

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(ANGUILLA CIRCUIT)
(CRIMINAL)
A.D. 2019**

CASE NO. AXAHCR 2019/0009

BETWEEN:

REGINA

v

JAMES HODGE

Appearances:

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

Mr. Devin Hodge, Astaphan's Chambers appearing amicus for the defendant

2019: November 4, 8

SENTENCING JUDGMENT

[1] **INNOCENT, J.:** The defendant filed a request for sentence indication in accordance with the practice set out in **R v Goodyear**¹. The defendant sought an indication of (1) a sentence of a particular type within a particular range and or (2) a combination of sentences. The court had ordered that prosecuting and defence counsel file an agreed statement of facts. That order has been complied with. Therefore, there appears to be no disagreement regarding the underlying factual circumstances giving rise to the offence contained in the current indictment upon which the defendant stands charged.

¹ [2005] All ER (D) 266

- [2] The court has had the opportunity to read Counsels' written submissions on sentencing. The court has also had the benefit of a pre-sentence report (the 'PSR'). The Crown has presented a report of the defendant's antecedent offending.
- [3] The defendant stands indicted for the following offences, namely: -
1. Possession of a firearm without being the holder of a firearm user's licence contrary to section 20 (1) (b) as provided for by section 20 (4) of the Firearms Act² ('Count 1');
 2. Possession of ammunition without being the holder of a firearm user's licence contrary to section 20 (1) (b) as provided for by section 20 (4) of the Firearms Act ('Count 2')
 3. Discharging a firearm in a public place contrary to section 23 (1) as provided for by section 23 (3) of the Firearms Act ('Count 3')
- [4] On 4th November 2019 after the court had given its sentence indication, the defendant was arraigned, and upon his arraignment he entered pleas of guilty to all three counts on the indictment.
- [5] The court then heard oral submissions from both Counsel. The court has considered the plea in mitigation made on the defendant's behalf. The court had previously indicated that the sentence to be imposed would be 8 years and 2 months imprisonment. These are the court's reasons for imposing this sentence.
- [6] The charges contained in the indictment arose out of an incident that occurred on 4th December 2017 at Lower South Hill, in Anguilla. The undisputed facts are contained in the Agreed Statement of Facts presented to the court. The defendant was driving behind Mr. Patrick Carty ('Mr. Carty') who was on his way to the gym

² R.S.A. c. F30

located at Lower South Hill. There was an obstruction in the road so Mr. Carty veered left to avoid colliding with the obstruction. In so doing, he almost collided with the defendant's vehicle. The defendant continued on his way but later turned around and followed Mr. Carty to the gym where Mr. Carty had parked his vehicle. The defendant pulled up alongside Mr. Carty's vehicle. An exchange of words fueled by what can only be described as road rage, ensued between Mr. Carty and the defendant. Mr. Carty exited his vehicle and while removing his gym gear, the defendant approached Mr. Carty and a physical confrontation ensued. Mr. Carty threw the defendant to the ground and pinned him down with his knees. This physical restraint lasted for about one minute, during which time the defendant pleaded with Mr. Carty to release him. Mr. Carty described the defendant as appearing scared during this restraint. Mr. Carty released the defendant and proceeded on his way to the gym. The defendant returned to his vehicle and retrieved a handgun. The defendant followed Mr. Carty into the gym and discharged a total of seven rounds of ammunition while insisting that Mr. Carty, who was in hiding, reveal himself. The several patrons at the gym ran away and hid in various locations. The defendant's vehicle was later found abandoned near his home but the police were unable to locate him. On 1st January 2018 the defendant was apprehended by the Dutch Authorities in Saint Maarten and later handed over to the Anguillian Police.

Seriousness of the offence

- [7] In determining the benchmark or starting point, the court will have regard to the seriousness of the offence.
- [8] The seriousness of this class of offence is reflected in the statutory penalty prescribed upon conviction for the same. Section 50 (b) of the Firearms Act prescribes a term of 14 years or a fine or both on conviction upon indictment.

- [9] The court adopts the view that the maximum statutory penalty for the commission of this offence is not necessarily the starting point or benchmark to be adopted. The court retains the discretion to impose a lesser penalty than that prescribed by law for the commission of the offence.
- [10] In determining the seriousness of the offence the court will have regard to the degree of harm and the degree of criminal culpability of the defendant in the commission of the offence. The court is also mindful of the fact that the sentence likely to be imposed must be commensurate with the seriousness of the offence.

Harm

- [11] In assessing the degree of harm the court paid regard to the following features of the present case: -
- (a) The offence was committed in circumstances where there was a serious risk of harm and or personal injury to persons present including children. Although Mr. Hodge has impressed on the court that in the present circumstances, no physical injury or damage to property resulted from the defendant's actions, the court is of the view that the defendant's actions not only instilled fear in Mr. Carty by also caused the other patrons of the establishment to apprehend the likelihood and risk of personal injury to themselves. There is the clear inference of this upon the facts of the present case.
 - (b) The offence was likely to cause alarm and distress to persons present.
 - (c) Location in which the offence was committed.

Culpability

- [12] In assessing the defendant's degree of criminal culpability in the commission of the offence the court took into account the following factors: -
- (a) Possession of a highly dangerous and potentially lethal weapon.

- (b) The firearm was used to threaten and to cause fear.
- (c) The defendant's conduct not only instilled fear in one individual, but also in respect to other persons who were present at the time.
- (d) The fact that the defendant's conduct went over and above what was required as a result of the perceived threat. In any event, the defendant's conduct not amount to self defence but rather was retaliatory and went above and beyond what was commensurate with the actions of the virtual complainant.
- (e) The defendant's conduct was a rage reaction to a seemingly minor incident.
- (f) The firearm and ammunition were unlawfully in his possession.
- (g) The firearm was loaded at the material time.
- (h) The defendant discharged a total of seven rounds of ammunition.

[13] In arriving at a suitable benchmark the court also paid regard to sentences imposed for similar offences in this jurisdiction. In this regard the court is grateful to counsel for providing the necessary authorities.

[14] The court has discerned that although these decisions give an indication of the final sentence they do not assist the court in distilling the approach to sentencing taken by the sentencer when imposing the sentence. Also, no indication is given with respect to the starting point adopted.

[15] Therefore, in the absence of any definitive sentencing guidelines from this jurisdiction the court will be left to construct a sentence that is based on a suitable benchmark that reflects the seriousness of the offence and one that is based on the principles of judicial sentencing.

[16] Nevertheless, it appears that the sentencing range in this jurisdiction on conviction for these offences is 2 years imprisonment to 7 years imprisonment and in some cases a fine or a suspended sentence.

[17] In determining the seriousness of the offence the court sought guidance from the dicta of Lord Bingham CJ in the case of **R v Avis and Others**³ cited in **Kashorn John v The Commissioner of Police**⁴ where his Lordship said:

“The appropriate level of sentence for a firearm offence, as for any other offence will depend on all the facts and circumstances relevant to the offence and the offender, and it would be wrong for this Court to seek to prescribe unduly restrictive sentencing guidelines. It will however, usually be appropriate for the sentencing court to ask itself a series of questions:

(1) What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun will be viewed even more seriously than possession of a firearm which is capable of lawful use.

(2) What if any use has been made of the firearm? It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm: the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.

(3) With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offences under the Act are those which require proof of a specified criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.

(4) What is the defendant's record? The seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearm offences or other crimes of violence.”

[18] In the circumstances, after assessing the degree of harm and the defendant's degree of criminal culpability the court adopts a benchmark of 10 years imprisonment. The court finds the defendant's culpability to be high based on the factors that the court has taken into account. The court also finds that the degree of harm, although not resulting in actual physical harm or damage to property, to be high given the circumstances in which the offence was committed. Therefore,

³ [1998] 1 Cr App Rep 420; [1998] Crim LR 87

⁴ [2008] ECSCJ No 87

the court finds that the benchmark of 10 years' imprisonment is justified in all the circumstances of the case.

The notional term

- [19] In arriving at the notional sentence the court weighed the aggravating and mitigating factors present in the instant case. The court finds that the aggravating factors outweigh the mitigating factors. Therefore, the court considers it necessary to scale the benchmark upwards to take account of this. Therefore, the court will scale the benchmark of 10 years imprisonment upwards by 2 years thereby arriving at a notional sentence of 12 years imprisonment.

More than commensurate sentence

- [20] Although the court adopts the approach that the sentence imposed must be commensurate with the seriousness of the offence, the court must also be minded of whether any additional term of imprisonment more than commensurate with the seriousness of the offence is required to satisfy the need to protect the public from serious harm from this offender. This aspect of the case is highlighted in the Pre-Sentence Report (the 'PSR') and in the submissions made by Mr. Hodge.

Aggravating factors

- [21] The court has identified the following aggravating factors present in the case: -
- (a) The defendant has previous convictions for similar offences involving the possession and use of a firearm and ammunition. This conviction was shortly before the commission of the present offence.
 - (b) The firearm used in the commission of the offence was never recovered.
 - (c) The defendant sought to avoid detection and apprehension by the local police authorities. The defendant was apprehended by Saint Maarten authorities and surrendered to Anguillian police.

Mitigating factors

- [22] The court was unable to identify any mitigating factors present in the instant case. However, Mr. Hodge has directed the court in his submissions, to some of the subjective factors that might have influenced the defendant in the commission of the offence. The court does not regard these matters as mitigating factors. The court adopts the view that these matters are more concerned with an assessment of the character and antecedents of the defendant in so far as it would permit the court to make a determination as to the type of sentence that it is likely to impose.
- [23] Having weighed the aggravating and mitigating factors in the present case the court will fix the notional sentence at 12 years imprisonment. There is no likelihood of this sentence being scaled downwards on account of any mitigating factors that can be distilled from the circumstances surrounding the commission of the offence.

Permissible aims of punishment

- [24] In determining the length of the custodial sentence, and the type of sentence to be imposed, the court took into account the permissible aims of punishment, namely, retribution, rehabilitation and deterrence. The court considered whether any of the permissible aims of punishment would be better served by the imposition of a custodial sentence as opposed to a noncustodial sentence.

Punishment

- [25] This permissible aim of punishment is premised on the principle that the sentence imposed should reflect society's abhorrence for the commission of the offence. This kind of offence will almost invariably attract a custodial sentence unless there are substantial mitigating factors that warrant a non-custodial sentence such as the defendant's age and lack of previous convictions for similar offences. This was indeed a serious offence. The defendant discharged seven rounds of ammunition from an unlicensed firearm in a public place causing alarm and fear in several

persons present. Therefore, the court is of the view that the only sentence that can serve this permissible aim of punishment is a custodial one.

Deterrence

[26] In this regard, the court is concerned with both specific and subjective deterrence. This defendant has previous convictions for similar offences for which he was sentenced to 12 months imprisonment respectively on charges of possession of firearm and ammunition to run concurrently. This sentence was imposed by the High Court on 7th October 2016 in relation to events that occurred on 23rd March 2014. Therefore, the overall sentence imposed by the court must serve to deter the defendant. This is particularly the case where Mr. Hodge has highlighted in his mitigation that the defendant possesses a particular kind of personality which suggest impulse control and rage reaction to pressured circumstances. This aspect of the defendant's character is also highlighted in the PSR.

[27] The court is also mindful of the serious spate of gun related offences in the jurisdiction. In the absence of empirical data to substantiate the rate of such offending, the court is well placed, based on experience to make a determination on its own, having regard to the number of gun related offences that come before the court in this jurisdiction. In the circumstances, the court must tailor a sentence that reflects the need to deter others from engaging in conduct that involves the unlawful possession and use of firearms in the commission of offences.

Rehabilitation

[28] The PSR conveys the impression that there is a serious need for the rehabilitation of this defendant. The question that arises, is whether this permissible aim of punishment would be better served within the prison environment. The court has taken the view that it is necessary to impose a further term of incarceration to permit the defendant to undergo rehabilitative programs to avoid the risk of the

defendant's reoffending and being a danger to the public. Therefore, the court will impose a further term of 1 years imprisonment on the defendant to alleviate the likelihood of the risk of harm by the defendant to others.

[29] The matters canvassed in the PSR, and what Mr. Hodge has put forward in mitigation on the defendant's behalf satisfies the court that any rehabilitation of this defendant will have to be supervised rehabilitation within an institutionalized environment.

[30] The court has formed the view that any period of imprisonment so imposed is not likely to derail the defendant in his future prospects.

Discount for guilty plea

[31] The defendant having pleaded guilty at this stage of the proceedings will not be entitled to a full 1/3 discount from the notional sentence that the court is minded to impose. For all intents and purposes the timing of the guilty plea cannot be regarded as having been entered at the earliest opportunity. In the circumstances, the court will deduct a total of 1/4 of the notional term that the court is minded to impose which amounts to a discount of 3 years imprisonment from the notional term of 12 years imprisonment.

Time spent on remand

[30] The defendant will be entitled to a discount from the notional sentence for all the time spent on remand. The defendant has spent a period of 1 year and 10 months and 1 week on remand. This period of remand will be deducted from the overall sentence imposed.

Totality principle

[31] The court recognizes that all three charges arose out of the same transaction. Therefore, the court would order that the sentences for each offence shall run

concurrently. The overall sentence imposed is calculated to reflect the totality of the defendant's offending.

Sentence

- [32] The court will therefore impose a sentence of 13 years imprisonment. From this period of 13 years imprisonment a period of 3 years imprisonment will be deducted on account of the defendant's guilty plea. From the remaining period of 10 years imprisonment, a period of 1 year and 10 months will be deducted from the period of 10 years imprisonment to reflect the deduction for time spent on remand. Accordingly, the defendant will serve a period of 8 years, 1 month and 3 weeks imprisonment on counts one, two and three on the indictment commencing from today's date. All the sentences are to run concurrently.
- [33] During this period of incarceration the defendant shall be required to undergo counselling and rehabilitation programs offered by the prison to deal with his anger management issues.

Justice Shawn Innocent
High Court Judge

By the Court

Registrar