

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 32/2017

IND 023/2017

SC#01913/2017

BETWEEN:

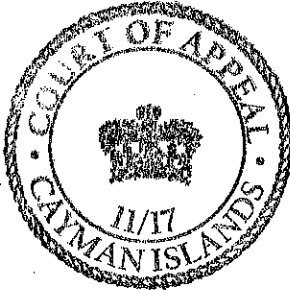
KASHWAYNE HEWITT

Appellant

- and -

Her Majesty the Queen

Respondent



CRIMINAL APPEAL 33/2017

IND 012/2017

SC#0809/2017

BETWEEN

MALIK WILFORD MOTHEN

Appellant

-and-

Her Majesty the Queen

Respondent

BEFORE:

The Rt. Hon Sir John Goldring, President

The Hon. Sir Richard Field, Justice of Appeal

The Hon. C Dennis Morrison, Justice of Appeal

Date of Hearing:

Tuesday 9 April 2019

Appearances:

Mr. Rupert Wheeler of Samson Law for Mr. Hewitt and Ms. Lee Halliday

Davis of Brady Law for Mr. Mothen

Mr. Patrick Moran of DDP for the Crown

JUDGMENT

Transcript of oral judgment dated 9 April 2019

Approved for Release 31 May 2019

Introduction

Malik Mothen

1. On the 13th of December 2017, after a trial before The Honourable Justice Chapple, the applicant Malik Mothen was convicted by a jury as follows:

On count 3 of the amended trial indictment, of assault occasioning actual bodily harm on Carlney Campbell. He was sentenced to 12 months' imprisonment.

On count 4 of the same indictment, of assault occasioning actual bodily harm on Daniel Bennett. He was sentenced to 12 months' imprisonment concurrent. On count 8 of the same indictment, of causing grievous bodily harm with intent to Carlney Campbell. He was sentenced to 12 years' imprisonment, consecutive: a total of 13 years' imprisonment. He was found not guilty of the more serious alternative of attempting to murder Carlney Campbell (Count 7).

2. All the offences were committed on 4th February 2017. Count 2 of the same indictment had alleged that on that date "*in the vicinity of the Fête nightclub ... Malik Mothen had in his possession a firearm*" without a licence. He was found not guilty on that charge. Counts 5 and 6 of that indictment alleged that he, with his wife Tashika Mothen, attempted to murder, alternatively cause grievous bodily harm, to Daniel Bennett. They were both found not guilty on those counts. Tashika Mothen was also found not guilty on Counts 7 and 8.
3. Malik Mothen now seeks leave to appeal against his conviction and sentence on Count 8.

Kashwayne Hewitt

4. On the same date, Kashwayne Hewitt was also convicted on Count 8 of causing grievous bodily harm with intent on Carlney Campbell. He was found not guilty on Counts 5, 6 and 7. He had previously pleaded guilty to possession of an unlicensed firearm. He was sentenced to 12 years' imprisonment for causing grievous bodily harm with intent, and

nine years concurrently for the possession of an unlicensed firearm. The judge also recommended that he be deported from the Cayman Islands. He now seeks leave to appeal against sentence.

The Facts

5. In the early hours of the morning of 4th February 2017, there was a violent incident outside the Fête nightclub on West Bay Road. Although there was CCTV evidence, it was of limited assistance as far as the crucial events were concerned. However, as the judge said in summing up, it did show where people were and when. The background to the offence was previous tension and, more immediately, an earlier argument between Tashika Mothen and Daniel Bennett. There came a time when Daniel Bennett was outside the nightclub. Carlney Campbell, who was a friend of his, was with him. Daniel Bennett said he called Carlney Campbell to join him because he was afraid of Tashika and Malik Mothen.
6. Tashika Mothen, and later Malik Mothen, came out of the nightclub. There was an altercation, initially between Tashika Mothen and Daniel Bennett. Carlney Campbell became involved. It became violent. Carlney Campbell and Daniel Bennett were both assaulted. A Colt .45 semi-automatic pistol was, at some stage, produced. It was fired twice. One of the bullets struck Carlney Campbell at close range. He was, at the time, on the ground being kicked and punched. The bullet became lodged in his shoulder blades. It was later removed in hospital. It had passed close to his spinal cord. As the judge said, the potential for catastrophic injury was obvious. It was agreed that the injury he did suffer amounted to grievous bodily harm.
7. The Crown's case was that Malik Mothen had brought the pistol to the scene. Count 2 reflected that allegation. Both Daniel Bennett and Carlney Campbell said they saw Malik Mothen with a gun. Daniel Bennett said Malik Mothen fired the gun at him, but he ducked. Carlney Campbell said he was threatened, then struck by Malik Mothen, with the gun. Carlney Campbell said he saw Malik Mothen strike Daniel Bennett with the gun. It was those attacks which formed the basis of counts 3 and 4. In short, those counts

alleged that Malik Mothen had "*pistol-whipped*" Daniel Bennett and Carlney Campbell with a gun he had brought to the scene.

8. In his second police interview, Malik Mothen accepted he did attack Daniel Bennett and Carlney Campbell. He said Daniel Bennett was the worse for drink. He had provoked him by what he said earlier that evening and then outside the nightclub. Malik Mothen said that Daniel Bennett was abusive and was threatening. He said that, having been provoked, he fetched some brass knuckledusters and attacked Daniel Bennett and Carlney Campbell with them. He referred also to his wife previously having been shot, an offence for which he said no one had been arrested. He said that he struck Daniel Bennett and Carlney Campbell once with his brass knuckledusters. At no time, he said, did he have a firearm.
9. Mr Moran, on behalf of the Respondent, accepts that Malik Mothen's acquittal on Count 2 indicates the jury was not sure that he had a firearm in his possession, either when he struck Daniel Bennett and Carlney Campbell, or thereafter. He accepts, in other words, that Malik Mothen's conviction on Counts 2 and 3 means that the jury was sure he unlawfully attacked the two victims, but not sure the weapon used was a gun.
10. The Crown's case was that there was a further attack on Carlney Campbell. As a result, he was brought to the ground, as to which there was no doubt. He was kicked and punched. It was the Crown's case that during that attack Malik Mothen passed the firearm to Kashwayne Hewitt, who then shot Carlney Campbell as he lay on the ground. Carlney Campbell's evidence was that there came a time when he lost sight of who was holding the firearm, although he could see it was not Malik Mothen. He said that Malik Mothen was one of those who was kicking him. In other words, Malik Mothen was one of those participating in the attack on Carlney Campbell, which ended up with him being shot.
11. In his second interview, Malik Mothen agreed he was present during the attack leading to the shooting of Carlney Campbell. He said he took no part in it. He ran away.

12. Mr Moran accepts that the jury's verdict on Count 2 means that their conviction of Malik Mothen in respect of Count 8 could not have been on the basis that he passed the firearm to Kashwayne Hewitt, let alone that he fired it, but on the basis that he was part of a joint enterprise in which Kashwayne Hewitt shot Carlney Campbell.
13. Kashwayne Hewitt's case, as set out in his interview, was that he was present during the incident. He saw Malik Mothen attack Daniel Bennett and Carlney Campbell. He saw the subsequent attack on Carlney Campbell. He saw, he said, Malik Mothen shoot Carlney Campbell. He claimed he took no part in the attack. He took, he said, the firearm off Malik Mothen after the shooting, to prevent him killing Carlney Campbell.
14. There was CCTV evidence which showed Kashwayne Hewitt with the firearm, at some stage. Moreover, it was Kashwayne Hewitt who left the scene with the firearm, keeping it until it was recovered on 10th February 2017. Kashwayne Hewitt's plea of guilty to possession of a firearm was intended to reflect that. Kashwayne Hewitt said that Malik Mothen had approached him in prison and asked him to take the blame for both shootings in return for money to be sent to his parents in Jamaica.
15. Neither Applicant gave evidence. They relied on what they said in interview.

The Judge's Directions to the Jury

16. In a document entitled "*Notes and Route to Verdict*" the judge gave careful, detailed and agreed written directions to the jury. We only need to refer to some parts, although we have obviously read the whole of the document with care. The document set out the "*Alternate Bases of Criminal Liability*". As to joint enterprise, it said:

"In the majority of the counts you have to consider, two or more defendants are said to have committed the offence together. In law and in fact, it is often the case that 2 or more defendants commit offences together - each

of them may play a different part, but if they are in it together as part of a joint plan or agreement to commit it, they are each guilty. The words 'plan' and 'agreement' do not mean that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod and a wink, or a knowing look. An agreement can be inferred from the behaviour of the parties.

When two or more people act together to bring about a result, their participation need not be the same, nor precisely contemporaneous; one may begin, others may join in later.

The essence of joint enterprise is that the defendant whose case you are considering:

- (i) Intended or shared an intention to commit the offence; and*
- (ii) Took some part in bringing about the commission of the offence.*

A person who is present at the scene of a crime but who plays no part in committing it is not guilty of it. This is so even when a person stands and watches a crime being committed and does nothing to prevent it. But if a person who is present at the scene intends to encourage others to commit the offence and does in fact encourage whether by his or her presence alone and/or by anything said or done, he or she is guilty of the offence.

Probable consequence: Section 19 [of the Cayman Islands] Penal Code.

It can happen in the course of a criminal enterprise (an agreement to commit an offence) that one of the parties does something more than is agreed between them - goes outside the plan. Suppose for example that a number of people agree to attack another with feet and fists. All intend to cause the victim some harm - to teach the victim a lesson - but do not

intend really serious harm. Suppose then that in the result, one attacker gets carried away and uses such force as to cause really serious harm to the victim. Are all attackers responsible in law for the harm that in fact results, albeit it went beyond the joint plan? Suppose that one attacker decides that the victim deserves to be taught a serious lesson, that he takes out the knife he is carrying and stabs the victim. Are all attackers criminally responsible for the serious harm that the knife man alone caused and intended? The answer lies in s.19 of the Cayman Islands Penal Code, which provides as follows:

'When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'

So the question in such circumstances is whether the actions of the one going beyond the agreed plan was a probable consequence of the plan they had agreed upon. If it was, each is deemed to have committed the offence involving the greater use of force. The questions for a jury to determine are firstly whether the additional force used by one was a probable consequence of what was agreed and if so, whether a defendant who was part of the agreed plan but not the stabber knew at least the essential facts which make the stabbing a probable consequence of the agreed plan. At the very least, surely, they would have to know that one of their number was armed with a knife."

17. In the context of the present case, and in the light of the verdict on Count 2, it is now common ground that the jury could only have convicted Malik Mothen of a joint enterprise if they were sure he knew Kashwayne Hewitt had a gun.

18. The judge's directions went on to deal with each count in turn. In the light of the grounds of appeal, we need only specifically refer to some parts of the document.

“Count 7:

Attempted murder of Carlney Campbell...

Malik Mothen:

Question 1:

Did Malik Mothen shoot Carlney Campbell?

If you are sure that he did, go to question 2.

If you are not sure that he did, go to question 3.

Question 2:

When he shot him, did he intend to kill him?

Nothing less than an intent to kill will suffice for an offence of attempted murder.

If you are sure that he did intend to kill, he is guilty of count 7 and you need not consider questions 3 to 7. If you find Malik Mothen guilty of count 7, you are not required to return a verdict upon count 8.

If you are not sure that he intended to kill, go to question 3.

Question 3:

Albeit that Malik Mothen did not fire the shot, did he take some part in an attack upon Carlney Campbell, sharing with at least one other an intention to kill Carlney Campbell?

If, for example, you are sure that Malik Mothen handed the gun to Kashwayne Hewitt, intending that Kashwayne Hewitt would kill Carlney Campbell, he is guilty of attempted murder.

If you are sure that he did participate in a joint plan to kill Carlney Campbell, he is guilty of count 7.

If you are not sure about that, go to question 4.

Question 4:

Did Malik Mothen share a common purpose with Kashwayne Hewitt...to attack and cause harm to Carlney Campbell?

If you are sure about that, go to question 5.

If you are not sure, your verdict will be not guilty of count 7.

Question 5:

Did Kashwayne Hewitt shoot Carlney Campbell intending to kill him?

If yes go to question 6.

If no, Malik Mothen is not guilty of count 7.

Question 6:

Was it, in your judgment, a probable consequence of the common purpose referred to in question 4 above that Kashwayne Hewitt would shoot Carlney Campbell, intending to kill him?

If you are sure that it was, go to question 7.

If you are not sure Malik Mothen is not guilty of count 7.

Question 7:

Was Malik Mothen aware of the basic facts upon which you conclude that Kashwayne Hewitt's actions (shooting, intending to kill) were a probable consequence of the common purpose they were pursuing?

If you are sure that he was aware of those basic facts, Malik Mothen is guilty of count 7.

If you are not sure that he was aware of those basic facts, he is not guilty of count 7...

19. As to Count 8 and Malik Mothen, the document stated:

“Question 1:

Did MM shot CC?

If you are sure that he did, go to question 2.

If you are not sure that he did, go to question 3

Question 2:

When he shot CC, albeit that he did not intend to kill him, did he at least intend to cause him grievous bodily harm?

Grievous bodily harm means really serious harm. The harm need not be life threatening, it need not be permanent.

If you are sure that he did intend to cause really serious harm, he is guilty of count 8.

If you are not sure that he intended to cause DB really serious harm he is not guilty of count 8.

Question 3:

Did MM take some part in the shooting of CC, sharing with at least one other an intention to cause him grievous bodily harm?

If you are sure that he did participate in a joint plan to cause CC grievous bodily harm, he is guilty of count 8.

If you are not sure about that, go to question 4.

Question 4:

Did MM share a common purpose with KH to shoot CC albeit not to cause him serious harm?

If you are sure that he did, go to question 5

If you are not sure that he did, he is not guilty of count 8.

Question 5:

Was it, in your judgment, a probable consequence of the common purpose referred to in question 4 about that KH would shoot CC, intending to cause grievous bodily harm?

If you are sure that it was, go to question 6.

If you are not sure MM is NG of count 8.

Question 6:

Was MM aware of the basic facts upon which you conclude that KH's actions (shooting, intending to cause really serious harm) were a probable consequence of the common purpose pursuing?

If you are sure that he was aware of those basic facts, MM is G of count 8

If you are not sure that he was aware of those basic facts, he is NG of count 8."

20. When referring to section 19, and the observation that to convict Malik Mothen on the basis of it, the document stated that he had to be "*aware of the basic facts upon which you conclude that [Kashwayne Hewitt's] actions (shooting intending to cause really serious harm) were a probable consequence of a common purpose they were pursuing,*" again, it is common ground that the judge was referring to the need for Malik Mothen to know that Kashwayne Hewitt had a gun.

The judge's directions during the course of the summing up

21. The jury had the written directions. The judge effectively read Count 7 to the jury. As to Count 8, he said:

"Count 8, [is] an alternative to Count 7. Count 8, you consider if you reach a verdict of not guilty upon Count 7..."

...Ladies and gentlemen, I'm not going through count 8 question by question since it's all set out there for you, and there is nothing I could usefully add at this stage. Given all that we've gone through before, I don't see the point. But obviously if you find the defendant not guilty of count 7, go through those questions in respect of count 8..."

22. One of the grounds of Malik Mothen's appeal against conviction is the suggested inadequacy of that direction.

The grounds of Malik Mothen's appeal against conviction

23. There are a number of bases upon which it is submitted Malik Mothen's conviction was unsafe. Firstly, it is submitted that his acquittal on Count 2 of possessing a firearm was inconsistent with his conviction on Count 8. However, Ms Lee Halliday-Davis, in her helpful oral submissions on Malik Mothen's behalf, accepts that the conviction must have been on a joint enterprise basis: in other words, on the basis, among other things, that Malik Mothen did not himself shoot Carlney Campbell, but was aware, as the judge emphasised, that Kashwayne Hewitt had a gun. Secondly, it is submitted that the verdict on such a basis was unsafe given the inadequacy of the direction on Count 8. Thirdly, Ms Halliday-Davis submits that there was no evidence of any connection between Malik Mothen and the firearm. There was insufficient evidence of Malik Mothen's participation in the second attack on Carlney Campbell. There was no evidence of communication between the applicants at the time of the violence. Finally, Ms Halliday-Davis submits that the jury could well have been confused. The Crown's case changed substantially

from the time it was opened. The counts on the indictment were changed and re-numbered. That required very careful analysis by judge.

Our conclusion

24. As Mr Moran accepts, the jury's verdict on Count 2 indicated they were not satisfied that Malik Mothen had been in possession of the firearm at any stage of the incident. Their verdict on Count 8 indicated they were satisfied that he remained criminally liable for the shooting of Carlney Campbell, either on the basis of joint enterprise or on the basis of section 19 of the Penal Code. That, as Mr Moran points out, was something which leading counsel for Malik Mothen and the judge took to be the case, as an interchange during the course of the sentencing bears out. As it seems to us, the fundamental issue at the heart of this appeal can be encapsulated very shortly: was there evidence of Malik Mothen's participation in the gun attack on Carlney Campbell? In our view, there plainly was. For there was evidence:

- (1) Of the animosity between Malik Mothen and Daniel Bennett that lay behind the violence in the first place.
- (2) That Malik Mothen and Kashwayne Hewitt were substantially together for much of the evening of the 3rd and early morning of the 4th of February, albeit that no doubt there were occasions, as was pointed out to us, when they were apart, for example, in the nightclub.
- (3) That very shortly before the violence was instigated, the jury was entitled to conclude that the two of them together collected something from a nearby vehicle. On their return, Malik Mothen had something in his hands.
- (4) That the violence was instigated by Malik Mothen. He attacked Daniel Bennett and Carlney Campbell, on the jury's verdicts, with knuckle dusters.

(5) That Malik Mothen participated in the second attack on Carlney Campbell, during which Carlney Campbell was brought to the ground and kicked and shot by Kashwayne Hewitt. Before the second attack in which Malik Mothen participated, the firearm had been fired without causing injury. That it was fired twice was clear from the fact that two used cartridges were found.

(6) That during that second attack on Carlney Campbell, there was, the jury was entitled to infer, a gun both present and visible. Carlney Campbell said he saw it.

25. In all those circumstances, the jury was entitled to conclude that Malik Mothen knew of the gun and to convict him on the basis which they did. He participated in an attack when he knew his fellow attacker both had, and had previously fired, a firearm.
26. We can deal with the other grounds of appeal very shortly. As to the failure to read out the written direction in respect of Count 8, it seems to us there is nothing in that. The jury had the clear written directions in front of them. They retired with them. As to the suggested difference between the opening and the jury's consideration of the case at the end, and the alterations to the counts on the indictment, we cannot accept that the jury might have been confused. It was clear what the case was which they had to consider; the written directions summarised it. They were given a most careful, fair and detailed summing up. Jurors often have to consider cases which turn out to be different from those envisaged at the outset. Provided it does not lead to unfairness in a particular case, it provides no basis for calling into question the safety of the conviction. There was no such unfairness here.
27. In the circumstances, although we are prepared to grant Malik Mothen leave to appeal against his conviction, his appeal is dismissed. As will become apparent, that leave does not apply to any application for leave to appeal against sentence.

The applications for leave to appeal against sentence

The Applicants' criminal history

28. Malik Mothen was some 36 years old. He had been before the court for serious offending on several occasions. We accept, as Ms Halliday-Davis submitted, that the last significant convictions, very serious though they were, were some time before the present offending. Kashwayne Hewitt was 20. He had no previous convictions.

The judge's approach to sentencing

29. At the outset, the judge said, that in the absence of an assault guideline in the Cayman Islands, he regarded the Definitive Assault Guideline issued by the Sentencing Council of England and Wales as "*informative, helpful and of persuasive authority*".
30. Before turning in detail to what the judge said, we refer to the relevant guideline, namely that for causing grievous bodily harm with intent (section 18 of the Offences against the Person Act 1861). By that guideline, the court is first required to determine the category of offence. There are three possible categories. Only categories 1 and 2 are material. Category 1 is an offence of "*Greater harm (serious injury must normally be present and higher culpability)*". Category 2 is an offence of "*Greater harm (serious injury must normally be present) and lower culpability or lesser harm and higher culpability.*" The "*factors indicating greater harm*" require that "[an] *Injury ... which is serious in the context of the offence must normally be present.*" Other factors indicating greater harm are, as the judge found, not applicable to the present case. The factors indicating lesser harm are those defined in terms of "*Injury which is less serious in the context of the offence.*"
31. The judge concluded that the injury suffered by Carlney Campbell, although by definition serious, did not amount to serious injury in the context of an offence of grievous bodily harm. He therefore concluded it was an offence of lesser harm. There plainly were factors indicating higher culpability. Prime among them, and the one relied upon by the judge, was the use of firearm.

32. The guideline sets out the starting points and range in respect of each category. Category 1 has as its starting point 12 years' custody, with a range of 9 to 16 years; Category 2 has as its starting point 6 years' custody, with a range of 5 to 9 years. The factors aggravating seriousness within those ranges include previous relevant convictions and the location of the offence. Factors reducing seriousness include a single blow. As is stated in the guideline, the list is not exhaustive. Moreover, the guideline states that the sentence should *"Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range."*
33. The judge concluded this was a Category 2 case on the basis of lesser harm and higher culpability. The sentences of 12 years' imprisonment were plainly outside the suggested category range for Category 2 offences. Twelve years' custody is the starting point for Category 1. In imposing the sentences he did, the judge said:

"It is clearly a case of higher culpability, given the use of a weapon; thus, on the face of it, this is a category 2 case.

What was always clear in this case was that Carlney Campbell had not threatened, let alone offered, any violence to anyone that night. He had already been struck with substantial force by Mr. Mothen wearing brass knuckles. He was shot while he was lying defenceless on the ground. Despite all that's been said about where the shot was fired, the bullet passed close to his spinal cord. The potential for catastrophic injury when such a shot is fired is obvious.

The proliferation of guns and gun crime is a source of great concern in many jurisdictions but particularly in the Caribbean and most particularly, for present purposes, on this island. Gun crime threatens the stability, well-being and reputation of the island and its people. For that reason, deterrent sentences are clearly required in this case.

In my view, the interests of justice demand sentencing in a range higher than that provided by category 2 cases. I am fortified in that view by this: such is the concern about firearms in this jurisdiction that the legislature has provided that for mere possession of an unlicensed firearm a minimum sentence of ten years is to be imposed, assuming no exceptional circumstances -- and none are urged here -- or seven years on a plea of guilty.

The category 2 range of appropriate sentences is five to nine years. It cannot make any sense at all that an offence involving the discharge of an unlicensed firearm, causing grievous bodily harm is met with a lesser sentence than the minimum sentence for mere possession. For that reason alone, the interests of justice demand a departure from the guidelines...

This is another case of gun crime on this island...Firearms threaten the way of life, the safety and the prosperity of its people and the international reputation of the islands which so many have worked so hard to build and preserve and on which the livelihood of so many depends. Firm and deterrent sentences are required for those convicted of gun crimes...

The incident in which you were both involved happened at night soon after closing time at a nightclub in the heart of the tourist area of Seven Mile Beach in the presence of members of the public.

Having seen and heard Daniel Bennett give evidence, I have little trouble in accepting that he was making a thorough nuisance of himself that night but your reaction, Mr. Mothen, was extreme. I conclude that you are a violent and dangerous man and a man on a very short fuse. Both your criminal record and your behaviour that night tell me that. Some 20 years ago you were involved in the attempted robbery of a gas station, in the course of which an employee was shot, and you were convicted of an assault causing actual bodily harm. And while serving that sentence in 2006, possession of a machete and resisting arrest. You reacted to Daniel Bennett's nuisance by going off back to near the Power Supply bar to arm yourself with a weapon and then returned showing a degree of

deliberation. You struck Carlney Campbell and Daniel Bennett with those brass knuckles with obvious force, given the injuries that resulted...

You, Mr. Hewitt, shot the innocent, defenceless and already injured Carlney Campbell as he lay on the floor. It is a blessing that he did not sustain more serious injury... You, Mr. Mothen, on the jury's verdict, at the very least participated in the attack on Carlney Campbell knowing that Mr. Hewitt had a gun and was likely to use it.

I take into the account, Mr. Hewitt, your age. You were 20 at the time of this incident, 21 now, and the fact that you had, until this incident, no previous convictions recorded against your name either here or in Jamaica, I give you such credit as I can for that... you and others, including your new wife, had obviously thought there was something seductive about guns and that is obvious from the WhatsApp photos taken sometime before the events at Fête. You are young, obviously seriously misguided and, I suspect, very easily led.

I have decided that the right approach here is to pass the same sentence upon you both for the offence of causing grievous bodily harm with intent. It was you, Kashwayne Hewitt, that held the gun that fired the shots into Carlney Campbell's body. But then, Mr. Mothen, you are the older man and this is the second time you have been convicted of gun crime, the second time you have been involved in an offence where an innocent victim got shot."

The grounds of appeal against sentence

34. In respect of Count 8, both Applicants submit the judge was wrong to go outside the guidelines for a Category 2 offence. On behalf of Malik Mothen it is said that the injury was not serious in the context of the offence. The firearm was not pointed at Carlney Campbell's torso. There was a lack of premeditation and planning. He did not himself have the gun or fire it. The sentence should have been within the suggested Category 2 range, with a maximum of nine years. Too much emphasis was placed on the previous

convictions, which had happened a long time ago. He was now a family man in his mid-thirties.

35. On behalf of Kashwayne Hewitt, Mr Wheeler submits that too much weight was placed on the fact that the weapon used was a firearm. Again, the judge should not have gone outside the Category 2 guideline. A sentence of nine years' imprisonment would have been appropriate given his age and lack of previous convictions. Emphasis is placed on the absence of premeditation. There was no intention to cause more harm than resulted. It was impermissible to elevate the sentence to one of 12 years.
36. Mr Wheeler draws our attention to documents which indicate how much progress his client had made since being incarcerated. In short, Mr Wheeler submits his client is young, immature and easily led. This is his first court appearance.

Our conclusion

37. In our view, these applications for leave to appeal against sentence are without merit. The guidelines specifically contemplate that a judge may move outside a category if the facts require it. In the final analysis, the judge has to assess the criminality of the offending before him. In this case, a loaded semi-automatic pistol was brought to a public area in the tourist part of the Cayman Islands. In that public area it was fired at an individual who was lying on the ground. One of applicants fired it; the other, a man with a significant criminal record, was party to its use. It is only good fortune that the man on the ground was not more seriously injured, if not killed. For the reasons carefully spelled out by the judge, there was ample justification for going outside the categorisation set by the guidelines. It would in our judgment, have been plainly wrong for the judge, on the present facts, to have been constrained by the range of sentences within Category 2.
38. We bear in mind, of course, that Kashwayne Hewitt was a young man and of good character. However, the fact remains that it was he who fired the gun and he who thereafter sought to hide it.

39. In the circumstances, we refuse leave to appeal against sentence.

