

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CRIMINAL)

CASE NO. SLUHCR2011/0052 BETWEEN:

THE QUEEN

Complainant

-v-

MIGUEL DESRIVIERES

Defendant

Appearances:

Ms. Nardia Morgan for the Crown

Mr. Leslie Mondesir holding for Mr. Alfred Alcide for the Defendant

2017: December 23.

JUDGMENT ON SENTENCING

[1] **CUMBERBATCH, J.:** The Defendant was indicted by the Director of Public Prosecutions for the offence of Using a Firearm with Intent Unlawfully to Cause a Wound contrary to Section 101(1)(b) of the Criminal Code 2004. After a fully contested trial he was convicted by a unanimous verdict from the jury.

THE FACTS

[2] At around 11.00 pm on Friday 14th September 2007 one Gibson Dostalie (the Virtual Complainant) was on his way home when he saw the Defendant and one Owen Jeremie speaking. He stopped because he was aware that there was bad blood between him and the Defendant. When the Defendant and Jeremie parted company, the Virtual Complainant proceeded on his way. When he was about 8 feet away from the Defendant he observed emerging from under a coat worn by the Defendant the muzzle of a homemade shotgun. He heard a loud noise and saw smoke coming from the gun muzzle. He also felt an impact to his right hand and saw it bleeding.

[3] The Virtual Complainant ran into a bushy area to conceal himself from the Defendant who he heard traversing the area in search of him. He remained hidden for over an hour after which time he managed to reach friends who called an ambulance which took him to the Victoria Hospital. The attending physical opined that he suffered from injuries inflicted with a shotgun which were multiple entry wounds with pellets lodged under the skin of his right arm. Eleven pellets were later recovered by another physician at the Tapion Hospital.

THE PRE-SENTENCE REPORT

[4] The Defendant was the issue of a common law relationship between his parents. He commenced residing with his father when he was about six months old and later resided with his mother. At age 14 he ran away from home and basically lived on the streets until he was rescued by his father. He continues to have a good relationship with his father but his relationship with his mother remains strained.

[5] The Defendant admits to having been involved in violent behavior in the past, but has settled down and tries to stay out of trouble. He asserts that his family is the most important thing in his life at present. Community residents describe the Defendant as loud and aggressive but hard working. I shall refer to other parts of this report later on in my judgment.

[6] The aggravating and mitigating factors herein are as follows.

Aggravating Factors

1. The seriousness of the offence which was planned and premeditated,
2. The use of an unlawful firearm against the Virtual Complainant,
3. The injuries incurred by the Virtual Complainant,
4. The Defendant's lack of remorse,
5. The Defendant was on bail for another similar offence when he committed this offence.
6. The Defendant is not a first offender.

Mitigating Factors

1. The delay in bringing this matter to a stage of finality.
2. The relatively youthful age of the Defendant at the time of the commission of this offence.

SUBMISSIONS

[7] The Court benefitted from written submissions submitted by defence counsel and Mr. Brette for the Crown. Mr. Alcide contends that his client was 15 years old at the time of the commission of this offence hence he ought to be treated as a juvenile, and that the provisions of the Children and Young Persons Act should have been invoked. He urged the Court to consider an alternative sentence rather than a custodial one.

[8] Defence counsel concedes that in the case at bar, that the aggravating factors outweigh the mitigating ones. However, he submits that the delay herein should be taken into consideration in sentencing. He further submitted that the Defendant has for the past 10 years become a farmer and a family man and wishes to make a meaningful contribution to the society.

[9] The Deputy Director of Public Prosecutions took issue with defence counsel's submissions of the Defendant's age. Both the Pre-Sentence Report and the charge sheet disclose the Defendant's date of birth to be the 25th September 1900, which makes him a few days shy of his seventeenth birthday when he committed this offence. He went on to contend that there were no mitigating factors herein and hence a custodial sentence should be imposed. Mr Brette addressed the Court on the classical principles of sentencing and also referred the Court to previous decisions on sentencing in cases similar to the one at bar.

[10] On the issue of delay, Mr. Brette concedes that there has been delay in bringing this matter to a stage of finality. He contends however that the gravity of the offence coupled with the absence of mitigating factors are compelling reasons why at this stage that it would be in the public interest to impose a custodial sentence.

[11] I will consider and apply the classical principles of sentencing to the facts and circumstances of the case at bar.

RETRIBUTION

[12] This is another case which involves the use of a firearm without lawful justification. What makes it that more egregious is that this was an illegal homemade shot gun which was no less lethal than a conventional one. This offence was committed by the Defendant at a time when he was on bail for the offence of attempted murder. He later pleaded guilty to the lesser offence of causing grievous harm for which he received a non-custodial sentence.

[13] The Court must show its abhorrence for what has been described as the introduction of gun law into this jurisdiction. It has become quite common for offenders to resort to the use of illegal firearms to settle differences and as an aid in the commission of various offences.

DETERRENCE

[14] As stated aforesaid gun related offences have become alarmingly prevalent in this jurisdiction hence the Court must impose a suitable sentence to deter others from this heinous practice.

[15] The Pre-Sentence Report indicates that since the commission of this offence some 10 years ago, the Defendant has not treaded on the wrong side of the law. Hence this principle may not be applicable to him.

PREVENTION

[16] The Pre-Sentence Report reveals that the Defendant is a farmer and family man. Though the offences committed by him involve violence he has not since then acted in a manner considered to be dangerous to the society. I have noted however that he has been described by some persons as being loud and aggressive. These unsavory features of his personality can be corrected with the appropriate counseling.

REHABILITATION

[17] The Defendant seems to have done well in rehabilitating himself since his last infraction with the law. From all accounts he has not transgressed on the wrong side of the law, is meaningfully employed and is a family man.

[18] The Court is concerned that the Defendant is unremorseful and continues to deny responsibility for his conduct in spite of the strong evidence against him at his trial. His loud and aggressive behavior needs to be addressed as this could lead to recidivism. His continued denial of involvement in this matter together with his allegations that the Virtual Complainant had chopped him some time ago may have a similar result.

[19] It is important to note that this was not part of his case at the trial where he was represented by counsel. I find that these matters could militate against his rehabilitation in this respect.

SENTENCE

[20] Parliament has enacted a maximum sentence of ten years imprisonment for the commission of this offence. The gravity of this offence which involves the use of an illegal homemade shotgun cannot be trivialized in light of the current crime rate in this jurisdiction. Moreover, the aggravating factors outweigh the mitigating ones. Thus, a custodial sentence is inevitable. Before I determine an appropriate sentence I must consider the issues of delay and the Defendant's age at the time of the commission of this offence.

DELAY

[21] It is common ground that there has been inordinate delay in bringing this matter to a stage of finality. It is also accepted that no blame can be attributed to the Defendant for this occurrence.

[22] In **Hassen Eid-En Rummun v The State of Mauritius** Lord Kerr opined thus at paragraph 13:

1. " In the event , the respondent has now accepted that the delay in this case constitutes a breach of the appellants constitutional right. A breach of that right will always be a factor to be considered in deciding upon the appropriate disposal . In some instances it may not be a factor of great weight and there may even be some cases in which , because of the strength of countervailing factors such as the gravity of the offence , it will be accorded no weight at all. But it will always be a factor to be considered ."

[23] His Lordship went on to cite the dictum of the Board in **Dyer v Watson** at paragraph 55 to wit:

1. "The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is , generally speaking , incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured ... "

[24] This Court is well aware of the many constraints and events which negatively affected the Crown's ability to conduct criminal trials in the High Court with due expedition. This fact however does not in the opinion of the Board absolve the Crown from its responsibility to ensure that the Defendant's right to a fair trial within a reasonable time is not breached. Accordingly, the Defendant is entitled to a reduction in sentence as a result of the breach of his constitutional rights.

[25] I now turn to consider the Defendant's youthful age at the time of the commission of this offence. In

Desmond Baptiste et al v The Queen Sir Dennis Byron opined thus:

" On the issue of age of the offender , a sentencer should be mindful of the general undesirability of imprisoning young first offenders . For such offenders the Court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects.

Where imprisonment is required , the duration of incarceration should take such factors into account . In the same vein , in cases where the offender is a mature individual with no apparent propensity for commission of the offence , the sentencer may also take this circumstance into account in weighing the desirability and duration of a prison sentence. As with first time offenders , the more serious the offence , the less relevant will be these circumstances . "

[26] The Defendant admitted to the Probation Officer that from age 14 when he left his mother's home he basically lived on the streets. There is no doubt that living on the streets at age 14 had with it the usual consequences more particularly resorting to criminal activity. At and around that age he was bereft of parental supervision and mentoring until his father rescued him. Thus, the Court will take into consideration the Defendant's age at the time when he seemed to be actively participating in criminal activity.

COMPENSATION

[27] Defence counsel in his written submissions urged the Court to make an Order for compensation against his client. The Court was reluctant to do so having regard to the stance taken by the Defendant that he is innocent and unrepentant for the injuries caused to the Virtual Complainant. However, in an oral submission at the sentencing hearing Mr. Alcide repeated his suggestion of compensation with which the Defendant concurred.

[28] Thus having regard to all circumstances in this case the Court makes the following orders:

1. The Defendant shall pay compensation to the Virtual Complainant in the sum of \$10,000.00 in the manner hereinafter set out:
 - a. The sum of \$3,000.00 shall be paid on or before the 20th day of November 2017;
 - b. The balance of \$7,000.00 shall be paid in 11 monthly installments of \$600.00 commencing on the J d day of January 2018 and continuing on the first day of business of each and every month;
 - c. Thereafter the sum of \$600.00 shall be paid within one month of the payment of the eleventh installment.
2. In the event of his failure to pay compensation as ordered the Defendant shall serve a period of imprisonment for 2 years.

FRANCIS M. CUMBERBATCH

HIGH COURT JUDGE