

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

IN THE HIGH COURT OF JUSTICE

NEVHCR2023/0009

BETWEEN:

Director of Public Prosecutions

v

Lawrence Herbert

Appearances: Mr. Teshawn Vasquez and Ms. Megan Nisbett for the Director of Public Prosecutions
Ms. Sandra Hector for the Defendant

2024: March 8

SENTENCING

- [1] **THOMPSON J JR:** On November 3rd, 2023, the DPP filed an indictment alleging that the Defendant had attempted to murder Jerusha Shiwamber. An alternative count in that indictment alleged that the Defendant had wounded the same Jerusha Shiwamber with intent. In other words, the prosecution alleged that there was one incident of domestic violence where the Defendant had either tried to kill Ms. Shiwamber or had caused her serious harm and wounded her. It was thus open to the jurors to convict the Defendant of one or the other but not both offences.
- [2] On December 11, 2023, the Defendant sought a sentence indication from this court. Crucially, the indication was sought only in relation to the count of wounding. The unspoken thought was that if the court's indication was acceptable to the Defendant on the wounding charge, the Defendant would have accepted it and the prosecution would have thus withdrawn the count of attempted murder and the Defendant would have been sentenced for wounding Ms. Shiwamber.
- [3] The maximum penalty for attempted murder is 25 years imprisonment. The maximum penalty for wounding with intent is 20 years. Even without this statutory anomaly¹, attempted murder is usually treated as a more serious offence than wounding with intent so that any penalty imposed for

¹ The 1861 Offences Against the Person Act provides for maximum penalties of life imprisonment for attempted murder and wounding with intent. The legislation in St Kitts and Nevis is still called the Offences Against the Person Act and is largely similar to its colonial predecessors, save that the penalties are significantly reduced.

wounding is likely to be less than imposed for attempted murder, even where they share the same maximum penalties.

- [4] At the sentence indication hearing for the wounding count, this court indicated that if Mr. Herbert had pled guilty, any sentence imposed on him would not exceed 8 years. The indication process thus sets a ceiling but not a floor for the sentence that a court may ultimately land on and thus encourages defendants and their counsel to consider their options. The indication was open for acceptance and the Defendant was given until December 14, 2023 to indicate whether he would accept it. For reasons known only to the Defendant and his lawyer, this court's indication was rejected and the matter thus proceeded to trial with the attempted murder charge as the primary count and the wounding charge in the alternative.
- [5] At trial, the Defendant gave evidence in his defence. It was his evidence that he was under attack by Ms. Shiwamber and her teenaged son and that he pulled a knife and waved it around. According to him, the knife connected with Jerusha but he couldn't remember how many times it connected or where it connected.
- [6] This evidence was to be contrasted with the prosecution's case that the Defendant was the aggressor and had attacked Ms. Shiwamber with a knife and managed to inflict 13 wounds on her body. Dr. Rawlins testified that all of those wounds required stitches so that while he did not count how many stitches were required per wound, assuming that at least 3 stitches per wound were required, Ms. Shiwamber needed at least 39 stitches, if not more. There was no dispute that Ms. Shiwamber was hospitalized for 3 days after the incident.
- [7] Mr. Herbert's case at trial, such as it was, was rejected by the unanimous verdict of the jurors. The evidence at trial demonstrated that Ms. Shiwamber's teenaged son sustained no cuts in this incident. All of the Defendant's attempts to wave around the knife connected with the body of Ms. Shiwamber. Dr. Rawlins's evidence at trial was that Ms. Shiwamber's injuries were not individually serious, in terms of their depth or extent but that the cumulative effect of the 13 wounds means that she was in a serious condition in view of the multiplicity of wounds.
- [8] The Defendant's case at trial was that Ms. Shiwamber's teenaged son, had emerged with a cutlass while he (the Defendant) and his mother were arguing and struck him repeatedly with a cutlass. It was the Defendant's evidence that Ms. Shiwamber had struck him repeatedly with a mirror in his head. Ms. Shiwamber accepted that she had struck the Defendant in the head with mirror but that was only to stop him from choking her, after which he pulled out his knife and stabbed her. The mirror appeared to be a small one and broke early in the fracas.
- [9] The DPP's case was that the Defendant came home and an argument ensued between himself and Ms. Shiwamber because according to him, he came home and realized that while food had been cooked earlier that day, none had been left for him. The plates were thus clean and it appeared that Angie (Ms. Shiwamber's friend), Ms. Shiwamber, her son and her young daughter had all eaten. According to Ms. Shiwamber, the Defendant told her that he had come ready for her, had nothing to live for and was going to make a lot of people cry for her and began choking her. She then struck him with a mirror while he was choking her and he then pulled a knife and stabbed her repeatedly. During the stabbing, her son heard the commotion, grabbed a cutlass and either threatened to hit or did hit the Defendant in order to stop him from continuing to attack his mother. The medical evidence

called at trial confirmed that the Defendant had a swelling to his head and small abrasions to his hands.

- [10] The jurors by their unanimous verdict are taken to have rejected the Defendant's case of an assault by Ms. Shiwamber and her son. Self defence, such as it was, was thus rejected and the defendant was found guilty of attempted murder at the conclusion of his trial on January 26, 2024.
- [11] There are not yet any Eastern Caribbean Supreme Court ("ECSC") guidelines for attempted murder. Counsel were agreed that the UK Guideline for attempted murder provides useful guidance to this court on how the sentence to be served by the Defendant should be constructed. This court reminds itself that the UK maximum penalty for attempted murder is life imprisonment while the maximum in the Federation is 25 years imprisonment so that the UK Guideline must be adapted with this difference being borne in mind. For this reason, this court, with the concurrence of counsel used the ECSC Violence Offences Guideline in order to determine the relevant starting point.
- [12] Ms. Nisbett for the DPP argued that the Defendant's offending fell squarely within Category 2 – High, Level A, on the Violence Guideline which meant that after consulting the relevant grid the starting point for the Defendant's offending was 15 years imprisonment with a range of 11 ¼ years imprisonment to 18 ¾ years imprisonment. Ms. Hector for the Defendant agreed that while the Defendant's use of a weapon justified a Level A placement on the grid, it was her submission that the impact of her client's offending on the victims fell into the lesser category and thus required and 11 ¼ starting point.
- [13] It was Ms. Hector's submission that the medical report tendered at sentencing in relation to Ms. Shiwamber did not disclose any long-term impact since that report indicated that Ms. Shiwamber's prognosis was good in relation to the injury to her left ring finger. Ms. Hector's submission pointedly ignored the fact that this medical report was directed to the left ring finger injury only and paid scant regard to the victim impact statements from Ms. Shiwamber, her teenaged son and 7 year old daughter who all had ringside seats when the Defendant inflicted these injuries. Furthermore, Ms. Hector boldly submitted that this court should only consider what Ms. Shiwamber's 7 year old daughter said to the social workers in their social inquiry report and disregard what Ms. Shiwamber had to say about the impact of the offence on her daughter.
- [14] In this court's view, this was a startlingly proposition, particularly since no justifiable reason was advanced for ignoring what a mother had observed about her own child in relation to the impact of the Defendant's offending on her own child. Even without the victim impact statements from Ms. Shiwamber's children, Ms. Shiwamber's victim impact statement established the nature of the physical and psychological impact of the Defendant's offending upon her.
- [15] Therefore, this court had little difficulty in roundly rejecting Ms. Hector's submissions on this issue and fully took into account what was attributed to Ms. Shiwamber's children. In Ms. Shiwamber's view, her daughter was 'like a police officer' and refused to leave her side and gets nightmares every time she sees the Defendant. Her son was angry all the time and refused to go to counseling or talk to anyone about how he feels about what the Defendant did to his mother. A finding of lesser culpability or harm on the part of the Defendant would in those circumstances have been absurd.

[16] All the same, adjusting for the difference in maximum penalty between the United Kingdom and ECSC jurisdiction means that a sentencing range of 10 to 17 years with a starting point of 12 years imprisonment was warranted.

[17] Both Ms. Hector and Ms. Nisbett agreed that the following factors aggravated the Defendant's offending:

- a. That the offence was committed in a domestic context
- b. That the offence was committed in the presence of others (to wit Ms. Shiwamber's then 5 year old daughter and friend)
- c. That the offence was in breach of the trust implicit in intimate partner relationship (see the reasoning of Floyd J in *R v Denville Clarke* at paragraph 21 on this issue).

[18] Ms. Nisbett for the DPP argued that a further aggravating factor was the fact that there was a history of domestic violence by the Defendant on Ms. Shiwamber. Ms. Hector trenchantly sought to dissuade this court from adopting this reasoning. In her view, the previous incident of domestic violence also included violence from Ms. Shiwamber on her client. Ms. Nisbett countered that any such violence was in response to the Defendant's assault on Ms. Shiwamber and that in any event, Ms. Shiwamber was the one who had made a report to the police in relation to this previous incident.

[19] Ms. Hector's submissions tacitly accepted that there was violence between the parties and that in her view the *'tumultuous nature of their relationship should be considered in the round'* in assessing the Defendant's criminality. In this court's view, domestic violence is a pox on our societies. It is rooted in a patriarchal view of how domestic affairs ought to be managed. That attitude has contributed in no small measure to the levels of intimate partner violence (predominantly, but not exclusively, male on female) in our societies.

[20] Physical violence, much less, violence involving weapons is contrary to all established norms and expectations of intimate relationships. Such violence is also at odds with the fundamental respect for the dignity of the person and bodily autonomy which is at the heart of all human relationships. In simple terms, persons in intimate relationships are entitled to have their partners fully respect and not injure their bodies by their words or deeds.

[21] Moreover, the social inquiry report revealed that since Ms. Shiwamber was a hairdresser, the Defendant was the breadwinner and shouldered the lion's share of the financial burden of the household. It was not clear whether the Defendant lived with Ms. Shiwamber but it is clear from the social inquiry report that he felt aggrieved that Ms. Shiwamber in failing to ensure that food was left for him was a source of some irritation for him. The Defendant's account to the social worker occupied 5 pages and was essentially a retread of his case at trial and repeated the statement that he had made sacrifices for Ms. Shiwamber and her children and that *'all he asked for in return was some food when he got home from work'*.

[22] The violence visited upon Ms. Shiwamber in view of the Defendant's request for a meal after work is startling and confirms that our societies have a long way to go towards restructuring, much less, eliminating such patriarchal notions. It goes without saying that the Defendant's greater financial resources do not allow him to wield that power to Ms. Shiwamber's disadvantage.

[23] Ms. Nisbett in her written submission listed a veritable cornucopia of aggravating factors in addition to the ones cited at paragraph 17 above. None of these additional factors were made out so that there was no room for any argument that the Defendant's offending was aggravated by the following:

- (i) Blame being wrongly placed on others.
- (ii) Location of the offence
- (iii) Significant degradation or humiliation
- (iv) Unprovoked nature of the attack and
- (v) The Defendant's intention.

[24] In this Court's view, these matters were either subsumed under other aggravating factors, did not properly arise or were implicit in matters which the DPP had to prove at the Defendant's trial. This court was satisfied that the Defendant's offending was aggravated by the factors enumerated at paragraph 17 together with the history of domestic violence in the course of the relationship.

[25] This Court is mindful of the need to avoid double counting and is satisfied that the domestic context and breach of trust factors can be subsumed into one aggravating factor. There are thus 3 aggravating factors proved against the Defendant which requires an upward movement from the starting point.

[26] The offence is mitigated by the defendant's previous good character. It is accepted that weight to be attached to previous good character as a mitigating factor depends on the gravity of the offence in question. See the reasoning of Chief Justice Bryon at paragraph 29 of the decision in Desmond Baptiste v R. For what it is worth, Chief Justice Byron prayed in aid the reasoning of Chief Justice Lane in Turner v R that "the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration when the Court is dealing with cases of this gravity".

[27] All the same, this court is struck by the fact that all of the Defendant's collateral contacts were surprised to learn of this offence. This court takes with a proverbial grain of salt the observations of the Defendant's relatives on his lack of propensity to violence since those relatives appear to have been aware of the tumultuous nature of his relationship² with Ms. Shiwamber. In view of this court's finding that at least one previous domestic violence incident had occurred it is hard to see how they can argue that he did not have a propensity for violence.

[28] Interestingly enough, the Defendant's brother was bold enough to tell the social workers that 'he told Odessa to consider dropping the charges and let them work out things and make whatever compensation'. Whether any further criminal proceedings are contemplated is a matter for the DPP but the suggestion that the pain of domestic violence or any criminality can be assuaged by dollars is repugnant to the interests of justice. It is also striking how the Defendant's brother detailed and underscored the financial support that his brother provided to Ms. Shiwamber. There is an appalling lack of insight into any pain that Ms. Shiwamber has suffered and suggests that the Defendant was not dissuaded from his penchant for violence.

² See page 9 of the social inquiry report

- [29] Nevertheless, the Defendant is entitled to credit for his lack of previous convictions as a mitigating factor of the offender and this court weighs this factor in the balance against the 3 aggravating factors enumerated above in arriving at its sentence in this matter.
- [30] Ms. Hector's written submissions had argued for a suspended sentence with compensation as a just punishment for her client. To her credit, she did not press this argument upon the court in her oral arguments and with good reason, since her own analysis of the ECSC guideline mandated a starting point of 11 ¼ years imprisonment. Quite how Ms. Hector hoped to persuade this court that it should arrive at suspended sentence³ for the greater offence of attempted murder when its indication for the lesser wounding charge was one of 8 years imprisonment was chalked up to her unbridled fervor for her client's cause.
- [31] There were no mitigating factors of the offence. There were faint arguments that perhaps the Defendant's offending could be explained by excessive self defence or that the Defendant was significantly provoked since there was a suggestion (not proven) that Ms. Shiwamber had been unfaithful to the Defendant.
- [32] These faint arguments are easily dispensed with. The evidence at trial was that the Defendant told Ms. Shiwamber that he had come prepared for her, had nothing to live for and would make a lot of people cry for her. This clearly put an end to any lack of premeditation arguments. The evidence of unfaithfulness came from the statement of Ms. Shiwamber's uncle. That statement is startling in view of how it sought to endorse the patriarchal ideas held by the Defendant and paint Ms. Shiwamber in a bad light.
- [33] In this court's view, even if all of her uncle's allegations were true (they were not accepted by Ms. Shiwamber), none of those matters could justify or excuse the Defendant's infliction of 13 wounds on Ms. Shiwamber's body. This Court was hard pressed to see how any of these matters were of assistance in determining Mr. Herbert's culpability. There was no evidence that any of these unproven allegations were proximate in time to the Defendant's violent attack on Ms. Shiwamber. Moreover, the multiplicity of wounds could not amount to excessive self defence. There were thus no mitigating factors of the Defendant's offending. The suggestion that the Defendant may have felt humiliated could not excuse, justify or explain the use of repeated violence on a woman, armed with a small mirror.
- [34] This court reminds itself of the reasoning of Justice Appeal Barrow in *Dwight Dookie v R* that any sentence imposed should be the shortest possible sentence that meets the objectives of sentencing.
- [35] The case of *R v Vernon Paddy* was cited in argument before this Court and was of useful guidance to the court on the sentence to be imposed on the Defendant. Mr. Paddy had pled guilty to causing grievous bodily harm after he had assaulted his wife with a hammer and inflicted injuries (but not broken bones) on her body. A sentence of 8 years imprisonment was imposed upon him. In this court's view, an analysis of the aggravating and mitigating factors confirms that a sentence of 12 years imprisonment is entirely appropriate for this Defendant.

³ Suspended sentences are where a court is minded to impose a sentence of no more than 3 years imprisonment.

[36] In this court's view, the Defendant's offending falls at the upper end of a bad wounding case as opposed to the middle level of an attempted murder case. The use of the ECSC Violence Guideline was thus useful in establishing the starting point.

[37] The Crown sought compensation as an ancillary sentencing order but failed to supply this court with any medical or other receipts in order to make good its request for compensation. In the absence of such documents, this court was loathe to pluck a figure from the air and award it as compensation to Ms. Shiwamber. This finding does not preclude her from pursuing any civil remedies open to her but those are matters for her.

[38] Finally, Justice Floyd in R v Denville Clarke, consistent with ideas expressed by Justice Hariprashad Charles (as she then was) in R v Vernon Paddy (paragraph 47) and Chief Justice Byron in Beazer and Stevens v R (paragraph 11) all confirm that domestic violence is a blight on our societies. Additionally, Justice Floyd was compelled to indicate that

"In the case of assaults by a man against his wife or other female partner in life, two of the applicable principles are that the sentence should be shaped in the hope of furthering the rehabilitation of that man and in the hope of deterring him from repeating his conduct in the future. However, the more important principles are that the sentence should be such as to deter other men from similarly conducting themselves toward women who are their wives or partners (what is called the principle of "general deterrence"), and that the sentence should express the community's wish to repudiate such conduct in a society that values the dignity of the individual (the "denunciation principle")."

[39] Sentencing required a balancing of all the penological objectives – punishment, denunciation, deterrence (specific and general), prevention, and rehabilitation. Those objectives are met by a sentence of 12 years imprisonment from January 26, 2024. For the avoidance of doubt, the time spent on remand by the Defendant before he was admitted to bail was credited towards his sentence.

[40] The objectives of sentencing are also met by the following orders:

- (i) During the course of his sentence the Defendant is ordered to undergo a course of cognitive behavioral therapy with an emphasis on empathy building.
- (ii) The Defendant is also ordered to enroll, participate and complete any and all such domestic violence or gender based violence programs as are put on at HM Prison in St Christopher during the currency of his sentence.
- (iii) Should the Defendant be deemed eligible during the course of his sentence he should also participate in the Yes to Success and any other analogous programs at HM Prison during the currency of sentence. These programs include any programs which would allow the Defendant to share any insights gleaned into his offending with the general public during the currency of his sentence.

[41] The recently deceased American athlete, movie star and civil rights activist, Jim Brown⁴ put it best when he said:

“There is no excuse for violence. There is never a justification for anyone to impose themselves on someone else. And it will always be incorrect when it comes to a man and a woman, regardless of what might have happened. You need to be man enough to take the blow. That is always the best way. Do not put your hands on a woman.”

**Patrick Thompson Jr.
High Court Judge**

BY THE COURT

REGISTRAR

⁴ Jim Brown died on May 18, 2023 and was arrested on at least 7 occasions for assault, mostly against women. The preceding quote was in a Sports Illustrated article from 2015 when he had clearly seen the error of his younger days.