EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. 10 OF 2015

BETWEEN:

THE QUEEN

and

KENYATTA BOYNES

Appearances:

The Learned Director of Public Prosecutions Ms Kim Hollis QC and with her Ms. Leslie Ann Faulkner, Senior Crown Counsel for the Crown
Mr Patrick Thompson, Counsel for the Defendant

2017: 12th January
27th January
6th February

JUDGMENT ON SENTENCING

(Criminal law – Sentencing – Murder – Attempted Murder - Mandatory Life Imprisonment – Sections 150 , 152 and 23 of the Criminal Code 1997 – the Parole Act No. 7 of 2009 Section 9(2) – Criminal Justice (Alternative Sentencing) Act 2005 Sections 3(1) and (4) – determination of minimum term in relation to mandatory life sentence – choice of starting points – seriousness of the offence – aggravating and mitigating factors – announcement of minimum term in open court – manner in which life sentence is to run where accused already serving a determinate sentence-matters to be considered)

[1] **BYER J.:-** After a two (2) week trial on a two count indictment for murder and attempted murder the jury unanimously returned a verdict of Guilty on the two counts on the indictment, of having committed the murder of Paul Prentice and the attempted murder of Cadeem Thomas on the 14th December 2014.

[2] On the delivery of the verdict, the sentencing hearing was adjourned to facilitate obtaining the Social Inquiry Report for the Defendant and for the Court to be seized of all pertinent information with regard to sentencing the Defendant. The hearing was convened on the 12th January 2017 and judgment was reserved. This is the judgment on the sentence this Court intends to impose.

The Background facts

[3] The facts of the case as outlined by the Prosecution at trial and which were ultimately accepted by the jury given their verdict, were that the Paul Prentice("the Deceased") Cadeem Thomas("the Complainant") and the Defendant were all part of a group of young men who in parochial terms "limed" together. The Crown led the evidence that the Complainant and the Defendant by December 2014 had known each other for about thirteen months and that on the 10th December that year, the Defendant approached the Complainant and asked him to hold a package for him, which the Complainant in his evidence before the Court admitted he had been informed was weed or "pop". The Complainant having taken custody of the package, secreted the same for the Defendant but he also at some point removed some of this weed for his own personal use. An amount he told the Court in evidence, which amounted to about $100.00USD worth. On the 11th December 2014 the Defendant is said to have collected the package from the Complainant, who also told the jury in evidence that he had not told the Defendant that he had taken the quantum of weed as he did not think he would miss it.

[4] The Crown led the evidence that two days later the Defendant returned to the Complainant and informed him that he knew what he had done and if he did not pay him $600.00 "*he would have to pay twice*", a statement the Crown proffered amounted to a threat of violence against the Complainant. The Crown's case was that thereafter on the 14th December, the day after this

confrontation, the Complainant and the Deceased were positioned at Aarons Car Rental, the central location for the congregation of these young men, located in the heart of Road Town and next door to a popular ice cream parlour La Dolce Vita.

[5] The evidence led was that the Defendant, during the afternoon drove up to the business place in a vehicle that the Complainant had seen him drive on a myriad of occasions, looked at him and left the area without speaking to him. The evidence was that what transpired after was that moments after this " drive by", that the Complainant and the Deceased were shot at by a man masked who the Complainant categorically identified by his eyes as the Defendant. In the ensuing barrage of bullets that emanated from the gunman's firearm, the Deceased was shot and killed and the Complainant was forced to flee for his life.

[6] The motive advanced for the shooting by the Crown and the rationale given for this killing and attempted killing, was that the Defendant had been pressured by a person named "Rev' through retrieved *what's app* messages to recoup the loss attributed to the Complainant's appropriation of the $100.00 worth of weed.

[7] The Defence as led by the Defendant was that it wasn't him and he was not there. He however brought no evidence to substantiate his version of events and it was apparent his alibi was soundly rejected by the jury by the verdict that was handed down.

The Plea in Mitigation

[8] Counsel for the Defendant, Mr Thompson sought to make a very strong plea in mitigation. At no time however did Counsel attempt to convince the court that the charges of which his client were convicted were not serious. However, what Counsel did proffer to this Court was that he was not in agreement with the aggravating factors relied on by the Crown but frankly conceded that there was little if nothing to say in relation to the mitigating factors.

[9] Mr Thompson asked this Court to look at the aggravating factors relied on by the Crown and even though he clearly told the Court that even though he may not agree with the advanced aggravating

factors he accepted that this offence, in the manner that it is alleged to have been committed could have been considered aggravated.

[10] In this regard he asked the Court to consider that the failure to recover a firearm that was used in this crime could not amount to an increase in the culpability of the Defendant.

[11] Counsel also asked the Court to consider whether the fact that the killing was unprovoked could really aggravate the offence. If the offence had been provoked. then the charge would have been manslaughter not murder and in those circumstances the lack of provocation could not have aggravated the offence. Counsel also asked the Court to consider whether the fact that the Defendant has failed to express remorse could really aggravate the offence per se when it could not affect the culpability of the Defendant or exhibit any greater harm. These effects, he submitted, are what the Court must be concerned with when considering whether a particular circumstance can be considered an aggravating factor to the offence. Therefore any reported failure to express remorse which has nothing to do with the elements of the offence, should not be held against his client.

[12] In relation to the offence being premeditated, Counsel asked the Court to consider whether the reported confrontation between the Complainant and the Defendant some twenty four hours before, in which the Complainant stated that the Defendant had indicated that he would "*have to pay twice*" was sufficient to amount to a threat to kill which could amount to premeditation. Although Counsel accepted that there was perhaps some premeditation, he submitted to this Court that in order for there to be a conclusion to this extent, any such premeditation had to be "significant", which he said was missing in this case.

[13] Counsel also asked the Court to disregard the Crown's submission that the intention to kill the Complainant by the multiplicity of shots in his direction could amount to an aggravating factor. Counsel submitted to the Court that this is by necessity an element of the offence of attempted murder. That being said, to count it as an aggravating factor when it is an element that had to be proven by the prosecution would amount to double counting.

[14] Counsel for the Defendant in his comprehensive submissions also submitted to this Court, that although it is accepted that previous convictions could constitute an aggravating factor, he asked that this sweeping conclusion not be adopted wholesale to his client. In that regard he asked this Court to consider that the previous convictions of his client, could not all be considered relevant. He asked the Court to disregard the traffic offences of his client as being irrelevant and he also asked this Court to consider the conviction that he obtained before this very Court for Assault occasioning actual bodily harm in 2014 also be considered irrelevant but he conceded that the conviction for possession of a firearm could be considered where in ***this*** offence a firearm was used. Counsel's interesting submission was that it was not every previous conviction that is relevant in a murder conviction. It must be convictions that showed a pattern of repeat offending. Therefore the submission by Counsel was that even though the one conviction he admitted may be of relevance, it did not affect the culpability of the Defendant and therefore amount to an aggravating factor. It was merely relevant for the Court to take into consideration based on the nature and commission of this offence. However having already considered that the use of a firearm would amount to an aggravating factor, to say that the previous conviction for the possession of a firearm was also aggravating, in his submission would be considered double counting.

[15] Counsel in his submissions, accepted that the time and place of the offence was an aggravating feature, in that it occurred in the early evening in a public area and also accepted that the use of the firearm must amount to aggravation.

[16] Counsel having accepted that there was little to say regarding mitigating circumstances to which he could draw the Court's attention, centered his argument on sentence, on the change that has been manifested in the law at present which recognizes that 1) we no longer should slavishly apply the United Kingdom guidelines with regard to sentencing and in this regard stated that the sentences imposed in this jurisdiction prior to the Privy Council's decision in ***Milton and Campbell***[1] in in 2015 would be of limited assistance and 2) that there now not being any fixed starting point that the

[1] [2015]UKPC 42

Court should view a cross section of the existing legislation and practice from across the Commonwealth to formulate the starting point that is appropriate in this case.

[17] Counsel submitted that it was common ground that this Defendant did not warrant a "whole life order". The contention of Counsel was therefore taking into account the circumstances a starting point of 25 years was acceptable with a sentence of 17 – 25 before he was eligible for Parole under the Parole Act, for the offence of murder and for the offence of attempted murder that a range of 7-15 and/or 12-20 years was entirely appropriate.

[18] Having brought to the Court's attention the letters written on behalf of the Defendant for a previous sentencing exercise, Counsel asked the Court not to consider them as character references but to assess them when examining the criminality of his client.

Crown's submissions

[19] The Crown by their submissions reminded the Court of their obligations as prosecutors to the Court in matters of sentencing. Essentially these were five. i) To draw the Court's attention to the aggravating and mitigating factors as they find disclosed on their case, ii) any victim impact statement, iii)where evident, evidence of the impact of the crime on the community, iv) any statutory guidelines or guideline cases which could assist the Court and v) any relevant statutory provisions relating to any ancillary orders that may be sought[2].

[20] Therefore in looking at this matter before the Court, the Crown did submit that they agreed that this was not a case that required the whole life order as is set under the provisions of the Criminal Code, but they did submit that this was a matter which reflected a high degree of culpability with the aggravating factors drawn to the Court's attention, that would still warrant a substantial tariff.

[21] The Crown stated that in this case, the aggravating factors far outweigh the mitigating factors and that this is a proper case for the Defendant to spend a significant portion of his life incarcerated.

---

[2] ***R v Webb*** [2003]EWCA Crim 3731; ***R v Pepper and Ors*** [2006] 1 Cr App R. (s) 20 CA

[22] The Court was referred to several sentencing cases from this jurisdiction in which sentences had been given for the offence of murder. These included ***R v Aaron George***[3] with a minimum period of 22 years; ***R v David Swain***[4] with a minimum period of 25 years; ***R v Jessroy Mckelly***[5] with a minimum period of 40 years; ***R v Milton, Campbell and O'connor***[6] with a minimum period of 35 years and the most recent decisions of ***R Devin Maduro and R v Deshawn Stoutt***[7] who were given 30 years and 35 years respectively as minimum periods to serve.

[23] In relying on these sentencing cases the Crown by the Learned Director submitted to this Court, that this was a proper case in which the starting point for this offence should be in the region of 30 years to which then the Court should take into account the plethora of aggravating factors which they say exist. They submitted that the total disregard for human life was evident, where the Defendant having fired not just at the man the subject of the antagonism but at an innocent bystander as well who in fact died, meant that there was a high degree of culpability on the Defendant. They submitted that there were no personal mitigating factors which could take this matter out of the high degree of culpability which they say must attract to this Defendant and finally that the Defendant having not acknowledged his responsibility for the crime shows that he has no remorse for the incident. They submitted that all of these together with the aggravating factors they identified must lead to the inescapable conclusion that although this case may not be the worst of the worst, it still carried a high degree of culpability.

[24] The Crown in making their submissions on the offence of attempted murder also referred the court to the cases of ***R v Patrice Grant***[8]; ***R v Devon Dawson***[9]; ***R v Jerry Martin***[10], ***R v Sherman Williams and Jevon Demming***[11] in which the range of sentences ran from 7 to 20 years

[3] No 21 of 2008 (unreported)
[4] No 17 of 2009
[5] Crim case No2 of 2014 (unreported)
[6] Op Cit
[7] Criminal Case 18 of 2005 and criminal case No 2 of 2008
[8] Criminal ase No 19 of 2005
[9] Criminal case No 2 of 2006
[10] Criminal case No 2 of 2006
[11] Criminal case No 3 of 2013

imprisonment. This they submitted was an entirely consistent pattern given the fact that even though this offence requires an intention to kill, the level of harm or injury sustained must be assessed in the determination of the sentence in this regard.

[25] The Crown therefore submitted that any sentence passed for the murder and the attempted murder charges would have to reflect the principle of totality and thus "***if the sentence for one offence can comprehend and reflect the criminality of the other then the sentences ought to be concurrent***".[12]

Social Inquiry Report

[26] At the end of the trial and upon the verdict being given, the Court on its own motion sought the preparation and presentation of a Social Inquiry Report and a Report from the Superintendent of Prison as to the conduct of the Defendant during his present incarceration.

[27] The Social Inquiry report was dated the 14th December 2016 and in the same the Defendant was characterized as being "*good*" by his family. That he had a good childhood he having grown up "*well*". What the father of the Defendant did tell the social worker responsible for preparing the report was that the Defendant got sent to boarding school because his grades were not good neither were his choice of friends.

[28] By this report, it is obvious that this Defendant was a child of privilege and opportunities, raised in a family environment that loved him dearly as a beloved son and brother.

[29] From all reports and based on the information that was available the Department therefore came to the conclusion that the Defendant grew up in "a *well-rounded close knit Christian home. He was nurtured and molded by his parents and taught the trade of a welder from a tender age and ...given all opportunities by his parents to make the best out of his life*"

[12] Paragraph 67 of the Crown's submissions dated 6th January 2017.

Prison Report

[30] Upon order of the Court the Superintendent of Prisons Mr David Foot compiled a report on the incarceration of the Defendant.

[31] The Superintendent has indicated that the Defendant is well behaved and well respected by his peers and was seen more as a leader than a follower. He was tested to show that he is well educated and takes part in the regime and activities.

Court's Consideration and analysis

[32] By Section 150 of the Criminal Code: "***any person who is convicted of murder is liable to imprisonment for life.***"

[33] In addition section 152 of the Criminal Code states that " ***any person who by any means attempts to commit murder is liable on conviction for life***"

[34] However these sections must be read in conjunction with Section 23, where provision is made 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.***"

[35] It is therefore pellucid that once an individual is convicted of murder under section 150 he faces the maximum penalty of life imprisonment while under section 152 he may be visited with a shorter sentence.

[36] It is therefore clear that the provisions of these sections must inform this Court as to its powers in sentencing in this matter.

Considerations for Sentence of Murder

[37] What is clear in this Court's mind is that the sentencing for murder is no longer as straightforward as passing a life sentence for the offence and leaving the Defendant so sentenced to be "***entirely reliant on the possibility of executive clemency for release on an unconditional or licensed basis***"[13] It is now incumbent on this Court to bear in mind the provisions of the Virgin Islands Parole Act No 7 of 2009 (the Act) which came into force on the 20th May 2009. The specific provision is section 9 thereof which states :

> (1) *Subject to section 66 of the Criminal Procedure Act and except in the case of a person sentenced to imprisonment for life, a prisoner is eligible to be considered for parole for the first time if the prisoner has served at least two-thirds of his or her sentence.*
>
> (2) *A judge upon sentencing a person to imprisonment for life, shall state whether such person may be eligible to be considered for parole and, if a person is found to be so eligible, state a minimum period of imprisonment that such a person shall serve before being considered for parole for the first time.*
>
> (3) *A prisoner who is not released on license after a parole hearing is eligible for reconsideration for parole twelve months after the date of the last hearing if the remaining part of his or her sentence is more than twelve months.*
>
> (4) *For the purposes of computing two-thirds of a prisoner's sentence under subsection (1), "six months" shall be substituted for every "twelve months" if the prisoner was under the age of eighteen on the date when the sentence which he or she is serving was passed.*
>
> (5) *For the purposes of determining the length of that part of that sentence which a prisoner has served, any period pending the determination of an appeal against conviction or sentence shall be taken into account as if he or she has served that period as part of the sentence, unless the court hearing the appeal otherwise directs".*

[13] ***Devin Maduro v R and Deshawn Stoutt v R*** 18/2005 and 2/2008 respectively per Ellis J at para 2

[38] It is therefore clear that by this Act, a judge is given the discretion whether they consider a person eligible for parole and if that person is so eligible they must state a minimum period that they must serve before being considered for parole for the first time.

[39] It is therefore very clear that there is no ***right*** to parole for a convicted person, it is a discretion given to the Court to enforce that provision if they think that the person should have some shorter period than what is called a "whole life order." Also, let me be very quick to add, it is ***not*** an automatic right to be released at the end of the minimum period. The person who has been given the opportunity to be paroled must therefore satisfy at the time he makes the application to the appropriate body, that he or she is entitled to be released back into society.

[40] In the case of ***The Queen v Lorne Parsons, Clinton Hamm and Selena Varlack***[14] Olivetti J. had this to say about the Parole Act which had just come into force in the Territory at the time: "***the Parole Act gives no guidance as to the factors to be considered in determining whether a convicted person sentenced to life imprisonment may be eligible for parole neither does it lay down criteria for assisting in determining the minimum or tariff term if such a person is found to be so eligible. Thus, these matters are left to the discretion of the trial judge.***"

[41] I am in agreement with the Learned Judge with regard to the lack of guidance that is contained in the Parole Act and state that in large measure whether a convicted person under Section 150 could be considered for parole falls to the discretion of the sentencing judge.

[42] In exercising this discretion, the Courts both in this region and in this jurisdiction in particular have looked for relevant guidance from the United Kingdom. However of recent note, is that the former practice which actively informed those cases referred to by the Learned Director on the sentences determined for murder all used the provisions of Schedule 21 of the Criminal Justice Act 2003 of the UK for almost "slavish" guidance which has now been eschewed by the Judicial Committee in the ***Milton and Campbell*** case.[15]

[43] In that case the Board made the following observation:

[14] Hct Crim 9/2006 para 16
[15] Op Cit

"the courts are entitled to look for guidance to sentencing practices in other countries, but the Board would not recommend that they bind themselves too closely to the regime of a particular country including the UK. Local judges are in the best position to assess the appropriate tariff in their jurisdiction, subject to their own statutory provisions"

[44] Therefore what has now become of note, is that while the tariffs set by Section 269(5) and Schedule 21 may be of assistance to guide the courts in this region, they are no longer to be considered binding on the Courts or even by necessity the yardstick.

[45] However it goes without saying that even where there is no binding precedent, the sentencing Court must undertake its own assessment of an appropriate starting point for any particular case under consideration and thereafter proceed to consider the aggravating and mitigating factors, the effect of previous convictions on the sentence to be imposed, the personal characteristics of the offender and the time if any spent in custody or remand.

[46] Therefore in making such a determination, it is abundantly clear that among all the factors that must be considered, to determine the total effective sentence, the gravity or the seriousness of the offending is paramount.

[47] Ellis J in the cases of ***Maduro and Stoutt***[16] had this to say about the determination of seriousness:

"[49]The primary indicator is the culpability of the offender in committing the offence. According to the learned authors of the Sentencing Handbook- Sentencing guidelines in the Criminal Courts there are four levels of criminal culpability where the offender:

1. *Has the intention to cause harm, with the highest culpability when an offence is planned. The worse the harm intended the greater the seriousness.*

[16] Op Cit

2. *Is reckless as to whether harm is caused. That is where the offender appreciates that at least some harm would be caused but proceeds giving no thought to the consequences even though the extent of the risk would be obvious to most people;*
3. *Has knowledge of the specific risks entailed in their actions even though they do not intend to cause the harm that results;*
4. *Is guilty of negligence"*

[50] Culpability will generally be greater where an offender causes more harm that(sic) is necessary for the commission of the offence or where he/she targets a vulnerable victim(due to age, disability or by virtue of their job)

[51] The second factor to be considered in assessing seriousness is the harm caused, intended to be caused or which might foreseeably be caused to the individual victim or the community. Harm must always be judged in the light of the level of culpability of the offender in an individual case having regard to the motive of the offender and whether the offence was premeditated or spontaneous."

[48] In the case at bar it is clear and it is the agreed position by both sides that this offence does not fall within the "worst of the worst" cases warranting a whole life order. In considering the authorities it is clear that the imposition of a life sentence or a whole life order can be equated to the imposition of the death penalty. In effect, the whole life order sentences the convicted person to live a life without any possibility of re-emerging into society. The end of life as he knows it.

[49] Thus in the case of ***Ernest Lockhart v The Queen***[17] Lord Kerr in giving the judgment of the Board made it clear that in order for the imposition of the death penalty to be given to any person, and by extension the whole life order, the sentencing judge had to undertake a two prong investigation. Firstly, he was required to consider whether the murder can be considered the "worst of the worst" in looking at the nature of the crime and the surrounding circumstances and then as a secondary aspect, the personal circumstances of the killer himself in that there was no capacity for reform. However it is clear that the second exercise is not necessary if the first limb is not made out, in

[17] [2011] UKPC 33 paragraph 15. 16

that the nature of the offence does not fall within the characterization of the "worst of the worst" or the "rare of the rare."[18]

[50] In the case of ***Lockhart***[19] the killing that was executed showed that there was some degree of planning, there was a single gunshot wound to the back, there was a threat issued to the deceased previous to his death and although planned was not "*expertly executed.*"[20] In those circumstances the Board held that "***callous and brutal though this murder was, it simply cannot be described as the worst of the worst.***"[21]

[51] Further in the case of ***R v Jones and others***[22] it was recognized by Lord Phillips CJ that a "***whole life order should only be imposed where the seriousness of the offending is so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his life. Often perhaps usually, where such an order is called for the case will not be on the borderline. The facts of the case, considered as a whole will leave the judge in no doubt that the offender must be kept in prison for the rest of his life. Indeed if the judge is in doubt this may well be an indication that a finite minimum term which leaves open the possibility that the offender may be released for the final years of his or her life is the appropriate disposal.***"

[52] In this case, this Court is not at all convinced that, as senseless and possibly characterized as callous as was this crime, that this Defendant to be adequately punished must spend the rest of his life behind bars under the sentence of a whole life order.

[53] Having said so, it is now for me to determine the starting point for this Defendant for a minimum term that he will be required to serve.

[54] That being said, the Crown has said that this offence however does fall very closely to a whole life order. Indeed in so far as that submission is accepted partially by this Court, what this Court does

[18] Trimingham v The Queen [2009] UKPC 25.
[19] Op cit
[20] Op cit at paragraph 3
[21] Op cit at paragraph 16
[22] [2005]EWCA Crim 3115 paragraph 10

find is that this offender planned this offence to the extent that (from the evidence) he made sure that the Complainant, the subject of his angst was where he usually was, "eye balled" him , knew he was not alone and returned moments later and proceeded to issue multiple shots at the Complainant and the Deceased in an area that was in the middle of town on a Sunday evening close to a family establishment.

[55] Those circumstances, in this Court's mind cannot amount to anything other than a high level of culpability on the part of the Defendant, who may not have intended the death of the Deceased but certainly intended harm and intended to kill the Complainant.

[56] That being said I do agree that there should be attributed to this Defendant a high degree of culpability on his part. The Defendant was aware of the risks and was careless or reckless to those very apparent risks.

[57] This Court is therefore satisfied that having considered the culpability of the Defendant, the gravity of his conduct and that he was well aware of the consequences of his offending and the actual consequences that occurred, that a starting point for this Defendant in all the circumstances will be 25 years.

[58] This however is only the commencement of the sentencing process and not the end. The sentence must therefore, in order to take into account the aims of sentencing, bear in mind the aggravating and mitigating circumstances that would impact whether there is a concomitant increase or decrease of this determined minimum term.

[59] It was common ground between the parties that there were no mitigating circumstances on the part of the Defendant. Counsel for the Defendant sought to advance that the personal circumstances of the Defendant being a father of young children should have some bearing on the sentence that is appropriately determined. However this Court is persuaded by the submission of the Crown that the inevitable hardship caused by incarceration should be of little relevance. In that regard this Court adopts and agrees with the words of the Queensland Supreme Court in the case of ***R v MP***

[23] where they stated: "*imprisonment imposed upon parents, usually fathers almost invariably involves hardship on children, but this consideration is almost never relevant and never in cases of serious offences for which substantial periods of imprisonment must be imposed*". In addition this Court repeats the word of this Court in the judgment rendered in ***R v Jessroy Mckelly*** [24] where it was stated "*that personal circumstances even though have to be taken into account cannot be an excuse for the vicious and brutal action of an individual who has reached the age of reason*".

[60] That being said the Court also considers the further submission by Counsel for the Defendant on the character of the Defendant as elicited in the Social Inquiry Report and the letters relied on in his previous matters before the Magistrate's Court but who were not called as character references before this Court. Counsel has asked this Court to consider this information as against the criminality of the Defendant and indeed it is proper for this Court to do so.

[61] In relation to the aggravating factors that were canvassed before this Court in both written and oral submissions by the Crown and what was said in response by Counsel for the Defendant, it cannot be denied that this offence was aggravated by certain factors. The Court finds these to be the i) use of a firearm as opposed to another type of weapon; ii) the time and place the offence occurred - the middle of Road Town on a Sunday evening next door, literally on the doorstep of an ice cream parlor; and iii) multiple gunshots issued by the Defendant in the effecting of this offence. In relation to the other aggravating factors submitted to this Court for its consideration, this Court does not agree that the other factors claimed amount to an aggravation in the manner in which this offence was committed. Indeed in agreement with Counsel for the Defendant, the unprovoked nature of the offence must amount to the murder charge and conviction that the Crown based their case, the firearm not being recovered does not aggravate the manner in which the offence occurred and finally the fact that the Defendant has not acknowledged responsibility cannot in this Court's mind amount to an aggravation.

[62] Additionally in assessing the previous convictions of the Defendant. I am in agreement with Counsel for the Defendant that the previous convictions of the Defendant did not aggravate the

[23] [2004]QCA 170
[24] Criminal Case 2 of 2014

offence in that the convictions of the Defendant do not reveal a pattern of repeat offences of like manner that in any means establish a ***"substantial record of serious violence."***[25] They must therefore be kept and looked at in perspective. However in 2014 just prior to his arrest for this offence, the Defendant was arrested, charged and pleaded guilty to the possession of a firearm. This must be a relevant consideration in the overall sentence meted out to this Defendant and I am prepared to take this into consideration in the final analysis.

[63] All of that being said " *ultimately the fixing of a minimum term is an exercise of discretion undertaken with reference to established sentencing principles and requiring consideration of the individual facts of the particular case"* [26]

[64] The setting of this minimum term under the Act must therefore always consider the objectives and principles as set out in the now seminal case of ***Desmond Bapstiste v R***[27] being those of retribution or denunciation, deterrence both for the particular offender and for potential offenders, prevention to protect the community and rehabilitation so as to allow the offender to become a contributing member of society.

[65] Thus, in determining the minimum term that the offender must serve, this Court is guided by the words of the Australian Court in the case of ***Deakin v The Queen***[28] that "*the intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence"*

[66] The Court accepts that from all that has been said about this Defendant the prospect of rehabilitation is one that would ultimately be of benefit to him.

[67] That being said and although, I am not convinced that this Defendant requires to be kept from society for the rest of his life I am satisfied that a lengthy finite time is required before he can be

---

[25] ***Regina v Sullivan*** [2004]EWCA Crim 1762
[26] Per Ellis J ***Maduro and Stoutt*** at para 88
[27] Consolidated Appeal No 8 of 2003
[28] [1984] 58 AJLR 367

considered ready to return to this community. The aggravating features of this offence far outweighed the personal circumstances or prospects for rehabilitation and in those circumstances; I therefore sentence this Defendant to imprisonment for life with a minimum period for parole eligibility of 30 years.

Considerations for Sentence for Attempted Murder

[68] As stated in the earlier paragraphs of this judgment, section 152 of the Criminal Code 1997 prescribes the sentence for the offence of attempted murder. Like murder, the sentence is life imprisonment but unlike murder, the Criminal Code by section 23 allows for the court to pass any shorter sentence in offences of this nature.

[69] 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.***"[29]

[70] That being said, it is clear that 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.

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

[72] The Crown has not attempted to differentiate the aggravating factors for this offence as opposed to the offence of murder and this Court is in agreement with that given that these offences occurred

[29] Sentencing Guidelines Council: Attempted Murder – Definitive Guideline

out of the same set of circumstances. This offence, as is clear from the evidence is therefore only in relation to the Complainant.

[73] That being said, there is no doubt in this Court's mind that this Defendant had every intention to kill the Complainant. The evidence was clear.

[74] All the authorities to which this Court has been directed to by the Crown and from its own research, clearly show a range of sentences that can be imposed on offenders who have been found guilty of this offence.

[75] Having said so and considering the ranges that have emerged from those cases, it is clear that this offence as committed by this Defendant falls within the range of 10 to 20 years.

[76] There were no injuries suffered by the Complainant and we did not have the benefit of a victim impact statement by the Complainant as to the after effects, if any, of this attempt on his life.

[77] That being said and bearing in mind that this Court must bear in mind all the surrounding circumstances and the law, I am satisfied that for this offence the Defendant is sentenced to 10 years.

Consecutive or Concurrent sentences

[78] At the initial hearing for the sentencing submissions, the Crown purported to advance that this Court may not be in position to deliver consecutive sentences where the Defendant was currently incarcerated for an unrelated offence.

[79] The Court adjourned to hear further submissions on the point and was greatly assisted by the subsequent written submissions from the Crown, to which Defence Counsel gave no demurrer and in which reliance was placed squarely on section 33(1) of the Criminal Code.

[80] As this is integral to this portion of this judgment the same is set out :

> *"Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence other than a sentence of corporal punishment, which is passed upon him under the subsequent conviction, shall be executed after the expiration of the former sentence, unless the court, subject to subsection(2) directs that it shall be executed concurrently with the former sentence or any part thereof."*

[81] It is therefore clear, that the Court is mandated to pass any subsequent sentence not related to the offence for which he is presently incarcerated on a consecutive basis.

[82] I am fortified in this view from the words of the Learned Author Dana Seetahal in her text ***Commonwealth Caribbean Criminal Practice and Procedure*** [30] where she stated at page 369 thereof *"if the sentence of imprisonment is imposed on a defendant who is serving another sentence which is unrelated, the new sentence* ***will generally be ordered to run consecutively to the existing sentence****. If the Defendant is serving more than one sentence, the new sentence should be consecutive to the total period of imprisonment to which the prisoner is then subject."* (my emphasis)

[83] That being said the only other issue is therefore whether the Defendant should be given any credit for the period spent on remand for this matter.

[84] In that regard it may be useful to examine the chronology so helpfully provided by the Crown for this Defendant and the arrest for this matter:

[30] Rutledge . Cavendish Publishing

a. The defendant was arrested on suspicion by the Police for Possession of a Prohibited Firearm, Possession of Cannabis on 18th December 2014. He remained in custody.

b. The defendant was formally charged taken before the Magistrates' Court for his first appearance on 19th December 2014 for the aforementioned charges. Bail was argued but denied by the Court. The defendant was remanded to custody.

c. The defendant pleaded guilty and was subsequently sentenced on 25th March 2015. The Defendant's committal documentation to HMP was sent whereby his sentences were to run consecutively.

d. On 3rd February 2015, the defendant was formally arrested and charged for the murder and attempted murder and taken before the Magistrate's Court. He remained in custody.

[85] When one therefore peruses the same, it is clear that the Defendant was on remand for these offences when he was already on remand for the first offence and subsequently, for the period that he was serving a sentence. It is also instructive that in the sentence that was given to the Defendant at the Magistrate's Court for the first offence the same was clearly stated[31] to have taken into account the time spent from when he was first remanded which would have included by necessity the period when he was remanded for these offences.

[86] Once sentence was passed his remand for these offences became subsumed by his sentence. Thus as the CCJ recognized in the case of ***Romeo Da Costa Hall v The Queen***[32] the usual rule of the time spent on remand having to be taken into consideration as a mathematical calculation may not in fact apply as a "primary rule... (2) where the Defendant is or was on remand for some other offence unconnected with the one for which he is being sentenced... (4) **where the defendant was serving a sentence of imprisonment during the whole period spent on**

[31] Oral submissions made on the 27th January 2017 read from the sentencing remarks of the Learned Magistrate
[32] CCJ Appeal No Cr 1 of 2010 /BB Criminal Appeal No 15 of 2008

remand and (5) generally where the same period of remand in custody would be credited to more *than one offence*"[33] (my emphasis).

[87] In this Court's determination therefore, since the Defendant has been incarcerated serving a sentence of imprisonment on an unrelated matter during the whole of the period awaiting this trial I am satisfied that this period is not to be taken into account for the purposes of the calculation of his sentence.

[88] Therefore the sentence of the Court is that this sentence shall run consecutively to the one that the Defendant is presently serving, that the sentences for the murder and the attempted murder will run concurrently and he is not to be given any credit for the time spent on remand for this matter he having been incarcerated for the entire period awaiting trial serving a sentence on an unrelated matter.

[89] In conclusion, I therefore wish to repeat an edited version of the entreaty I left with the parties in the ***Jessroy Mckelly*** case and I leave these parting words from the case of ***Parsons et al***[34] and Olivetti J which I adopt whole heartedly. "*The taking of a young life in such a brutal fashion leaves behind unspeakable hurt and grief and nothing can assuage that.....one cannot exact revenge as this is not the sentencer's role in civilized society. We can only seek to punish for a crime according to law and leave the rest to the perpetrators conscience and to their gods.*"

Nicola Byer

High Court Judge

[33] Op Cit at paragraph 18
[34] Op cit paragraph 50