

IN THE EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

A.D. 2023

IN THE HIGH COURT OF JUSTICE

Case No.: NEVCR2023/0004

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

V

KEON MOORE

Appearances:

Ms. Megan Nisbett for the Director of Public Prosecutions

Mrs. Natasha Grey-Brookes and Mr. Hasani McDonald for the Defendant

2024: May 3, 24

SENTENCING

[1] **THOMPSON JR J:** On March 13, 2024, a unanimous jury found that Keon Moore (“the Defendant”) had attempted to murder Mr. X and had possessed a firearm with intent to endanger the life of Ms. Y.

Factual Background:

[2] August 18, 2020 was a Tuesday. The covid-19 pandemic was raging through the world and mask wearing was a mandatory feature of almost all societies. According to the World Health Organization, the number of persons who are estimated to have lost their lives from Covid-19 in that week was approximately

38,088. The jurors were satisfied that the Defendant attempted to add at least one, if not two more souls to that global tally.

- [3] Mr. X and Ms. Y (“the victims”) were on their way to work that morning. They walked on the pasture behind Arlene’s shop and emerged onto a road behind the Alexandra Hospital.
- [4] As they emerged onto that road they noticed a greyish-bluish car parked in the corner of the road on their right as they emerged from the track. They continued on their journey. One of the victims had a bag containing breadfruits in his hands and they were walking on opposite sides of the road, heading towards Charlestown.
- [5] According to Mr. X, something told him to look back and it was at this point that he saw two men dressed in black running towards him. One of those men had a gun in his hands and wore a green mask which was tied below his nose. That man wore a black stocking which covered his plaits but Mr. X was able to observe the eyes and nose and forehead of the man and identified that man as the Defendant.
- [6] Mr. X said that as the Defendant came closer he (X) began to say ‘is not me’, ‘is not me’ and run in a zig zag pattern away from the Defendant who then began shooting at him. It was his evidence that the Defendant paused when he said ‘is not me’ and this pause allowed him to further observe the Defendant as one of his assailants that day.
- [7] Mr. X then ran down the street and while running he felt a bullet hit his left arm, he then fell down. He had the presence of mind to remain on the ground and played dead and noticed that the Defendant who was walking closer to him turned around when he noticed he had fallen and was heading back to the car.
- [8] Mr. X then took off running, ran into a neighbouring house then over the back fence of the hospital where he was treated for the injury to his left hand. Save for that injury none of the other shots fired at him that morning connected with his body.
- [9] Ms. Y’s evidence was that she heard a tapping or flapping sound while walking down the road that morning and noticed two men running down the same side of her road as her boyfriend. The first man was roughly four feet away from her when he began shooting at her boyfriend. She too recognized that this man was dressed in black with a green mask below his nose and knew the man to be the Defendant.
- [10] According to her, both she and Defendant had grown up in the village of Craddock Road and that he lived 5 minutes’ walk, down the road from her childhood home. Additionally, they attended the same primary and secondary school in Charlestown and she knew his mother, sisters and late father. They were not in the same class but she detailed how often she would see the Defendant throughout her childhood. For what it is worth, Mr. X also attended the same school as the Defendant but he (X) was always in a higher class than the Defendant.
- [11] She therefore had a ringside seat to the Defendant’s persistent attempt to kill her boyfriend. According to her, after the Defendant had shot at her boyfriend he then pointed his gun at her and she heard a clicking sound but nothing came out. For reasons that were not fully explained at trial, this action did not suffice to justify a count of attempted murder but sufficed for proof that the Defendant had possessed a firearm intending to endanger the life of Ms. Y.

- [12] Ms. Y then took off running and the CCTV footage obtained from cameras on the FLOW building in the area showed two individuals running post haste down the road with a silverish vehicle following behind. The Crown's case at trial rose and fell on whether the jurors believed the evidence of the victims as the CCTV footage could not determine the identity of the occupants of the car.
- [13] The Defendant did not dispute knowing his intended victims but argues that they were mistaken when they identified him as the shooter. It was his case that he could not have been the shooter as he was at work¹ at the Hamilton area on the Peace Programme.
- [14] The Defendant did not give evidence but called two alibi witnesses in support of his case at trial. The first alibi witness, a Mr. Devon Parris testified that the Defendant was at work at the Hamilton area at 7 am that morning when he (Parris) got to work and did not leave the work site at any time that morning.
- [15] The second alibi witness was a Mr. Marcel Mills who could not recall the exact date but testified that he recalled hearing of the shooting incident and said that he met the Defendant at 'after 8' that morning when he reported for work at the Hamilton area that day. He too, testified that the Defendant did not leave their work area that morning.
- [16] Counsel on all sides were agreed that a visit to the various loci in the case would be of some assistance to the jurors. The area of the shooting was thus pointed out, together with the location of the various cameras and the work area at Hamilton Estate. In this court's view, the distance between the shooting and the work area was no more than 5 minutes' drive (in a coaster bus) from each other.
- [17] Counsel for the prosecution successfully applied to this Court to tender in evidence an extract from the interview of a Mr. Shakel Campbell as rebuttal evidence of the evidence of Mr. Parris and Mr. Mills. Their evidence was that Mr. Campbell owned a silverish/bluish car and together with the Defendant was one of the supervisors of their work on the Peace Program. It was their evidence that they both met Mr. Campbell and the Defendant at work that day.
- [18] In the extract of the interview, Mr. Campbell told the police that on the morning of the shooting he was awakened by a phone call from a Pastor Maynard at between 7:40 and 7:50 am that morning. He (Campbell) then left his home in Craddock Road with his mother and took her to work at Oualie Beach Resort that morning and then came back to Craddock Road at around 8:35 or 8:40 am to collect his weeding machine, rake and gas bottle before he headed to work at Hamilton Estate.
- [19] The Crown's argument was that Campbell's interview was manifestly at odds with the evidence of Mr. Parris and Mr. Mills on this issue. Additionally, Mr. Campbell's car was seen on the CCTV footage traveling up Government Road (a parallel road, in close proximity to the shooting) at time when both Mr. Mills and Mr. Parris said that Mr. Campbell's car was parked at Hamilton and Campbell and the Defendant were at work.

¹ The evidence at trial indicated that the Defendant and his co-workers would set their own hours and determine whether they had done enough work for each given day. It does not appear that anyone told them what to do or how to do it. Public funds were disbursed to them for this 'work' which in other countries are known as de-bushing or roadside maintenance.

[20] The jurors, by their unanimous verdict, accepted the evidence of the victims. At best, this meant that the jurors were satisfied that Mr. Mills and Mr. Parris were mistaken, if not lying about the Defendant's whereabouts on the morning of the shooting.

Relevant Law:

[21] The maximum penalty for attempted murder is 25 years imprisonment. This court does not propose to repeat its remarks in the DPP v Ervin Allen on the maximum penalty for attempted murder. Suffice it to say that Mr. Vasquez for the Crown agreed that the maximum penalty was anomalous and indicated that his office had made representations for reform but to date these representations had not yet landed on fertile soil.

[22] Insofar as the maximum penalty for possession of a firearm with intent to endanger life, this Court can do no better than to echo the reasoning of Mr. Justice Morley in DPP v Cuthbert Wilkes that:

*"This legislation is flawed and requires amendment. The offence has no maximum and mandates a minimum sentence of 14 years, when minimum sentences have been abolished by the **Abolition of Minimum Punishments Act** cap 4.01. Between Counsel it has been agreed and urged the fairest approach would be to treat the minimum as the maximum rather than as at large, and so the maximum here will be treated as 14 years."*

[23] Quite why the legislation has not yet been amended, particularly where there has been a number of firearm murders since Justice Morley's ruling is a mystery. This court does not presume to speak for the legislature but everyone agrees that legislative reforms to the criminal justice system are urgent. Until Parliament decides to act this Court is compelled to adopt the approach of Mr. Justice Morley and treat the mandatory minimum of 14 years as a maximum penalty of 14 years imprisonment. All counsel are agreed that the court should adopt this approach.

[24] The UK Guideline provides that the use of a firearm or explosive to commit attempted murder attracts a finding of very high culpability of their Guideline. It is difficult to see how any lesser finding of culpability could be applied to the facts of this case. Everyone agrees that the sentence imposed for the possession of a firearm with intent to endanger life offence should be expressed to run concurrently with the sentence for attempted murder as the arose out of the same incident.

[25] Everyone agreed that there is no ECSC Guideline on attempted murder and that this court was empowered to rely on the ECSC Guideline for Violence Offences and the UK attempted murder guideline to characterize the Defendant's offending.

[26] This court is satisfied that the Defendant's offending falls into the very high culpability bracket of the UK Guideline as the offence involved the use of a firearm. Fortunately for all concerned the harm caused was not more serious. That is to say, Mr. X sustained an injury to his arm and no other physical injuries in spite of the several bullets that were discharged in his direction.

[27] All the same, Mr. X and Ms. Y have detailed the significant loss and dislocation that they have suffered from their placement in the witness protection program. They did not ask to be the victims of any crimes and were simply proceeding to work as thousands of persons do every day when they were attacked. The impact of that attack has led to real and lasting consequences for their life. Neither of them are able

to enjoy the company of their family and friends. They cannot pursue any activities they used to pursue in Nevis.

- [28] Ms. Y subsists on a stipend from the witness protection program that is less than what she earned from her employment. She has lost weight and her movements are restricted as result of her involvement in the program. Ms. Y is aged 26 and has suffered immensely and seeks compensation from the Defendant.
- [29] Mr. X's stipend from the witness protection program is also less than what he earned before this incident. His social life and activities have been wholly curtailed and had difficulty meeting his medical and other expenses in view of the diminution in his earnings. He too seeks compensation for the suffering he has experienced as a result of this offence.
- [30] In *R v Klevoo (Godwin Cocu)* (2013) [2013] EWCA Crim 2219, the Court of Appeal noted that the sentencing judge had taken into account the fact that the victim in that matter had gone into the witness protection scheme. Victim personal statements from the victim and her father detailed the serious impact of Mr. Klevoo's offending on their lives such that the victim never returned to her parents' home and is presumably still in the witness protection scheme.
- [31] This court is satisfied that the harm caused by the Defendant's offending is serious. The lack of physical injuries must be juxtaposed against the fact that both of the victims have spent the past 4 years in the witness protection programme. They are likely to spend the rest of their natural lives looking over their shoulders and in fear because of this experience. This Court is thus entitled to take these matters into account and is thus satisfied that the Defendant's offending caused serious harm, giving the word harm a purposive construction, to the victims.
- [32] Serious harm and very high culpability on the UK attempted murder guideline lead to a starting point of 25 years custody with a sentencing range of 20-30 years imprisonment. The UK penalty for attempted murder is life imprisonment and therefore their starting points could not apply as their starting point was the maximum penalty in St Christopher and Nevis. It is trite law that the maximum penalty is not the starting point and for this reason all counsel concurred with the Court that it was appropriate to transpose the ECSC Violence Guideline in order to fashion the starting point.
- [33] Therefore, on the ECSC's Violence Guideline, the Defendant's offending would fall into the Level A – Seriousness category and Consequence, Category 2 on the Guideline. This would mean a starting point of 60% of the maximum sentence with a sentencing range of 45% to 75% of the maximum sentence. In mathematical terms, this meant a starting point of 15 years imprisonment with a sentencing range of 11 $\frac{1}{4}$ years to 18 $\frac{3}{4}$ years.
- [34] All counsel agreed that a 15 year starting point was appropriate. The next step was to assess the aggravating and mitigating factors of the Defendant's offending.
- [35] The Crown have argued that the fact that the firearm was not recovered is an aggravating factor. Mr. Moore's lawyers argued that the fact that the firearm was not recovered does not aggravate his offending and they pray in the aid the finding of Madam Justice Byer in *R v Kenyatta Boynes* that the fact the firearm was not recovered did not aggravate Mr. Boynes' offending. On the other hand, Mr. Moore's lawyers have also placed reliance on the sentencing judgment of Justice Byer in *R v Sherman Williams and Jevone Demming* for another point.

[36] All the same, at paragraph 123 of her judgment in R v Williams and Demming, Justice Byer expressly held:

“If we are therefore to use the considerations as stated in the R v Avis case it is clear that the answers that were given in the affirmative to the questions amount to and are the aggravating circumstances in this instant case. The Defendant Williams’ used a real loaded firearm and the fact that it has not been recovered is of no moment and in fact even an additional aggravating factor as it can potentially be used to perpetrate other crimes. Additionally, the fact that it was used to commit another indictable offence, attempted murder and used to bring fear not only to the Complainant but to others in the public place where it was discharged are all indicators of weighty aggravating matters.”

[37] Clearly Justice Byer was of the view in Williams and Demming that the failure to recover a firearm and its potential for harm to others aggravates a defendant’s offending. Moreover, Justice Ann Marie Smith in R v Nickhail Chambers and most recently in R v Corey Mills found that the non-recovery of a firearm is an aggravating factor. In this Court’s view, the weight of judicial authority (Boynes aside) suggests that the non-recovery of a firearm is an aggravating factor and this court comes to this finding for the following reasons.

[38] Firstly, the UK guideline on possession of a firearm with intent to endanger life indicates that an attempt to conceal or dispose of the firearm is an aggravating factor. For what it is worth the UK guideline on attempted murder provides that actions after the event (including but not limited to attempts to cover up/conceal evidence) would operate as an aggravating factor. Clearly if attempting, which presumes a lack of success, to dispose of a firearm is an aggravating factor then successfully ensuring that the firearm is not recovered must of necessity aggravate the offence.

[39] Secondly, the UK guideline provides that the voluntary surrender of the firearm and/or any ammunition is a mitigating factor. If the firearm is not recovered then the offence is by its nature more serious and thus aggravated. Thirdly, there is no evidence that the Defendant has ever lawfully possessed a firearm and thus it is presumed that the firearm that was used was an illegal one.

[40] Therefore, this court would be remiss in its duty if it were to fail to assess and give sufficient regard to the fact that another illegal firearm remains at large in the Federation.

[41] Guns kill. They are tools and if they are in the wrong hands they can cause untold harm and impose suffering on families. The fact that the firearm was never recovered must therefore operate as an aggravating factor.

[42] The Defendant’s offending is also aggravated by the fact that others were put at risk by the bullets that were discharged in the direction of Mr. X by the Defendant that morning. Defence counsel argued that since the construction workers at the hospital were not directly in the Defendant’s firing line, there was no real risk of harm to others.

[43] This argument belied the fact that the court and the jurors decamped to the locus in the course of the trial. There was no dispute that the bullets were discharged in the direction of Mr. X who was facing a busy 4 way crossroads with residences on three sides of that crossroads. In this court’s view, there was a real risk that any of the bullets which Mr. X was able to successfully dodge could have easily gone on

to harm any pedestrians or drivers or homeowners in the immediate vicinity of the shooting. It is accepted that the back of the Alexandra Hospital is not a public place but there can be no gainsaying the appreciable risk of harm to the general public from the indiscriminate firing of a weapon. The Defendant's offending is thus aggravated by this factor as well.

[44] The Defendant had no previous convictions for any offence and this mitigating factor is to his credit. The social inquiry report confirmed that the Defendant had formed a friendship with the son of his neighbour who has mental health challenges. This bond meant that the Defendant would visit and spend time with the neighbour's son. In this Court's view, this evidence went beyond establishing that the Defendant had no previous convictions but was clear evidence of positive good character. In this Court's view, the Defendant should have credit for this fact as an additional mitigating factor for the following reason.

[45] The UK sentencing guidelines confirms that no previous convictions and positive good character² are separate mitigating factors. To their credit, the UK Guideline recognizes that positive good character is less likely to be relevant when the offence is very serious or where positive good character has been used to facilitate or conceal the offending. Neither of these caveats apply to this Defendant. His offending is serious but not so serious that his positive good character should not apply to his credit.

[46] The Crown doubted the Defendant's bona fides in relation to the relationship with his neighbour's son and argued that he should not have credit for this fact. The Crown could not articulate the basis for their skepticism and faintly suggested that the relationship was a self-serving one for the purpose of making the Defendant look 'better' in the eyes of the Court. This argument was a curious one since it suggested that the Defendant somehow knew that the court would take this relationship into account. This Court had no choice but to roundly reject the Crown's arguments in this regard. Crown men do not ordinarily form friendships with children with special needs. There are only two real inferences to be drawn from that relationship, and without any evidence of any devious or nefarious intent on the part of the Defendant this Court gives the Defendant full credit for the fact of his positive good character.

[47] There was no issue of genuine remorse or youth or immaturity explaining the Defendant's offending and as such the 2 aggravating factors were cancelled out by the fact of 2 mitigating factors. Therefore, this Court was squarely back at its 15 year starting point. The Defendant was convicted after a trial so there was no issue of a discount for his guilty plea.

[48] In the course of the sentencing hearing, the Defendant indicated that he might have the means to pay some compensation to Mr. X and Ms. Y. The sentencing hearing was thus adjourned to allow the Crown to file and serve the evidence in support of the victims request for compensation. 2 or 3 days before the final hearing date, threadbare statements from the victims were lodged with the court. These statements contained no supporting receipts or details and essentially repeated the request for compensation.

[49] In this court's view, this was a deplorable state of affairs. The victims could not be expected to know what evidence the court was seeking. The police officer who took their further statements could not know

² Another example of positive good character is at paragraph 26 of their judgment in Collins [2018] EWCA Crim 113 the Court of Appeal found that some evidence of positive good character lay in the fact that Mr. Collins assisted a local couple who describe themselves as not in the first flush of youth by doing all their gardening and many household jobs and where Mr. Collins also had a strong record in raising money for charity.

what evidence a court would need. Compensation and the evidence in support of it are self-evidently matters of law which only a lawyer could properly assess. A request for compensation requires crown counsel, not the police, to liaise with the victims and determine what they were seeking and what information they required in order to make a case for compensation. In the absence of that evidence, there was no basis which this court could use to arrive at compensation to the victims.

[50] All the same, the dilemma faced by Mr. X and Ms. Y is a real one. Even at the best of times, members of the general public are unwilling to come forward to give evidence to the Police. If the public were to learn that the witness protection program is likely to reduce your quality of life in the way complained of by Mr. X and Ms. Y then even less persons will opt for that course. It goes without saying, that less witnesses will mean less prosecutions for serious criminality. Regional governments are thus obliged to take a hard look at their witness protection programs in order to mitigate this harm or accept the further detrimental consequences on the criminal justice system.

[51] All counsel were agreed that the Defendant had spent 10 months and 8 days on remand for this offence. This time was thus rounded upwards to 12 months such that the sentence to be served by the Defendant is 14 years imprisonment from today's date.

[52] In simple terms, this court proposes to test the fairness of its sentence in this way. This court was required to sentence Lawrence Herbert and Ervin Allen for the offences of attempted murder, after a trial, during the Assizes. Lawrence Herbert received 12 years for attempting to kill his partner with a knife. Ervin Allen received 18 years for attempting to kill two persons with a firearm. In this court's view the sentence to be served by this must fall somewhere on that continuum. Less than Allen certainly but more than Herbert since the offence of attempted murder involved two separate incidents, but one shooting with an illegal firearm.

[53] Insofar as the offence of possession of a firearm with intent to endanger life was concerned, the ECSC Firearms Guideline applied. The Defendant's offending thus falls into Category 1 and Level A Seriousness on the ECSC Firearms Guideline. The relevant starting point would thus be 75 % of 14 years with a sentencing range of 60% to 90% of the 14 year maximum sentence. 10 ½ years was thus the starting point with a range of 8.4 years to 12.6 years.

[54] Giving credit for the 12 months on remand for this offence and weighing up the aggravating and mitigating factors confirms that a sentence of 9 years imprisonment on this offence is reasonable and the Defendant is ordered to serve a sentence of 9 years imprisonment concurrent with the 14 year sentence of imprisonment on the attempted murder charge.

[55] Finally, this court notes that when the allocutus was put to the Defendant he indicated that he sought leniency and that his sentencing hearing fell on the same day of his son's 4th birthday. Critically, the Defendant briefly indicated that he was 'sorry for what had taken place'³ which begged the question of why we had a trial in the first place. The Defendant's remarks confirm that the consequences of criminality fall not just on the victims but on the family and friends of the Defendant. It is not lost on this court that the Defendant's son would have been several months old when his father embarked on this attempt to

³ This was at odds with his remarks in the social inquiry report that he was not remorseful and maintained his innocence.

kill Mr. X. Had the Defendant spared a thought for his newborn son then he is unlikely to have found himself in this predicament.

[56] A sentencing court is performing a dispassionate exercise. The law dictates the sentence that has to be served and the sentence is as above.

Patrick Thompson Jr.
Resident High Court Judge

By the Court

Registrar