

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

SAINT LUCIA

CRIMINAL CASE NO. SLUHCRD 2009/0004

BETWEEN:

THE QUEEN

Claimant

AND

MC CARTHY IMBERT

Defendant

Appearances:

Mr. Daarsrean Greene Counsel for the Defendant
Mr. Giovanni James Crown Counsel for the Crown

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2012: June 14
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JUDGMENT ON SENTENCING

[1]. CUMBERBATCH, J. : The defendant was indicted on the 16th April 2009 for the offence of using a firearm with intent to cause grievous harm to Richard Sharlan Felicien (the virtual complainant) contrary to section 151(b) of the Criminal Code 1992. On the 16th March 2011 the defendant was arraigned and pleaded not guilty. On the 18th January 2012 however the defendant changed his plea to one of guilty to the offence for which he was indicted.

[2] **FACTS**

On Saturday July 17, 2004 the virtual complainant's girlfriend and the defendant's sister were involved in an argument which escalated into a fight. The virtual complainant separated them and they went their different ways. Later that day the defendant saw the virtual complainant and threatened to burst his belly. He then pulled out a shotgun and the virtual complainant held on to same in an effort to push the barrel towards the ground and away from him. A struggle ensued during which the defendant discharged a round from the shotgun which connected with the virtual complainant.

[3] The virtual complainant received the following injuries as described by Dr. Ndidi Adoh Dagbue:

'Large gunshot wound to the mid-thigh with extensive devitalized muscles introspectively and fragments of bone in his clothing. He had definitive surgery during which more than 200grams of devitalized muscle was excised. Patient is not likely to have full recovery of the limb because of the extensive muscle loss.'

[4] **THE HEARING**

The court benefitted from a pre-sentence report from which it learnt that the defendant is regarded in his community as a quiet individual and is not known for being involved in altercations with other community members. His educational background was limited by the fact that he left school at age 15. Moreover he began using cannabis in his early teens and he was employed in various odd jobs, never holding a steady form of employment. The probation officer however stated that the defendant was known to associate with members of a gang though he was not known to be a gang member.

- [5] The court leant that the defendant after his committal to stand trial in the High Court acted in breach of his bail conditions by leaving the jurisdiction for Martinique and whilst there, was imprisoned from January 2008 to February 2011 for a drug related offence. On his release from prison in Martinique he was deported to St. Lucia by the French authorities and on his arrival here was remanded to custody at Bordelais Correctional Facility.
- [6] Mr. Greene for the defendant submitted that the virtual complainant would from time to time heckle, threaten and verbally abuse his client. He further contends that on the day in question it was the virtual complainant who was the aggressor but conceded that the force used by the defendant was totally out of proportion with the threat posed to him that day and that he was wrong for shooting the virtual complainant that day.
- [7] Counsel further contended that the defendant has no previous convictions in St. Lucia and accepted the statement in the pre-sentence report that the defendant appeared willing and motivated to change his life and stay away from crime. He also urged the court to impose a probation order on his client as the probation department was prepared to provide the necessary guidance and supervision. He further stated that the probation department would be willing to place his client on a treatment plan for his drug addiction.
- [8] Mr. Greene went on to address the court on the four classical principles of sentencing, namely retribution, deterrence, prevention and rehabilitation as they applied to this case and identified the following to be the aggravating and mitigating factors herein:

AGGRAVATING FACTORS

- (i) The defendant was armed with and discharged a firearm in public;
- (ii) The complainant suffered a significant gunshot injury from close range.

MITIGATING FACTORS

- (i) The defendant was 21 years old and so, he was relatively young at the time of the offence and had no criminal history.
- (ii) The defendant is remorseful, as evidenced from the pre-sentence report as he expressed his remorse to the writer. Further the defendant has expressed his willingness to financially compensate the virtual complainant with the view to assisting him with the hospital bills he incurred and also for his pain and suffering.
- (iii) The defendant cooperated with the police from the outset. In particular he gave an under caution statement to the investigating officer less than 2 hours from the time he committed the offence and gave a full confession. He further gave the police information as to whom he got the firearm from and also gave it to him after he committed the offence.
- (iv) The defendant has no previous conviction of a similar nature or at all in the state of Saint Lucia.
- (v) The defendant has pleaded guilty although not timely but is still deserving of some credit being attached for same.

Counsel submitted that the mitigating factors outweigh the aggravating ones and that in the circumstances the court should impose a probation order coupled with an order for compensation.

[9] THE LAW

The court agrees with Mr. Greene's submission that the four classical principles of sentencing namely retribution, deterrence, prevention and rehabilitation should be applied to the case at bar. I will now proceed to do so.

[10] **RETRIBUTION**

The attending physician opined that the firearm which inflicted the injury on the virtual complainant was fired from close range. A wad was recovered by the doctor from the virtual complainant and same was turned over to the police. PC 288 Cools who was deemed an expert in firearms at the preliminary inquiry by the committing magistrate testified that the wad is a plastic cap used in shotgun ammunition. He stated that when the shotgun cartridge is discharged the wad also comes out at high velocity and could penetrate any soft material. He opined that the wad came from a weapon with a 12 gauge barrel.

[11] It is common ground that during the altercation between the defendant and the virtual complainant that the virtual complainant was unarmed. In those circumstances the court views with concern the decision of the defendant to arm himself with a weapon as lethal as a 12 gauge shotgun and discharge same at the virtual complainant who was unarmed and defenceless.

[12] The aforesaid matters are indicative of the seriousness of this offence which involved the use of a deadly weapon at close range in unwarranted circumstances. The court must therefore show it's abhorrence of this type of behavior by the sentence it imposes.

[13] **DETERRENCE**

Deterrence is general as well as specific in nature. The former is intended to be a restraint against potential criminal activity by others whereas the latter is a restraint against the particular criminal relapsing into recidivist behavior. Drug and alcohol addiction as well as need may trigger high rates of recidivism.

[14] The defendant has admitted to drug use, to wit cannabis which may serve as a trigger to recidivism. The court has also considered that the defendant who by absconding to Martinique in breach of his bail conditions committed a drug related offence in that country for which he was incarcerated as compelling evidence that he seems to have little or no regard for law and authority.

By virtue of the foregoing I do not share counsel's view that this principle is of limited applicability to the defendant.

[15] **PREVENTION**

This court is not unaware of the prevalence of gun related offences in this jurisdiction. Though the court accepts that the defendant does not have a history of committing acts of violence, it is clear that the defendant was able to acquire a weapon as deadly as a 12 gauge shotgun, which he said he had for his 'protection'.

[16] **REHABILITATION**

The defendant in his interview with the probation officer expressed remorse over the incident and states that he has no intention of re-offending. The pre-sentence report further discloses that the defendant appeared willing and motivated to change his life around and stay away from crime. These are positive signs for the rehabilitation of the defendant. However there are other issues such as the defendant's drug use and his aggressive and violent conduct exhibited in the commission of this offence.

[17] I have reviewed and considered the submissions of counsel for the defendant and the principles of law inherent in the four classical principles of sentencing. I find the aggravating and mitigating factors to be as follows:

AGGRAVATING FACTORS

1. The seriousness of the offence
2. The defendant's armed himself with a deadly weapon and attacked an unarmed person with same
3. The defendant showed scant regard for lawful authority when he absconded from the jurisdiction and travelled to Martinique where he committed another offence.

MITIGATING FACTORS

1. The defendant's guilty plea albeit not at the first available opportunity.
2. The defendant's expressions of remorse and stated intention to change his life and stay away from crime
3. The defendant's cooperation with the police during the investigations.

The court has considered and carried out a balancing exercise in respect of the aggravating and mitigating factors and finds that the aggravating factors outweigh the mitigating ones.

[18] SENTENCE

The defendant's mother testified that with the help of the defendant's immediate family compensation in the sum of \$12000.00 would be paid to the virtual complainant. The virtual complainant in sworn testimony has agreed to accept same. Though this would make a positive impact on the sentence to be imposed on the defendant I do not consider it to be a mitigating factor in his favour as clearly, such compensation must be derived from a source other than the defendant. I do not as well consider the defendant's age of 21 years old at the time of the commission of this offence to be a mitigating factor.

[19] The offence for which the defendant has pleaded guilty carries a maximum sentence of ten (10) years imprisonment. Having regard to the circumstances of this case I find that a benchmark of seven (7) years imprisonment to be appropriate. The defendant did not make an early guilty plea. Indeed because of the breach of his bail conditions the defendant could not be arraigned until the 20th March 2011 at which time he entered a plea of not guilty. In the circumstances he will not benefit from the usual one third reduction in sentence.

[20] Citizens in civilized societies no longer settle disputes with the barrel of a gun. In this case the defendant by means unknown but none-the-less unlawful acquired a 12 gauge shotgun and shot the virtual complainant in public at 7.15 am whilst the virtual complainant was unarmed and defenceless against such a weapon. The court cannot ignore the prevalence of gun related offences in this jurisdiction and in the circumstances it must impose a suitable period of imprisonment to show its abhorrence for this type of conduct and to serve as deterrence to those persons who may wish to emulate the defendant's conduct.

[21] The court must take into account the positive sentiments expressed in the pre-sentence report as it relates to the defendant's intention to change his life. The defendant's prognosis for rehabilitation seems good, hence the court ought not to impose a sentence which would destroy the defendant's hopes of reintegration into the society as a law abiding citizen and become a father to his children. I must also take into consideration the defendant's offer to compensate the victim in the sum of \$12000.00 and his co-operation with the police during the investigations.

[22] In the circumstances the defendant is sentenced to a period of imprisonment of three (3) years. He shall be credited with all time spent on remand from the date of his return from Martinique. He shall pay compensation to the virtual complainant in the sum of \$12000.00 on or before the 30th day of June, 2012. Upon his failure to pay compensation as ordered the defendant shall serve an additional period of imprisonment of one (1) year which shall run consecutively with the sentence of

three (3) years imprisonment. The defendant shall be credited for the time served on remand whilst awaiting his trial reaching a stage of finality.

[23] The defendant shall receive counseling for his drug abuse and anger management.

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FRANCIS M. CUMBERBATCH
HIGH COURT JUDGE