

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

IN THE HIGH COURT OF JUSTICE

CASE NO. GDAHCR2017/0028

BETWEEN:

REGINA

V

VERLON MITCHELL

Appearances:

Mr. George W. Prime for the Defendant/Accused
Ms. Crisan Greenidge for the Crown

2018: April 27th and May 3rd

SENTENCING AFTER TRIAL

- [1] **TAYLOR ALEXANDER, J.:** The Defendant was found guilty on the 20th of April 2018 on a single count of causing Dangerous Harm to Abbydan Mitchell contrary to section 208 of the Criminal Code as enacted by section 35 of the Criminal Code (Amendment) Act 2012. He was sentenced the week following on the 27th of April 2018. The following are my reasons for the sentence imposed.

Brief Facts

- [2] The Defendant and the Virtual Complainant were in the yard of a shop at Mt Cuma in St. Georges Grenada. There were at least eight other persons in the vicinity of the shop and discussion between the men had become animated, escalating to a quarrel and to aggression. The Virtual Complainant, to whom most of the aggression had been directed and who was standing in the yard, looked up to the

gap of the road and saw the Defendant coming towards the shop; at the time the Defendant was 30 feet away. The Defendant is his cousin. They were on speaking terms and live 20-30 feet away from each other. They have both lived at Mt Cuma for their entire lives. The Defendant reached where the Virtual Complainant was standing and came in front of him. The Defendant made a shove towards the Virtual Complainant with his hand and the Virtual Complainant felt a touch to his belly. He looked at the Defendant who looked at him. Shortly after, he felt something running down his leg. He saw blood on his white shirt. He looked back at the Defendant, and then he took off running. As he ran he heard a noise that sounded like keys and money jingling, he turned around and saw the Defendant running after him. He ran up the road towards his brother's shop. When he got there he sought a ride to the hospital.

- [3] The medical evidence at trial of Dr Yearwood was that the Defendant suffered from a single stab wound, to the left side of the upper abdomen. The injury was caused by a sharp object consistent with a knife, and there was a lot of force used in the infliction of the injury. The trajectory of the weapon used, caused it to go straight through the stomach. Internal examination revealed that there was more than 1 litre of blood in the Virtual Complainant's abdomen. There was a 1 cm laceration to the liver on the left side, that went through the left lobe of the liver then through the stomach from the front wall right through to the back wall, and continued. The injury lacerated an artery and vein of the spleen and also went into the pancreas and lacerated the primary drainage of the pancreas, which meant that the pancreatic or digestive juices necessary to break down the food we eat, were leaking out into the abdominal cavity. There was also a large blood clot in the area extending over the kidneys and aorta, but neither of these organs was injured. The splenic artery and vein had to be sutured to stop further bleeding. Dr Yearwood and his team also closed off the two holes in the stomach. They removed half of the Virtual Complainant's pancreas, because the channel could not be closed securely, and this was the only way to do so. The depth of the injury into the Virtual Complainant's body was 6 or 7 inches.

- [4] Doctor Yearwood's evidence was that the injury sustained was life threatening and without medical intervention would result in death. He also said, because the Virtual Complainant had a perforation in his stomach, the blood accumulating there was acting like food for bacteria and left untreated the Virtual Complainant would have developed an abscess, which could have resulted in death. The possible long term effect of the injury, given that the Virtual Complainant has only half his pancreas, is that his ability to produce adequate insulin to regulate his sugar intake may be compromised. The result of the injury therefore means that the development of diabetes is likely to be aggravated. Although not a direct cause and effect, it is a risk factor. His ability to produce adequate digestive juices may also be a problem that could develop later, but at the time of discharge there was no note of diabetes or difficulties with the production of digestive juices.

The Crown's Submissions

- [5] Learned Counsel, Ms. Greenidge, reminded the Court of the statutory maximum penalty for the offence of Dangerous Harm, the guiding and settled principles for a tribunal who comes to sentence an offender, and the other factors to which a court must have regard, namely his antecedents and the impact to the victim.
- [6] She invited the Court to consider the following cases which have emanated from our jurisdiction namely **R v Ali Hamilton Criminal** SLUCRD 2011/0929; **R v Craig Nelson** SLUCRD 2012/0556, as cases from which the Court can draw guidance in arriving at a starting point sentence.
- [7] I was also asked to consider the following Aggravating and Mitigating Factors before dispensing the sentence:-

Mitigating:

- No previous convictions

- One wound inflicted

Aggravating:

- Totally unprovoked act
- An act of retaliation based on a false premise
- Weapon used though particulars unknown
- The extent and location of the injury – potentially life threatening injury without timely medical intervention
- Present physical effect of injuries on the Virtual Complainant having lost half of his pancreas and the on and off loss of feeling in his limbs. At trial he also stated that he is now on a very strict diet, he experiences numbness in his big toes at times and pain in the area and his breathing has gotten heavy and he gets tired fast.
- Familial relationship – the Defendant did not consider an amicable non-violent resolution situation with his cousin
- Was persistent in his actions – chased after the Virtual Complainant after inflicting the fatal wound

The Defendant's Submissions

[8] The Defendant submits the following are the issues relevant to the sentencing of the Defendant:-

- (i) What are the mitigating and aggravating factors in the instant case?
- (ii) What is the object of sentencing in the instant case?
- (iii) What is the effect of the various mitigating factors on sentencing?
- (iv) What is an appropriate sentence in the instant case?

I agree these, as the relevant issues for consideration.

[9] He submits the following as the Aggravating and Mitigating Factors for consideration in the instant case:—

Aggravating Factors

- The seriousness of the offences.
- A weapon was used.
- Unprovoked.
- Serious injury involved, life threatening.
- Young and vulnerable victim

Mitigating Factors

- Good character: The Defendant has no previous convictions. He is a first offender.
- Remorseful: The Defendant and the Virtual Complainant are cousins and he is very remorseful.
- Youth: At the time of the offence, the convicted man was 24 years. Youthfulness is probably the best known of all matters of mitigation. The younger the offender at the time of the offence, the greater its effect by the way of mitigation. (Archibald 5-130, p.595)
- Spontaneous/ Impulsive
- Offered compensation to the victim
- Secure job, good work record

[10] I reject the submission of the Defendant's remorse, he has expressed none. I also agree with Counsel for the Crown that although he is aged 24, youth is not a

mitigating factor that the Defendant can benefit from. It is a practice of this court to reserve youth as a mitigating factor for juvenile and young offenders, because juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed and the susceptibility of juveniles to immature and irresponsible behaviour means their irresponsible conduct is not as morally reprehensible as that of an adult. At age 24, and being the father of two, the Defendant is a fully grown man, an adult who cannot benefit from the susceptibility of youth.

- [11] I accept the aggravating and mitigating factors as distilled by the Crown, with the exception of the Defendant having retaliated based on a false premise. Although this issue arose inferentially at the trial, this was not an agreed or accepted fact.

Object of Sentencing

- [12] The purposes of criminal punishment has been settled in our jurisdiction in the Court of Appeal case of **Desmond Baptiste et al v The Queen** Criminal Appeal No. 8 of 2003, as being retribution, deterrence, prevention and rehabilitation.
- [13] I am aware that albeit all criteria are important, it is for the Court to decide which principle should predominate “*as the Court strives to fashion the appropriate penalty in each case*” per Rawlin JA as he then was in **Harry Wilson v R**. This would call for the careful scrutiny of the various circumstances and facts which surround the particular case.
- [14] I have read Counsel’s guidance on the objectives that are to be prioritised in this case, and it is the common position, and I accept, that retribution, being a reflection of society’s intolerance for criminal conduct and general deterrence to restrain against potential criminal activity by others, are to be prioritised.

- [15] The Parliament of Grenada as recently as 2012, undertook an upward revision to the maximum penalty that may be imposed on conviction on indictment for Dangerous Harm, from fifteen (15) to twenty (20) years. Although the Criminal Code of Grenada acknowledges that the ultimate discretion to impose an appropriate sentence resides with the Court, it is part of the Court's sentencing obligation to take account of society abhorrence for crimes of a particular nature, and to impose an appropriate sentence in the circumstances. The society often speaks through its elected representatives in Parliament. The revision of the penalty upward indicates the views of Parliament and, by extension, the community about the seriousness of this offence compared to other criminal offences, and their intolerance for it.
- [16] As it concerns General Deterrence, Counsel for the Crown has provided the Court with crime comparative data for the period 2008-2009 in the island of Grenada which show offences of wounding and harm including dangerous harm as being the far more prevalent offences before the Court. Dangerous Harm finds itself at the top of the harm category offences. It is a very serious offence which ordinarily attracts a custodial offence, due to the degree of harm caused to the victim and the intent of the offender.

Starting Point Sentence

- [17] In **R v Taueki, Ridley and Roberts** [2005] NZLR 372, a decision of the Court of Appeal of New Zealand, the Court clarified that a "starting point" for sentencing should be understood as the sentence appropriate, when aggravating and mitigating circumstances relating to the offending are taken into account, but excluding aggravating and mitigating features personal to the offender.
- [18] The Court relying on another New Zealand case of **R v Mako** [2000] 2 NZLR 170. said thus:-

“The modern approach to sentencing uses as a reference point a starting point taking into account aggravating and mitigating features of the offence, but excluding mitigating and aggravating features relating to the offender. Put another way, a starting point “is the sentence considered appropriate for the particular offence (the combination of features) for an adult offender after a defended trial”:

[19] In **Aguillera et al v The State** Crim All 5,6,78 of 2015 the Court of Appeal of Trinidad and Tobago adopted the approach in **R v Taueki, Ridley and Roberts**, to determine a starting point sentence and emphasised that a sentencing Judge needs not only to identify such factors, but also to evaluate the seriousness of a particular factor. The evaluative task is an important aspect of sentencing: without it, there would be a danger of a formulaic or mathematical approach to the assessment of sentencing starting points.

[20] The United Kingdom Sentencing Council have issued sentencing guidelines of the most important aggravating and mitigating features with potential application to more than one offence or class of offences, including factors that indicate a more than serious degree of harm. It is accepted that these aggravating and mitigating features include some factors which are integral features of certain offences and in such cases, the presence of the aggravating factor is already reflected in the penalty for the offence and cannot be used as justification for increasing the sentence further.

[21] I find the guidance persuasive and have distilled from those, the relevant aggravating and mitigating features relevant to the offence for this case as follows:—

- (i) use of a weapon to frighten or injure the victim;
- (ii) an intention to commit more serious harm than actually resulted from the offence;

- (iii) an especially serious physical or psychological effect on the victim, even if unintended;

The Defendant does not benefit from any mitigating features identified by the Council.

Application of these features to the offence

- [22] It is the evidence of Doctor Yearwood that the depth of the injury into the Virtual Complainant's body was 6 or 7 inches. It is my conclusion therefore, that the blade of the weapon used was of at least that length. The injury was to the left upper quadrant of the Virtual Complainant's abdomen which area contains amongst other things portion of the liver, the majority of the stomach, the pancreas, the left kidney, and the spleen, all of which organs suffered damage. The Virtual Complainant's quality of life has been reduced by the Defendant's action. This is clear from the doctor's report. I have no difficulty concluding that the Defendant's actions were deliberate to cause very serious injury to the Defendant, averted only by the timely and expert intervention of the surgical team at the Grenada General Hospital. From the Doctor evidence, the Virtual Complainant's quality of life has been significantly reduced.
- [23] The Virtual Complainant's own evidence is that he is now on a special diet for the rest of his life, having been banned from nuts and grease, and in his own words *"almost everything in the world good to eat"*. He suffers from shortness of breath easily now and loss of sensation at times in his toes.
- [24] I have considered the cases referenced by Counsel emanating from this jurisdiction, where the court has fixed starting point sentences based on the facts and circumstances of the case. In particular:—

- (i) ***R v. Ali Hamilton***¹ a case of an unprovoked attack, where the defendant had five previous convictions and was generally appreciated to be a troublemaker, deviant and rebellious;
- (ii) ***R v. Craig Nelson***² a case of domestic violence where the violent beating of his common law spouse resulted in the premature delivery of a still born.

In both these cases the court used a suitable starting point of ten (10) years and;

- (iii) ***R v. Godwin Modeste***³ where the Defendant maimed the Virtual Complainant causing his left ear to hang off and flesh on his head to be exposed. The virtual complainant appeared to have multiple injuries, including soft tissue scalp haematoma on areas on his head, and cerebral contusions The defendant had seven (7) previous convictions and his pattern of offending was escalating. It was also demonstrated in his social inquiry report that there were several offences for disruptive and disorderly type behaviour. A starting point sentence of 8 years was used.

I have compared the facts and circumstances in these cases, with the facts and circumstances in this case, and have applied the considerations of general deterrence and retribution and have concluded that an appropriate starting point in this case is six (6) years.

Sentence

- [25] This Defendant is a 27 years old man. He was 24 and the date of the commission of the offence, employed as a technician, with no previous convictions. His background is unremarkable; he is a single man, with two children. The evidence in this case did not reveal any particular motive for the Defendant's behaviour and it appreciated that this was an unprovoked attack.

¹ SLUCRD 2011/0929

² SLUHRD2012//0556

³ GDAHCR2016/0064

[26] Having applied my mind to the aggravating and mitigating factors specific to the Defendant as referenced by the Crown, including that the Virtual Complainant and the Defendant are cousins who share the same surname, grew up in the same area, and it appears share the same friends. They live in close proximity to each other and prior to the incident shared a cordial relationship. I am mindful that the incident took place after what was a day of binge drinking by the Virtual Complainant and the other people who were at the scene, and tempers were flaring and persons on the scene were seemingly agitated. From the evidence it appears that the Defendant may have misread what had transpired, causing his attack of the Virtual Complainant. There is evidence of strong community support for the Defendant, and of family support. That, together with evidence of the Defendant having no previous convictions and being gainfully employed with two young children, whom he cares for, militate against recidivism, and provide the court with compelling reason to apply a further reduction of the starting point sentence of 2 years.

Suspended sentence

[27] I am of the considered view and despite the seriousness of this offence that a non-custodial sentence is justified in this case for the reasons I have stated immediately above, in particular, the compelling argument that there is minimal chance of recidivism. I am also of the considered view that this case cries out for compensation for the Virtual Complainant which the Defendant who is gainfully employed is in a position to pay. I therefore impose a sentence of 4 years, suspended, to be reactivated were the Defendant were to commit an offence for a period of two years from the date of this judgment.

[28] I also make an award of compensation. I considered awards made in civil proceedings, in order to derive guidance on an appropriate award for the injuries

sustained by the Virtual Complainant, together with his prognosis for recovery, In particular I considered:-

- (a) **Yee v Grant and Anor** Suit Number C.L 1989/Y011 an award of the High Court of Jamaica where in 1990 General damages for pain suffering and loss of amenities were awarded for bruises across the abdomen, hips, and right side of the neck, ankle sprain and cut on the palm of the left hand in the amount of JA \$5,000.00 updated to December 2011 to JA\$153,886.01 or EC\$4,817.12. 50
- (b) **Clunie v Johnson and Anor** C.L 1987/C517 where for contusions to the right loin and to the right kidney, a crushed right thumb resulting in a 10% disability, the court awarded JA \$55,000.00 updated to December 2011 to JA\$1,524,261.28 or EC\$47,709.38
- (c) **Shaunette Thompson et al v Owen Jones et al** SVGHCV 2012/0138 where awards for the 2nd named Defendant Ronisha Foyle, who suffered mild closed head injury, right lung contusion, blunt abdominal trauma with renal injury bilateral proximal humeral fractures and a scalp laceration and; Latesia Foyle, who suffered severe head injury, bilateral lung contusions, blunt abdominal trauma with splenic, likely hepatic and pancreatic injury and renal injury, were awarded \$35,000.00 and \$50,000 respectively for pain, suffering and loss of amenities. The Claimants were both minors at the time.

I have made adjustment for the differences in the circumstances and injuries of these cases and order the Defendant to pay compensation to the Virtual Complainant in the amount of \$45,000.00, to be paid within 2 years, failing which the suspended sentence revives.

- [29] I further order the Defendant to perform 300 hours community service during the next 6 months, to further emphasis the implications of engaging in criminal

conduct. The Community Service is to be discharged at the Presentation Boys School, the Defendant's Alma Martyr, doing general maintenance, including electrical, yard work, cleaning and tidying, as agreed by the school's authorities and probation services. These works are to be supervised by probation services.

- [30] The Defendant is also to attend Anger Replacement Therapy (ART) to be undertaken within three months of this judgment, in default he is to serve 6 months imprisonment.



V. Georgis Taylor-Alexander

High Court Judge

By the Court

Registrar