

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

CASE NO: ANUHCR 2019/0068

BETWEEN:

THE KING

and

MARLON JOSEPH

Appearances:

Mr. Cedric Dyer, Counsel for the Crown

Mr. Wendell Alexander, Counsel for the Defendant

2022: December 15th;
2023: January 24th

SENTENCING DECISION

- [1] **WILLIAMS, J.:** On Friday 2nd December, 2023 Mr. Marlon Joseph was convicted of wounding with intent to do grievous bodily harm to Mr. Duncan Drew. The offence was contrary to section 20 of the **Offences Against the Person Act**, Cap. 300 of the Laws of Antigua and Barbuda, Revised Edition 1992.
- [2] In Antigua and Barbuda, wounding with intent is described as a felony and “any person... being convicted thereof, shall be liable to be imprisoned for any term not exceeding fifteen years, with or without hard labour.”
- [3] Mr. Joseph was unrepresented at the two-day trial by Judge alone. However, at the sentencing hearing, on the 15th of December 2022, he was represented by counsel, Mr. Wendell Alexander.
- [4] Mr. Alexander urged that the Sentencing Guidelines of the Eastern Caribbean Supreme Court not be followed in the particular circumstances of this case. Counsel pleaded for “mercy” and “leniency” to be extended to his client.
- [5] Mr. Alexander contended that having read the deposition and written judgment in this matter, his client was “ill-advised” in not entering a guilty plea. Counsel felt that if Mr. Joseph “had the benefit of proper representation”, then Mr. Joseph “ought to have taken a particular course in relation to the

indictment.” Counsel was adverting to the alternative Second Count of unlawful wounding that was on the indictment – a charge which carried a maximum sentence of seven years imprisonment.

Mitigation

- [6] At the date of the sentencing hearing, Mr. Joseph had spent nineteen days on remand in relation to this offence – one week following his arrest in 2018, and twelve days post-conviction as he awaited sentencing.
- [7] Mr. Joseph is the father of four children, three of whom he maintains. The other child is a young adult for whom Mr. Joseph is not financially responsible. Mr. Joseph worked in construction in Barbuda. He lived in Potter’s Village with his common law wife, Ms. Janet Wynter, who is a self-employed gardener.
- [8] Mr. Joseph had no previous conviction for any offence.
- [9] Mr. Alexander urged that “a way to depart from the sentencing guidelines” be found. Counsel opined that Mr. Joseph’s conduct in unlawfully and maliciously wounding Mr. Drew was inconsistent with Mr. Joseph’s general and known behavior.
- [10] Counsel called Ms. Wynter, as a character witness. Ms. Wynter described Mr. Joseph as a “loving and sharing person. He loves people. Loves his grandmother. Love his work.”
- [11] Mr. Alexander indicated that his client was sorry for the incident. Mr. Joseph did not testify on his own behalf.
- [12] According to Counsel the Defendant had time to reflect during the almost two-weeks since Mr. Joseph was convicted and remanded to prison.
- [13] Mr. Alexander conceded that the Defendant’s conduct on the night in question was “way out of proportion”.

Victim Impact

- [14] The virtual complainant, Mr. Duncan Drew, in his testimony said that he believes that since being hit with the pool stick in July 2018 that an after effect he has suffered is in relation to his memory: “That hit from the pool stick - my memory has become deficient and I don’t think it is as a consequence of the ageing process. I have always been sharp mentally”.
- [15] Mr. Drew said that as he sat in Court during the trial, he started feeling sorry for Mr. Joseph. “At a point, I began to feel sorry for the Accused [Mr. Joseph]. I found his ignorance in the proceedings astounding and it caused me to feel sorry for him.”

- [16] Counsel, Mr. Alexander, asked Mr. Drew if he would be willing to accept any monetary compensation from Mr. Joseph. Mr. Drew enquired whether such compensation would be in lieu of Mr. Joseph being imprisoned. Mr. Drew stated that he was willing to accept compensation for the injuries that were inflicted upon him.
- [17] Mr. Alexander also asked Mr. Drew if he had a figure in mind. The Virtual Complainant said: "I struggle with this. I will forever look at my face in the mirror and see the disfigurement. It's not just that. It is the loss of memory. How do you compensate for that? \$14,000.00 is a figure that jumps out at me."

Sentencing Guidelines

- [18] The Eastern Caribbean Supreme Court Sentencing Guidelines provides for the imposition of a custodial sentence upon any person convicted of "inflicting unlawful violence with intent to cause really serious harm".
- [19] The First Stage in the construction of a sentence is to establish the starting point for the offence. In order to do this, there must be (i) an assessment of the seriousness of the offence, including culpability of the offender; and (ii) an assessment of its consequences, by reference to the harm caused.
- [20] There are three categories in relation to consequence: Highest, High and Lesser. Given the facts of this case, where there has been serious physical harm with scarring and disfigurement of the face of the virtual complainant, places this case in consequence category 2 – High.
- [21] There are two seriousness levels: A, which is High, and B, which is lesser. The difference between the two is that there is a list of circumstances that would place the matter in Level A; while if those factors are absent, the offence would fall into Level B. The use of a weapon – in this case, a bottle and a pool cue stick – situates this matter in Level A – High.
- [22] The next thing to be done is to consult the grid to see where Consequence Category 2 and Seriousness Level A intersects. In doing so, the range is 45% to 75% of the maximum sentence, with a starting point of 60%. The maximum sentence for wounding with intent to do grievous bodily harm as provided by the statute is 15 years imprisonment. This means the range is 6 years and 9-months to 11 years and 3-months and a starting point of 9 years.

Departure from the Guidelines?

- [23] Should the ECSC Sentencing Guidelines be dispensed with in the circumstances of this case? What does the justice of this case require? Are there compelling reasons for not following the Sentencing Guidelines?

- [24] Among the questions which must be asked are: Is a term of imprisonment the appropriate sentence in this case? Would a non-custodial sentence with an order for compensation to the Virtual Complainant be sufficient to do justice in this?
- [25] Crown Counsel, Mr. Cedric Dyer, said that he did not know of any prior case in Antigua and Barbuda of wounding with intent to cause grievous bodily harm which attracted a non-custodial sentence. However Mr. Dyer noted that the ECSC Court of Appeal in Everton Francis v The Queen, ANUHCRA: 2012/0005, (31st October, 2012) affirmed a non-custodial sentence and the imposition of a monetary penalty in a case of shooting with intent to murder.
- [26] Having carefully considered the various issues, in particular the testimony of the Virtual Complainant during the sentencing hearing, it is apparent that the one ought to depart from the Sentencing Guidelines.
- [27] Practice Direction 8A, No: 1 of 2019 of the ECSC which addresses General Sentencing Principles states that: "Any departure from the guidelines must be explained as part of the reasoning."
- [28] The reasons for departing from the Sentencing Guidelines are:
- a) The Crown from the very beginning of the case considered that a conviction for unlawful wounding would be sufficient in this case. It was always open to Mr. Joseph to plead guilty to unlawful wounding, rather than proceeding to trial for the far more serious wounding with intent to do grievous bodily harm for which he was convicted. In the Crown's contemplation therefore, a conviction on the lesser count would have been sufficient to do justice in the case.
 - b) Although the Virtual Complainant suffered multiple injuries, particularly to his face, he was ready, willing and open to practically forgiving Mr. Joseph and accepting a monetary sum as compensation. Although the Virtual Complainant's opinion is not conclusive of the matter, the fact is, he thought that the payment of compensation was a satisfactory punishment.
 - c) The Virtual Complainant understood and accepted that if any order for compensation was made, it will be in the alternative to a sentence of imprisonment being imposed on Mr. Joseph. The Virtual Complainant was willing to accept compensation as a sufficient punishment.
 - d) Of the four principles of sentencing, the consideration that was most applicable to this case was retribution. This was a 'one-off' incident, there was no premeditation and Mr. Joseph has no history of any such behavior. Accordingly there was no need for a sentence to include prevention, general or specific deterrence, or rehabilitation. Retribution does not necessarily require the imposition of a term of imprisonment.

- e) The ECSC Court of Appeal in **Everton Francis v The Queen**, a case of shooting with intent to murder, was far more serious than the present case; that offence carries a maximum penalty of 35 years. The Court of Appeal affirmed the quantum of compensation that was ordered where the person convicted was not imprisoned. In an appropriate case, there can be an order for compensation. The imposition of any term of imprisonment in keeping with the Sentencing Guidelines was not mandatory.

Sentence

- [29] Mr. Marlon Joseph, for wounding Mr. Duncan Drew with intent to cause grievous bodily harm, you are ordered to pay compensation in the sum of \$15,000.00. Having heard from Ms. Janet Wynter that she had the sum of \$2,000.00 which could be paid immediately on your behalf that sum of \$2,000.00 is to be paid forthwith. The balance of \$13,000.00 is to be paid in five monthly installments of \$2,600.00 each. The \$2,600.00 is to be paid by the last week day of the month, commencing the end of January 2023 and ending on the 31st May, 2023. In default of any monthly installment, you are to serve a sentence of one year imprisonment consecutively.
- [30] Mr. Joseph you are to appear in Court on the first day of court following the end of each month to provide proof that you have paid the installment. Accordingly, the payment schedule, return date for reporting and default provision are as follows:
- i. By Tuesday, the 31st of January, 2023, the sum of \$2,600.00. In default, one year in prison. Return to Court on the 1st of February, 2023.
 - ii. By Tuesday, the 28th of February, 2023, the sum of \$2,600.00. In default, one year in prison, consecutive to any default sentence. Return to Court on the 1st of March, 2023.
 - iii. By Friday, the 31st of March, 2023, the sum of \$2,600.00. In default, one year in prison, consecutive to any default sentence. Return to Court on the 3rd of April, 2023.
 - iv. By Friday, the 28th of April 2023, the sum of \$2,600.00. In default, one year in prison, consecutive to any default sentence. Return to Court on the 2nd of May, 2023.
 - v. By Wednesday, the 31st of May, 2023 the sum of \$2,600.00. In default, one year in prison, consecutive to any default sentence. Return to Court on the 1st of June, 2023.
- [31] No order is made for the payment of any fine. Mr. Joseph served three weeks overall on remand and that is applied in lieu of any fine.

Colin Williams
High Court Judge

By the Court

Registrar