



In The Supreme Court of Bermuda
CRIMINAL JURISDICTION
Case No. 12 of 2022

BETWEEN:

THE QUEEN

-and-

JOSIAH QUINTON KING

Before: The Hon. Justice Juan P. Wolffe, Puisne Judge

Appearances: Ms. Cindy Clarke for the Prosecution
 Mr. Marc Daniels for the Defendant

Date of Hearing: 8th September 2023
Date of Sentence: 29th September 2023
Date of Reasons: 16th October 2023

SENTENCE
(Reasons)

Possession of a Prohibited Weapon – Possession of Ammunition – Carrying a Firearm in a Public Place – Offences under the Firearms Act 1973 – Application of section 70JB of the Criminal Code Act 1907 – Unlawful Gang Activity – Increased Penalty

WOLFFE J:

1. The Defendant pleaded guilty to the offences of (i) Possession of a Prohibited Weapon, contrary to section 2(1)(a) of the Firearms Act 1973 (the “FA”)(Count 1 on the Indictment);

(ii) Possession of Ammunition, contrary to section 3(1)(a) of the FA (Count 2); and (iii) Carrying a Firearm in a Public Place, contrary to section 18 of the FA (Count 4).¹

2. At the sentencing hearing on the 8th September 2023 the Director of Public Prosecutions Ms. Cindy Clarke (the “DPP”) submitted, and Mr. Marc Daniels for the Defence agreed, that the appropriate basic sentence for each of the offences should be one of 12 years imprisonment. The bone of contention between the parties however was whether I should invoke section 70JB of the Criminal Code Act 1907 (the “Criminal Code”) and accordingly add an additional 1 year of imprisonment to this basic sentence on the grounds that the offences for which the Defendant pleaded guilty fall within the definition of “unlawful gang activity” as set out in section 70JA of the Criminal Code.
3. On the 29th September 2023 I followed Counsels’ agreement and sentenced the Defendant to a basic sentence of 12 years imprisonment for each count on the Indictment. I also acceded to the DPP’s application to apply section 70JB of the Criminal Code and I increased the said 12 years imprisonment by 1 year. I therefore sentenced the Defendant to a total sentence of 13 years imprisonment for each offence with each sentence to run concurrently and with time in custody to be taken into consideration. Set out herein are my reasons for doing so.

Summary of the Evidence

4. At around 1.10pm on Tuesday the 10th May 2022 a number of persons were dining and socializing at the Divots Restaurant Bar and Grill (“Divots”) located in Warwick Parish when police received a 911 call from a female who reported that a male had entered the restaurant brandishing a firearm and after a struggle with one of the patrons had run off. A description was given of the assailant.

¹ The Prosecution offered no evidence on Count 3 on the Indictment which was the offence of Carrying a Firearm with Criminal Intent contrary to section 17(1) of the Firearms Act 1973.

5. Accounts from several witnesses and a review of CCTV footage taken at Divots showed that the Defendant, whilst wearing a black balaclava and a helmet, rode a motorcycle up to Divots, parked the motorcycle, and entered the restaurant. The Defendant walked past several patrons who were in the dining area, pulled out a black Glock Gen 5 19 firearm from his right jacket pocket, and pointed the firearm at two persons seated at the bar. As he did so patrons started yelling "*He has a gun! He has a gun!*". Several patrons could then be seen frantically running out of the restaurant.
6. Immediately upon seeing the Defendant the intended victims jumped from their seats and ran towards the rear storage area of Divots. The Defendant chased after them whilst brandishing the firearm and when doing so he passed by other patrons who were seated at the bar. Unable to find his intended victims the Defendant attempted to run out of the premises but before he could do so an off duty police officer (who was a patron at the time) struck him with a chair to apprehend him and to disarm him of the firearm. The off-duty police officer was able to get the Defendant to release the firearm. Another member of the public attempted to apprehend the Defendant but unfortunately the Defendant made good his escape leaving behind a black helmet which came off during the struggle and the motorcycle on which he was riding. Fortunately, the firearm was recovered.
7. On the 13th May 2022 the Defendant, accompanied by his mother, surrendered to police. He was then arrested for the offence of possession of firearm/ammunition with intent to injure. The Defendant's residence was searched and the following were seized: light blue stone-washed jeans; a black balaclava; a trash bag containing numerous napkins with what appeared to be blood on them; and a white bath mat with what appeared to be a blood smear. The jeans and the balaclava were similar in appearance to what were worn by the assailant at Divots. The black helmet was examined and fingerprint impressions on the inside front visor were identified to the Defendant.
8. The Glock firearm was found to have a live load within the firing chamber and 14 rounds of ammunition in the magazine. When tested the firearm was found to be in good working order.

9. I am informed by the DPP that one of the persons who the Defendant chased and pointed the firearm at is a Tahj Toussaint. Mr. Toussaint’s name will be mentioned later in this decision.

The invocation of Section 70JB of the Criminal Code

10. As I said earlier, there was unanimity between the Prosecution and the Defense that the basic sentence for each of the offences charged should be one of 12 years’ imprisonment. This sentence lies at the lowest end of the statutory minimum sentence for these types of offences. Table 2 of Schedule 1 of the FA provides that the punishment for the offences of possession of a prohibited weapon and possession of ammunition is one of imprisonment for not less than 12 years and not more than 17 years. I will say more about this later.
11. The issue which took up the most oxygen in the Courtroom was whether I should add an additional year to the basic sentence as provided for by section 70JB of the Criminal Code and so it is that issue to which I will now pivot. Section 70JB of the Criminal Code stipulates that:

“Unlawful gang activity - increased penalty

70JB (1) Where a person is being sentenced for an offence which (whether wholly or partly) falls within the definition of unlawful gang activity, the court shall—

- (a) first determine the sentence (“the basic sentence”) in accordance with established principles but without regard to this section; then*
- (b) where the basic sentence includes a term of imprisonment or a fine, increase the sentence by adding an additional element determined in accordance with subsection (2).*

(2) The additional element shall be—

- (a) *a term of imprisonment of at least one year but not more than five years, where the basic sentence includes a term of imprisonment of five years or more; or*
 - (b) *a term of imprisonment of not more than one year, where the basic sentence includes a term of imprisonment for less than five years; or*
 - (c) *a fine of at least \$1,000 but not more than \$10,000, where the basic sentence includes a fine.*
- (2A) *Notwithstanding any requirement under subsections (1) and (2), the court may impose an additional penalty of a fine of at least \$1,000, but not more than \$10,000 to any basic sentence.*
- (3) *The court shall not add an additional element under this section where the basic sentence is one of imprisonment for life.”*

12. Section 70JB of the Criminal Code should be read with section 70JA of the Criminal Code which defines “unlawful gang” and “unlawful gang activity” as follows:

“Unlawful gang and unlawful gang activity - interpretation

70JA (1) *For the purpose of this section and section 70JB —*

“unlawful gang” means a group, however organised, that—

- (a) *is composed of three or more persons; and*
- (b) *has as one of its purposes or activities the facilitation or commission of one or more offences, that, if committed, would likely result in the direct or indirect receipt of a material benefit (including a financial benefit), by the group or by one of the persons who constitute the group;*

“unlawful gang activity” means unlawful criminal acts committed by—

- (a) *an unlawful gang; or*
- (b) *a person participating in or actively contributing to the activity of an unlawful gang.*

(2) *In determining whether a person participates in or actively contributes to unlawful gang activity, the court may consider if the person—*

- (a) *uses a name, word, symbol, or other representation that identifies, or is associated with, an unlawful gang;*
- (b) *frequently associates with any of the persons who constitute an unlawful gang;*
- (c) *receives any benefit from an unlawful gang; or*
- (d) *frequently engages in activities at the instruction of any of the persons who constitute an unlawful gang.”*

13. Through the evidence of a Police Sergeant Khalid Pitcher who produced statements dated 25th July 2023 and 4th August 2023, the DPP submitted that there is compelling evidence to conclude that at the time of these offences that the Defendant frequently associated with persons who constituted an unlawful gang (section 70JA(2)(b) of the Criminal Code) and that accordingly the offences for which he pleaded guilty to wholly or partly fall within the definition of “unlawful gang activity”. This, the DPP submitted, is the basis upon which the Defendant’s basic sentence should be increased by an additional year pursuant to section 70JB of the Criminal Code. To be clear, the DPP is not asserting that the Defendant is a member of a gang.

14. Mr. Daniels submitted to the contrary that there was no evidence at all linking the Defendant to any gangs, gang members or gang activity and therefore section 70JB of the Criminal Code should not be awakened.

15. It should be noted that both the DPP and Mr. Daniels indicated that it would not be necessary to hold a *voir dire* in respect of the “gang evidence” of PS Pitcher. From this, I took it to mean that there was no dispute that PS Pitcher possessed the necessary qualifications to give gang evidence or that he had made a special study of the supposed gangs in this matter and generally about the gang culture in Bermuda. That is, as per the threshold requirements for expertise set out in the well-known Privy Council decision of *Myers, Brangman & Cox (Privy Council Appeal No. 0088, 0089, and 0094 of 2013) [2015]*

UKPC 40. I therefore find that PS Pitcher was qualified to give the expert evidence on gangs that he did and that he has sufficiently shown how he arrived at his conclusions in his statements.

The Gang Evidence

16. As I understood it, the only issue was whether the Defendant could rightly be linked to the gangs and the gang culture which are spoken of by PS Pitcher in his statements. In this regard, PS Pitcher referred to the following evidence and observations:

- A group of persons known as “Cedar Hill” represent a gang in the area of Cedar Hill/St. Mary’s Road in Warwick Parish and that members of Cedar Hill come from the Ord Road area going from Paget Parish to Warwick Parish.
- Members from Cedar Hill will “throw up” (i.e. make finger gestures) in the shape of a “C” for Cedar Hill or an “O” which is representative of the “Ord Road Crew”. The acronym “ORC” is also used and that representative of the Ord Road Crew is also the throwing up of a “C” or an “O”.
- There are photographs and videos of persons named Davin Dill, Tyler Wilson and Bryce Daniels throwing up C’s with their hands.
- Gangs in Bermuda have rivalries with other gang members which can lead to taunting, assaults, robberies or murders of members or associates of opposing gangs. PS Pitcher stated that at the time of the commission of the offences in this matter the Cedar Hill/Ord Road Crew had a rivalry with a group called Jones Village Crew or “JVC” which hail from the Khyber Heights neighborhood in Warwick Parish.

- Mr. Tahj Toussaint, who I stated earlier was one of the persons who the Defendant pointed a firearm at, lives in an area linked to the JVC. It should be said that PS Pitcher could not identify Mr. Toussaint as a gang member.

17. PS Pitcher also looked at hand written notes that had been seized from the Defendant on the 24th May 2022 while he was in custody at the Westgate Correctional Facility (“Westgate”). The subject offences occurred on the 10th May 2022. In these notes the following was written:

- *“.....cedar hill made me cedar hill raised me you could never ~~take~~ take that from me”.*

PS Pitcher stated that this was referable to the Cedar Hill gang.

- *“Better ~~with~~ watch what you do cause they will get you, they ~~what~~ watching your every move you better have sum hope when I tell you karma’s real that shit ain’t no joke you think this shits a game til ya sitting in a cage feeling all this pain”.*

PS Pitcher was of the view that this speaks about being caught doing illegal activity.

- *“Don’t ~~gaf~~ give a fuck if you strapped up we strapped up to uh uh, don’t give a fuck if you blicked up we blicked up to uh uh, don’t give a fuck if you got murderers we got murderers to uh uh, bitch if you steppin we steppin on you uh uh”.*

To PS Pitcher’s knowledge, the term “strapped” refers to carrying a gun and the term “blicked up” refers to carrying a knife.

- *“If you wanted it done you should’ve done it bitch not my fault I was the only person tryna score shit Ƴ ik it’s my fault that I lost it but shit happens that’s the streets b and again I’m really sorry we just gotta get right for banky RIP”.*

PS Pitcher’s take on this is that it talks about doing a job or task that was unsuccessful, such as carrying out a “hit” or targeting someone to do harm. Further, that “banky” refers to a person named Che Jennings who died as a result of multiple guns shot wounds on the 7th April 2022, and, that Mr. Jennings is associated with persons from the Cedar Hill/Ord Road Crew.

18. PS Pitcher also referred to a message which was seized from the aforementioned Davin Dill to the Defendant when they both were incarcerated at Westgate. It said:

- *“Heads up Bro!! Let me know if you need anything – Dilly Bop 100” and on the same page the words “Kno dat mi nigga C’s up til we freeze up O way or no way”.*

PS Pitcher stated that Davin Dill, who is seen in photographs throwing up C’s, goes by the nickname “Dilly Bop”, and, that Mr. Dill is a member of the Cedar Hill/Ord Road Crew.

19. From all of this, PS Pitcher opined that:

- The Defendant is saying that he grew up in the Cedar Hill area and associates himself to that area.
- The Defendant references lyrics to carrying guns, knives and having associations with persons that would kill.

- The Defendant is exchanging messages with Davin Dill who is a member of the Cedar Hill/Ord Road Crew.

- The Defendant is associated with the Cedar Hill/Ord Road Crew.

Decision

20. As stated earlier, it is the DPP's position that when taking what PS Pitcher concluded into consideration then I could be properly satisfied that the circumstances of this matter wholly or partly fit neatly within the definition of unlawful gang activity. Therefore, the DPP submitted, I should then go on to add an additional 1 year of imprisonment to the basic sentence of 12 years' imprisonment as per section 70JB of the Criminal Code.

21. It was Mr. Daniels' contention that PS Pitcher and the DPP are reading too much into where the Defendant was raised and into the handwritten notes seized from the Defendant and Mr. Dill. Specifically, he asserts that just because the Defendant is from the Cedar Hill area does not conclusively mean that he is associated with the Cedar Hill/Ord Road Crew, and, that the handwritten notes are simply creative musings of a young man that are reflected in rap lyrics and that they should not in any way whatsoever be seen to denote gang activity or gang association. Mr. Daniels went on to say that it cannot even be said that the Defendant penned the handwritten notes.

22. To Mr. Daniels' submissions I will say this. He is absolutely correct that one should not automatically extrapolate that because a person is raised in an area where gang members may live, gather or carry out their nefarious activity that they are associated with the gang members. I would say without hesitation that many persons who live in gang infested areas abhor gang members in their neighborhood and that they do not succumb to becoming associates of gang members. However, this is clearly not the case with the Defendant. Taken on its own, writing that Cedar Hill raised him could be taken to mean that the Defendant is simply saying that he grew up in the Cedar Hill area. However, when combined with other facts one can properly conclude that the Defendant was referring to

the Cedar Hill/Ord Road Crew “raising” him. Firstly, the fact that the Defendant is exchanging handwritten notes whilst in custody at Westgate with Mr. Dill aka “Dilly Bop” who PS Pitcher identified as a member of the Cedar Hill/Ord Road Crew. Secondly, the Defendant being in possession of a firearm from who he would have received from nefarious individuals. Thirdly, the Defendant chasing Mr. Toussaint who lives in an area linked to the JVC and which is a rival gang of the Cedar Hill/Ord Road Crew. Taking all of this in combination it is reasonable to conclude that the Defendant is not just a law-abiding resident of the Cedar Hill neighborhood but that he is also associated with gang members of the Cedar Hill/Ord Road Crew. For the avoidance of doubt, I draw such a conclusion.

23. In respect of Mr. Daniels’ submission that it is unclear whether the Defendant even wrote the handwritten notes, it is patently obvious that the Defendant was the author of the notes, and most importantly, it is clear that the Defendant was speaking about the offences for which he has pleaded guilty. Furthermore, in addition to the extracts from the handwritten notes referred to by PS Pitcher in his statements, there are other parts from the notes which speak to the Defendant as being the author of the notes and as to his association to gangs. Such as:

- *“Blood Money Gang Bitch!”* [page 103 of the Court Record]
- *“.....they say I done divots how if I was home counting up rocks. Don’t believe the rumours please.”* [page 103 of the Court Record]
- *“I was running niggas down wit dat pole real tryna take a soul.”* [page 104 of the Court Record]
- *“Attempted RedRum Imma Beat it!”* and *“Redrum Redrum Redrum Redrum”* [pages 105 and 108 of the Court Record]

As I stated at the sentencing hearing, and which I take Judicial Notice of, the word “Redrum” spelled backwards is the word “Murder”. This is presumably taken from the highly popular 1980 horror movie “The Shining” directed by Stanley Kubrick and starring Jack Nicholson, Shelley Duvall and Scatman Crothers.

24. It goes without saying that the Defendant wrote those words on the notes. It was only he who was being prosecuted for running into Divots whilst brandishing a firearm to do serious injury to Mr. Toussaint and another and to suggest that some other person wrote the notes would be folly.

Conclusion

25. In the circumstances, I accept the evidence of PS Pitcher and find that the Defendant frequently associated persons who constituted an unlawful gang (for the purposes of section 70JA(2)(b) of the Criminal Code). Accordingly, I reiterate my decision to invoke section 70JB of the Criminal Code and add 1 year to the 12 year basic sentence which I imposed. I therefore confirm my total sentence of 13 years’ imprisonment with each sentence to run concurrently and with time in custody to be taken into consideration.
26. I do however want to conclude these written reasons with what I said at the sentencing hearing. That is, that the 1 year additional sentence proffered by the DPP is a bit on the low side of the 1 to 5 year range set out by section 70JB(2)(a) of the Criminal Code. The circumstances of this case are particularly horrific given that it involved the Defendant, in broad daylight and at lunch time, putting the precious lives of a considerable number of innocent and unsuspecting members of the public at risk as he brazenly and with reckless abandon preyed upon his intended victims. The bloodcurdling images created by his actions will likely be etched into the memories of all those who were at Divots that fateful day and who luckily escaped serious physical injury themselves.

27. But the person who I have the most admiration and concern for is the brave person who subdued the Defendant and caused the firearm to be dislodged from the diabolical hands of the Defendant. Out of respect for this person I will not mention his name in this decision but he is nothing short of being a “hero”. As they say, not all heroes wear capes. Through his selfless actions he most certainly prevented Mr. Toussaint and the other person from being killed or seriously harmed, but most importantly he prevented all of the other patrons at Divots from being seriously injured. For that, the entirety of Bermuda owes him a debt of gratitude and I can only hope that he is able to overcome the challenges which he details in his victim impact statement.
28. Given this, I probably would not have been sustainably criticized if I had imposed a higher basic sentence of 13 to 14 years imprisonment and an additional sentence of 2 to 3 years imprisonment. The fact that I did not should send a strong message to the Defendant that he should see the extremely egregious error of his ways and to use the period of his incarceration to reflect and reverse the negative trajectory which his life has taken. It is hoped that he will then lead a meaningful and productive existence upon his release from custody. Time will tell.

Dated the 16th day of October, 2023



The Hon. Mr. Justice Juan P. Wolffe
Puisne Judge of the Supreme Court of Bermuda

