

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

IN THE HIGH COURT OF JUSTICE

Criminal No. BVIHCR 2017/0017

BETWEEN:

THE QUEEN

Applicant

-AND-

KANI HAZEL

Defendant

Appearances: Kael London, Counsel for the Crown
Patrick Thompson and Reynela Rawlins, Counsel for the Defendant

2019: 16th September, 11th October
18th October

SENTENCING REMARKS

Headnotes: Criminal Law – Sentencing – Vulnerable Defendant – Aggravating and Mitigating Factors – Possession of a Prohibited Firearm – Unlawful and Malicious Wounding – Goodyear Indication

- [1] **Smith J:** This defendant is before the Court for sentencing on one (1) count of possession of a prohibited firearm contrary to Section 16 (A) (3) (4) of the Firearm Act¹ and one (1) count of unlawful and malicious wounding contrary to Section 164 of the Criminal Code.
- [2] A Goodyear Indication was sought by the defence and that indication was given on 7th July 2017. A second Goodyear Indication was sought from this Court and that indication was given in the following terms:- Count one (1) seven (7) – ten (10) years; the indication on Count three (3) was

¹ The firearm in question was a Mac-11 9mm

one (1) to three (3) years. The defendant entered pleas of guilty to Counts one (1) and three (3) and Count two (2) was discontinued by the Crown.

- [3] The defendant Kani Hazel is a twenty (20) year old British Virgin Islander as is the complainant in this case. They were once friends and neighbours. At the time of the commission of the offence Kani Hazel was nineteen (19) years old. Under the ECSC Sentencing Guidelines, he is considered to be a 'youthful offender'.

Facts in Brief

- [4] On 30th June, 2016 both parties got into an argument about the late return of a motor vehicle belonging to the complainant. The complainant became upset with the defendant and pushed him. He (the defendant) subsequently left the scene. The complainant went inside of his house and about twenty (20) minutes later he heard a rattling sound at his front door. He went to open it and saw two hands come inside of the door, with one hand holding the handle of a gun and the other hand pulling back the slide of the firearm.
- [5] The complainant ran towards the door and grabbed the firearm and saw that it was being held by the defendant Kani Hazel. Both parties began to wrestle and fight during which the firearm went off hitting the complainant in his abdomen region. They both continued to fight and struggle with the complainant managing to hit the defendant repeatedly in his head. The fight spilled out into the yard. The complainant in his deposition to the Magistrates' Court said he saw the defendant coughing up blood and he (the complainant) then stopped hitting him.
- [6] At this point the defendant picked up the magazine to the firearm which had fallen out of the firearm during the struggle, and ran away with it. The complainant went inside his home and sat down while his mother and a neighbour called an ambulance. He was taken to Peebles Hospital and stayed there for five (5) days.
- [7] The complainant sustained serious injuries. He sustained a gunshot wound to the peri-umbilical region and one to his right flank region.

[8] The defendant also sustained injuries:-

- two (2) penetrating injuries to the scalpes;
- three (3) penetrating injuries to the left side of the face;
- a 3cm laceration outside left side of mouth with loose teeth to the upper leg jaw.

[9] The Aggravating and Mitigating Factors as found by the Court are as follows:

Mitigating Factors

1. He was nineteen (19) at the time of the commission of the offence. The guidelines consider him to be a youthful offender.
2. Guilty plea entered after the Goodyear Indication.
3. No previous convictions
4. The precarious mental and physical condition of the defendant

[10] **Aggravating Factors**

1. Firearm was loaded
2. Injuries sustained by the complainant
3. Type of firearm-Mac 11 9mm

[11] In looking at the Mitigating Factors special attention has to be paid to the mental state of the defendant. The Court is aware that the defendant has mental health issues which will necessitate long term treatment. At the time of the commission of the offence the defendant was only nineteen (19) and had (1) one eye. All of this has been taken into consideration and will be further examined in paragraph twelve (12) below.

The Special Circumstances of the Defendant

[12] The medical report dated 6th June 2015 pertains to an incident that preceded the case at bar. The medical report prepared pertaining to his injuries as a result of that incident indicated that the defendant was involved in an incident which showed, a complete fracture of the right mandible with bullet fragments lodged in the neck posterior to the cervical spine. There was extensive damage to the right eye showing rupture of the right eye ball. There was extensive soft tissue injury about the neck.

- [13] A scan showed multiple fragments of shrapnel in the soft tissue of the back and right side. There was also bilateral pulmonary edema noted in the lungs. There was a gunshot wound to the defendant's right jaw with fractured mandible and bullet fragments lodged posterior to C2 vertebra within posterior facet. The medical report also indicated that there was a gunshot injury to right eye resulting in non-viable right eye.
- [14] The Court cannot ignore the fact that for these sentencing purposes that at the time the defendant committed these offences at bar, he had been shot in the head and back and had lost the sight in his right eye.
- [15] Every sentencer must recognize that although there are guidelines given for the imposition of sentences, there is a great degree of discretion in the ability of a sentencer to mete out the punishment which is best suited to the crime/offence and the offender in every case.
- [16] The Court has considered these factors in deciding whether or not to exercise its discretion in relation to imposing a lesser penalty on both of the statutory penalties. Section 16 (a) of the Firearms Act states:- *A person who contravenes subsection (1) commits an offence and is liable, on conviction on indictment to a fine of not less than a hundred thousand dollars or imprisonment for a term of not less than ten years or both.*

Aims of Sentencing

- [17] In relation to the aims of sentencing the Court has rehabilitation, deterrence and punishment as being the aims uppermost in its mind.
- [18] The defendant is still relatively young and would benefit from rehabilitation and counseling which can be provided at Her Majesty's Prison. He also has to remain under the care of a mental health facilitator to ensure that this mental health is monitored and treated.
- [19] While the offence was spontaneous the sentence must be viewed as a deterrent to this defendant and to other young men in society who may feel that to resort to gun violence is the way to resolve

their problems. The Court is very mindful of the fact that the defendant left the fight and returned with a fully loaded firearm.

[20] In this respect the Court considers that the issue of prevalence of gun crimes and the unlawful use of firearms in society must be mentioned. The prevalence of gun related offences in the Territory of the Virgin Islands requires this Court to be mindful of the important public dimension of criminal sentencing which includes the protection of the public by punishing the offender or reforming him or deterring him and others or all of these things.

[21] The ECSC Guideline Rules at paragraph 8 states in relation to prevalence *“if there is a high incidence of a particular offence then the court is entitled to take this into account”*.

Construction of the Sentence

[22] The Court has considered the harm to the complainant. The Court understands that the complainant spent five (5) days at the Peebles Hospital with very serious injuries. The Court has not had the benefit of a victim impact statement and the Court has not received any information regarding any permanent injuries to the complainant. Be that as it may, the complainant received gunshot wounds to his belly/abdomen and his right front region.

[23] The starting point for both offences is obviously a custodial one. I have assessed the harm to the complainant and the culpability of the defendant.

Possession of A Prohibited Firearm

[24] The notional sentence in my view would be on Count one nine (9) years bearing in mind that the Goodyear Indication was in the range of seven (7) to ten (10) years. The nine (9) years will be adjusted downwards to take into consideration the mental capacity of the defendant and his previous good character bringing the sentence to seven (7) years.

[25] I have exercised my discretion to not impose the mandatory minimum penalty. The Court is of the view that no useful purpose can be served in imposing the mandatory minimum sentence of ten

(10) years and or one hundred thousand dollars (\$100,000) on this defendant who is mentally and physically challenged.

[26] The Court has determined that it would be in the interests of justice to exercise its discretion to impose a lesser penalty as it is of the opinion that the imposition of the minimum penalty (a) would be arbitrary and disproportionate; and (b) where the offender is unfit to serve the minimum sentence.

[27] The defendant also contends through his Counsel that his medical situation (the loss of sight in his right eye and the need for extensive and long term medical care) militate against a finding that he is a fit and proper person to serve the minimum sentence.

[28] The defendant entered a plea of guilty after the Goodyear Indication was given. He will therefore receive his full one third (1/3) discount for the guilty plea. The one third (1/3) of seven (7) years brings us to eighty four (84) months minus twenty eight (28) months:

$$84 - 28 = 56 \text{ months or } 4.6 \text{ years.}$$

Unlawful and Malicious Wounding

[29] Count three (3) on the indictment is Unlawful and Malicious Wounding contrary to Section 164 of the Criminal Code as amended provides as follows:

“Any person who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, commits an offence and is liable on conviction to imprisonment for a term not exceeding five years.”

[30] As already stated in paragraph one of this ruling the Goodyear Indication was in the range of one (1) to three (3) years. The Court's starting point would therefore be three (3) years with the defendant being given his full one third 1/(3) discount. One third of thirty six (36) months is twenty four (24) months or one year.

[31] The defendant will serve four and a half (4 ½) years for the prohibited firearm and one (1) year for the unlawful and malicious wounding. Both sentences are to run concurrently.

[32] I would recommend that the defendant continue to receive treatment for his mental health challenges.

[33] The defendant has been incarcerated from 30th June 2016. His sentence is to take effect from the date he first went into custody at Her Majesty's Prison.

**Ann-Marie Smith
High Court Judge**

By the Court

Registrar