

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

**IN THE HIGH COURT OF JUSTICE**

**Criminal No. BVIHCR2018/0014**

**BETWEEN:**

**THE QUEEN**

**Applicant**

**-AND-**

**NICKHAIL CHAMBERS**

**Defendant**

**Appearances:** Ms. Leslie Ann Faulkner Senior Crown Counsel for the Crown  
Mrs. Carmelita Jamieson, Counsel for the Defendant

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**2019: July 12<sup>th</sup> & 14<sup>th</sup>**

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**JUDGMENT ON SENTENCING**

**Headnotes:** Attempted Murder – Sentencing – Aims of sentencing – Application of Avis guidelines – Aggravating and Mitigating factors.

**BACKGROUND**

- [1] **SMITH J:** The defendant Nickhail Chambers was arraigned for a single count of attempted murder and a single count of unlawful possession of a firearm to attempted murder contrary to Section 152 of the Criminal Code 1997 (Act 1 of 1997) and unlawful possession of firearm with intent to endanger life contrary to section 27(a) (a) of the Firearms Act Chapter 126, as amended, of the Laws of the British Virgin Islands. He entered pleas of guilty to both counts on the indictment. He was sentenced on 14th July 2019. I am now reducing my sentencing remarks into writing.

## BRIEF FACTS

- [2] Khori Prince the complainant was once good friends with the defendant. They had known each other for over ten years having both attended the Althea Scatliffe Primary School together.
- [3] On Thursday 22<sup>nd</sup> June, 2017, the complainant was at work at Fort Hill. Sometime during the morning the defendant arrived riding a pink motor scooter. The complainant indicated in his deposition at the Magistrates Court that the defendant rode off but subsequently returned and said to him, *"what going on big dog, when you plan on giving me that lil thing you have for me"*, to which the complainant responded, *"I hut right now, when I get a lil change I will pay ya."* The defendant then replied, *"like that is your favourite line, like you really want to get hurt."* The complainant responded, *"nobody going do me nothing for \$60."*
- [4] After the conversation the complainant went home and returned shortly back to his place of work. When he arrived, he met the defendant there and sat next to him. He observed that the defendant was rolling a joint, and he asked him, *"all that money you made from me renting scooter from you every week for \$200.00, its \$60.00 you getting on with me so for."* Whilst the complainant was asking the defendant this question, he states in his deposition that his hand accidentally touched the defendant's hand and this resulted in the joint that he was rolling, to fall on the ground. The defendant jumped up and punched the complainant and held him into a headlock.
- [5] A fight ensued with the complainant punching the defendant in his face which caused same to bleed. The altercation subsequently came to an end and the complainant returned to his work and the defendant left.
- [6] Later that day whilst at work, the complainant observed that the defendant had rode pass his place of employment on his pink motor scooter and that he was shirtless. He was in the company of a brownish Vitara jeep. The complainant observed that the defendant appeared to be upset.
- [7] A few minutes later the complainant stated that he saw the defendant riding back up the road towards him pointing a black handgun in his direction. Upon seeing this, the complainant

immediately ran behind the building of his workplace and ran down the hill towards the direction of some apartments.

[8] As he took off running, he said in his deposition that he heard the sound of loud explosions which sounded like gunshots, followed by at least five (5) more loud explosions. The complainant continued to run, stating that he had to duck as he crossed the main road, escaping into some bushes, and down the side of the mountain. As he ran, down the mountain, he lost his footing and fell. He eventually reached an area called Free Bottom located below the mountain/hill of Fort Hill.

[9] The defendant's antics that day were caught on surveillance cameras CCTV footage. In addition to the CCTV footage part of the incident was witnessed by a passer-by name Andre Armstrong.

[10] In his deposition he stated that at that same time, he thought the noises were as a result of a vehicle backfiring and so, he continued on his way. He stated further that he then observed a young man (the complainant) runs hastily across the main road and into the bushes followed by the defendant pointing what appeared to be a firearm.

[11] The complainant called his mother, his sister and reported the incident to the police. CCT footage was recovered from the complainant's workplace. The footage is important and has been reproduced here in some detail to give a full picture of the occurrences on that day:-

#### CCTV Footage

*17:59:10 – jeep arrives on the right of the screen where three persons exited; young man in orange shirt arrives on pink scooter. Complainant is seen running hastily across the street.*

*17:59:16 – complainant is seen running downwards facing Purcell Estate direction.*

*17:59:19 – the defendant is seen running in the right corner of the footage/camera with his right hand out-stretched with a gun in same. Defendant is now shirtless. A pink scooter with young man wearing an orange shirt passes.*

*17:59:36 – 17:59:42 – young man in red and black shirt with stars is seen looking down hill in the direction of where the complainant ran.*

*17:59:28 – young man in white shirt with locks that exited the jeep runs downhill towards the direction of the complainant.*

*17:58:57 – a brownish Suzuki Vitara Jeep appears on the left side of the road and the defendant is seen exiting same with his right hand by his right side. A gun is seen in that hand.*

*17:59:15 – The defendant is seen holding a gun in his right hand, firing same whilst standing next to PS661 a C300 Mercedes car. The smoke is seen emitting from the gun. The gun is seen to be moving back and forth in rapid succession.*

*17:59:56 – The young man dressed in an orange shirt riding a pink scooter is seen to ride off in the direction of Bellevue. The defendant re-enters the brownish, Vitara Jeep in the drivers section and drove off into the same direction as the young man on the pink scooter.*

*17:59:15 – The complainant is seen hastily running around some parked ATV's, then he ran across the main public road.*

*17:59:19 – The defendant is seen from his waist down near the top of the right hand section of the footage. The young man on the pink scooter is seen riding across.*

[12] Upon the receipt of the report, members of the Royal Virgin Islands Police Force responded to the scene. The Firearms Armorer had the opportunity to view the footages and from his observations he described that the defendant who was shirtless, appeared to be holding a Glock pistol and was discharging same several times. He was able to conclude that the pistol was being fired as he observed that the top slide of the firearm was rotating backwards and forwards and from his experience, this only occurs when the trigger is pulled, causing the rounds/explosives to be discharged from the chamber.

[13] The defendant was subsequently arrested and charged.

[14] **Legal Framework**

“Any person who, by any means, attempts to commit murder is liable on conviction to imprisonment for life”.

[15] However, this Section must be read alongside Section 23(1) of the Criminal Code:

“23(1) a person liable to imprisonment for life or any other period may be sentenced to a shorter term, except in the case of a sentence passed in pursuance of Section 150.”

[16] **Crown's Aggravating and Mitigating Factors**

**Aggravating Factors**

1. The shooting was premeditated. The altercation between the defendant and the complainant started at Bellevue; however this altercation came to an end and the complainant returned to work and the defendant left.
2. The firearm has not been recovered.
3. Multiple shots were fired in a public place.
4. The firearm was loaded.
5. The defendant has previous convictions

[17] **Crown's Mitigating Factors**

1. The defendant's early guilty plea.

**The Defence Plea in Mitigation**

[18] The defence disagrees with the Crown's aggravating factor that the shooting was premeditated. They say that the Crown has not put forward any evidence to prove that the offence was premeditated and they cite cases to substantiate this point. The defence admits that the firearm was not recovered and that there were no spent shells at the scene. They contend that the non-recovery of the firearm does not aggravate the offence or adds to aggravation and therefore cannot be rightly placed as an aggravating factor.

[19] The defence also says that while multiple shots were fired in a public place, they were directed only towards the complainant and no one was injured including the complainant.

[20] While the defence accepts that the defendant has previous convictions it is their submission that none of those are offences that bear any similarity to the case at bar. The defendant's conviction is for handling stolen goods and the Court is urged to not place any weight on this.

## **The Authorities**

[21] The Crown helpfully put forward a number of authorities for consideration of the Court.

**The Queen v Matthew Hazel**<sup>1</sup> – This case bears little similarity if any to the present except that it was a case of attempted murder and a firearm was used. I agree with defence counsel when she states that this case is distinguishable in that it was a case of robbery and involved an off-duty police officer and therefore the aggravating factors were also vastly contrasting: That defendant in that case was found guilty after a trial and the Court had the benefit of a Victim Impact Assessment. In the ***Matthew Hazel*** case that defendant was sentenced to nine (9) years for attempted murder, four (4) years for robbery and six (6) years for possession of firearm with intent.

**R v Kenyatta Boynes**<sup>2</sup> – In this case, the defendant was sentenced to ten (10) years imprisonment for attempted murder. This case went to trial and Boynes was found guilty of murder and attempted murder. In this case there were a plethora of aggravating factors including lack of remorse and the fact that there was loss of a life. In the case at bar no one was physically injured.

**The Queen v Patrice Grant**<sup>3</sup> – This is a case where the defendant a serving police officer shot and injured the then Commissioner of Police while holding him hostage. Counsel for the defendant says that the case is so “contrasting that it ought not to be given consideration in the sentencing of the Defendant since it is aggravated by the fact of gunshot injuries and involved a Commissioner of Police among other aggravation”. I am constrained to agree as the Patrice Grant case is much further along on the scale of seriousness than the case at bar.

**The Queen v Devon Dawson**<sup>4</sup> – In this case the defendant was sentenced to twenty (20) years in a case where the complainant suffered multiple injuries from a machete attack. The defendant had confronted the complainant days before the incident. Again, this is distinguishable from the case at bar and of a much more serious nature. The Devon Dawson case had grave aggravating circumstances which included life threatening injuries to the complainant and does not really assist the Court.

**The Queen v Jerry Martin**<sup>5</sup> – in this case the complainant suffered life threatening injuries from nine (9) gunshots unlike the case at bar where no injuries were suffered. The defendant was sentenced to eighteen (18) years. This case is also highly distinguishable from the case at bar where no injuries were suffered

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<sup>1</sup> BVIHCR2015/0020

<sup>2</sup> Criminal Case 10 of 2015

<sup>3</sup> Criminal Case 19 of 2005 (unreported)

<sup>4</sup> Criminal Case No. 2 of 2006

<sup>5</sup> BVIHCRAP 2007/003

## **The Aims of Sentencing**

- [22] The Court of Appeal decision of *Desmond Baptiste et al* is instructive in so far as it adopts and endorses the cardinal principles of sentencing which are retribution, deterrence, prevention and rehabilitation. It is therefore submitted that the said principles be considered in determining the appropriate sentence to be meted out. In performing the sentencing exercise the cardinal principles of sentencing are uppermost in my mind and will be applied to the case at bar:-

**Punishment:** The objective here is to reflect society's abhorrence of criminal conduct especially of this type of offence;

**Deterrence:** This specific or general and is aimed at not only deterring the particular offender from relapsing engaging in recidivist offending but also to deter likeminded people from engaging in similar deviant behavior. This defendant has to be deterred from committing other offences of a similar manner and the sentence must demonstrate this while other young men in the Territory must equally be deterred from gun related offences;

**Prevention:** This is aimed at protecting society from offenders who persist in high rates of criminality by imposing protracted sentences designed to keep them away from society;

**Rehabilitation:** Here, the Court considers whether the offender is capable of rehabilitation and reintegration into society as a contributing member of society. The Court is concerned to shape the sentence in a way that assists in achieving this objective. This defendant by entering an early guilty plea has shown that he is ready to take responsibility for his actions and that he is a good candidate to rehabilitation.

## **Firearm Offences**

- [23] Unfortunately offences of this ilk are coming before this Court more frequently. In such cases the sentencing guidelines for firearm offences originate from *R v Avis*<sup>6</sup> which have been applied by the Eastern Caribbean Court of Appeal in *Kashorn John v Commissioner of Police*<sup>7</sup>. *R v Avis* was decided in December 1997 and in that judgment; Lord Bingham CJ offered guidance to sentencers about the levels of sentence which would be appropriate for a variety of offences taking account of the ambit of the Firearms Act 1968, as amended by the wide-ranging, recent statutory provisions of the Criminal Justice and Public Order Act 1994.

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<sup>6</sup> (1998) 1 Cr. App. R.

<sup>7</sup> Court of Appeal MCRAP 2007/086

[24] It was suggested that by addressing a series of questions the sentencing court would provide itself with appropriate indications of the true extent of the defendant's culpability. The questions to be considered were:-

- (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 or a high powered assault gun) 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 specific 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 firearms offences or crimes of violence. The position taken by Bingham CJ in 1997 has repeatedly been referenced and mirrored in our Courts as well as regionally.

[25] I join with my sister judge Ellis J when she said in **R vs. Tim Daley**<sup>8</sup> at page 8 that *"there is a clear need to discourage the unlawful possession and use of real and imitation firearms and to give effect to the clear intention of Parliament to stamp out the burgeoning scourge in our peaceful societies. In that vein, Parliament has continually increased the maximum penalties for firearm offences. There can therefore be no doubt the offence before the Court is a serious one which warrants a custodial sentence."* This position was endorsed in **Kendrick Marksman v Commissioner of Police**<sup>9</sup> by Sir Dennis Byron C.J. (as he then was) who, in laying down guidelines for sentencing in firearm offences pointed out that..."

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<sup>8</sup> BVIHCR: 2014/005

<sup>9</sup> Mag. Cr. App. No. 41 of 2003 (SVG) 6/12/04



[26] *"Firearm offences are on the rise... and it would be rare for a magistrate not to impose a custodial sentence for an offence involving the use of an unlicensed firearm..."*

[27] Cases of attempted murder can vary widely in their gravity depending upon the nature of the attempt and any injuries sustained by the victim. They are however ultimately serious as unlike murder where an intention to cause grievous bodily harm will suffice, attempted murder require an intention to kill. Nothing else will suffice. Therefore, a defendant convicted of attempted murder will have demonstrated a high level of culpability. The level of injury or harm sustained by the victim must be taken into account and reflected in the sentence imposed.

### **Discussion**

[28] As defence Counsel has urged the Court to do, the Court has assessed all the circumstances that impact upon the case to therefore determine the final sentence. The Court has also had regards to the aims of sentencing as set out in the paragraphs above. The Crown submitted that an aggravating factor of the offence was the fact that the firearm was never recovered. The defence on the other hand maintains that this cannot rightly be deemed to have aggravated the offence since it is an assumption that the defendant knew where the firearm was located and failed to disclose its whereabouts. The defence submitted that such an assumption could not be supported. The defendant however stated in open court that he had informed a police officer where the gun could be located. One of the two officers said he could not recall if that was said to him or not, while the second officer refuted and said nothing was said. In relation to this inconsistency the Court is of the view that it is clear that a firearm was used and it is clear that it had not been recovered meaning that an unlicensed firearm is somewhere out there in the territory. This in my view must be an aggravating factor and shall be treated as such.

[29] Finally, the factor of previous convictions should also not be given full weight since the convictions are not related to the type of offence committed or involved any gravity of violence or firearm usage. His previous convictions as agreed by the Crown are for handling stolen goods, burglary and rape. Rape is clearly an offence of violence and so will be taken into consideration.

[30] The Court agrees with both Crown and defence Counsel with regards to the offence of the use of a Firearm with Intention to Endanger Life and the discretion that this Court now has pursuant to Section 27A of the Firearms and Air Guns (Amendment (Act), 2015 where the Court has a discretion as to whether or not to impose the minimum 20 year sentence for such offence where:-

1. It is fair and just in all the circumstances of the case to impose a penalty other than the minimum; or
2. It is of the opinion that the imposition of the minimum penalty would be arbitrary and disproportionate.

[31] The Court has determined that it is just and fair in all the circumstances for the Court to exercise its discretion to impose a lesser sentence than the statutory twenty (20) years for the firearm offence based on the aims of sentencing, the aggravating and mitigating factors of the offence and of the defendant.

[32] The Court has determined the following:

**Aggravating factors relating to the offence:**

1. The shooting was premeditated. The altercation between the defendant and the complainant occurred and the defendant left the area and returned with a loaded firearm. While I agree with the defence that the complainant punched the defendant causing his face to bleed, the defendant was clearly the aggressor on that day. Notably, the defendant actually said that he would shoot the complainant.
2. The firearm was never recovered.
3. Multiple shots were fired in a public place.
4. The firearm was loaded.

[33] **Aggravating Factors relating to the defendant**

1. The defendant has a previous conviction for handling stolen goods, rape and burglary with convictions as recent as 2015.
2. The defendant was motivated by an intention to cause harm/revenge.

**Mitigating Factors relating to the defendant**

1. The defendant entered an early guilty plea
2. The defendant is twenty seven (27) years old,
3. The father of an eight (8) year old child
4. Exhibited remorse in Court and by writing to the complainant a letter of apology

[34] There are no mitigating factors relating to the offence.

[35] The Eastern Caribbean draft sentencing guidelines offer guidance in the construction of the sentence starting with assessing the harm occasioned to the complainant and the seriousness of the offence. In this case the complainant did not receive any physical injuries and the Court does not have the benefit of a victim impact statement. Notwithstanding this fact it is highly likely there may have been psychological harm or trauma occasioned to the complainant. Being shot at is not an occurrence to be taken lightly.

[36] In consulting the Eastern Caribbean draft guidelines the Court places this case at a level three (3) where minimal harm has been visited upon the complainant, and without the benefit of an impact statement the Court can take it no further than that.

[37] Having assessed the harm to the complainant on both counts, the Court must now assess the culpability of the defendant. In this case I am of the view that the culpability of the defendant is of a medium level thus bringing my starting point to fifteen years (15) years for both offences. The Court is cognizant of the fact that the altercation occurred when the defendant left the scene and returned with a loaded gun.

[38] The Court will adjust the fifteen years upwards due to the defendants list of previous convictions bring the figure to seventeen (17) years. One previous conviction is for rape, clearly an offence of violence. The seventeen (17) years will be further reduced to take into account the fact that the defendant entered an early guilty plea resulting in a one third reduction resulting in sixty-eight (68) months. This will bring the figure to twelve (12) years. With the aggravating factors outweighing the mitigating factors the figure will not be further adjusted in this case.

[39] The defendant has been in custody since 22<sup>nd</sup> July 2017 which will amount to two (2) years which will be deducted from the sentence.

[40] The defendant is therefore sentenced to ten (10) years for attempted murder and ten (10) years for the unlawful possession of a firearm. He will be given credit for his time spent on remand and the sentence will therefore take effect from the time he first was placed on remand. Both sentences are to run concurrently.

**Ann-Marie Smith**  
**High Court Judge**

**By the Court**

  
**Registrar**