

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

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CASE NO. 3 OF 2013

BETWEEN:

THE QUEEN

and

SHERMAN WILLIAMS

&

JEVONE DEMMING

Appearances:

Mr. Valston Graham, Senior Crown Counsel and Ms. Leslie Ann Faulkner, Senior Crown Counsel,
for the Crown

Mr. Stephen Daniels of Maximea & Co. Counsel for the First named Accused

Mr. Patrick Thompson of Mc W. Todman & Co. Counsel for the Second named Accused

2014: 11th December
2015: 2nd February

JUDGMENT ON SENTENCING

(Criminal law- Sentencing- Attempted Murder- Joint Enterprise- variables in sentencing for persons involved in Joint Enterprise)

[1] **BYER J.:-** After a trial upon hearing an indictment for attempted murder against the two Defendants the jury found the Defendants, Mr. Sherman Williams and Mr. Jevone Demming on the 22nd October 2014 guilty of the charge of attempted murder and in relation to Mr. Williams guilty of possession of a firearm with the intent to endanger life in relation to an incident occurring on the 30th September 2012, in which one Mr. Neil St Rose was the Virtual Complainant.

- [2] On the delivery of the verdict the sentencing hearing was adjourned to facilitate the Court having the benefit of a social inquiry report on the Defendants and for the Court to be seized of all pertinent information regarding sentencing for attempted murder in relation to a joint enterprise and for possession of a firearm with intent to endanger life. The hearing was convened on the 11th December 2014 and judgment was reserved.

The Background facts

- [3] These were helpfully provided by the Crown in their sentencing guidelines and were not disputed by Defence Counsel at the hearing and as such I adopt the same here.
- [4] On Sunday September 30th 2012, sometime in the early morning, the Virtual Complainant Mr. Neil St. Rose attended a social function at the Rock Café and Restaurant at The Valley, Virgin Gorda. The Defendants along with other patrons including Reberty Williams and Dayna Hillhouse, who became the Crown's key witnesses, were also in attendance. Whilst inside the Rock Café, the Complainant felt someone push him in the back. When he turned around he saw Defendant Demming directly behind him. He inquired of the Defendant what was wrong and the Defendant gesticulated and uttered something, which was not heard by the Complainant.
- [5] Shortly after, Defendant Demming accompanied by Defendant Williams and their cousin surrounded the Complainant. Nothing was said and the incident ended without any physical altercation. Following this incident, both Defendant Demming and the Complainant went outside at different intervals. Their paths, according to the Crown's case, crossed incident free when the Complainant was leaving to go outside and the Defendant Demming re-entered the Rock Café. Defendant Demming however has said to this Court that it was the Complainant who at that point chucked him and he in retaliation "boxed" him which resulted in him falling down.
- [6] Sometime later, the music ceased and patrons began to exit the Rock Café. Defendant Williams was ahead of the Complainant. As they were leaving, the Complainant pushed him in the back, an act which when giving evidence he acknowledged was wrong. The Complainant's explanation was that he felt that Defendant Williams was deliberately obstructing or impeding his exit from the Rock Café.

- [7] This led to an altercation between the two at the exit way of the Rock Café which was then separated by patrons who were present in the vicinity.
- [8] Following the separation, the Complainant began walking towards his parked vehicle. The Crown's case is that it was at this point that Defendant Williams pulled a gun from his waist and immediately after he did so, there was a loud noise, which sounded like a gunshot. At that time, persons who were outside dispersed. Reberty Williams along with others ran back inside the Rock Café. According to Reberty Williams, at the time when Defendant Williams pulled the gun from his waist, Defendant Demming was about 2 feet away from Williams, but that he did nothing.
- [9] Having heard what appeared to be a gunshot; the Complainant looked around and saw Defendant Williams approaching him with his arm extended. In his outstretched hand was a gun pointed in the Complainant's direction.
- [10] As both Defendants approached the Complainant he picked up a rock to defend himself, which he explained to the Court, he subsequently threw away as he was under the apprehension that Defendant Williams would shoot him at that point.
- [11] The evidence of the Virtual Complainant was that Defendant Demming approached him with his hands pointing in his face but he, the Complainant, knocked the Defendant's hands away.
- [12] The Complainant said that Defendant Williams then struck him, the Complainant, with the gun to the back of his neck. Witnesses say that this was then followed by Defendant Demming punching him on his nose. He fell to his knees. Dayna Hillhouse observed both Defendants kicking and punching the Complainant who at that time was on his knees. She also saw the Defendants with their hands in the shape of a gun. She described the Complainant as being on the ground defending himself. The Complainant then stated that he saw Defendant Williams place the gun against his neck and shoot him, after which he lost consciousness.
- [13] Dayna Hillhouse recalled hearing two gunshots whilst the Complainant was on his knees and saw him fall to the ground. After the gunshots she heard one of the two Defendants say ***"take that in***

your mother scunt". However, she was unable to say which one of the Defendants uttered those words.

[14] Both Defendants ran through the exit gate of the Rock Café, and left the scene.

[15] The Complainant was transported to the Nurse Iris O'Neal Clinic where he received initial medical attention and was subsequently transported to the Peebles Hospital on Tortola where he was examined by Doctor Rotimi Oyetunji about 6:45 a.m. on Sunday 30th September 2012 who observed some 6 wounds. These wounds were located as follows:

- 1) *Left side of the neck;*
- 2) *Left side of the chest;*
- 3) *Central abdomen;*
- 4) *The anterior part of the phallus;*
- 5) *The posterior part of the phallus; and,*
- 6) *Over the scrotum*

[16] Doctor Oyetunji described the injury to the neck as potentially life threatening and the wound to the penis and scrotum as likely to have long term dysfunctional effects to the Complainant.

[17] In Doctor Oyetunji's opinion the wounds were caused by a missile object. Based on the number of injuries and his observations, he gave two theories as to how the injuries could have been inflicted. First, he suggested that a single missile entered the neck, exited the chest, grazed the abdomen, re-entered the phallus and exited through the scrotum. The alternative theory was that there were two missiles one entering the neck coming out the chest and grazing the abdomen, and the other one which entered the phallus, grazing the scrotum and going away.

[18] Neither Defendant gave evidence at trial, nor called any witnesses but they relied on the exculpatory statements contained in their Police interviews.

- [19] The Crown's case to the Jury with respect to the first count on the indictment was one of joint enterprise with Defendant Williams as the shooter. Defendant Williams case was that the Complainant was mistaken as to who had shot him. Further, he claimed that the witness Dayna Hillhouse, his former girlfriend's evidence was fabricated. The reason advanced for her motivation to lie was that he had terminated their intimate relationship on September 29th 2012, the evening preceding the shooting.
- [20] Defendant Demming admitted an altercation with the Complainant inside the Rock Café when he hit him. He however claimed that when the Complainant stumbled back initially he tried to stop him. He denied being involved in any altercation with the Complainant in the parking lot at Rock Café. He stated he was not present at the time of the shooting. He admitted that he heard what sounded like gunshots, but by then he was not at the Rock Café. The Crown's case was that Defendant Demming assisted and encouraged Williams. He denied he was a party to a joint enterprise with Williams.
- [21] The Jury after deliberation delivered a unanimous verdict against Defendant Williams for Attempted murder and possession of a firearm with intent to endanger life and by a majority verdict as against Defendant Demming for attempted murder obviously accepting the Crown's version as presented through their case.

The Plea in Mitigation Sherman Williams

- [22] Counsel for the Defendant Williams Mr. Daniels made a strong plea in mitigation.
- [23] Mr. Daniels spoke of Defendant Williams being a "gentle mouse". Counsel forever mindful throughout his presentation that the offence for which his client stood convicted was a serious one however asked this Court to temper justice with mercy.
- [24] Counsel's essential submission was that this act on the part of his client, a man of 34 years of age, was completely out of character given all the information that had been presented in the social inquiry report before the Court. He sought to rely heavily on the report and emphasized to the

Court that this was a man with absolutely no previous criminal convictions against him who from all accounts was “provoked” into a spontaneous, random act which had resulted in this conviction.

[25] Counsel asked the Court to disregard several of the factors identified by the Crown as aggravating factors. These he said were. 1. the fact that he showed a lack of remorse, cannot be used against him when he maintains his innocence in the entire event; 2. that there was no premeditation on his part in that there was no planning, it being a purely spontaneous event even though he recognized that the intention to kill could have been formed on the spur of the moment and 3. the fact that the Prosecution relies on multiple gun shots as an aggravating factor is exaggerated, when the Police only in fact recovered one spent shell and that all the evidence pointed to one entry wound with multiple exit wounds.

[26] Counsel sought to convince this Court that the act of his client being random and spontaneous meant that if reliance was placed on the English guidelines as provided, by the Crown, that this offence fell within Level 3 as ***“other spontaneous attempts to kill”*** with ***“some physical or psychological harm”*** attracting therefore a range of nine (9) to seventeen (17) years in custody.

[27] Having recognized that this offence must attract a custodial sentence, Counsel made it clear that his client was not a threat to society and was therefore a proper candidate for rehabilitation.

Jevone Demming

[28] Counsel Mr. Thompson then rose to speak on behalf of his client Defendant Demming.

[29] He too like Mr. Daniels made it clear from the start that the fact that his client continues to disavow his involvement in the incident should not be properly used against him as an aggravating factor equivalent to him showing no remorse. Defendant Demming although accepting the jury’s verdict, Counsel submitted, continues to state that he was not involved.

[30] Counsel Mr. Thompson submitted to this Court that it was clear from the social inquiry report that not only had his client garnered respect within the sporting world but that respect was additionally buttressed by his “positive good character”.

- [31] Having thus said that, Counsel was quick to concede that it was clear that this fact alone could not mitigate the seriousness of the offence. He went on to submit that in looking at the sentence to be imposed on his client, this Court must look at all the principles of sentencing and weigh up those which are more readily identifiable to be referable to the case at hand.
- [32] In so doing, Counsel submitted that this Court must assess the culpability of the offender and the concomitant harm caused.
- [33] Counsel disagreed with the aggravating factors identified by the Crown and stated that definitively the concept of premeditation had no place in this offence when there was no evidence of any degree of planning but from all evidence was a spontaneous act. He asked this Court to consider the other aggravating factors that the Prosecution relied on and whether they can properly be ascribed to his client given his involvement.
- [34] Counsel Mr. Thompson argued strenuously that in imparting sentence on his client there must be an acceptance of the distinction in roles played by him as opposed to Mr. Williams in that there must be a distinction between the man with the weapon that causes the damage and the other participants with the sentence being reflective of that distinction.
- [35] Counsel Mr. Thompson, accepting that his client faces a custodial sentence, however submitted that any such sentence should be within the single digit range of four (4) to nine (9) years. The sentence he submitted to this Court must show the involvement and participation of his client and that the sentence should be as short as possible to meet the objectives which reflect his client's culpability.

Crown's submissions

- [36] The Crown by their submissions have rightly indicated throughout their presentation that they have only sought to present to the Court what they consider are the appropriate guidelines for the sentencing of the two Defendants.

- [37] In relation to the conviction for attempted murder they submitted to this Court, that the aggravating factors greatly outweighed the mitigating factors which they identified as the age of the Defendant (namely Demming) and previous good character, both of which they submitted were lessened due to the fact that attempted murder was a serious offence, where unlike murder, the only intention that they had to prove and which obviously the jury agreed with, was the intention to kill.
- [38] The Crown also argued that the circumstances surrounding the cases of attempted murder vary widely from case to case and in light of this they presented to the Court several authorities both from this region and the United Kingdom which showed the range of sentences that have been imposed for a conviction of attempted murder.
- [39] They submitted to this Court that given this range and having assessed the authorities, that the question that a sentencing court should ask itself, is what would have been the appropriate starting point and sentence if the Defendants had been convicted of murder.
- [40] The Crown readily agreed that none of the factors that would have taken this matter, if it were a case of murder, into the category of “**exceptionally high**” were present and the one factor that took it into the “**particularly high**” category of offences was the use of the firearm. (Schedule 21 to Criminal Justice Act 2003 UK).
- [41] Having made that submission, the Crown did not go further and make any recommendation as to the period of time for incarceration but submitted that in this instance where the offence resulted from a “progression of seriousness”¹ on the part of the Defendants, the interests of the Defendants had to take second place to the victim and the public at large.
- [42] Further, in relation to the issue of joint enterprise which was the nature of the case led by the Crown for this offence, the Crown submitted to this Court that even though Defendant Williams was the “gun man” that Defendant Demming actively participated in the offence as it occurred. They relied upon eight pieces of evidence to support this contention namely :
- (i) *He approached the Complainant together with Defendant Williams;*

¹ Paragraph 66 of the Sentencing guidelines produced by the Crown.

- (ii) *The Complainant identified Demming as the person who was pointing hands in his face at the point of confrontation;*
- (iii) *Demming present with Williams kicking and punching the Complainant;*
- (iv) *Was present when Williams gun butted Complainant;*
- (v) *He punched the Complainant on his nose after he was gun butted;*
- (vi) *He was present with Williams at the time of the shooting;*
- (vii) *Dayna Hillhouse's evidence was that he also had his hands in the shape of a gun; and,*
- (viii) *He ran from and left the scene with Williams.*

[43] They therefore contended that these factors displaced the usual disparity that would have been effected where the joint participants who played different roles would be treated differently in sentencing. This being the case, the Crown submitted that the Court should not consider any distinction regarding the culpability of the Defendants in the present case.

[44] In relation to the conviction for possession of a firearm with intent to endanger life which concerned Defendant Williams only, the Crown submitted that there were several questions that had to be answered in relation to what a Court should take into account in setting the appropriate level of sentence.

[45] These questions were formulated in the case of **R v Avis**² which set out four questions 1. What sort of weapon was involved- real or imitation; 2. What if any use had been made of the firearm – prolonged and premeditated use would mean a far worse offence; 3. What intention did the Defendant have for possessing the firearm – that is, what was the criminal intent; 4. What is the Defendant's record – did he already have a record of committing firearm offences or offences with violence.

² Paragraph 47 of the Sentencing Guidelines of the Crown.

[46] The Crown submitted that when those questions are answered in this present case, it is clear that in relation to Defendant Williams three of those four can relate to him in that it was a real firearm, there was no lawful use and that the firearm was used to inflict serious injury on the Complainant.

[47] Having so submitted, they also contended that sentences for offences of this nature had increased over time and referred the Court to several local authorities in which firearms were used which showed a range of four to ten years covering a spectrum of instances.

Social Inquiry Report

[48] At the end of the trial and upon the verdict being given, Counsels for the Defendants requested the preparation of a social inquiry report which was agreed to by the Crown.

[49] By letter dated the 20th November 2014 to this Court by the Social Development Department, this Court was informed that two reports had been prepared for the Defendants who willingly participated in the process for its preparation.

Sherman Williams

[50] Defendant Williams is 34 years old and is the father of 4 children between the ages of 6 and 12 who all reside on the Island of Tortola.

[51] He also has 7 maternal siblings having been raised in a one parent household. He never met his biological father and he never had a relationship with his stepfather and his mother is now deceased.

[52] The Defendant maintained throughout the interview that he was not involved in the incident in which the Virtual Complainant, Mr. Neil St. Rose was shot.

[53] The only prior incident for which the Defendant was incarcerated was for default on paying child maintenance for which he spent 16 months which did not equate to a criminal conviction.

- [54] The report further spoke to the fact that Defendant Williams recognized that he had an issue with the use of marijuana since he was 16 years old.
- [55] By all accounts it appeared that this offence for which he stands convicted was therefore outside any “usual” or “normal” behaviour for the Defendant and his sister who was interviewed even said these charges were “a real surprise” to her.
- [56] The Defendant failed to maintain a school attendance to allow him to obtain any qualifications and as result he never passed the Entrance Examination for secondary school and was placed in the Literacy and Skills Programme but left school ultimately in 3rd Form.
- [57] Generally, this Defendant is seen as one whose single parent upbringing resulted in him not having any positive male role model leading to poor choices which affected his life decisions. However these are the first criminal offences in which he had gotten involved and with no other incidents of violence noted, the Report sought to characterize what transpired as “*possibly [being] out of the normal character of the accused*”³.
- [58] It was noted that there was no specific expression of remorse in light of the fact that he maintained that he had not been responsible for the incident but he did express to the Social Worker that he was indeed sorry that the Complainant had been shot.

Jevone Demming

- [59] Defendant Demming is 25 years old and the father of a 2 year old son.
- [60] Mr. Demming’s parents never married and his mother resides in St. Kitts and has three other children and his father is married and lives in Virgin Gorda and has four other children.
- [61] Mr. Demming throughout the interview maintained his non-involvement in the incident but made no reference to anyone else being involved in the incident and made the only admission of “boxing” the Complainant on the night of the incident.

³ Page 12 of Social Inquiry Report

- [62] Mr. Demming lived with his father from the age of 6 years old and often stayed with his paternal grandmother who is a self declared disciplinarian.
- [63] Mr. Demming had issues with regularly attending school and as such he repeated both his first and second years in Secondary School on Virgin Gorda. He was however suspended in 2006 and never returned to school. During the period that he remained in school it is stated that he made very little academic progress. However he enrolled in the Technical Vocational Education Training apprenticeship programme and became the “poster child” of the programme.
- [64] He started his own business in 2011 and then joined The Solution Group in 2012.
- [65] Defendant Demming also became involved in sports in particular basketball and football in which he represented Tortola regionally. In both of these sports his peers and coaches said his playing and behaviour were exemplary and that this incident was “unfortunate”.⁴
- [66] There was no indication that Defendant Demming had any major issue in relation to the use of drugs but did admit that he used marijuana from time to time.
- [67] There is no prior criminal record for Defendant Demming and he says that his life was finally on track when this offence occurred.
- [68] It was found by the Social Worker who prepared the report that he had positive and strong male role models but that he lacked the necessary discipline and maturity to work towards a positive goal and seemed to have been “easily influenced to take part in negative behaviour” and ignored his “upbringing and caused his family to be disappointed”⁵. The final assessment being that professionally Defendant Demming behaved like an adult but in his social circles he behaved like a child.

⁴ Social Inquiry Report of Jevone Demming

⁵ Social Inquiry report of Jevone Demming

Victim Impact Assessment

[69] In the sentencing guidelines presented to the Court, the Crown indicated that it had not produced a Victim Impact Assessment; however it asked this Court to take into account what the Doctor said of the injuries suffered by the Complainant. Not only were they potentially life threatening but also that as a result of the injuries the Complainant could possibly have long term effects from the injuries especially the ones that he suffered on his phallus affecting his urethra.

Court's Consideration and analysis

Attempted Murder

[70] By Section 152 of the Criminal Code: ***“any person who by any means attempts to commit murder is liable on conviction to imprisonment for life”***.

[71] This however must be read together with Section 23(1) of the Criminal Code which further provides that ***“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”*** which refers to a conviction for murder.

[72] It is therefore clear that this Court by legislation is given the discretion to impose a sentence much less than the penalty provided for by the offence itself.

[73] With these parameters in mind it is clear that this Court like any other sentencing Court must always bear in mind the guiding principles of any sentencing exercise. As stated by Byron CJ as he then was, in the now seminal case of **Desmond Baptiste v The Queen**⁶, these are identified as retribution, deterrence, prevention and rehabilitation. ***“The main purpose of the criminal sanction is to protect the public. Built into this overarching purpose are the concepts of deterrence and retribution in the sense not of revenge but of “a measured social response to the harm done to the society by the offender” which are both aimed at ensuring that the wrongdoer does not repeat the offence and that potential wrongdoers get the message that***

⁶ Hct Crim App 8/2003 SVG

society will not condone or tolerate certain acts. There is also the important aspect of rehabilitation which is the more humane consideration when sentencing an offender”⁷

[74] It is indeed to be noted that the penalty for murder is the same as for attempted murder and it is equally clear that whereas in murder the Crown has the option of proving either an intention to kill or an intention to cause grievous bodily harm, in attempted murder the only intention to be proven is an intention to kill. ***“Accordingly an offender convicted of this offence will have demonstrated a high level of culpability.”⁸***

[75] Be that as it may, every incident and every offender has to be taken into account on an individual basis and as such each set of circumstances can give rise to a range of injuries and concomitantly, sentences.

[76] It is therefore incumbent upon this Court as the sentencing court to assess all the circumstances that impact upon this case and thereby determine the final sentence.

[77] The Crown has identified in this case as the aggravating factors the following:

- (i) Premeditation in the shooting in that it was the decision of the Defendant Williams to pull out a firearm after the initial altercation was at an end, advance with the firearm, gun butt the Complainant and then still shoot him;
- (ii) Shooting was done at close range;
- (iii) Firearm was not recovered;
- (iv) Multiple shots in a public place;
- (v) Multiple gunshot injuries to the neck and chest and
- (vi) Seriousness of the injuries themselves.

[78] While the mitigating factors were merely two, being the age of the Defendant (Demming in particular) which they say is minimized due to the seriousness of the crime and the men having no previous convictions.

⁷ Per Joseph-Olivetti J. in **The Queen v Patrice Grant** BVICrim 19/2005 paragraph 26

⁸ Sentencing Guidelines Council: Attempted Murder – Definitive Guideline

- [79] Thus it is clear from the Crown's perspective that the aggravating factors outweigh the mitigating almost three to one.
- [80] With that ratio in mind this Court must therefore undertake a considered view of all the circumstances of this case in coming to its final decision.
- [81] All the authorities to which this Court have been directed to by the Crown and Counsel for the Defendants, clearly show a range of sentences that can be imposed on offenders who have been found guilty of this offence. I however find as quite instructive the United Kingdom line of cases which seem to present a guideline by which the Courts can draw some assistance.
- [82] The United Kingdom Sentencing Guidelines Council has provided the Court in the United Kingdom under the tenets of the Criminal Justice Act 2003 (CJA), with definitive parameters for sentencing for attempted murder.
- [83] These guidelines provide three different levels of sentencing ranges whereby Level One provides for the most serious offences in which if they had been convicted of murder fell within the parameters of Sections 4 and 5 of the Schedule 21 of the CJA. Level Two encapsulated "**other planned attempts to kill**" and Level Three "**other spontaneous attempts to kill**". Under each of those levels there is a further division where it is clear that there is accommodation made for the various lengths of sentences depending on whether there existed i) serious and long term physical or psychological harm; ii) some physical or psychological harm; iii) little or no physical or psychological harm.
- [84] In the case at Bar, I find that having considered the facts of this case in which it seems to have been the culmination of a series of clashes or altercations as between all the persons involved that there was no premeditation as submitted by the Crown but that it was a spontaneous act of retaliation on the part of the offenders. In so finding, I also find that this offence falls within the ambit of Level 3 of the Guidelines, namely "**other spontaneous attempts to kill**".

- [85] Having so found I now move on to the next phase.
- [86] It has long been said and now without a doubt that guidelines only provide the Court with, a guide or yardstick and that the individual offender must be assessed in each and every case.
- [87] In now moving to this stage of the assessment, I must assess the factors that can affect the level of culpability of each offender. These have been commonly referred to as the aggravating and mitigating factors that exist in any given matter.
- [88] In the case at Bar, the Crown has proffered six aggravating factors namely, that the shooting was premeditated (I have already found that I am not in agreement with this factor), the shooting was done at close range, the firearm was not recovered, multiple gun shot injuries, multiple shots fired in a public place and serious injuries resulting in the quality of life being reduced.
- [89] Having duly considered these factors, I now find that in addition to the lack of premeditation which I have already found I also find that the factor relied on as the multiple gunshot injuries was not substantiated on the evidence that was led and solicited at trial. Therefore I find that I am only in agreement with the Crown as to the existence of the other aggravating factors which however makes it manifestly clear that these factors still heavily outweigh the mitigating factors of youth and lack of previous convictions even though to a lesser extent.
- [90] Even though youth (and this is only in respect to Defendant Demming) and the lack of previous convictions can in some cases have a substantial counter effect to aggravating factors it has now been widely accepted that these are of little relevance "... ***when the Court is dealing with cases of this gravity***"⁹.
- [91] The injuries that were inflicted on the Complainant although stemming from theoretically one shot were multiple which have now resulted in a reduction of the quality of a life of a virile young man who may develop problems which may affect both his sexuality and his normal bodily functions. These cannot be minimized and despite Counsel Mr. Daniels' submission that there was no direct

⁹ Per Lord Lane CJ in Turner v The Queen [1975] 61 Crim. App Rep. 67 cited with approval by Byron CJ in Desmond Baptiste

evidence from the Virtual Complainant himself, the Court accepts the medical prognosis of the Doctor who gave the opinion.

- [92] In the **Patrice Grant** case, the Learned Judge in her assessment of the circumstances where a police officer attacked and held hostage his superior officer resulting in the shooting of that superior officer, held that the offender in that case was “*a danger to the public as the events which unfolded show[ed] the extent to which he was prepared to go.*”¹⁰, and handed down a custodial sentence of fourteen (14) years on his guilty plea.
- [93] In this case however, I have found that no such characteristic could be ascribed to these two Defendants which would warrant them being considered “a danger to the public” despite the given result of their actions.
- [94] I am therefore in agreement with Counsel Mr. Daniels that the Crown has failed in this regard and further as pointed out by Counsel Mr. Thompson, they has been no established history of violence of any kind on the part his client and indeed I say both Defendants, which in the instant case must count in their favour.
- [95] Neither do I categorize the level of the attack that was showered upon the Complainant Mr. St. Rose as anything close in proximity to the senseless and merciless attack that transpired in the **Devon Dawson** case in which Her Ladyship Justice Hariprashad-Charles sentenced the accused therein to 20 years (having it would appear also taken into consideration his previous convictions in which violence was used).
- [96] Therefore in considering all the authorities and what has been submitted by both the Crown and Counsel for the Defendants, I am of the opinion that the most helpful formula, loosely put, must be to look at the sentence that would have been attracted if the offenders had been charged with and found guilty of murder.
- [97] In this regard, it is clear to this Court that in looking at the circumstances of this case, it would have under Section 5(2) of the Schedule 21 of the CJA 2003, attracted a starting point of 30 years.

¹⁰ Per Joseph-Olivetti J **Patrice Grant** case at paragraph 30

- [98] Having said all of this, I therefore find that having determined that if this had been a charge of murder that the starting point would have been in the region of 30 years, I apply the discount for the fact that it is the incomplete offence on the basis of the authority of **R v Ford**¹¹ and other such line of authorities and give the starting point in this instance of 20 years which was recognized by the Sentencing Council as being at the higher end of the Level 3 type of offence.
- [99] Further although, I am in agreement that the aggravating factors in this case outweigh the mitigating factors, I do not consider that the circumstances were anything in the region of those that applied in the **Dawson case** in which a sentence of 20 years was given. As such I am of the view that a lesser sentence should be visited on these Defendants.
- [100] However before I make that final determination, I must also resolve the issue that these Defendants are charged jointly and whether I should accede to the Crown's submission that the usual disparity between joint offenders who play different roles should now be departed from in the instant case.
- [101] The Crown submitted eight factual instances which emerged from the evidence which they sought to rely on to stress to this Court that Defendant Demming who was not the shooter was just as culpable as Defendant Williams who was. I will now go through those individual indications as to whether they really cumulatively make the case as submitted by the Crown.
- [102] The Crown has sought to submit that the fact that Defendant Demming approached the Complainant with Defendant Williams, the fact that Defendant Demming was identified by the Complainant as pushing his hands in his face, that Demming was present with Williams kicking the Complainant, that Demming was present when Williams gunbutted the Complainant, that he punched the Complainant in the nose after the gun butt, that he was present when Williams shot the Complainant, that Dayna Hillhouse saw both of them with their hands in the shape of guns and ran from the scene with Williams all amounted to the Defendant Demming being as equally culpable as the Defendant Williams, the shooter. I however do not agree.

¹¹ [2005] EWCA Crim 1358

- [103] In the case of **R v Amanda Jane Belton and Claire Marie Petrow**¹², the Court assessed a similar situation where it was apparent that the offenders acted together and caused harm of a varying nature to the Complainant, a 16 year old girl who they taunted and tortured. Petrow was the one who had inflicted the actual knife wounds and Belton said she participated because she was afraid of Petrow.
- [104] In the instant case, these Defendants have maintained their innocence in relation to what occurred and in fact for the first time through the social inquiry report, we have heard that there was someone totally different who perpetrated this attack which at this point must be of little moment. We also have the opinion of the Social Worker regarding Demming that he is a follower not a leader and was and is easily led astray.
- [105] I find that this is wholly conceivable in this case especially given the almost decade age difference between Defendant Demming and Defendant Williams. It was recognized in the **Belton and Petrow case**, by the Court of Appeal that where it was evident that Petrow took the lead which Belton then followed, that there ought to have been “***some distinction between the two appellants, ... relating to their participation and roles...***”
- [106] Counsel for Defendant Demming, Mr. Thompson, has in this Court’s mind, made a convincing argument that none of the identified eight factors relied upon by the Crown advance the case any further to the end result of establishing equal culpability. In fact, Mr. Thompson has convinced this Court that it is clear that these two men must be assessed according to their respective culpability and participation.
- [107] In doing so Counsel so helpfully provided for the Court the case out of Antigua, **Craig Smith and Ors v The Queen**¹³ in which the Court of first instance sentenced the men reflective of their varying degrees of participation from driving the get away car to assault to the actual shooting and which sentences on appeal were not varied.

¹² [1997] 1 Cr App Rep 215

¹³ HCRAP 2008/10;2008/12;2008/014

- [108] I am therefore not persuaded by the arguments for the Crown that the facts upon which they seek to rely can elevate Defendant Demming to the same level of culpability as Defendant Williams.
- [109] None of the facts relied upon, in this Court's mind, can place Defendant Demming on equal footing with his co-accused who was the shooter. I therefore find that the sentences should reflect that disparity.
- [110] I also find that the aggravating factors which were identified generally by the Crown also by their nature, by and large reflect against Defendant Williams being the shooter and not Defendant Demming and as such in the case of Defendant Demming his youth and lack of convictions and what his Counsel called his "positive good character" will in this instance count in large measure in his favour.
- [111] That having been said, and reflective of the disparity that I find between these two Defendants, and the relative roles as played I sentence Defendant Demming to seven (7) years for the offence of Attempted murder and Defendant Williams who I agree with Counsel can from all accounts be rehabilitated, to fifteen (15) years for the offence of Attempted murder.
- [112] I now consider the conviction for the offence of possession of a firearm with an intent to endanger life which concerns Defendant Williams only.
- [113] All of the Courts both regionally and internationally recognize the "**concern of the public for the alarming incidence of firearm related crime**"¹⁴. It is widely recognized that Parliament by its stipulated penalties has sent the message to the public that crimes of this nature will not be tolerated. In addition, we are all aware of the intention to review our own local legislation later this year.
- [114] By Section 27A(2) of the Firearms Ordinance Cap 126 as amended, a person who is convicted of the offence of possession of a firearm with the intent to endanger life is liable to imprisonment for 20 years.

¹⁴ Per Byron CJ in Desmond Baptiste at paragraph 32

- [115] There can be no other indicator that the nature of this crime is frowned upon by the very people who have brought it into law.
- [116] In the case of R v Grant Wilkinson¹⁵ it was clearly stated that ***“the gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise and intimidate. That is why criminals want them; that is why they use them: and that is why they organize their importation and manufacture, supply and distribution. Sentencing courts must address the fact that too many lethal weapons are too readily available: too many are carried: too many are used and always with devastating effect on individual victims and with insidious corrosive impact on the wellbeing of the local community”.***
- [117] In this instant case, it is clear that the firearm that was found by the jury to be in the possession of Defendant Williams is the same weapon that perpetrated the offence of attempted murder. It is also clear that the jury believed that not only was the Complainant shot but that he was shot by an individual whose only intention having the firearm was to endanger someone’s life.
- [118] From the authorities provided to this Court in submissions it can be seen that the law relating to gun crime has evolved from pats on the wrists to lengthy periods of incarceration all as a manifestation of being the signs of the times.
- [119] In the case of Wilkinson, it was recognized that the questions that need to be answered by the sentencing court have however not changed, just the approach to those questions. These questions were first itemized in the case of R v Avis¹⁶. These have been identified as follows: what sort of weapon is involved- real or imitation/loaded or unloaded; what if any use was made of the firearm- take into consideration all the circumstances regarding the use is important; what was the intention if any to possess the firearm- that is what has been proven regarding the intent and what is the defendant’s record- that is what are his antecedents generally and specifically with regard to firearms or violent crime.
- [120] It was submitted by the Crown and I am in agreement with that submission, that in relation to Defendant Williams that three of those four questions can be answered as against him. In that he

¹⁵ [2010] 1 Cr App. R 100

¹⁶ [1998] 2CAR 128

had a real gun, the firearm was discharged and it was used to shoot an individual with the intention to harm someone and it did, the Complainant.

- [121] From the authorities presented to the Court the one that is closest in all the circumstances to the present case was The Queen v Leonard Sprauve Jr and Jason Stevens¹⁷ in which the Defendants were sentenced to 10 years in relation to the offence of possession of a firearm with intent to endanger life in which during a robbery the security guard was shot during the escape.
- [122] Another recent local case of R v Tim Daley¹⁸ saw the Court impose a sentence of 4 years on a young man who had not caused injury to anyone but had shot in the air during a robbery but as the Court pointed out in that case the mitigating factors outweighed the aggravating factors as identified.
- [123] If we are therefore to use the considerations as stated in the R v Avis case it is clear that the answers that were given in the affirmative to the questions amount to and are the aggravating circumstances in this instant case. The Defendant Williams' used a real loaded firearm and the fact that it has not been recovered is of no moment and in fact even an additional aggravating factor as it can potentially be used to perpetrate other crimes. Additionally, the fact that it was used to commit another indictable offence, attempted murder and used to bring fear not only to the Complainant but to others in the public place where it was discharged are all indicators of weighty aggravating matters.
- [124] On the other side with the mitigating factors, youth does not play a part here as Defendant Williams is a man in his thirties who should have reached the age of reason however the fact that he has no other convictions of any kind in this Court's opinion weighs heavily in his favour. From all accounts this offence was not at all in keeping with the character of the Defendant and this Court is persuaded by this fact. In spite of that however this Court feels that it is required that a custodial sentence also be handed down for this offence and I therefore sentence Defendant Williams to ten (10) years for this offence.

¹⁷ Referred to in paragraph 56 of the Sentencing Guidelines by the Crown

¹⁸ HCr BVI No5 /2014

- [125] Given the fact that this offence was part and parcel of the entire set of circumstances that led to the offence of attempted murder this sentence shall run concurrently with the sentence given for attempted murder above.
- [126] Additionally, the Court is aware that Defendant Williams served a period on remand while awaiting trial and this shall be taken into consideration in the final tabulation of the sentence for him. Specifically the period of twenty one (21) months for Defendant Williams for period 5th October 2012 to 14th July 2014 shall be deducted from his sentence.
- [127] I wish to go on record and thank both the Crown and Counsels for the Defendants for their help and assistance in this matter.

Nicola Byer
High Court Judge