

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO.SKBHCR2015/0033

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

and

**DWAYNE MARTIN
CARLA HENDRICKSON**

Appearances:-

Ms. Greatess Gordon, Crown Counsel, with her Mr. Teshaun Vasquez, Crown Counsel for the Director of Public Prosecutions

Dr. Henry Browne, QC with Mrs. Marissa Hobson Newman and Mr. O'Grenville Browne for the Accused.

2017: May 12

JUDGMENT ON SENTENCING

Introduction

- [1] **WARD J.:** On 2nd June 2016 the defendants were each convicted by a unanimous jury of two counts of possession of firearms and ammunition. The learned trial judge ordered the preparation of social enquiry reports.
- [2] Sentencing in this matter was delayed because the judge who presided at the trial has since resigned. Initially, an issue arose as to whether another judge could proceed to deal with the sentencing phase. Submissions were filed and a date set for hearing oral arguments on the point.
- [3] Based on authorities, the parties have since agreed that this court is properly clothed with jurisdiction to proceed to sentence.

The Facts

- [4] On the 29th May, 2014 members of the Royal St. Christopher and Nevis Police Force Drug Unit went to the residence of the defendants to execute a search warrant for controlled drugs, arms, ammunition and documents used in the commission of a crime.
- [5] On arrival, the party of police officers, led by Inspector Rogers, surrounded the premises. Inspector Rogers knocked on the door and announced police presence and called out loudly to Ms. Hendrickson to open the door.
- [6] After several minutes had elapsed without response, the officers made a forced entry into the defendants' home.
- [7] Constable Woods and Wilson went to a bedroom where they saw the defendants. Sergeant Godwin read the warrant to the defendants, showed it to them and asked them whether they had anything to declare. They both answered in the negative.
- [8] Constable Wilson proceeded to search the defendants' bedroom. Upon lifting the box frame of the bed he discovered a pistol secreted under the bed. He showed the pistol to the defendants and cautioned them. He asked them to say what the object was and to say to whom it belonged. Neither defendant responded to his questions.
- [9] PC Wilson retrieved the firearm. Upon examination it, proved to be a Glock 23 pistol of .40 caliber. The magazine was loaded with thirteen (13) .40mm rounds of ammunition.
- [10] The defendants were arrested and charged with (1) possession of a firearm and (2) possession of ammunition contrary to section 20(1)(b) of the Firearm Act, Cap 19.05 of the Revised Edition, 2009 of the Laws of the Federation of St. Christopher and Nevis.

The Pre-Sentence Report

- [11] The Social Enquiry Reports explore the defendants' family composition and history, educational background and employment record, and attitude towards the offence.
- [12] Family members and friends spoke of their positive attributes.

Plea in Mitigation

- [13] In a stirring plea in mitigation, learned Queen's Counsel, Dr. Bowne entreated the court to consider the impact of the sentence to be imposed on the young children of the defendants who are aged 7 and 4 and whose fate would be determined by the sentence imposed on their parents. Counsel submitted that this throws into sharp focus the social, spiritual and legal requirement to consider the impact the potential separation would have on the children. Counsel buttressed this submission by reference to research findings pointing to the deleterious effects of parental incarceration on their children.
- [14] Learned Queen's Counsel advanced the following mitigating factors:
- (i) The previous unblemished record of the defendants;
 - (ii) The fact that the firearm was found in the privacy of their home under the bedstead;
 - (iii) The firearm was not used to menace the society;
 - (iv) The firearm was not in a position to be readily discharged given that there was no evidence that there was a bullet in the breach;
 - (v) Given that the firearm was found under the bedstead, a reasonable inference to be drawn is that the intention with which the firearm was possessed was for use as a last resort in the event of a home invasion.
- [15] Dr. Browne further submitted that having regard to the character, antecedents, age and the extenuating circumstances under which the offence was committed, the

defendants are fit and proper candidates for a non-custodial sentence in the exercise of the court's discretion pursuant to section 2(2) of the Probation of Offenders Act, Cap. 4:27.

Crown's Submissions

- [16] On behalf of the Crown, learned Crown Counsel, Ms. Gordon, submitted that a custodial sentence is appropriate in the circumstances of this case. Crown Counsel rejected the notion that the fact that the defendants were the parents of young children provided, in itself, justification for a non-custodial sentence. In support of this contention, Ms. Gordon referred the court to three authorities: **R v. Obiamaka Akpan**¹; **R v Samantha Burmis**²; and **R v. Rosie Lee Petherick**³.
- [17] Crown Counsel further argued that since a court was precluded from giving a suspended sentence if the offence involved the possession of firearms under the Alternative Sentencing Powers Act, Cap. 3:20, by parity of reasoning, a probation order is also inappropriate in these circumstances and would set a bad precedent given the seriousness and prevalence of these type of offences.
- [18] Learned Crown Counsel referred the court to a number of local authorities to illustrate that for firearms offences custodial sentences are the norm.
- [19] Ms. Gordon submitted that there were no aggravating features present in this case. She confirmed that the defendants had no previous convictions which is a mitigating factor.
- [20] In the circumstances, of this case, submitted learned Crown Counsel, a starting point of 3 years was appropriate.

Discussion

¹ [2014] EWCA Crim 167

² [2014] EWCA Crim 2106

³ [2012] EWCA Crim 2214

- [21] Section 20(1)(b) of the Firearms Act, Cap 19.05 prohibits the possession of firearms and ammunition except under and in accordance with the terms and conditions of a Firearm User's Licence.
- [22] Section 20(4)(a)(ii) provides:
- “Every person who contravenes this section commits an offence, and shall be liable on conviction before the High Court, to imprisonment with or without hard labour for a term **not less** than ten (10) years”
- [23] It is conceded by both sides, that notwithstanding the mandatory terms in which section 20(4)(a) (ii) is expressed, by virtue of the Abolition of Mandatory Punishments Act, Cap.4.01, the court retains its discretion to determine an appropriate sentence in every case.
- [24] Section 2 of this Act provides:
- “It shall be lawful for any Judge of the High Court when passing sentence upon any person convicted under any enactment which prescribes for the offence of which such person is convicted a minimum term of imprisonment or a minimum fine, notwithstanding any enactment to the contrary, to reduce the prescribed term of imprisonment, and, in case of a fine, to reduce the prescribed amount thereof, and to sentence such person to such less term of imprisonment, or to pay such less fine, as to the presiding Judge shall appear right.”
- [25] In determining the appropriate sentence, the court is enjoined to have uppermost in its mind the cardinal principles of sentencing:
- (a) Punishment of the offender and to reflect society's abhorrence of his conduct.
 - (b) Deterrence, aimed at not only at deterring the particular offender from committing further offences but also to deter like-minded people from acting in a similar way.
 - (c) Prevention; (need to keep offender away to prevent him re-offending)

(d) Rehabilitation. Here, the court considers whether the offender is capable of rehabilitation and if so what kind of sentence may assist with this.

[26] It will be rare for all of these aims to be met in any one case; the task of the court is to consider which of these aims will be best served by the sentence to be passed on an individual offender.

[27] This calls for a balancing exercise of a number of competing interests and objectives, tailoring the punishment to the individual circumstances of the offender whilst ensuring that the punishment is commensurate with the seriousness of the offence.

[28] The court is also mindful that it must not pass a custodial sentence unless it is of the opinion that the offence was so serious that no other sentence can be justified for the offence. The purpose of the custody threshold test is to reserve custody as a punishment for the most serious offences.

[29] The first task, therefore, is to identify an appropriate starting point. I use this expression to refer to 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. These are the objective circumstances which relate to the gravity of the offence itself and which assist in gauging seriousness of the offence and, in particular, whether a custodial sentence is presumptively appropriate.

[30] ***R v Avis and Others*** provides helpful guidelines as to the matters that a court should consider when determining the appropriate level of sentence for a firearm offence. Lord Bingham CJ stated at page 424:

"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 offence or other crimes of violence."

[31] These guidelines were adopted and applied by our Court of Appeal in **Kashorn John v DPP**.

[32] In this case, the firearm in question was a genuine and loaded Glock pistol. These two factors enhance its dangerous character.

[33] Secondly, while no actual use was made of it, the Social Enquiry Report of Dwayne Martin gives some factual basis for drawing a reasonable inference of the intention with which the defendants possessed the firearm. In interview with the Probation Officer, Mr. Martin expressed remorse for his actions and referred to a previous incident in which he had been shot at. Ms. Hendrickson had similarly been shot and wounded on a previous occasion.

[34] Dr. Browne asked the court to infer that the defendants possessed the firearm to guard against home invasion. In my view, this seems unlikely given the location of the firearm under the bedstead. It seems much more likely and reasonable that the firearm was unlawfully obtained for potential retaliation and protection in the aftermath of the previous shooting attacks upon both defendants.

[35] Either way, this affords no mitigation, as to attribute that quality to these circumstances is to effectively condone vigilante justice. This is an aggravating

feature and merits a starting point of 6 years. This is consistent with the starting point used in a number of cases emanating from within the jurisdiction of the Eastern Caribbean Supreme Court to which reference will be made later.

[36] Having determined the starting point, I must next consider the aggravating and mitigating features relative to the offender as these may result in an upward or downward adjustment of the starting point unless there is a cancelling out; in which case there will be no adjustment at all. These subjective circumstances of the offender inform the degree of culpability of this particular offender.

[37] In this case, there are no aggravating features relative to the offender.

[38] On the other hand, the defendants have no previous convictions and have expressed genuine remorse. These factors purchase a discount.

[39] The court has also given anxious consideration to Dr. Browne's submissions regarding the welfare of the defendants' two young children. This is an issue that not infrequently requires the courts' earnest consideration.

[40] In **R v Rosie Lee Petherick**, the appellant was convicted of causing death by dangerous driving and driving with excess alcohol. She pleaded guilty and was sentenced to imprisonment for four years and nine months. On appeal, the court recognized that the sentencing of a defendant inevitably impinges on family life, including dependent children, and that this must be a consideration in any sentencing exercise.

[41] The court cited the dicta of Lord Judge, CJ, in *HH* particularly, at paragraphs 128 and 129 where he said:

"128. The continuing responsibility of the sentencing court to consider the interests of children of a criminal defendant was endorsed time without number over the following years. Examples include *Franklyn* (1981) 3 Cr AppR(S) 65, *Vaughan* (1982) 4 Cr App R(S) 83, *Mills* [2002] 2 Cr App R (S) 229, and more recently *Bishop* [2011] EWCA Crim 1446 and, perhaps most recently in *Kayani*; *Solliman* [2011] EWCA Crim 2871, [2012] 1 Cr App R 197 where, in the context of child abduction, the court

identified'... a distinct consideration to which full weight must be given. It has long been recognised that the plight of children, particularly very young children, and the impact on them if the person best able to care for them (and in particular if that person is the only person able to do so) is a major feature for consideration in any sentencing decision.'

129. Recent definitive guidelines issued by the Sentencing Council in accordance with the Coroners and Justice Act 2009 are entirely consistent. Thus, in the Assault Guideline, taking effect on 13 June 2011, and again in the Drug Offences Guideline, taking effect on 29 February 2012, among other features the defendant's responsibility as the sole or primary carer for a dependant or dependants is expressly included as potential mitigation."⁴

[42] The court went on to recognize that:

"[T]he likelihood, however, of the interference with family life which is inherent in a sentence of imprisonment being disproportionate is inevitably progressively reduced as the offence is the graver and *M v South Africa* is again a good example. Even with the express Constitutional provision there mentioned, the South African Constitutional Court approved the result in which in one of the cases a sentence of four years was necessary upon a fraudulent mother, despite the fact that she was the sole carer for a number of children who were likely to have to be taken into care during her imprisonment - see paragraphs 43 to 44. Likewise, in *HH*, the majority of the Supreme Court was satisfied that there was no basis on which the extradition to Italy could be prevented of a father who was in effect the sole carer for three young children, but who had been a party to professional cross border drug smuggling. His extradition of course meant not only his imprisonment, but his imprisonment too far away from the children's home for there to be more than the most rare of contact.

... in a case where custody cannot proportionately be avoided, the effect on children or other family members might (our emphasis) afford grounds for mitigating the length of sentence, but it may not do so. If it does, it is quite clear that there can be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges...

those briefly stated principles are we think sufficient to guide sentencing judges and do no more than reflect what has been the practice of the criminal courts since long before arguments were habitually couched in terms of article 8 or human rights generally."

⁴ [2012] EWCA Crim 2214

- [43] Having set out those principles the court concluded there could be no getting away from the fact that before it was a serious case of motor homicide and that by modern standards of harm and culpability a substantial sentence of imprisonment was absolutely unavoidable. However, this was to be mitigated by, in particular, the effects of her behaviour on her relationship with her son and, more important, his relationship with her.
- [44] In view of the principles enunciated in this case, the court considers that it must regard the impact that incarceration is likely to have on the defendant's children as a mitigating factor.
- [45] In assessing the impact on the welfare of the children, I have considered the Social Enquiry Reports which speak to the family circumstances of both defendants. The court receives the clear impression that this is a close knit family and that this bond extends to the grand parents of the young children.
- [46] Ms. Hendrickson's mother is quoted as saying:
"I raised three wonderful kids since babies, and I will always try to be there for them in spite of it all. It's my duty. I would like her to continue to have the opportunity of being the good mother that she is to her children and a second chance to have her life back. She is a good mother. When I look back and see how important my mother and father was to me, I want the same for my grandchildren."
- [47] Mr. Martin's mother spoke highly of him. She stated:
"Dwain and I have a very good relationship since he was a young child. His father moved away when he was still young but still maintained contact with his children...I can call Dwain at any time for anything and he would show up no matter what he is doing."
- [48] Based on both reports, I am satisfied that both defendants were nurtured in strong and stable family networks whose bonds with their parents endure to the present and that the grandparents love and are devoted to their grandchildren and clearly wish the best for them.

- [49] I can discern no reason for concluding that they will not seek and protect the welfare of the young children in the event that a custodial sentence is imposed on their parents.
- [50] The court must also place in the scales the nature and seriousness of the offence for which the defendants stand convicted. This is to enable the court to determine the proportionality or otherwise of a custodial sentence.
- [51] In **Kenrick Marksman and Commissioner of Police**⁵ Sir Dennis Byron C.J. in laying down guidelines for firearms offences stated that *"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."*
- [52] In **DPP v Vere Merchant**⁶ the prisoner and his girlfriend were observed having an argument on the road side by members of the Royal St. Christopher and Nevis Defence Force on patrol. The argument appeared to be escalating which prompted the service men to stop and intervene. Upon searching the prisoner he was found in possession of a firearm and five rounds of ammunition. The prisoner pleaded guilty and was sentenced to two years and six months imprisonment. In arriving at his sentence the court considered that the prisoner had pleaded guilty very early, had previously enjoyed a clean record and was a member of the St. Christopher and Nevis Fire Service. The court also considered that the Offence was a serious one, that the Firearm was capable of discharging rounds, the ammunition was live and that the prisoner as a Fireman was in a position of responsibility and should have known better.
- [53] In **Lennox Gumbs v the Chief of Police**⁷, the prisoner threw a firearm out of a vehicle in which he was travelling and fled the scene. He later turned himself into the police. The firearm recovered was a Smith & Wesson 9mm pistol loaded with six (6) live rounds of ammunition. In sentencing him, the court considered the fact that the prisoner was a repeat offender having been convicted and sentenced to

⁵ Magisterial Cr. App No. 41 of 2003 (St Vincent and the Grenadines) 6/12/ 04 ECSC

⁶ SKBHCR2014/0021

⁷ SKBMCRAP2015/0016

three years for possession of a firearm. The court also considered, inter alia, that the prisoner had fled the scene intending to escape the police, the firearm was loaded and was in good working condition and the prisoner had intended to discard the firearm. The prisoner was sentenced to six years imprisonment on both charges of possession of a firearm and ammunition. His conviction and sentence were upheld on appeal.

[54] In **Chase Hamilton v the Chief of Police**⁸: the prisoner was found in possession of five rounds of ammunition when the Police executed a search warrant at his premises. The prisoner pleaded guilty to the charge at a very early stage. The prisoner had seven (7) previous convictions of which two were for possession of a firearm and possession of ammunition. He was sentenced to five years seven months imprisonment. On appeal his sentence was reduced to 5 years. In reaching its judgment the Court of Appeal stated that the appropriate starting point would have been six years and taking into consideration the guilty plea reduced to four years, then brought up to five years given the prisoner's previous convictions.

[55] **Terrance Ritchen v the Chief of Police**⁹, the prisoner was found to be in possession of a firearm after a vehicular search. The prisoner was found in possession of a pistol and eight rounds of ammunition. He pleaded guilty at the first available opportunity. The prisoner had five (5) previous convictions one of which was for possession of ammunition. In mitigation the court considered the prisoner's early guilty plea, his age of 33 years at the time of the offence, the fact that he was the father of four minor children, had co-operated with the police and that no one was harmed by the firearm. He was sentenced to seven years imprisonment on both charges of possession of a firearm and ammunition. On appeal his sentence was reduced to five years imprisonment. The Court of Appeal applied the same reasoning in **Chase Hamilton** and used a starting point of six years reduced to four on account of the early guilty plea, then brought up to five years in light of the prisoners previous convictions.

⁸ SKBMCRAP2016/0001

⁹ SKBMCRAP2015/0012

- [56] In **Kashorn John v DPP**, counsel for the appellant urged the Court of Appeal to consider the impact of incarceration on the appellant who had left 6 children in society with inadequate arrangements for their welfare, particularly as their father was also in prison serving a term. The court reduced her sentence from 3 years to 18 months.
- [57] Having regard to forgoing principles and authorities and to the particular circumstances of this case, and having given the matter my best consideration, the court considers that in balancing the interests of the young children against the very grave and serious nature of the offence with which the defendants stand convicted, it is of the clear view that a custodial sentence would not be disproportionate.
- [58] I am however mindful that given the ages of the defendants and the content of the social inquiry report, both present good prospect for rehabilitation.
- [59] Having weighed all the matters in the round, the sentence of the court is that the defendants are each sentenced to imprisonment for 3 years on each count to run concurrently. Time on remand will count towards the sentence.

Trevor M. Ward, QC
Resident Judge

By the Court

Registrar