

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

SLUCRD2018/0286, 0288

BETWEEN:

THE QUEEN

vs

1. YOHAN HENRY
2. DAVID PHILIP

Defendants

APPEARANCES:

Isa Cyril together with Bernick Faisal Counsels for the Crown
Horace Fraser of Counsel for the Defendants

2019: December 19.

JUDGMENT ON SENTENCING

Criminal Law – Sentencing-Dangerous Harm – Starting Point Sentence-Application of Aggravating and Mitigating Factors of the Offence and Offender-Evidence of a Hate Crime.

- [1] **TAYLOR-ALEXANDER, J.:** The Defendants are to be sentence each for the offence of Dangerous Harm for which they both entered pleas of guilty.

The Relevant Facts

- [2] On Tuesday the 10th day of April 2018 at about 8:00 p.m., the Virtual Complainant met the Defendants Yohan Henry and David Phillip at the Vide Boutielle roundabout. The Defendants and the Virtual Complainant were friends and they had known each other for years. At different points the Virtual Complainant had attended school with both the Defendants. They drove in a car belonging to the Virtual Complainant to a secluded area at Cap Estate where Yohan directed them

to a road with a dead end. After parking the vehicle, the Virtual Complainant sent a message to his friend Teres Edward saying that he was in Cap Estate with the Defendant Yohan Henry. He then exited the vehicle to meet the Defendants after which he took off his pants and held the Defendant Yohan Henry around his waist. Just then David Phillip took off his shirt proceeded toward the Virtual Complainant and suddenly and violently stabbed him in the stomach. The Virtual Complainant took off running away from the Defendants but the Defendants relentlessly pursued him. After running for approximately half a mile, The Virtual Complainant fell down; the Defendants caught up with him, held him down and continued stabbing him multiple times about the body.

The Defendant Yohan Henry tried to break the neck of the Virtual Complainant who fought back and threw both Defendants to the ground. The Virtual Complainant then ran to a house and knocked on the door at which point the two Defendants left him. The Virtual Complainant described his condition after the Defendants left as being bloody with at least seven stab wounds, four to his abdomen with at least two being just below his lungs and three to his back.

After receiving assistance from Guardsman Security Patrol he was hospitalized at the Intensive Care Unit of the Victoria Hospital. On presentation, Dr. Chartuah Fevrier described his condition as unstable and suffering from Hypovolemia Shock a life-threatening condition that results when more than 20 percent (one-fifth) of the body's blood is lost. Both Defendants were later identified during an identification parade in Vieux Fort on the 18th of April 2018.

Allocution and Plea in Mitigation

- [3] The Defendants were assisted in their allocution and plea in mitigation by their Counsel Mr. Horace Fraser who aptly described what had transpired as a night of madness. He reminded the court that the Defendants never wasted the courts time and readily admitted their wrongdoing and remorse for what transpired. The Defendants are both young men and first-time offenders. They are gainfully employed, of previous good character with strong family support. One of the Defendants plays Rugby for the county's national team and regularly travels regionally to represent the country. Mr. Fraser submitted that all these factors suggest that despite the serious nature of the offence, a rehabilitation order should be the court's motivation together with an order for compensation to the Virtual Complainant.

- [4] During the submissions on sentencing it became necessary to clarify from the Defendants whether their plea of guilty to Dangerous Harm was unequivocal. Statements made by the Defendants in the social enquiry report to the effect that the Virtual Complainant was the aggressor in the events that unfolded, was the motivation for this enquiry. The Crown invited the court to completely disregard, or to otherwise exercise extreme caution in the alternative when traversing the statement of the Defendant Yohan Henry in the social enquiry report.
- After the Defendants satisfied the courts that their guilty plea to the charge represents their unequivocal acceptance of the facts as advance in the evidence submitted by the Crown, the hearing continued.

Submissions of the Crown

- [5] The Crown submits that all of the sentencing principles apply to the facts of the case and invites the court, in the application of these principles, to send a strong message to persons who place themselves in a position similar to the Defendants, premeditating the commission of heinous crimes. There is absolutely no doubt that Justice in this matter requires the incarceration of both Defendants. The Virtual Complainant in addition to the unsightly scares now permanently embossed into his skin, was compelled to seek refugee status in a foreign country. The Crown submits that internationally, further damage is done to the reputation of the entire state of Saint Lucia, on the basis that the receiving state accepted the Virtual Complainant's account of his circumstances.
- [6] The Crown reminded that the offence of Dangerous Harm carries a maximum penalty of 20 years. They relied on the following cases in providing guidance to the court:-
- I. In **R v Ali Hamilton SLUCRD2011/0929** the Defendant pled guilty to a single count of Dangerous Harm. On March 2011, the Defendant stabbed one Sea Blaze at a social event in Vieux Fort. The Virtual Complainant was admitted to the St. Jude's Hospital and underwent two (2) surgeries incurred by the hands of the Defendant. The Defendant was eighteen years at the time of the offence. The court accepted the benchmark of 10 years and deducted 5 years for the early guilty plea. The Defendant was sentenced to 5 years imprisonment.

- II. **In R v Godwin Modeste GDAHCR2016/0064** the Defendant who was sixty-three years old pled guilty to the offence of Dangerous Harm. The Grenadian Statute carries the same 20 year maximum as Saint Lucia's Criminal Code for the same offence. The Defendant who was afflicted by mental issues struck the Virtual Complainant several times with a pipe measuring 2 feet 7 inches in length. He was in a mild coma (scale 14 on 15 on the Glasgow Scale). He also suffered from scalp haemaoma cerebral contusions and incoherent speech which lasted a few days. When questioned by police after being arrested the Defendant admitted the crime. Due to his mental disability the starting point was reduced to 8 years imprisonment, 2 years and 8 months were deducted for an early guilty plea and a term of 5 years 4 months was imposed.

Pre-Sentence Report of Yohan Henry

- [7] Yohan Henry is 22 years old and was 21 at the time of the offence. He was born of a marital union and resides with his parents. His mother is a lecturer at a tertiary institution and his father is a retired manager and now a taxi driver. Yohan is a regular church goer, who sings in his church choir. His parents inform that he was always taught to journey the path of goodwill and to follow Christian principles. His father was an active participant in raising his son, spending quality time with him and engaging him in meaningful discussions. He is an avid sportsman who is a member of the national Rugby team. His coach describes him as an inspiration and moral supporter to the other team members.
- [8] He graduated secondary schooling with 8 CXC subjects, 7 of which were at the highest attainable grade. He graduated from the Sir Arthur Lewis Community College with an associated degree in Food and Beverage Operations and is currently pursuing a Bachelor's of Science Degree in Business Administration, with a university in the United States.
- [9] There are no risk factors identified in the documented history of this Defendant that explains the reprehensible, shameful and criminal behavior that he engaged in on the evening of the 11th of April 2018.

Pre-Sentence Report of David Philip

- [10] David Philip is 20-year-old young man from a close-knit family of meager means. He was 19 at the time of the incident. His family schooled him on the important of avoiding friends who were

negative influences. He played Rugby for the Rogue Football Club. This Defendant's schooling background was different and identified some risk factors. At the Vide Boutielle Secondary school where he attended, he engaged in a fight with a teacher, and had been suspended on multiple occasions for fighting, disrupting classes and for an incident with a marijuana cake, forcing his parents to request his transfer to another secondary school.

This Defendant was placed on probation when he was 15 years old, and his probation officer identified him as being a good young man with external issues stemming primarily from his home which affected him negatively. The probation department at the time, engaged him in psycho education programs (self-care and budgeting) and had multiple sessions with his parents. The Defendant himself admitted to the probation officer of an occasion where he fought with a police officer, alleging that the police officer assaulted him. He also admitted to smoking marijuana twice weekly. He has difficulty controlling his anger.

- [11] He worked at the Rendezvous Hotel as a steward for 6 months. He is currently employed with his mother repairing motorcycles where he earns a salary of \$1000.00 a month. He plans to become a chef and his parents have been making plans for him to pursue this overseas.
- [12] The parents of the boys also addressed the court, highlighting that they were both raised in good homes with guidance and support. They asked the court to be merciful in their sentence imposed and to consider an order for compensation which they stand ready and willing to pay.

Victim Impact

- [13] The victim of this incident was unreachable by probation services. His mother and brother attended the sentencing hearing and spoke very passionately of the impact this incident has had on their family life. They also explained why the Virtual Complainant was unavailable to probation services and unavailable for the sentencing hearing.
- [14] The attack on the Virtual Complainant was brutal and had the appearance of a hate crime. The Virtual Complainant's family members spoke of continuity of threats to him, although there was no suggestion that those threats came from the Defendants. The attack and subsequent threats forced the Virtual Complainant to seek asylum outside of St. Lucia. His mother broke down in tears when she explained the multiple scars on his upper torso resulting from stab wounds and when

she explained the loss, she now feels, in having her son torn from her to be relocated elsewhere for his safety.

The General Principles of Sentence

- [15] In **Desmond Baptiste et al V R** Criminal Appeal No. 8/2003 our Court of Appeal accepted as the correct statement of the principles of sentencing to be the statement of Lawton LJ in **R v Sargeant**, [3] 60 Cr. App. R. 74 at page 77 that a sentencing judge is obliged to keep at the forefront of her mind the principles Retribution, Deterrence, Prevention and Rehabilitation as the main factors to be considered when sentencing an offender. The circumstances of a case may not call upon all to be considered. Where any or all these principles are present, a sentence ought properly to reflect how they were considered and applied.
- [16] I have prioritized all four principles in this case for the following reasons. Although this case was not identified by either the Crown or the Defendants as a homophobic hate crime, I have little hesitation in forming that conclusion. The accepted evidence is that the Virtual Complainant was lured to a secluded location for the singular purpose of brutally harming him, if not, to cause his death. I also have no difficulty concluding that the Defendants were motivated in their conduct by the Virtual Complainant's sexual orientation.
- [17] The St. Lucia Constitution Order provides for and protects the interest of all persons and guarantees the equality of treatment of all persons. The courts are obligated to be bastions of those rights and freedoms, and to guard against their violation. But in addition to that, our very humanity enjoins us to protect those vulnerable to violations of their fundamental human rights, and to treat with abhorrence and disdain those acts that threaten to undermine our ability to show tolerance, acceptance and understanding of each other and each other's right to live equally.
- [18] The sentence imposed must therefore appease the injured person and his family that he exists in a society where he can live freely and securely; it must deter persons of similar sentiments that should they wish to act out in similar fashion that their actions too will not receive the tolerance of our society; The sentence must also assure persons who live in our society who are different that their differences will not be met with ignorance, violence and irrelevance, but that they too are to be guaranteed security before the law.

[19] Finally, I am cognizant of the Defendant's ages and their immaturity and I am satisfied that they are capable of meaningful and impactful contribution after this case and are therefore to be afforded rehabilitation.

[20] Of the four principles to be applied I have accorded greater weight to Retribution and General Deterrence.

Factors Surrounding the Commission of the Offence

[21] I have accepted the following as the aggravating and mitigating factors relevant to the commission of the offence:–

Aggravating:-

- a. The offence was committed with weapon;
- b. The Victim was unarmed;
- c. The victim offered no form of retaliation when the defendants accosted him;
- d. It was a sustained attack;
- e. There was a substantial degree of planning, including the selecting of a secluded location.

[22] I find no mitigating factors of the offence.

Factors Surrounding the Offenders

[23] I find no aggravating factors of the offenders.

Mitigating:-

- a. An Early Guilty plea.
- b. Previous good character:- The Crown's submission is that previous good character is of little consequence when dealing with a crime of this severity. The Crown relied on the dictum of Byron CJ (as he then was) in **Desmond Baptiste v The Queen**.¹

*"As to the fact that the offender was committing a crime for the first time, it seems to us that the importance of this circumstance should be left to the discretion of the sentencer as a matter that is to be taken into account with all other mitigating circumstances of the offence. It must be stressed though that the more serious the offence, the less relevant will be this circumstance. In **Turner v The Queen** (1975) 61 Crim. App. Rep. 67 at page 91, a case of armed robbery, Lord Lane, CJ stated that " the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration*

¹ Consolidated Criminal Appeals Nos. 8, 10, 16, 22, 25, 29 etc. of 2003, at paragraph [29].

when Court is dealing with cases of this gravity. Conversely, the lack of a criminal record would be a powerful mitigating factor where the offence is of an insubstantial nature.'

Despite this submission, I am inclined to consider the Defendants previous good character as a relevant mitigating factor.

- c. The Defendant's youth. They were 19 and 21 at the time of the commission of the offence.
- d. The Defendant's remorse. This was expressed on their behalf by the Counsel.

The Starting Point:-

- [24] In **R v Mako** C.A. 446 of 1999 it was said that the starting point for a sentence is *"the true point of comparison with other offending, before individual aggravating and mitigating factors are taken into account. Fixing the starting point is the mechanism for seeking consistency in sentencing."*
- [25] The offence of Dangerous Harm carries a maximum penalty of 20 years. The very nature of the offence is one of seriousness and the facts and circumstances in this case would warrant nothing other than a sentence that starts with a custodial sentence.
- [26] I have considered various cases decided in this jurisdiction for the offence of Dangerous Harm, the consistent thread throughout these cases is that given the seriousness and consequences occasioned by the harm, it is unlikely that a sentence would attract anything other than a custodial sentence. There are cases where a fine or compensation or a combination were imposed. Such cases include **the Queen v Mikel Scotland** SLUCRD2011/0026 which sentence can be confined to its particular facts and circumstances.
- [27] In **R V Ali Hamilton** SLUCRD2011/0929, the court accepted a benchmark of 10 years with a deduction of 5 years for an early guilty plea and in **R v Godwin Modest** GDAHCV2016/0064 a starting point of 8 years was identified. In both these cases the court recognized a history of deviant behavior which was escalating.
- [28] I have assessed these cases and have done a comparison with the facts and circumstances of this case. I have selected 6 years as an appropriate starting point. I have weighted the aggravating factors of the offender in particular that it was a sustained premeditated hate attack and I increase the starting point to 8 years.

Deductions

- [29] Both Defendants are to benefit from a full discount for their very early guilty plea, recognizing that Practice Direction No. 1 of 2015 offers the Defendant a full one third (1/3) discount for a plea at the first available opportunity which takes their sentences to 5 years and 3 months each.
- [30] For their previous good character and their youth, the Defendants are each to benefit from further discount of two (2) years.

Sentence:-

1. The Defendants are both sentenced to 3 years and 3 months imprisonment at Bordelais Correctional Facility.
2. Time spent in pre-trial custody was 3 days, and the sentences are to be so discounted.
3. The Defendant David Philip is to participate in the kitchen helpers program at the facility and is to be enrolled in the education program at the facility. In default of either, he is to serve an additional 6 months at the facility.
4. David Philip is to be enrolled in the Anger Replacement Therapy (ART) offered by probation services at the facility, in default, he is to serve an additional 6 months.
5. Yohan Henry is also assigned to the kitchen helpers program and to assist with the education program at the facility for the duration of his incarceration. In default of each, he is also to serve an additional 6 months.

V. GEORGIS TAYLOR-ALEXANDER
HIGH COURT JUDGE

BY THE COURT

REGISTRAR