

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CRIMINAL)
A.D. 2020**

AXAHCR 2020/0013

REGINA

v

JAVAL HODGE

Appearances:

Ms. Erica L.P. Edwards, Senior Crown Counsel, Attorney General's Chambers of
counsel for the Crown

Mr. Devin Hodge of counsel for the defendant

2020: November 20; 24; 27.

JUDGMENT ON SENTENCING

- [1] **INNOCENT, J.:** Mr. Javal Hodge ('Mr. Hodge'), the defendant in these proceedings, was indicted on 5th October 2020 for the offences of possession of a firearm and possession of ammunition respectively, contrary to section 20(1) (b) of the Firearms Act and also for the offence of discharging a firearm in a public place contrary to section 23(1) of the Firearms Act. The Crown withdrew the third count of discharging a firearm in a public place.
- [2] Upon his arraignment on 19th October 2020, Mr. Hodge entered pleas of guilty to the remaining counts on the indictment. His plea was accepted by the Crown.
- [3] The agreed facts are that on 5th August 2016, a barrage of gunfire was heard in the vicinity of the Ruthwill Auditorium in The Valley, Anguilla. Witnesses present on the scene were unable to identify the shooters. However, it was reported that persons were seen running in the direction of the Anglican Church Cemetery.

- [4] Shortly thereafter, police officers entered the James Ronald Webster Park in search of the individuals who were responsible for the shooting. Mr. Hodge was observed running away. He was pursued by a police officer. Mr. Hodge was seen throwing an object over a wall and there was a loud explosion. Mr. Hodge surrendered to police and was arrested. Upon recovery of the object that Mr. Hodge was seen throwing over the wall, it was discovered that the object was a firearm. Mr. Hodge acknowledged that this was the firearm that he had in his possession.
- [5] Mr. Hodge was interviewed by the police. In the police interview he confessed that he was in possession of the firearm and ammunition.
- [6] The firearm in question was a .45 semi-automatic handgun with 10 rounds of ammunition contained in the magazine.
- [7] Mr. Hodge is now before the court for sentencing.
- [8] In sentencing Mr. Hodge, the court has adopted the approach as set out in the Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules, 2019 ('ECSC Sentencing Guidelines') and more specifically the provisions of the Sentencing Guidelines for Firearm Offences with the Eastern Caribbean Supreme Court (Sentencing Guidelines – Firearm Offences).
- [9] The court adopted a starting point sentence by reference to the grid contained in the Sentencing Guideline – Firearm Offences. The starting point sentence was established based on the seriousness of the offence, including Mr. Hodge's culpability in the commission of the offence and the consequences of the offence as referenced by the harm caused in the commission of the offence. According to the Sentencing Guidelines – Firearm Offences, the starting point sentence arrived at was adjusted within the range to take account of the aggravating and mitigating factors in the case. This figure was also adjusted to take account of Mr. Hodge's personal mitigation.

- [10] Having arrived at a sentence that is within the appropriate range for the commission of the offence, the court considered whether there were any factors warranting a discount from the sentence arrived at; for example, whether and what if any discount was required to take into account Mr. Hodge's plea of guilty, and his cooperation with police investigators.
- [11] The court assessed the consequences by reference to the harm done at Category 2 – medium. The court assessed the seriousness of the offence at level A – higher. The court noted that none of the factors outlined at Category 1 were present in the instant case. The only factor present in Category 2 was the presence of a firearm in the commission of an offence. In any event Category 3 would not be appropriate since at least one of the factors mentioned in Category 2 applied.
- [12] In assessing seriousness the court has placed the offence at Level A. The firearm in question contained more than two rounds of ammunition. In addition, the firearm was carried not only in a public place but at or near a place of substantial public gathering.
- [13] Therefore, the court determined that the appropriate starting point sentence would fall at 65% of the maximum statutory penalty and within a range of 50% to 80% of the maximum statutory penalty. Therefore, the starting point sentence adopted by the court is 9 years imprisonment with a range of 7 years to 11 years imprisonment.
- [14] The court having determined the starting point sentence considered the aggravating and mitigating factors present in the case.
- [15] The court was able to discern the following aggravating factors in the present case. There was notably an attempt to conceal and dispose of the firearm. Mr. Hodge sought to evade detection by running away and had to be pursued by the police.
- [16] The court took into consideration the following mitigating factors in the commission of the offence. Mr. Hodge willingly admitted to police authorities that he was in possession of the firearm that was recovered. In addition, Mr. Hodge cooperated

with police investigators in the course of their investigations. The court also took into account the fact that the firearm was not used to cause injury or damage to property.

[17] In making an assessment of matters of personal mitigation in relation to Mr. Hodge, the court considered the following matters. Mr. Hodge has shown genuine remorse for having committed the subject offences. In addition, Mr. Hodge has taken steps to address his offending behaviour. Mr. Hodge has no previous convictions for any similar offence.

[18] It appears that Mr. Hodge, at the time of his arrest had in his possession a controlled substance. He was charged with the offence of possession of a controlled substance subsequent to his arrest. He pleaded guilty to this offence at the magistrate's court and was sentenced to two months imprisonment on 12th February 2018. At the time of sentencing, Mr. Hodge had already served out this sentence.

[19] The Crown, in their submissions and the Pre-Sentence Report ('PSR') made mention of Mr. Hodge having previous convictions for drug related offences for which he was sentenced to a fine by the magistrate's court. However, these convictions form part of Mr. Hodge's remote and distant past and may properly be considered as spent. Therefore, the court did not treat these previous convictions as relevant to the present sentencing exercise.

[20] Notwithstanding any previous brushes with the law that Mr. Hodge may have had, it appears from the PSR that Mr. Hodge is a young man of relatively good character. The PSR also disclosed that Mr. Hodge has made significant progress, as far as his personal and academic development is concerned, during his time on remand. In the circumstances, it does not appear that any period in excess of any notional sentence that the court is minded to impose is necessary to achieve the permissible aim of rehabilitation in the case of Mr. Hodge.

[21] In the circumstances, the court finds that in the present case the aggravating factors are far outweighed by the mitigating factors. Therefore, the court will apply the sentence that is at the lower end of the sentencing range which is 7 years

imprisonment. This figure of 7 years imprisonment reflects the adjustment made to the starting point sentence of 9 years imprisonment to take account of the aggravating and mitigating factors present in the case and matters related to Mr. Hodge's personal mitigation.

- [22] Mr. Hodge is entitled to credit for his guilty pleas. Typically, Mr. Hodge would be entitled to a discount equivalent to 1/3 of the notional sentence that the court was minded to impose to take account of an early guilty plea.
- [23] In determining whether the pleas were entered at the earliest available opportunity the court had occasion to examine the provisions of the Criminal Procedure (Committal for Sentence) Act¹, in particular the provisions of section 1 thereof. It appears that pursuant to the provisions of the Criminal Procedure Act that where, except when the charge is one of treason or murder, if an accused person in any statement referred to in section 59 of the Magistrate's Code of Procedure Act says or admits that he is guilty of the charge, the Magistrate shall, instead of committing the accused for trial, order him to be committed for sentence before the High Court.
- [24] Section 3 of the Criminal Procedure (Committal for Sentence) Act sets out the procedure to be followed in a case where an accused is committed for sentence before the High Court. It provides that as soon as conveniently may be after the filing of an indictment against an accused person committed for sentence, the Registrar of the High Court shall issue a summons to the accused person to appear and, if he is in custody, an order to the gaoler to bring the prisoner before a Judge of the High Court at a time to be fixed by the Judge, and the Registrar shall notify the Attorney General accordingly.
- [25] Therefore, it appears that Mr. Hodge could have availed himself of this procedure. In the circumstances it cannot properly be said that the pleas were entered at the earliest or first available opportunity. Be that as it may, Mr. Devin Hodge, counsel

¹ R.S.A. c. C155

for Mr. Hodge alerted the court to certain salient facts that are relevant to the sentencing exercise.

[26] Mr. Hodge having been charged with the firearm offences was subsequently charged with the offence of murder on 22nd June 2017; this was subsequent to the preliminary inquiry in relation to the offences under the Firearms Act. On 19th July 2018, the Crown applied to have the two matters proceed jointly. The two sets of charges appeared to be related. On 25th February 2020 the Crown withdrew the charge of murder against Mr. Hodge. Mr. Hodge was then committed for trial on the lesser firearm charges.

[27] In these circumstances, Mr. Hodge, counsel appearing for Mr. Hodge argued that Mr. Hodge was only able to enter a plea on his initial arraignment on the present indictment. Given the procedure employed by the Crown at the preliminary inquiry at the magistrate's court, the court found Mr. Hodge's explanation for failing to enter a plea at an earlier stage of the proceedings acceptable.

[28] In the premises, Mr. Hodge was given full credit for his guilty plea, and was therefore entitled to a discount of 1/3 from the notional sentence. The discount of 1/3 from the notional sentence equates a period of 2 years 3 months. Therefore, the sentence after the discount for the guilty plea would be 4 years and 9 months and 18 days.

[29] Mr. Hodge has spent a period of 1439 days on remand which equates to 3 years 11 months and 9 days at the date of the sentencing hearing and 3 years 11 months and 16 days up to the date of sentencing. Mr. Hodge will be credited for all this time spent on remand. The remainder of the term of imprisonment left to be served by way of sentence after credit is given for time spent on remand would be a period of 10 months and 2 days.

[30] During the course of the sentencing hearing the question arose regarding whether Mr. Hodge would be entitled to any further discount in respect of any delay in the conduct of the proceedings which was not attributable to any fault on the part of Mr. Hodge in addition to any deduction for time spent on remand.

- [31] The court had the benefit of written submissions from both sides in respect of this issue. It appeared that the period of delay was not attributable to any fault on the part of Mr. Hodge. The Crown has conceded that this was indeed the case. The reasons for the delay were well chronicled in the supplemental written submissions on both sides and there did not appear to be any factual conflict in respect of the reasons for the delay.
- [32] Both counsel appearing for the Crown and counsel appearing for Mr. Hodge are agreed that separate and apart from credit given to Mr. Hodge in respect of time spent on remand, he should also be given credit for the inordinate delay in bringing the matter before the High Court.
- [33] It is well settled that a defendant has a constitutional right to a fair hearing within a reasonable time before a fair and impartial tribunal established by law. In an appropriate case the court ought to address the question of delay as it relates to sentencing in a criminal trial. Delay in a criminal case which constitutes a breach of a defendant's constitutional right to a fair hearing within a reasonable time will always be a factor to be considered in deciding upon the appropriate disposal.²
- [34] The factors relevant to the cause of the delay ought to be assessed in determining whether there has been any breach of a defendant's constitutional right. Where a breach of this constitutional right has been established, the sentencing court should consider whether there should be any effect on the sentence that would have been passed if there had been no delay.
- [35] In the case of **Violet Hodge v The Commissioner of Police**³ the Court of Appeal of the Eastern Caribbean Supreme Court ('Court of Appeal') dealt with the question of the relevance of delay in criminal proceedings to sentencing. Baptiste JA delivering the judgment of the court said:
- "The principles regarding delay can be summarized as follows. In determining sentence, there is a need to have regard to any failure to

² Hassen Eid-En Rummun v The State of Mauritius [2013] UKPC 6 at para 13

³ BVIMCRAP 2015/0005 delivered 27th February 2017

proceed with a case with due expedition. Excessive delay can affect the question of the justice of the sentence. Delay in bringing an accused to justice is recognised as a mitigating factor that can be taken into account in sentencing and its effects can be recognised by a reduction in sentence. One has to examine the extent to which a defendant or appellant has been prejudiced by the delay per Lord Hope at paragraphs 53 and 54 of *Mills v Her Majesty's Advocate*. "A judge retains the discretion to do justice on the particular facts of a case, for example in the case of excessive delay, and may therefore reduce an otherwise appropriate sentence accordingly" per Lady Hallett in *R v Kerrigan* at paragraph 56. This is very much a residual general discretion to correct any perceived injustice. Delay is undoubtedly of relevance to the broad question of what a just sentence is when eventually and belatedly conviction occurs, per Vice President Hughes LJ in Attorney General's Reference No. 79 of 2009. He emphasised that applications for reductions in sentence would be unusual.

With the guidance provided by the cases, this Court has to consider whether the magistrate erred in failing to make a specific allowance for delay in imposing sentence. There was ample material to support the assessment that the magistrate should have considered the issue of delay as a mitigating factor conducing to a reduction in sentence. The question of whether delay is excessive is really fact sensitive. The magistrate gave no reason for not factoring in delay as a mitigating factor. It is therefore open to this Court to exercise its discretion by assessing the facts and making a judgment as to what is required. There is no automatic right to a reduction in sentence on the ground of delay. As has been seen, the court possesses a residual discretion in the matter, per Mr. Justice King in *R v Phillips et al*:

"Discretion by definition requires a court to exercise an assessment of the facts and to make a judgment as to what is required"

There was undoubted delay for which the appellant was not responsible. There would be anxiety resulting from the prolongation of the proceedings. Delay related grounds may justify an adjustment to sentence; one of the grounds would be the anxiety resulting from prolongation of the proceedings per Lord Hope in *Mills v HM Advocate*.²⁵ Reference has already been made to the appellant's state of health. In the circumstances, the court in the exercise of its discretion considers that a one year reduction for delay would be fair. The sentence of six years is accordingly reduced to five years."⁴

⁴ Per Baptiste JA at paras [66], [67] and [69]

[36] The court having assessed the reasons for the delay and the factors that contributed to the delay, in the exercise of its discretion, is of the view that a reduction of 1 year imprisonment is appropriate in the present case.

[37] Therefore, the sentence of the court is that Mr. Hodge be sentenced to time served on remand being 3 years 11 months and 16 days. Accordingly, Mr. Hodge will not be required to serve any further period of incarceration and is to be released from custody immediately.

Shawn Innocent
High Court Judge

By the Court

Registrar