, this is not an exercise in mere pedantry.
- [32] On post mortem examination, the deceased presented with an old scar on the left temporal region measuring approximately 1.5 cm and to the right temporal region measuring approximately 3 cm. There was no skull fracture. There was subdural hemorrhage in its resolution stage to the bilateral front parietal region and no cerebral edema. There were other features of organ failure documented in the post mortem examination report.
- [33] The deceased's cause of death was stated as respiratory insufficiency, bilateral bronchopneumonia, chronic subdural hematoma due to cerebral contusion and septic ulcer.
- [34] In a supplemental post mortem examination report, the pathologist opined:

"In the basic cause we write chronic subdural hematoma due to brain contusion and because it was the reason he was admitted to the hospital and due to the time elapsed between the contusion and death, it was not possible to determine if the cause of the contusion was a fall or a blow with a blunt object."

- [35] The defendant was apprehended by the police on 17th October 2018. In an interview under caution conducted on 18th October 2018, the defendant made the following statement:

"From the jump in Gouyave ah get ah ride down with ah van, me and ah young lady. Ah drop off in Palmiste down dey but ah can't remember what time. As ah drop off dey now ah call Poopa and ah tell him that ah want a pack a cigarette, Ah give him ah fifty dollars and he give me back five dollars change. Ah tell him ah fifty dollars ah give him and ah want me change. He turn and tell me what happen to you boy five dollars you give me and he open he door and he say what happen to you that young fellars and dem. He then came outside with ah piece of wood in his hand he give me one lash ah wood on me knee and one on me hand. Then he gave me a lash on me back then ah grab the piece of wood and me and him start to scuffle. Then ah give him one lash ah wood on he head, then he fall down and he know he head on the blocks. When the wood hit him it just come out in me hand it go in the sea.

- [36] When the defendant was asked in the interview how many times he had hit the deceased, he replied "once". In a third interview under caution with the police the defendant admitted to the police that he had told his siblings what had transpired between him and the deceased. He was asked whether he remembered saying to his siblings that:

"Poopa hit you with a piece of wood and you took the wood from him and when he was going back inside you hit him with the wood behind his head and he fall down and knock his head on the block?

The defendant's response was:

"Yeah, I remember."

He was also asked whether that statement was true; and he replied:

"Yeah that what happen."

He was asked whether he agreed that the deceased's back was turned towards him and which was also facing the sea when he struck the deceased. He replied:

"Yeah, when he turn around going ah hit him."

[37] The defendant was also questioned about the degree of force that he used to strike the deceased. It was suggested to him that the degree of force which he described and the direction or angle from which he struck the deceased would have been inconsistent with his statement that after he struck the deceased the piece of wood flew out of his hands and fell into the sea. The defendant's response to this suggestion was:

"When ah hit him it come out me hand and go in the sea."

He also said:

"Ah didn't hit him hard and the wood come out my hand and go in the sea."

When asked what his reason was for striking the deceased, the defendant replied:

"Well the man hit me first."

[38] Section 207 of the Criminal Code enacted by section 34 of the Criminal Code (Amendment) Act provides that a person who intentionally and unlawfully causes grievous harm to any other person commits an offence and is liable on conviction on indictment to a term of imprisonment not exceeding ten years.

[39] In sentencing this offender, the court is mindful of the fact that the starting point sentence is not necessarily the maximum sentence prescribed by statute. Ultimately, the court has a discretion when sentencing offenders and must ensure that the punishment imposed is proportionate to the offending and the offender. In making an assessment of what is proportionate, the sentencing court must also be guided by the principal aims of sentencing. The court will expound later on relative to how these principles should be applied in fashioning the appropriate sentence in the exercise of the court's discretionary sentencing powers.

[40] The court in sentencing this offender will proceed on the footing of what is imbedded and implicit in the Sentencing Guidelines (the 'Guidelines') relative to the approach to be adopted by the sentencing court when sentencing offenders for this category of offence. The general principle which is at the foundation of the Guidelines is that the punishment must be commensurate with the seriousness of the offence reflected in the offender's degree of criminal culpability in the commission of the

offence and the harm done as a consequence of the offender's criminal conduct. By this method, the court will derive an appropriate starting point sentence.

[41] The court will then assess the aggravating and mitigating factors relative to the commission of the offence or the offending conduct as the case may be; and adjusting the starting point sentence upwards or downwards. Thereafter, the court will assess the aggravating and mitigating factors relative to the offender; again adjusting the sentence previously arrived.

[42] After making the adjustments to the starting point sentence based on the aggravating and mitigating factors relative to the offence and the offender, the court will adjust the starting point sentence within the scale provided for by the Guidelines.

[43] On completion of this exercise, the court will then consider what discount, if any, the defendant is entitled to on account of his plea of guilty at this stage of the proceedings. The court will also go on to consider what if any discount the defendant is entitled to relative to time spent on remand.

Seriousness – Harm

[44] Based on the agreed facts, it appears that it is not disputed that the defendant only struck a single blow to the deceased. The result was that the deceased fell to the ground and struck his head on some blocks that were lying adjacent to the entrance to the shed. The medical examination of the deceased revealed that he suffered three lacerations to the scalp. The prosecution's position is that one of those lacerations was caused by the defendant striking the deceased. This position was also adopted by the defendant.

[45] Although there appeared to have been no skull fracture, there was a laceration or tearing of the scalp. The deceased would have bled from his injury. The victim required medical intervention for his injury. It appears from the agreed facts that some time would have elapsed before the victim obtained medical treatment. Therefore, given the nature of the injuries suffered by the victim, it is not

inconceivable that he would have suffered a degree of pain, anxiety and discomfort during the intervening period.

- [46] The court did not have the benefit of a victim impact statement in this case.

Seriousness – culpability

- [47] In assessing the defendant's degree of culpability in the commission of the offence, the court took the following matters into account. Although it is conceded that the defendant only struck a single blow to the victim's head, it was inflicted with such force to cause the victim to fall to the ground and hit his head.

- [48] Additionally, the court had to consider the question, whether the use of force employed by the defendant was commensurate with the harm done to him or the apprehension of danger or harm being done to him. According to the agreed facts in this case, the defendant had already disarmed the victim. Therefore, in the court's view, there did not appear to be any need to inflict harm on the victim as a result of any impending or any reasonable apprehension of further harm being done to the defendant.

- [49] Additionally, the victim was 72 years old at the time and clearly there was a significant disparity in age between the defendant and the victim. The defendant would have told the police in his interview under caution that the victim had dealt him blows to his hand, his knee and his back. There is no evidence in this case that the defendant suffered any injury as a result of the lashes inflicted on him by the victim.

- [50] In the court's view, striking the victim on his head with a blunt object after he had been disarmed was more than what was commensurate to repel any danger or any perceived danger or attack at the hands of the victim. It is clear that the defendant in this case has accepted that fact by his very plea of guilty. In addition, the defendant by his own admission accepted that the victim's back was turned towards him when he inflicted the blow to the victim. Therefore, it is fair to conclude that the harm inflicted on the victim was both intentional and unlawful – unlawful to the extent

that it did not amount to a justifiable use of force in the circumstances. Whatever threat there might have been previously had been abated when the defendant disarmed the victim.

Aggravating factors – offence

- [51] According to the agreed facts in this case, the defendant would have disclosed the incident to his siblings. However, it seems that his intention was that his disclosure would remain a secret. Therefore, it is not unreasonable to conclude that the defendant's intention was to avoid detection of what had transpired between himself and the victim and inevitably to avoid the consequences of his actions and any attendant criminal prosecution or liability that he might have been exposed to.
- [52] Another aggravating feature of the present case is that the defendant left the victim, quite possibly knowing that the victim had been injured without rendering any assistance to the victim or seeking any medical assistance for the victim. This is not implausible assumption, as the defendant himself admitted that the victim had hit his head on the blocks in his presence and the agreed facts reveal that blood was seen on the blocks. In these circumstances, it must have been apparent to the defendant that the victim had suffered some injury that required medical attention. The defendant left the scene and casually returned to his friends as if nothing had transpired. This, in the court's view, was a cold and callous act considering the defendant's own revelation regarding the nature of the relationship that he shared with the victim.
- [53] In the court's view, the agreed facts presented to the court suggest that the unlawful act perpetrated against the victim was more than likely retaliatory in nature and possibly as suggested to the court, an act carried out in excessive self-defence so that it did not amount to a justifiable infliction of harm. This is emblematic in the response given by the defendant in his interview under caution where he stated that the victim had struck him first and the sequence of events that followed after the defendant had disarmed the victim. Additionally, the court must reiterate that the

defendant by his very plea has conceded that the harm inflicted was intentional and unlawful, that is, unjustifiable or without lawful excuse or justification.

Mitigating factors – offence

- [54] The agreed facts reveal that the defendant's infliction of harm on the victim was not a wanton, premeditated or planned attack on the victim. This was not a sustained and prolonged attack upon the victim with repeated assault or multiple blows on the same victim.
- [55] There was no evidence of violence or threats of violence beyond what was inherent in the commission of the offence. It did not appear that the defendant had any hostility towards the victim save an except the allusion to the fact that he may have become incensed by the victim failing to give him the incorrect change and the fact that he was struck by the victim in the debate surrounding the correctness of the change payable upon the purchase of the cigarettes.
- [56] Furthermore, it did not appear that the defendant possessed the intention to inflict more serious harm on the victim than actually resulted from the offence. In considering the mitigating factors inherent in the commission of the offence, the court also took into account the fact that the defendant did not go to the victim's home armed with a weapon with the intention to inflict harm on the victim. Therefore, it seems that there was no premeditation or planning in the commission of the offence.
- [57] The court will now turn to consider the subjective factors, if any, that might have influenced the defendant in the commission of the offence. This will require an assessment of the aggravating and mitigating factors relative to the offender. In making its assessment, the court has referred to what is contained in both the written and oral submissions before it and the Social Inquiry Report presented to the court previously.
- [58] The defendant in this case is 44 years old at the time of sentencing and was 38 years old at the time of the commission of the offence. He is the father of 12 children.

It does not appear that the defendant plays any meaningful role in the lives of all of his many children except for his last twin daughters. He is mainly employed in the trawler fishing industry. It appears that at the time of sentencing the defendant is gainfully employed.

Aggravating factors – offender

- [59] The court has identified what it perceives to be the following aggravating factors relevant to this offender. It appears from the Social Inquiry Report that the defendant engages in alcohol and marijuana consumption to at the very least a moderate degree. His anti-social traits it seems are attributable to his consumption of these two substances. The writer of the Social Inquiry Report attributes the commission of the present offending to his alcohol consumption. The writer of the Social Inquiry Report, relying on clinical theory stated that:

“...the use and or abuse of alcohol can impair the ability to reason and affect healthy judgment. This leads to aggressive reactions with little or no time to think and reflect on the consequences of one’s actions and little or no time to think and reflect on the consequences of one’s actions and little or no time to make healthy choices, which can be the basis for crimes of aggression.”

- [60] It also appears from what is reported in the Social Inquiry Report that the defendant has a tendency towards lewd and antisocial behaviour which is exacerbated by his consumption of alcohol. It appears that the defendant, by his own admission, was intoxicated at the time of the offence. This was a case of voluntary intoxication which, in the court’s view, does very little if anything to palliate his unlawful acts.

Mitigating factors – offender

- [61] The defendant has no previous convictions for any or any similar offence relevant to the current sentencing exercise.
- [62] It appears that the defendant has shown genuine remorse for his commission of the offence.

[63] The Social Inquiry Report documents that since the defendant's recent offending, he has taken positive steps towards curbing his antisocial behavior.

[64] In light of the subjective factors which the court has identified relative to the defendant, it does not appear that there is any need for the court to consider the question of dangerousness. Therefore, the court gave no consideration to the question of whether there was the requirement to impose a longer than commensurate sentence to serve the need to protect the public from serious harm from this offender.

[65] However, the court has observed that there appears to be the need for behavioural intervention in the case of this defendant. In the court's view, any attempt at rehabilitation of this offender in view of what is canvassed in the social inquiry report, is necessary. Additionally, there does not appear to be the need for the court to consider the question of either specific or general deterrence in this case.

[66] Therefore, the court has formed the view that the only meaningful aim of punishment that will be served in this instance is that of retribution or punishment. This observation will become more relevant later on in the court's sentencing remarks when the question of whether an immediate custodial sentence is appropriate in the present case.

Guilty plea

[67] In light of the procedural chronology set out initially in the court's sentencing remarks, the court has formed the view that the defendant is entitled to a full 1/3 discount from the notional sentence as credit for his guilty plea.

The sentence

[58] Counsel appearing for the defendant has implored the court to find that an immediate custodial sentence is not warranted in the present case and that in the circumstances, the court should impose a non-custodial sentence or consider the imposition of a suspended sentence. Counsel for the defendant suggested to the

court that perhaps an appropriate sentence which is proportional or commensurate with the defendant's offending, would be the imposition of a fine together with an order for compensation payable to the victim's family.

- [59] In arriving at a starting point sentence relative to the seriousness of the offence reflected in the defendant's degree of culpability and the harm done as a consequence of the offence, the court has determined that the defendant's degree of culpability would fall within Level B – Lesser as per the Guidelines; and at Category 3 – Lesser as per the Guidelines. Therefore, applying the grid in the Guidelines, the starting point sentence would be 20% x 10 years which equates 4 years' imprisonment.
- [60] The starting point sentence is capable of being adjusted within the range of 5% to 35% to take account of the aggravating and mitigating factors relevant to the offence and the offender.
- [61] In the court's view, the aggravating factors in the present case outweigh the mitigating factors. Therefore, in the court's view, this requires an upward adjustment of 2 years' imprisonment.
- [62] When weighing and assessing the aggravating and mitigating factors relative to the offender, the court is of the opinion that the mitigating factors outweigh the aggravating factors. Therefore, the court will adjust the starting point sentence downward by 1 year.
- [63] The defendant having been credited for his guilty plea in the amount already determined by the court, a period of 1 year and 7 months' rounded off to 2 years' imprisonment will be deducted from the nominal sentence of 5 year's imprisonment.
- [64] The resulting nominal sentence would therefore be, 3 years' imprisonment for the commission of the subject offence of intentionally and unlawfully causing grievous harm to the victim.

- [65] There was considerable debate on both sides as to whether an immediate custodial sentence was proportionate and or commensurate with the defendant's level of offending and the circumstances of the commission of the offence.
- [66] The court's initial inclination is that offences of this nature particularly those involving unwarranted or unjustifiable harm or injury necessitate the imposition of a custodial sentence. Mr. Ruggles Fergusson KC, counsel for the defendant, has implored the court to impose a non-custodial sentence in the present case. According to Mr. Fergusson KC, if the court is not so inclined then, having regard to all the circumstances of the present case, the defendant's offending should be visited with the imposition of a suspended sentence as opposed to an immediate custodial sentence.
- [67] According to Mr. Fergusson KC, the primary objective of sentencing, presumably in the present context, should be rehabilitation of this offender. He urged the court to adopt an individualised approach in sentencing the offender by taking into account and prioritising the reintegration of the defendant into society. In fine, Mr. Fergusson KC submitted that a noncustodial sentence, emphasising counseling, active participation in rehabilitative programs, and community service, would be most appropriate in supporting the defendant's efforts to make amends and contribute positively to the community.
- [68] Mr. Fergusson KC made the further submission that the defendant has already demonstrated his inclination towards rehabilitation during his time awaiting trial. In essence, Mr. Fergusson KC suggested to the court that the defendant's conduct during the intervening period has demonstrated his efforts towards curbing his antisocial behaviour and therefore, there is an unlikely risk of his offending.
- [69] Therefore, following Mr. Fergusson's submission to its logical conclusion meant that any period of immediate incarceration or the length of incarceration ought to be weighed against the necessity of such incarceration in serving the need for rehabilitation of the offender or in satisfying the need for prevention. Hence, in Mr. Fergusson's view, if none of these two permissible aims are required to be met,

then the court, in looking at the sentencing objectives ought to examine whether some other appropriate method of punishment would suffice to meet the objects of those permissible aims of punishment that are appropriate to the particular case which would inevitably steer the offender towards rehabilitation and his reintegration into society. In Mr. Fergusson's view, to do otherwise would inevitably result in a sentence which was excessive having been premised on wrong principles or a misapplication of avowed sentencing principles.

[70] Mr. Fergusson KC also relied on the decision in **Benjamin v R**¹ to illustrate his point. He cited the dicta of Wooding CJ where he said:

"We accept these five principal objects as comprising the aims of punishment and we recognise that in some cases one object will be predominant whereas in others regard must be had more particularly to two or more of them. In this case, for instance, the conduct of which the prisoner was found guilty should, in the words of Hilbery J, "not only be held by ordinary men and women in utter abhorrence but also should receive when brought to justice the severest ... punishment". We have omitted the word "possible" since it would seem to us that "the severest possible punishment" can entertain no limits save such as the legislature may have imposed for the particular offences. We prefer "the severest punishment" because we consider that the punishment should at all times fit the crime. In so saying, we mean that all five objects of sentencing policy should, if possible, be kept in view although they will not all be necessarily applied. Each case must depend upon its own facts."²

[71] To further advance his argument on this point, Mr. Fergusson KC relied on the decision in **The People (at the suit of The Director of Public Prosecutions) v Charles Conroy (No 2)**³ where the Supreme Court of Ireland dealt with the issue of the length and severity of sentences to meet the permissible aim of rehabilitation. Relying on a previous decision of the Court of Appeal, their Lordships said:

"The second principle which is applicable in this case is that laid down by the Court of Criminal Appeal in *The People (Attorney General) v O'Driscoll* (1972) 1 Frewen 351. In delivering the judgment of the Court in that case Walsh J at p 359 stated as follows:-

"The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him

¹ (1964) 7 WIR 459

² *Infra* at p. 461

³ [1989] IR 160

in so far as possible to turn from a criminal to an honest life and indeed the public interest would be best served if the criminal could be induced to take the latter course. It is therefore the duty of the courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case - not only in regard to the particular crime but in regard to the particular criminal. The sentences in the present case may have a very deterring effect on other people but are not such as to induce these young men to turn from a criminal to an honest life. Regard must also be had to the fact that this is the first crime of violence of which either of them has ever been convicted."

To a minor extent the applicability of this principle may be somewhat heightened in the instant case by the fact that there was available to the learned trial judge evidence from a prison officer of a very high standard of behaviour on the part of the appellant between the date of his original detention in respect of these crimes and of the hearing with regard to sentence. Such evidence could never be in mitigation of the crime but could be a ground for supposing that there was a reasonable chance that he could be rehabilitated provided he was induced by the length of his sentence to have an expectation of eventually returning to ordinary society."⁴

- [72] The court accepts the foregoing as the correct application of the principles and approach to sentencing and would therefore adopt a similar approach to the application of these principles in the instant case.
- [73] On the foregoing premises, Mr. Fergusson KC argued that the permissible aim of retribution can be met by the imposition of a noncustodial sentence or a suspended sentence; and that this is an appropriate case for the court to impose such a sentence.
- [74] Given the discourse which the court has embarked on relative to the seriousness of the offence, particularly as it relates to the defendant's degree of culpability in the commission of the offence, the court does not think that this an appropriate case where a noncustodial sentence can be imposed. Therefore, the court has given consideration to whether a suspended sentence would be appropriate instead.

⁴ *Infra* p. 165

[75] The court is empowered by section 5 of the Criminal Code (Amendment) Act, which inserted the new section 78BB into the principal act, to impose a suspended sentence. The court thinks that a suspended sentence is appropriate in the present case for the following reasons. The court does not think that the appropriate punishment can only be achieved by immediate custody. There is no evidence placed before the court that the offender presents a risk or danger to the public or to the victim or anyone associated with the victim. Additionally, based on what has been foreshadowed in the social inquiry report there appears to be a realistic prospect of rehabilitation of this offender.

[76] There was the suggestion made by counsel on both sides that the court should consider making a compensation order in addition to any sentence that the court shall impose. The court in this instance does not think that a compensation order would be appropriate in the circumstances. The victim is now deceased and there is no way of assessing the financial and other loss that he would have suffered. Although counsel would have alluded to a possible dependent, there simply exist no empirical means by which it can be determined the extent or value of that dependency. For these reasons among others which are readily apparent to counsel, the court declines to make a compensation order.

[77] In the circumstances, the order of the court is as follows:

- (1) The defendant is sentenced to 3 years' imprisonment which shall be suspended for a period of 3 years. The sentence of 3 years' imprisonment herein shall not take effect unless, during the period of 3 years from the date sentence is pronounced, the defendant commits another offence punishable with imprisonment and thereafter a court having power to do so orders that the original sentence shall take effect with or without variation of its terms.
- (2) As a condition to the imposition of a suspended sentence, the defendant shall engage in counseling to curb his antisocial tendencies and anger

management issues for a period of 2 years to be supervised by a Probation Officer of the Ministry of Social Development.

Shawn Innocent
High Court Judge

By the Court

Registrar