

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

**CRIMINAL CASE No. 0019 of 2019
BETWEEN:**

THE QUEEN

and

K'VAWN CHOUCOUTOU

Appearances: Mr. Kristian Johnson, Counsel for the Crown
Mrs. Valerie Gordon, Counsel for the Defendant

2022: May 13th, June 2nd, 30th, July 6th

Judgment on Sentence

[1] **FLOYD J:** The defendant was originally charged with possession of a firearm without a licence, contrary to **s. 11A(2)(b)** of the **Firearms and Air Guns (Amendment) Act 2015** and possession of explosives contrary to **ss. 6 and 26** of the **Explosives Ordinance Chapter 124**. The offence dates run between 1st December, 2017 and 4th August, 2018. The firearm in question was said to be a .45 calibre semi-automatic pistol. The accused made several appearances in court. At one point, the Crown indicated that it would proceed on count one only, possession of a firearm, and amended that count to an offence contrary to **s. 11(1)** of the legislation. This had the effect of raising the potential minimum penalties. Appearances took place on 31st March, 14th May, 16th July, 19th July, 17th September, 26th November, 2021, 14th January, 13th May, 2nd June and 30th June 2022. Early on in the case, defence counsel indicated a desire to receive a Goodyear Indication. Therefore, on 30th March 2021, Crown counsel filed written submissions in advance of the Goodyear Indication.

- [2] It was during the court appearance of 31st March, 2021 that a good deal of relevant and important information was obtained. It was confirmed that the gun in question was not owned by the defendant. However, he admitted to being in possession of it and hiding it in a field. It was confirmed that the gun had been obtained by two other men and used in an attempted robbery. Those men had been arrested, charged and were in custody for that offence. The Crown sought to amend the charging section and that was allowed. Defence Counsel indicated that a social inquiry report would likely be sought if a plea was entered following the Goodyear Indication.
- [3] Most importantly, on 31st March 2021, it was confirmed by Crown counsel, Kael London, that the defendant was not involved in the attempted robbery incident. Two other persons had been charged with that offence. It was agreed that those two men knew where the gun was hidden and they had obtained it without the assistance or cooperation of the defendant.
- [4] On the next appearance of 16th July 2021, there was disagreement amongst counsel as to whether or not the Goodyear Indication had been formally given by the court on 31st March 2021. The case was therefore adjourned to 19th July 2021, at which time the Goodyear Indication was recorded. The case was adjourned to allow counsel to consider their positions and a plea of guilty was entered on 17th September 2021.
- [5] The case was further adjourned for the production of a Social Inquiry Report. On 26th November 2021, the case was scheduled for sentencing. On that date, it was confirmed that the Crown would rely on the material already filed but nothing had been received from defence counsel and the social inquiry report had not been received either. Counsel for the defendant then advised that she would not require such a report and that, owing to COVID restrictions at HM Prison Balsam Ghut, she had difficulty meeting with her client and preparing for the sentencing hearing. The case was adjourned.
- [6] Crown Counsel filed further submissions on 12th January 2022. Those submissions were presented to the court on 14th January 2022, at which time the Crown took issue with the Goodyear Indication previously provided by the court. Defence Counsel requested time to further consider her position and the case was again adjourned. The case was recalled on 13th May 2022, however, owing to a bereavement on the part of defence counsel, the case was adjourned to 2nd June 2022 for oral submissions. Defence counsel filed additional material on that day, necessitating a further

adjournment to allow for consideration of that material. Further material was filed by counsel for the defendant on 21st June 2022. Oral submissions were finally received from both counsel on 30th June 2022 and the case now proceeds to sentence.

THE FACTS

- [7] The defendant is 27 years of age, being born on 22nd January 1995. He has Belonger status in the Territory of the Virgin Islands and resided in Greenland, Tortola. An attempted robbery occurred on 4th August, 2018 involving two masked men. One carried a handgun. The victim was struck with the gun. However, he was able to take control of the gun and strike one robber with it. In fleeing, one robber was struck by a passing vehicle. The two men were captured and arrested. The robbery was unsuccessful. The gun was recovered and found to be loaded.
- [8] Further investigation eventually led police to the defendant. He was cooperative with police and provided a statement under caution. He admitted that the gun used in the attempted robbery was his. Although he knew the two men charged, he had no knowledge of the attempted robbery and he gave no one permission to use the weapon. The defendant explained that he took the gun from someone who had robbed him in 2017. Thereafter, he kept the gun in a safe place in a field. He identified the gun by way of scratches on it. It was in a far from pristine condition. He had only recently become aware of the fact that the gun was missing. He admitted he had no licence for the gun. He told police that he had never fired the gun and had no intention of using the gun.
- [9] The defendant was charged on 19th October, 2018. The date of offence on the indictment running from 1st December, 2017 to 4th August, 2018, presumably took into account the entire time the defendant had the gun concealed in the field. There is no evidence to suggest that the defendant ever made use of the firearm and certainly no evidence nor agreement by counsel that he was involved in the attempted robbery. The defendant was charged with nothing else and entered a guilty plea to simple possession of the weapon without having a licence.

- [10] The defendant was arrested on 18th October, 2018. He was 23 years old at the time. Although exact dates were unclear, the defendant was incarcerated after his arrest for a time and it was generally agreed by counsel that he should receive credit until on or about 26th November, 2018. It was agreed that he should receive credit for 1 ½ months time spent on remand for this charge.

THE POSITION OF THE PARTIES

- [11] In the submissions of 30th March, 2021, learned counsel for the Crown filed a copy of the **Compendium of Sentencing Guidelines for the Eastern Caribbean Supreme Court: Firearms Offences**. The **Guidelines** have since been overtaken by an updated version re-issued on 8th November, 2021. However, there are no substantive differences as they pertain to this offence.
- [12] Crown counsel also submitted a number of authorities. However, several of those cases involved serious facts such as injuries to victims, defendants actively engaged in robberies and a gun being fired by the defendant during a robbery. None of those facts correlate to the facts in this case. Crown counsel submitted the following facts were aggravating:
- (a) The firearm was used in the commission of an offence (attempted robbery).
 - (b) The robbery victim “sustained harm.”
 - (c) The gun was recovered and found to be loaded.
 - (d) The prevalence of this offence in this Territory.
 - (e) The offence is serious
- [13] Counsel for the Crown submitted that an early guilty plea was a mitigating factor and the defendant should receive credit for time spent on remand. He encouraged the court to follow the **Eastern Caribbean Supreme Court Sentencing Guidelines**.
- [14] Learned Crown counsel thereafter submitted further written material declaring the Goodyear Indication to have been unduly lenient. A number of authorities were tendered to support the position that a court could revisit a Goodyear Indication where it had been given in error or was not supported in law. Other authorities were filed to support a substantial period of incarceration as being the appropriate disposition. A number of those cases were decided in the local Magistrate's Court. Two

local decisions from the High Court and the Court of Appeal were submitted but can be distinguished on their facts.

- [15] In the case of **The Queen v Kani Hazel**¹, the defendant actively engaged with the victim while possessing a handgun. The gun discharged, wounding the victim. In the case of **The Director of Public Prosecutions v Shaunlee Fahie**², the defendant took part in what the court described as a “robbing spree” including burglaries while masked and armed with a handgun. The victims were bound, gagged and robbed. In the case at bar, the defendant took no active role in the offence with which the gun was used. The court was very clear in ascertaining that with Crown counsel before providing the Goodyear Indication. There was no evidence that the defendant was aware of the attempted robbery nor played any role in that incident. That is entirely different from the cases submitted by counsel for the Crown. In those cases, terms of substantial custody for the defendants were warranted on the facts and the roles played by the defendants in the entire scenarios. Cases, however, must be determined on their facts and appropriate sentences handed down, based upon those facts and the characteristics of the defendants. Each and every case must be determined upon its own unique facts.
- [16] Courts in this region receive direction in sentencing from the **Eastern Caribbean Supreme Court Sentencing Guidelines**. The learned Justice Morley in the case of **R v Evanson Mitcham**³, points out that the effect of the guidelines has been to supersede old case law on previous sentences, so that while such cases are of interest, and where appropriate helpful and of weight, they are no longer automatically persuasive or binding.
- [17] In material filed on 12th January 2022, learned counsel for the Crown submitted that the minimum penalties in **s.11(2)** of the legislation for this offence must be imposed unless “exceptional circumstances” exist. That is to say the mandatory minimum upon conviction of a fine of not less than eighty thousand dollars or imprisonment for a term of not less than eight years or both, must be imposed unless exceptional circumstances exist. Unfortunately, that appears to be incorrect, as this

¹ BVIHCR 2017/0017

² BVIHCRAP 2008/003

³ SKBHCR 2001/0035 at para 28

court can find no such language in the legislation. **Section 11(3)** of the principal Ordinance actually states that the court may, in its discretion, impose a lesser penalty where (a) it is fair and just in all the circumstances of the case to impose a penalty other than the minimum penalty or (b) it is of the opinion that the imposition of the minimum penalty (i) would be arbitrary and disproportionate; or (ii) the offender is unfit to serve the minimum sentence or is of advanced years. No where are the words “exceptional circumstances” found in relation to the court exercising its discretion, which the legislation allows, in order to go beyond the statutory minimum.

- [18] This is important to note in order to distinguish many of the cases submitted by Crown counsel. English cases involving the possession of firearms and ammunition such as **R v Neale Blackall**⁴, **R. v Kakir Rehman and Gary Dominic Wood**⁵ and others, refer to the sentencing court imposing the minimum term unless there are exceptional circumstances because that is what the English legislation mandates. **Section 51A (2)** of the **Firearms Act 1968** provides that the court shall impose an appropriate custodial sentence (or order for detention) for a term of at least the required minimum term (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.
- [19] A similar situation exists in the Turks and Caicos Islands. The court in the case of **Jimkelly Joseph v R**⁶, dealt with a minimum sentence for possession of firearms and ammunition. It held that a sentencing court only had the discretion not to impose the minimum seven-year sentence if it found there were exceptional circumstances. In fact, the court confirmed that the provisions of **s. 5** of the **Firearms Act 1968** of the United Kingdom are similar to **s. 30** of the **Firearm Ordinance** of the Turks and Caicos Islands. However, that is not the wording of the firearms legislation in the Territory of the Virgin Islands.
- [20] Learned Crown counsel also submits that “no sentencing guidelines or other submissions were invited by the court.” That is, unfortunately, also incorrect. Crown counsel filed a written Goodyear Submission on 30th March 2021, in advance of the Goodyear Indication and this court has always

⁴ [2006] 1 Cr. App. R. (S.) 22 (2005)

⁵ [2005] EWCA Crim 2056

⁶ CR-AP 18/2018

welcomed submissions from either counsel before passing sentence in every case that comes before it, including this one. In fact, additional written submissions were filed by the Crown on 12th January 2022 with a book of authorities being filed on 23rd May 2022. Learned defence counsel filed written material, including authorities, on 2nd June 2022 and further material 21st June 2022. Oral submissions were later received and we have not yet dealt with the case to its conclusion until today. This case has been before the court on many occasions, with the defendant making many appearances. All of which is to say that the court has in no way sought to prevent both parties from fully advising the court of their positions, advocating and arguing them to the fullest.

[21] Learned Crown counsel also submitted that once the Goodyear Indication was given, “the defendant immediately acted upon it by pleading: Guilty.” In actual fact, there was an adjournment between the Goodyear Indication being presented and the defendant pleading, as the court record confirms. Learned counsel for the defence, quite correctly, requested time to take instructions before deciding whether or not to act upon the indication. A great deal of discussion about the case, the facts and the possible direction it would take, occurred on 31st March 2021. Further discussion took place on 16th July 2021 and the case was adjourned to 19th July 2021 at which time the Goodyear Indication was given by the court to the parties. Finally, on 17th September 2021, a guilty plea was entered by the defendant.

[22] Counsel for the Crown, Mr. Johnson, submits that it is the duty of the sentencing judge to attempt to arrive at a just sentence by applying the generally accepted principles of sentencing. He recognizes the need to promote a respect for the law and its process. The sentence must fit the crime and the offender. Sentences should be proportionate to the gravity of the offence and the degree of responsibility attributed to the offender. They should be neither unduly harsh nor unduly lenient. He submits that this defendant is no less culpable than offenders who have received greater sentences and the defendant should therefore receive the same. That means a substantially higher sentence than that proposed by the Goodyear Indication. The court could rescind its earlier position on sentence if it can be shown that it is an error of law. A number of authorities were submitted in support of the position of Crown counsel.

[23] Learned counsel for the defendant submits that the Goodyear Indication is an acceptable and appropriate sentence. The defendant was a young man at the time of the offence and he remains so. He is a person of good character with no criminal record. The defendant has either been in school or gainfully employed for most of his life. He has attended day school and night school. When his plans to attend school and then a job placement in the United States fell through, he registered at the local Community College and obtained a certificate in solar panel installation. He was cooperative with the police investigation, providing a statement under caution. The court must consider the defendant's youth, his cooperation and his guilty plea. Defence Counsel submits that the defendant realizes the very grave nature of gun crime generally. However, while the charge is indeed a serious matter, defence counsel emphasizes the fact that there is no evidence that the defendant used or intended to use the firearm. He is not associated to the offence committed by others using the same weapon.

[24] Defence counsel submits that the court should maintain the Goodyear Indication and if it was considering a departure from that position, as advocated by Crown counsel, then the defendant should be allowed to withdraw his guilty plea. It would be unfair to the defendant to do otherwise. A number of authorities were submitted in support of that submission. This court recognizes that position as entirely appropriate and would certainly allow the defendant to do that if it was considering such a course of action. However, it is not. Defence counsel submits that it is only in exceptional circumstances that a Goodyear Indication should be altered once given. In this case, the Goodyear Indication was clear and unequivocal. A guilty plea was entered as a result. The Goodyear Indication was entirely appropriate, based on the agreed facts. The defendant submitted a plea in mitigation outlining the circumstances as to how he came to be in possession of the gun. Further and perhaps more importantly, there is no indication that the defendant had the firearm in a public place (other than an open field). There is no indication that the defendant used the weapon or caused the weapon to be used. He was not associated with the attempted robbery.

THE LAW

[25] The defendant was charged with keeping a firearm without a licence under **s. 11(1) of the Firearms and Air Guns (Amendment) Act 2015**. Upon conviction on indictment for that offence, a person is

liable, under **s. 11(2)(b)**, to a fine of not less than \$80,000.00 or imprisonment for a term of not less than 8 years or both. Under **s. 11(3)**, the legislation goes on, it must be noted, to provide the sentencing court with a discretion to impose a lesser penalty where it is fair and just in all the circumstances of the case to impose a penalty other than the minimum; or where the court is of the opinion that the imposition of the minimum penalty would be arbitrary and disproportionate. It is this discretion that is critical in this case.

[26] Before going further, however, the court reminds itself that sentencing in criminal cases involves many considerations in reaching the appropriate penalty. Of paramount importance are the sentencing goals of retribution, deterrence (both general and specific), prevention and rehabilitation, as confirmed in the well-known cases of **R. v Sargent**⁷ and **Desmond Baptiste et al v The Queen**⁸. Although the Caribbean Court of Justice in the case of **Renaldo Anderson Alleyne v The Queen**⁹ held that a more modern formulation would refer only to the principles of punishment, deterrence and rehabilitation. Sentencing seeks to promote respect for the law and an orderly society. The facts of the case and the gravity of the offence are balanced with the characteristics of the offender, including his age and background, whether he has a criminal record, the role he played in the offence and other items. The case of **R v Parranto**¹⁰ confirmed that sentencing is one of the most delicate stages of the criminal justice process. Sentencing requires judges to consider and balance many factors. While the sentencing process is governed by clearly defined objectives, it remains a discretionary exercise for sentencing courts in balancing all relevant factors to meet the basic objectives of sentencing. The goal in every case is a fair, fit and principled disposition. Sentencing is a highly individualized exercise, approached on a case-by-case basis. The court must determine which objectives of sentencing merit greater weight and evaluate the importance of mitigating or aggravating factors to best reflect the circumstances of each case. Notwithstanding the mandatory minimum penalties set out in the **Firearms and Air Guns (Amendment) Act 2015**, it is the sentencing discretion afforded to the court by **s.11(3)** that brings all of the traditional sentencing considerations back to the forefront of the decision. The court bears all of this in mind in formulating a sentence in this case.

⁷ 60 Cr. Ap. R. 74

⁸ Cr. Ap. No. 8 of 2003

⁹ [2019] CCJ 06 AJ, 93 WIR 155

¹⁰ [2021] SCC 46

- [27] Directions in sentencing for firearms offences are, as noted, found in the **Compendium of Sentencing Guidelines for the Eastern Caribbean Supreme Court**.

ANALYSIS

- [28] Having received and carefully reviewed the written and oral submissions of both parties, what follows is the decision of the court in this sentencing matter. Any offence that involves a firearm, particularly a handgun, is very serious. Gun crime is a great concern to the court. The use of firearms in the commission of offences presents a significant danger to this community. A message of deterrence must be sent that the commission of offences involving firearms, will not be tolerated and will generally attract a period of incarceration. Firearms are inherently dangerous and the state is entitled to use sanctions to signal its disapproval of careless or illegal practices involving firearms. That position is reflected in the minimum sentences that the legislature set out in the **Firearms and Air Guns (Amendment) Act 2015**.
- [29] Legislation that creates mandatory minimums for certain offences can, however, create sentences that are grossly disproportionate and excessive. It can go so far as to create what is sometimes referred to as constitutionally cruel and unusual punishment. Courts in many jurisdictions have recognized this. The issue was explained by the Supreme Court of Canada in the case of **R v Nur**¹¹:
- Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing.
- [30] However, in its wisdom, the legislature of the Territory of the Virgin Islands did not establish a mandatory minimum without alternatives for this offence. First of all, the legislation does not call for a mandatory period of incarceration. **Section 11(2)(b)** allows a sentencing court to impose **either** a

¹¹ [2015] SCC 15, 5 LRC 662 at para 44

fine **or** a term of imprisonment (emphasis added). That is an important consideration. The legislature went further at **s. 11(3)** in providing a sentencing court with the discretion to impose a lesser penalty than the stated minimums, if it was found to be **fair and just** to do so, or if imposing the minimum penalty would be **arbitrary and disproportionate** (emphasis added). That is unlike the situations in the United Kingdom and other Caribbean jurisdictions such as the Turks and Caicos. No doubt the rationale behind allowing a sentencing court to forego the imposition of a period of incarceration and to exercise its discretion, rests with the understanding that, although there is a general desire to punish violent offenders, in this case, offenders who possess guns, the judiciary must be permitted to not only punish and incarcerate offenders found to be dangerous but also apply more lenient sentences where the circumstances warrant it. Mechanisms that promote severity of punishment as the ultimate sentencing rationale will often fail to yield the desired deterrent effects. Sentencing continues to be based upon the individual and unique factors relating to each case and each offender. The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Judicial discretion has always been an essential element of the common law justice system. All of that is appropriately recognized in this legislation.

[31] Flexibility in sentencing for gun crimes may be seen in many cases from a variety of jurisdictions. A recent example of this is found in an unreported case from the Magistrates' Court of Antigua and Barbuda. In **R v Steve Dublin, Stanley Neilson & Akeem Williams (unreported)**, an altercation occurred at a local business, causing police to attend. Mr. Dublin admitted that he had a handgun in his car. He advised that someone had asked him to find a gun for purchase. He bought the gun from Mr. Williams. He gave the gun to Mr. Neilson. However, an argument arose regarding whether the gun was functioning properly, attracting the attention of the police. The three defendants entered guilty pleas to possession of an unlicensed firearm with sentencing being handed down on 14th February, 2022. Notwithstanding the serious facts involving a handgun in a public place, the court imposed a \$5,000.00 fine, in default, six months imprisonment, for each defendant.

[32] A further example of flexibility in the sentencing of offenders for possession of firearms is found in the case of **R v D'Quan Martin**¹². In that case, the learned Justice Innocent gave a non-custodial sentence to a man who was found entering the country with a 9 mm handgun in the waistband of his

¹² AXAHCR 2019/0016

trousers and 16 rounds of ammunition in his pockets. While noting the serious nature of the offence, the court confirmed at **para 13** that it was also “not in dispute that the court in passing sentence for any offence has the discretionary power to impose a sentence or penalty lesser than that prescribed by statute.” In fashioning the appropriate sentence, the court took a structured approach, bearing in mind the seriousness of the offence, proportionate to the circumstances of the case. The court was mindful of society’s abhorrence of crimes of this nature. The court was alarmed by the degree of gun crime in the community. For all of those reasons, general deterrence was of paramount concern. However, this was tempered by the consideration of rehabilitation. After taking all of that into account, the learned justice determined that there was no need to order the incarceration of the defendant. He was given 2 years’ suspended sentence and a fine of \$15,000.00. The weapon and the ammunition were forfeit for destruction.

[33] Of particular note is a very recent case from Magistrates’ Court in the Territory of the Virgin Islands. On 20th June 2022, learned Magistrate Benjamin passed a non-custodial sentence for possession of a firearm without a licence in **R v Richard Shanahan (unreported)**. Learned defence counsel Mrs. Gordon, also represented the defendant in that case. Mr. Shanahan arrived at the Beef Island airport on 26th April 2022 on board an international flight. Concealed in his luggage was a handgun and 15 rounds of ammunition. The defendant was an American citizen who had a licence to carry a concealed firearm in the state of Florida. That licence had, however, expired in 2019 and he had no such licence from this territory. He was charged and later entered guilty pleas to possession of a firearm without a licence and possession of explosives. He received a \$50,000.00 fine for firearms possession and 55 days imprisonment for possession of explosives. He was to be released once the fine was paid on a time served basis. The facts in that case are arguably more serious than the facts in the case at bar, as that defendant had both a handgun and ammunition in his possession and accessible to him at an airport. However, the learned Magistrate elected to exercise her discretion under the legislation when passing sentence. As in our case, the defendant, Mr. Shanahan, cooperated with police and entered guilty pleas.

[34] Although crimes such as the one with which the defendant is charged are serious and can often generate a custodial sentence to serve the ends of deterrence and denunciation, proportionality must be considered. In assessing that, it is important to preserve the distinction between factors relevant

to the seriousness of the crime on the one hand, and factors relevant to the defendant's degree of responsibility on the other.

[35] As will become evident, the court is satisfied that the Goodyear Indication provided is a fit and proper sentence in this case, taking into account the legislation for this offence, the facts of the case, the circumstances of the defendant and the application of the **Eastern Caribbean Supreme Court Sentencing Guidelines**.

[36] We therefore move to the fashioning of an appropriate sentence in this case by applying those **Sentencing Guidelines**. This begins with an assessment of the seriousness of the offence, its consequences and the harm caused. In this case, the firearm was used in the commission of a separate offence. However, this defendant was not implicated in that offence nor was he charged. That was confirmed by Crown counsel prior to the Goodyear indication. For that reason, it could be argued that neither category 1 nor 2 apply. However, taken at its highest, the presence of the firearm attributed to the defendant in the commission of an offence that did not involve the defendant places this in category 2 - High.

[37] In considering seriousness by assessing the culpability of the offender, it could again be argued that, as the defendant was not connected to the incident where the firearm was used, neither levels A nor B apply. However, taken at its highest, although this defendant was not involved, the firearm attributed to him was brandished by another and the incident occurred in a public place. This places the case into level B - Medium.

[38] By combining consequence and seriousness, the starting point is calculated to be 50% or a range of 35% - 65%. The court finds the appropriate starting point to be 35% of 8 years or 96 months. Therefore, 33.6 months.

[39] With a starting point of 35% or 33.6 months, the court must go on to consider the aggravating and mitigating factors pertaining to both the offence and the offender. None of the aggravating factors listed in the **Guidelines** pertaining to the offence are applicable to this case.

- [40] A significant mitigating factor is that, although the gun belonging to the defendant was used in the commission of an unrelated offence, he was not in any way involved and had no knowledge of it. Crown counsel confirmed that to be so.
- [41] After considering the mitigating features of the offence and determining that there are no aggravating features, the sentence shall be decreased by 12 months to 21.6 months.
- [42] As it pertains to the offender, the court considers aggravating and mitigating factors as set out in the **Guidelines**. None of the aggravating factors listed, apply to this case. However, a number of mitigating factors can be found. The defendant is a person of good character with no previous criminal record. Although in no way obliged to, he assisted the authorities by providing a statement under caution. He was and still is, a young man. He was age 23 years at the time of this offence and he is now age 27 years. As was confirmed in the **Desmond Baptiste** case and others, a sentencer should be mindful of the general undesirability of imprisoning young first offenders, although the more serious the offence, the less relevant that will be. Those are all significant considerations,
- [43] After applying the mitigating features of the offender, there being no aggravating features, the court shall therefore give a reduction in sentence of a further 12.6 months, taking the sentence to 9 months.
- [44] Credit must be given to the defendant for his guilty plea. Although it was not entered at an early opportunity, the defendant must receive credit for that. Guilty pleas save resources, court time and allow witnesses to move on with their lives. It saves the community the expense of a trial. Furthermore, the adjournments of the case before resolution, cannot be attributed to him. For a variety of reasons and through no fault of the defendant, sentencing in his case was delayed. He is therefore entitled to a further 1/3 reduction in sentence, taking it to 6 months.
- [45] The defendant was incarcerated on this charge for a period of time. He is entitled to receive credit for the time spent on remand. It was agreed by counsel that the time served equated to approximately one and a half months. He shall therefore receive credit for 1.5 months, thus reducing his sentence to 4.5 months. That was the Goodyear Indication given in this case.

[46] There can be no doubt that possession of an unlicensed or unregistered firearm is a serious offence. The presence of guns in the community and in the hands of unlicensed individuals creates a potentially dangerous situation. A message of deterrence must be sent to the community that the possession of firearms will be met with a term of imprisonment. That is so, even on a plea of guilty and in the case of an offender with no previous record. However, the facts of each case and each defendant must be considered. That is why the legislation preserves the discretion of the sentencing judge. As the court has stated, the significant aspect of this case is the lack of connection of this defendant to the attempted robbery that occurred with his gun. Other people were responsible for that. They were apparently convicted and given appropriately long terms of imprisonment. This defendant must be sentenced on the facts of this case. He had a worn handgun concealed in a field for which he had no licence. It remained there for many months as evidenced by the dates in the indictment. At some point, the gun was taken by persons without his knowledge and used in the commission of a crime without his knowledge. Once the gun was recovered, it was traced back to the defendant. Although he was under no obligation to, he candidly spoke to police and accepted responsibility for possession of the weapon. To sentence this defendant to a significant term of multiple years of imprisonment on those facts would be unjust and could not be supported, in the view of the court. A message of general deterrence can be sent without incarceration reaching that level. However, even as a youthful person convicted for the first time, the fact that an unlicensed gun was involved in this offence, renders it serious and merits a term of imprisonment. It must be remembered that the loss of one's liberty, for any length of time, is a significant penalty not to be lightly ordered but only after sober thought and consideration. It is particularly so for a first offence.

[47] The legislation in this case, as previously noted, not only allows for judicial discretion in sentencing for this offence but contemplates a non-custodial sentence in the appropriate circumstances. It would be possible, therefore, to impose a fine with or without an in-default custodial component, as was done in the **Dublin et al, Martin and Shanahan** cases. But the court must, in fairness, consider the ability of a defendant to pay a substantial fine and where, as in this case, that would be impossible, it cannot contemplate such a sentence. We return, therefore, to an appropriate custodial disposition, taking into account all relevant aggravating and mitigating factors, the facts of the case and the characteristics of the defendant. That is what is provided for in the **Sentencing Guidelines** and contemplated by the terms of the legislation.

- [48] Contrary to the submissions of learned Crown counsel, the legislation makes no mention of any requirement of “exceptional circumstances” being necessary in order for a court to go outside of the minimum sentences noted. The court is satisfied that it is appropriate to exercise its discretion as contemplated by **s. 11(3)** and impose a penalty less than what is set out in **s. 11(2)(b)**. The court is further satisfied that, based on the facts and circumstances of this case, it is not only fair and just to impose a lesser sentence but it would be arbitrary and disproportionate to impose the minimum penalties set out. Based on the facts of this case and the circumstances of this offender, the court is satisfied that the minimum penalties listed are too severe and excessive. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [49] Before closing this decision, the court must also note the importance of Goodyear Indications in the resolution of cases. This jurisdiction, like many other jurisdictions, suffers from a backlog of cases. The COVID pandemic reduced the efficiency of the court and its ability to hear cases for a period of time. That served only to accentuate an already overburdened criminal justice system. The volume of unresolved cases increased. There is only one criminal court and one criminal court judge in the High Court of this territory. All criminal trials are conducted with a jury. Despite the best efforts of the court and of counsel, it takes time to reach cases and to conclude them. Accused persons are therefore often left incarcerated in the remand system for extended periods of time. Every effort must be made to lessen the volume and encourage the resolution of cases. That includes encouraging pre-trial resolutions through the use of appropriate and reasonable positions taken on sentence, proportionate to the facts of the case and the circumstances of the defendant. Cases must be carefully and fully assessed by counsel and the court. The application of fit and proper sentencing discretion is part of that process. While the public interest in the proper administration of justice should never be sacrificed in the interest of expediency, the early resolution of cases, if at all possible, is a recognized tool in the reduction of court backlogs in many jurisdictions and it should be encouraged. Justice should be administered in a timely fashion for the sake of all participants in the criminal justice system.

[50] For all of these reasons, the defendant, K’Vawn Choucouthou, is hereby sentenced to a period of 6 months imprisonment for possession of a firearm without a licence. Taking into account the time he has served on remand and giving him full credit for that, the sentence imposed is reduced to 4.5 months as of today’s date. Pursuant to **s. 11(4)**, the firearm found in this case shall be forfeit to the Crown for destruction.

Richard G. Floyd
High Court Judge

By the Court

Registrar