IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No. BBCR2017/001
BB Criminal Appeal No. 25 of 2012

BETWEEN

TEERATH PERSAUD **APPELLANT**

AND

THE QUEEN **RESPONDENT**

Before The Honourables **Mr Justice Saunders**
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson
Mme Justice Rajnauth-Lee

Appearances

Mr Ajamu N K Boardi, Ms Safiya A Moore, Ms Nikita A O Vaughn and Mr Glenroy I Goddard for the Appellant

Mr Anthony Blackman and Ms Krystal L Delaney for the Respondent

JUDGMENT
of
The Honourable Justices Saunders, Wit, Hayton
Anderson and Rajnauth-Lee
Delivered by
The Honourable Mr Justice Anderson
on the 10th day of May, 2018

Introduction

[1] The Appellant, a Guyanese national resident in Barbados, and another man, Christopher Omar McCollin, (the co-accused), were indicted for the murder of 16-year-old Anna Druizhinina (the deceased) who was killed at her home on November 8, 2008. On February 3, 2010, the co-accused pleaded not guilty to murder but guilty to manslaughter and was sentenced to 16 years imprisonment. At the start of his trial on September 11, 2012, the Appellant pleaded not guilty to murder but guilty to manslaughter and was sentenced to a term of imprisonment for 25 years. His appeal against this sentence on the grounds of lack of parity with his co-accused and excessiveness was dismissed by the Court of Appeal on December 7, 2016**.** It is from this decision that the Appellant now appeals to this Court.

[2] The following facts on which the sentencing of the Appellant was based were agreed by the Director of Public Prosecution (DPP) and Mr Boardi, Counsel for the Appellant. The Appellant worked as an agricultural worker at Palmers Plantation in St. Philip which was owned by Mr John Jackson, step-father of the deceased. Mr Jackson and his wife, Larissa, also owned a business, Solo Distribution, in Black Rock, St. Michael. The Appellant was transferred from the Palmers Plantation and allowed to stay in an apartment at the Black Rock premises rent free, where he looked after the business as a caretaker, watchman and sometimes assisted in the business.

[3] Sometime before November 2008, a considerable sum of money went missing from Mrs Jackson's bag. There was a confrontation between Mr Jackson and the Appellant which resulted in the Appellant being shot in the left shoulder. Mr Jackson was charged by the police with causing serious bodily harm to the Appellant. The Appellant's employment was terminated, and he took up residence at Blades Hill in St. Philip.

[4] On November 8, 2008, the Jacksons went to work in the business leaving the deceased home at Palmers Plantation to do her Saturday chores. Later that day the Appellant and the co-accused went to the residence with the intention to steal. The

Appellant's knowledge of the area and his familiarity with the Jackson's dogs meant that he and the co-accused encountered no difficulty in gaining entry to the residence. On entering the home, they encountered the deceased who started to scream. The co-accused seized her on the balcony and bound her feet, and tied her arms behind her back, with electric wire which had been retrieved by the Appellant from a room downstairs. He then tied a towel around her face to silence her screams. The Appellant watched as his co-accused used a long piece of wire to make a draw knot which he put around her neck, threw the other end over a beam in the ceiling and made the deceased to stand on a paint can and bucket, one on top of the other. The can and bucket had been retrieved from elsewhere in the house by the Appellant. She was left precariously perched on these containers whilst the co-accused searched the house looking for items to steal and the Appellant waited on the balcony.

[5] After searching the house "for a very long time" the co-accused returned to the balcony and informed the Appellant that the deceased had fallen or jumped off the bucket and tin. The co-accused took the body down and placed it on a bed. The co-accused rested on the balcony for some time and then told the Appellant that he was going downstairs to look for gasoline. He returned to the bedroom with the gasoline and set fire to the room. On seeing the headlights of the Jackson's car coming into the entrance to the Palmers Plantation, the Appellant ran downstairs and made good his escape.

[6] Mr Jackson found his home on fire and later discovered the body of the deceased. According to pathologist Dr. Stephen Jones who carried out the post mortem examination, death was caused by ligature strangulation.

[7] That very night, the Appellant was taken into custody. He gave a written statement to police officers setting out in detail the events that had transpired. He stated that his co-accused wanted to do landscaping work and he had informed him that Mr. Jackson had tools at his home which they could steal. He advised the co-accused that Saturday would be the best day to steal the items as no one would be home.

Supreme Court Proceedings: Co-accused's Sentencing Hearing

[8] The co-accused was also arrested and charged. He too gave a statement to police officers, confessing to the offence and that statement was accepted by the DPP as the basis for his sentencing. Not surprisingly the account by the co-accused differed markedly from that of the Appellant. Suffice it to say that according to the co-accused, the Appellant had told him that Mr Jackson had shot him and that he wanted to get back at him. The co-accused said that the Appellant was the primary actor in grabbing the deceased as she began to scream, and it was the Appellant who went in search of wire to tie her up. The co-accused, however, admitted to tying her hands behind her back and taking a cloth from the kitchen and tying it around her face. He said that it was the Appellant who tied a piece of wire around the victim's neck and pulled at it so that "it closed in around her neck [and that] it was lifting her off the ground." The Appellant also told him to take the deceased to the top of the staircase and "string her up." The co-accused then "stood on the bannister and threw the wire over a rafter and wrapped it around the bannister rail." The Appellant then suggested that they put her to stand on cans and produced the cans on which they hoisted her. The co-accused said that the deceased asked if they were going to kill her and he told her not if he had anything to do with it. He said that after realising that Anna had died he took her down and placed her on the bed. He cried because he could not believe he was "in this situation." He said the Appellant was the one who suggested that they set the room on fire.

[9] In the plea in mitigation, Andrew Pilgrim Q.C. submitted that the co-accused "was led by [the Appellant] and that he is therefore definitely the secondary party." He said that his only interest was to "get some weed wackers and so from this place" and that "his motive at the highest would have been theft." He submitted that a review of the authorities (including the *Pierre Lorde* guidelines[1]) "indicate that the bottom of the scale of a grave case of manslaughter without a firearm is 16 years

[1] See the Court of Appeal of Barbados guidelines in *R v Pierre Lorde* [2006] 73 WIR 28.

and the top of the scale is 20." The learned DPP accepted this range of years as well.

[10] On August 8, 2010 Worrell J, found that this case warranted the imposition of a custodial sentence because of the seriousness of the offence which was caused by the reckless actions of the co-accused and the Appellant which took place in the victim's home. He said it was "quite clear that this young lady was tied up and left, more or less, to balance on paint cans." He said that "that in itself must have been a traumatic exercise to undergo." He noted that "the end result" was that "a person of 16 years of age, lost her life due to recklessness or reckless disregard for the sanctity not only of the home but also of the sanctity of human life." It was a "senseless, totally mindless tragic act". He held that this case fell outside of the *Pierre Lorde* guidelines and that the starting point should be 20 years. He thereafter considered the mitigating circumstances of the case, that is, an early guilty plea, the co-accused's remorse, his clean record, his age (26 years old at the time of the offence) and conduct in his community. The learned judge therefore sentenced the co-accused to 16 years' imprisonment and ordered time spent on remand for 20 months to be deducted.

Supreme Court Proceedings: The Appellant's Sentencing Hearing

[11] The Appellant was arraigned on September 11, 2012 and he entered a plea of not guilty to murder. At the start of trial on October 22, 2012, he pleaded not guilty to murder but guilty to manslaughter. In advance of the trial date, his intention to enter this plea had been communicated to the DPP. The DPP accepted his plea, and his statement to the police in terms set out at [2] to [5] was also read into evidence. In his plea in mitigation, his attorney, Mr. A. Boardi, submitted that the matter fell within guideline number 3 of the *Pierre Lorde* guidelines and suggested that a sentence of 10 years would be appropriate considering all the mitigating factors. The learned DPP in reply submitted that the case fell outside of the guidelines and the court could justifiably use a starting point of 25 years.

[12] The learned judge, Justice Maureen Crane-Scott, found that this was a serious case of manslaughter on the borderline of murder with numerous aggravating factors. She felt that the matter fell outside of the *Pierre Lorde* guidelines. She said that while no gun or intrinsically dangerous weapon was used, the facts showed that the victim's life was not "taken from her with a flash of a gun or thrust of a knife" but her death "was no quick and sudden death." She said that the guidelines were "biased towards death caused by a firearm" and did not "anticipate a terrifying and horrendous death such as has been disclosed by the special and exceptional facts of this case falling within the top end of the manslaughter scale." She held that a reasonable starting point would therefore be 30 years.

[13] The judge held that the Appellant's guilty plea would warrant a reduction of 4 years. The Appellant's clean record up to the date of the offence, his cooperation with the police in making an oral and written statement upon arrest as well as his remorse since the pre-sentence report also led to the discount of another year. Although informed that the co-accused had been sentenced to 16 years, the learned judge sentenced the Appellant to 25 years imprisonment with a discount of 4 years and 26 days for time spent on remand.

Court of Appeal Proceedings

[14] The Appellant appealed to the Court of Appeal on the basis that the sentence was manifestly excessive because he received a sentence that was 9 years longer than his co-accused whom the DPP accepted to be the primary aggressor in the commission of the offence. The Appellant's right to a fair trial had thus been breached. It was submitted that the trial judge erred in identifying the Appellant's awareness of the dangerous acts of his co-accused and lack of assistance to the victim as aggravating factors. The judge also erred in not applying the appropriate discount for the mitigating factors, in particular, the discount for the guilty plea of just 13% and she barely reduced the sentence by 3% for the other mitigating factors. It was submitted that this was out of step with the jurisprudence and generally recognized sentencing principles.

[15] The Court of Appeal comprising of Sir Marston Gibson CJ, Burgess JA and Goodridge JA dismissed the appeal in the written judgment of Goodridge JA. The court held that disparity in sentences, by itself, was not a ground for reducing a sentence. The Court applied this principle based on its previous decision in *Lorenzo Jordan v R*[2] where it was held that it was never intended that a sentence should be reduced solely on the basis of a disparity unless there was a glaring difference between the treatment of the offenders which was wrong in principle. It was also held in *Jordan* that disparity should be based on the circumstances prevailing when the sentence in question was passed; it was only in exceptional circumstances that a court could listen to an argument based on disparity in sentences passed on two separate offenders by two different judges.

[16] The court also found that there was no error by the learned trial judge in identifying the omissions of the Appellant as aggravating factors. They found no fault with the judge's comment that the Appellant was equally or more culpable than his co-accused. The Appellant had previously enjoyed the confidence of the family, was familiar with the dogs and the surrounding and knew the family's habits to the extent that he was fully aware of their goings and comings. Additionally, the court found that the judge's assessment that the Appellant's actions displayed a lack of concern for the deceased was a fair assessment.

Appeal to the CCJ

[17] In his Notice of Appeal filed with this Court on September 26, 2017, the Appellant listed some nine grounds of appeal, but these were essentially that (a) his sentence lacked parity with that of the co-accused and (b) his sentence was excessive because of the high starting point taken by the judge and her misapplication of the aggravating and mitigating factors.

Parity principle

[18] Counsel for the Appellant emphasized that Defence Counsel and the DPP had

[2] Criminal Appeal No. 22 of 2012, unreported decision of 3rd July 2014.

agreed in the case of the co-accused that the appropriate range of sentence was 16-20 years. The learned trial judge used 20 years as his starting point and then made the necessary deductions resulting in a sentence of 16 years. This contrasted with the 30 years starting point used by Crane-Scott J in the Appellant's case, which after the various deductions resulted in a sentence of 25 years. There was therefore a difference of 10 years between the starting points. Counsel cited *Taylor on Appeals*[3] which noted that disparity in sentences between co-defendants may be a ground of appeal where there was no good reason for the difference in sentences. Additionally, in the case of *R v Kenneth John Fawcett and Others*[4] it was accepted that disparity could be a ground of appeal if right-thinking members of the public with full knowledge of the relevant facts would believe that something had gone wrong in the administration of justice. *Fawcett* was accepted and applied by the Bahamian Court of Appeal in *Bowleg v AG.*[5] Counsel also cited cases from South Africa;[6] Hong Kong;[7] Australia;[8] and Fiji;[9] in support of the parity principle. He submitted that in not applying the parity principle, the lower courts had breached the Appellant's right to a fair trial.

[19] Ms. Delaney on behalf of the Respondent, contended that the Court should examine whether the Appellant's sentence was excessive without looking at his co-accused sentence because those proceedings were before a different judge. She submitted that the *HKSAR v Wong King Wai*[10] decision from the Court of Appeal of Hong Kong cited by the Appellant was further qualified in a later decision by the same court in *HKSAR v Chau Ping*[11] where it was held that the appellate court would interfere in cases of disparity only where the convicted persons were sentenced on the same occasion before the same judge. This approach was consistent with the current position adopted by the Court of Appeal of Barbados in *Jordan*.[12] Ms.

[3] (Sweet & Maxwell 2000) 416-417.
[4] 5 Cr. App. R(S) 158.
[5] BS 2009 CA 25.
[6] *Rudi Afrika v State* [2006] EWCA Crim 1586
[7] *HKSAR v Wong King Wai* CACC 364 of 2006.
[8] *Lowe v R* [1984] HCA 46; *Postiglione v The Queen [1997] HCA 26*
[9] *Sakeasi Ratumaiya v The State* AAU0060 of 2005S.
[10] Supra (n).
[11] [2014] HKCA 5.
[12] Supra (n2).

Delaney submitted that the disparity in the sentences could be justified on the basis that there was not a common set of facts before both sentencing judges. Alternatively, the sentence passed on the co-accused was lenient and it was a long-established principle since the case of *R v Stroud*[13] that where there was a wrong sentence and a right sentence, the right sentence should not be reduced to produce two wrong sentences.

[20] Consideration of the parity principle may be usefully traced to two oft-cited decisions of English Court of Appeal. In *R v. Stroud*[14] counsel argued that there should be a reduction of his client's sentence because a co-accused had received a lesser sentence. The court said that the submission,

> "…involves the proposition where you have one wrong sentence and one right sentence, this Court should produce two wrong sentences. That is a submission which this Court cannot accept." Even so, the court did agree that, exceptionally, a sentence could be reduced on the basis of disparity if there was "such a glaring difference between the treatment of one man as compared with another that a real sense of grievance would be engendered in the case of a man suffering the more serious penalty…"

[21] The subsequent case of *R v. Fawcett*[15] emphasized that in determining the sense of grievance, the court applies an objective test and not a subjective one. The person complaining of the disparity in sentence must show that a reasonable person, looking at the entire circumstances of the case, would regard the grievance as justified. In *Fawcett* four men had taken part in a robbery and three pleaded guilty and were sentenced. These sentences were reduced when their co-accused pleaded not guilty and was convicted on a subsequent trial but received a substantially lesser sentence. The court considered that as there was nothing to choose between the four accused the three who pleaded guilty would feel aggrieved because they had saved the public time and expense whereas their co-accused, who had done the opposite, had been treated more leniently. Lawton LJ stated:

[13] (1977) 65 Cr. App. R.150.
[14] (1977) 65 Cr. App. R. 150.
[15] 5 Cr. App. R(S) 158.

> "We are faced with the position that we have no hesitation at all in saying that the sentences passed by Judge Herrod on Hardwick were inadequate. Hardwick should have received much more severe sentences than he did… In our judgment, the approach is that which is set out in the decision of this court in *Pitson* (1972) 56 Cr. App. R 391, namely, would right-thinking members of the public, with full knowledge of all the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice. When the question is posed in that form, we are of the opinion that the public would say that something had gone wrong here because Hardwick and Chatterton should clearly have received the same sentences."

[22] *Fawcett* was expressly followed in the Bahamian Court of Appeal in *Bowleg v AG*[16] where Osadebay JA considered the earlier sentence of the Appellant's co-accused to be "inadequate" but nonetheless felt constrained to reduce the sentence of 10 years passed on the Appellant to time served. The court noted that its decision was not to be understood as approving the earlier excessively lenient sentence but simply, "so as to avoid any appearance of unfairness between people involved in the same offence."

[23] Both *Stroud* and *Fawcett* were cited with approval in the Barbados Court of Appeal in *Jordan*,[17] where Jordan argued that his sentence of 16 years' imprisonment was excessive having regard to the parity principle as his co-accused, in an earlier trial, had been sentenced to 12 years' imprisonment. Mason JA said:

> "[41] It must be noted that disparity is never a ground in itself. The question to be asked is whether the sentence was wrong in principle. Lawton LJ in *R. v Fawcett* [1983] 5 Cr App R (S) 158 suggested that when considering the issue of parity in sentencing it must be asked 'would right thinking members of the public with full knowledge of the relevant circumstances, learning of this sentence, consider that something had gone wrong with the administration of justice.'
> [42] We accept that in many cases involving joint enterprise it is prima facie unnecessary and unhelpful for the court to distinguish between the defendants and entirely appropriate for the same sentence to be passed on both. However, we consider that in some cases certain issues play a larger role in the resulting disparity of sentences meted out to the different actors. Justice requires that consideration be taken of the part played by each

[16] Supra (n5).
[17] Supra (n2), [40]

> offender before an appropriate sentence can be identified. It also demands that certain other factors like age and degree of culpability be taken into account."

[24] The learned Justice of Appeal also accepted the statement by Roskill LJ in *Stroud* quoting Lord Chief Justice May in the unreported case of *R v Brown* that:

> "It was never intended that a sentence should be reduced on the basis of disparity unless there was such a glaring difference between the treatment of one man as compared with another that a real sense of grievance would be engendered in the case of a man suffering the more serious penalty…An argument based on disparity should be based on the circumstances prevailing when the sentence attached was itself passed and we do not think save in the pleaded exceptional circumstances that it would ever be proper for the court to listen to an argument based on disparity which involves bringing in sentences passed on other people before a different judge in another case. The argument should be based, if it is to be raised at all, upon circumstances prevailing when the criticised sentence is imposed."

[25] Outside of the Caribbean, the parity principle has been repeatedly affirmed. The Australian High Court in *Lowe v R*[18] considered the case of two men charged with robbery while armed with an offensive weapon. They were jointly indicted but sentenced separately. The Appellant was sentenced to hard labour for six years with a recommendation that he be eligible for release on parole after two years whereas his co-accused was admitted to parole for three years with 200 hours community service. The Court of Criminal Appeal sought to rectify the disparity by varying the Appellant's sentence to allow him to be eligible for parole after serving one year's imprisonment but without reducing the overall sentence of six years. The Appellant's application to the High Court for leave to appeal on the ground of gross disparity in the sentences imposed was dismissed but the various judges all affirmed in one way or another the relevance of the principle of parity. Gibbs CJ, in words reminiscent of those used by Lawton LJ in *Fawcett*, affirmed that the very existence of the disparity reveals that an error must have been committed but that the basis on which the court interferes was that it considered that the disparity is such as to

[18] [1984] HCA 46.

give rise to a justifiable sense of grievance, or in other words, to give the appearance that justice has not been done.

[26] For his part, Mason J, who dissented from the decision to refuse leave to appeal, reviewed a number of English and Australian decisions and pronounced:

> "This brief review of the authorities raises two questions. The First is: is discrepancy a ground for intervention in itself or is it merely indicative of undisclosed error in the sentencing process? Logic and reality combine to compel an answer in favour of the first alternative. The undisclosed error, as we have seen, may have occurred in the sentencing process as it affected the co-offender. The sentence under appeal may be free from error except in so far as discrepancy itself constitutes or causes error. And the justification which the courts assign for intervention in the case of disparity is that disparity engenders a justifiable sense of grievance in the applicant and an appearance of injustice to that impassive representative of the community, the objective bystander."[19]

[27] The principles laid down in *Lowe* were applied in the subsequent Australian High Court decision of *Postiglione v The Queen*[20] which likewise involved disparate sentences imposed on co-offenders in one conspiracy to import drugs. Dawson and Gaudron JJ introduced the notion that the parity principle was an aspect of equal justice. Equal justice required that like be treated alike**.** In the case of co-offenders, different sentences may reflect different degrees of culpability, but the parity principle recognized that equal justice required that, as between co-offenders, there should not be a marked disparity which gave rise to a justifiable sense of grievance. If there was such a sense of grievance the sentence appealed against should be reduced, notwithstanding that it was otherwise appropriate and within the permissible range of sentencing options.

[28] The Hong Kong Court of Appeal in *HKSAR v Wong King Wai*[21]applied the test in *Fawcett* to reduce a nine-year sentence on the Appellant in circumstances where his co-defendant whose role was similar had received a much lower sentence. The

[19] ibid. [7].
[20] [1997] HCA 26; [1997] 189 CLR 295.
[21] CACC 364 of 2006.

court was satisfied that the sentence the Appellant received was richly deserved and that the co-defendant's sentence was wholly inappropriate to the gravity of the offence. However, right-thinking members of the public, with full knowledge of the relevant facts and circumstances, would consider that the Appellant had a legitimate sense of grievance and some reduction in the sentence was necessary despite the fact this would mean that he would, to some degree, be benefitting from the mistake made in sentencing the co-defendant.

[29] *Wong King Wai* dealt with disparity in sentences passed on the same occasion by the same judge whose sentences had not properly reflected the apportionment of blame between the accused. This was considered to be a critical distinction in the subsequent Hong Kong Court of Appeal decision in *HKSAR v Chau Ping*[22] which stated that where different sentences were passed on different occasions by different judges on different accused for the same offence, "then the only consideration would be whether the sentence passed on the Appellant was appropriate." Even so, the court in *Chau Ping* did in fact take account of the disparity in the sentences between the Appellant and his co-accused and the circumstances of their sentencings. The co-accused had pleaded guilty to robbery and was sentenced on the basis of an agreed Summary of Facts. The Appellant pleaded not guilty and the court therefore obtained an appreciation of the circumstances of the offence and its impact on the victims over the course of the full trial. The court therefore considered that "What has happened here does not allow of a disparity of sentence complaint"[23] and pointedly refused to say that the decision represented a difference between the English and Hong Kong approaches.

[30] In the Fijian case of *Sakeasi Ratumaiya v The State,*[24] the Court of Appeal considered that there was an unfair disparity between a sentence of two years imprisonment imposed on the Appellant and the sentence of a fine of $80 and 12 months imprisonment suspended for three years imposed on his co-accused. The

[22] [2014] HKCA 5.
[23] Para [64].
[24] AA U0060 of 2005S.

court accepted that the parity principle applied where the sentences imposed on co-offenders are so disproportionate as to leave the offender with the larger sentence with a justifiable sense of grievance. An independent minded observer knowing all the circumstances of the case, would find the disparity, 'odd'.

[31] Although not dispositive in the present context we consider it relevant that legislation has been adopted in countries such as Canada[25] and New Zealand[26] to codify the principle of parity in sentencing.

[32] We are satisfied that the concept of parity in sentencing has evolved from the bare proposition that an offender cannot be justifiably aggrieved if he receives an appropriate sentence simply because a co-offender has fortuitously received an unduly lenient sentence,[27] into an important principle in the law of sentencing. The principle of equality before the law requires that co-accused whose personal circumstances are similar and whose legal liability for the offence are relative should normally receive comparable sentences. Where the sentences are manifestly and unjustifiably disparate, the accused who has been dealt with more harshly may entertain a legitimate sense of grievance at that unfair treatment. It is also harmful to the public confidence in the administration of justice where significant disparity in sentences cannot be properly justified. Public confidence is eroded if, as it has often been put, a right-thinking member of the public, with full knowledge of all the relevant facts and circumstances would, on learning of the disparity in sentences, consider that something had gone wrong with the administration of justice.

[33] The parity rule is therefore to be regarded as fundamental to any rational and fair system of criminal justice. The rule is not antithetical to the principle of individualized sentencing and proportionality as reflected in the Penal System Reform Act because each accused has to be dealt with individually. Parity does not necessarily mean equality. Different sentences may be proper and required where

[25] See section 718.2(b) of the Canadian Criminal Code.
[26] See section 8 of the New Zealand Sentencing Act.
[27] Broadbridge [1983] 5 Cr App R (S) 269.

the individual circumstances and level of participation in the offence are markedly different. But if no real distinction can be drawn between the accused then the parity principle will require that the sentences be the same or at least comparable.

[34] Where it is not desirable or possible for co-accused to be tried and if convicted or having pleaded guilty, sentenced together and instead they are tried separately, the judge who tries a second accused, if that accused is found guilty, must have regard to the sentence passed by the first judge. The second judge, whilst obliged to pass the sentence which in his or her view is proper in all the circumstances must also have regard to the fact that the sentence passed by the first judge is an established and relevant fact to which appropriate weight must be given. The rationale for the placing of weight on the first sentence was explained by Street CJ in *R v. Tisalandis*[28] where he said that it was better:

> "…to strive to avoid disparity when the second offender comes before the court at first instance than for the second judge to give effect to his own unfettered view and leave it to an appellate court to take the responsibility of reducing what might on its face be a proper sentence to one which is subjectively too lenient… The true rationalization from the point of view of the second judge in cases such as these is not that he is passing a sentence which appears to him to be too lenient but rather that he is passing the sentence which is shown to be appropriate having regard to the whole of the relevant circumstances including, very particularly, the established circumstances of an unduly lenient sentence already passed by a brother judge upon the co-offender."[29]

[35] In Barbados, there is a statutory basis for considering the earlier sentence passed by the first judge. Section 37(3)(a) of the Penal System Reform Act provides that in determining whether a term of imprisonment is commensurate with the seriousness of the offence a judge shall "take into account all such information about the circumstances of the offence (including any aggravating or mitigating factors) as is available to the court." Section 39 further provides that "nothing in the Act prevents a court from mitigating an offender's sentence by taking into account any such matters as, in the opinion of the court, are relevant in mitigation." These provisions

[28] [1982] 2 NSWLR.
[29] ibid. p. 435.

appear to be wide enough to enable if not require a sentencing judge to take account of the sentence previously passed on a co-accused of more or less equal culpability and the reasoning underpinning that sentence.

[36] In the present case, we are not convinced that the case against the Appellant was so dramatically different from that against the co-accused that it warranted the imposition of an additional nine-years imprisonment. Both sentencing hearings proceeded on the basis of statements given by the accused persons to the police in which they blamed each other for being the primary actor. Each alleged that he played a minor role in the crime and should not receive as great a sentence as the other accused. In neither case was the evidence tested under cross-examination and so, essentially, the parties were sentenced based on their respective versions of what happened the tragic night the deceased died. The DPP accepted the Appellant's account of the offence which painted the co-accused as the primary actor.

[37] Taken in the round, a not unreasonable view of the case is that there was comparable culpability in the actual commission of the crime as between the Appellant and the co-accused. We do not believe that the aggravating factors peculiar to the Appellant, primarily the implied duty of trust based on his knowledge of the deceased and her parents and their residence, could justify an additional almost decade-long sentence. The aggravating factors subjective to the Appellant cannot possibly warrant a period of imprisonment of more than two years relative to his co-accused. For the reasons stated earlier, the judge sentencing the Appellant ought to have had regard to the earlier sentence imposed on the co-accused. Accordingly, we accept that the disparity in the sentence is a good ground of appeal in this case because a right-thinking member of the public with full knowledge of the relevant facts upon learning of the sentence would believe it was manifestly unfair and that something had gone wrong in the administration of justice.

Excessiveness of the sentence

[38] Mr Boardi submitted that the sentence imposed on the Appellant was excessive because the sentencing judge selected too high a starting point for the term of the

sentence having regard to the guidelines given in *Pierre Lorde*, and that the judge failed to properly account for the aggravating and mitigating factors.

[39] It is convenient to start by setting out the guidelines established in *Pierre Lorde* which are as follows:

> "In a contested trial where death was caused by a firearm and the facts are on the borderline of murder with no mitigating features, the range of sentence should be 25 years and upwards, including, in a proper case, life imprisonment.
> In a contested trial where death was caused by a firearm and the facts are grave but mitigating factors such as provocation exist, the range of sentence should be 18 to 22 years. However, an early plea of guilty in a non-contested case on similar facts will attract a lower sentence in the range of 14 to 18 years.
> In a contested trial *where no firearm was used and there are no mitigating circumstances*, the range of sentence should be *16 to 20 years*. An early plea of guilty in this type of case will reduce the range of sentence to 10 to 14 years.
> In a contested trial where no intrinsically dangerous weapon was used and there are mitigating features, the range of sentence should be 8 to 12 years. An early plea of guilty in this type of case may attract a sentence of less than 8 years."

[40] During the sentencing hearing, Mr Boardi submitted that the case properly fell within Guideline 3 of the *Pierre Lorde* guidelines and suggested a sentence of 10 years as appropriate. The DPP submitted that the case was a special and exceptional one falling outside the *Pierre Lorde* guidelines and suggested a starting point of 25 years fully discounted for the time spent on remand as well as the Appellant's guilty plea.

[41] The learned judge was satisfied, after considering the outline of the facts and the manner in which the offence was committed together with the pre-sentence report, that subsection 2(a) of the Penal System Reform Act applied and that the offence was so serious that only a custodial sentence could be passed. She found that the matter was one that warranted a custodial sentence because:

(a) The offence was committed in the home of the Appellant's former employer;

(b) After being surprised by the victim's presence they proceeded to embark on "a most bizarre and reckless plan to silence her";

(c) The Appellant stood and watched as the co-accused tied up the victim and covered her face;

(d) The Appellant had knowledge of the house and its contents and could, at the request of the co-accused, locate certain items;

(e) Although no gun or intrinsically dangerous weapon was used, the manner in which the victim was treated including being placed to stand precariously on the containers with a noose around her neck "showed that she suffered a thousand deaths before her inevitable strangulation.";

(f) The seriousness of the offence;

(g) The Appellant's lack of concern following the news that she had fallen from the cans;

(h) The Appellant failed to actively discourage the co-accused from setting fire to the house; and

(i) The Appellant personally knew the victim and her parents.

[42] The judge found that this was a serious case of manslaughter on the borderline with murder with numerous aggravating factors and no mitigating factors in relation to the offence. She found the conduct of the Appellant particularly callous and reprehensible. The parameters currently provided for in the four guidelines with their bias towards death by a firearm did not appear to have anticipated a terrifying and horrendous death which occurred in this case. The judge considered that in the special and exceptional facts of the case the suggested range of sentences set out in *Pierre Lorde* were "woefully inadequate to enable the Court to do justice in this case." Having regard to the flexibility that *Pierre Lorde* recognized in the sentencing judge, and in the unfettered exercise of the court's sentencing power, the judge established 30 years as the appropriate starting point for the determination of the Appellant's sentence.

[43] We agree with the learned trial judge that the *Pierre Lorde* Guidelines cannot fetter the judge's discretion in the sentencing process; a point emphasized in *Jeffrey Ray Burton v The Queen.*[30] Sentencing guidelines provide assistance to the sentencing judge, not rules from which departure is prohibited. They may be departed from provided the judge gives cogent reasons for doing so. In this case the judge gave a compelling account of the exceptional and horrendous circumstances in which the deceased had died, presumably in emotional terror and distress, by the callous actions and omissions of the co-accused and the Appellant.

[44] There does remain for consideration, however, the submission by Mr Boardi that the starting point adopted by the learned judge in this case was simply too high. In fixing the starting point the learned judge took into account all the aggravating factors, those relevant to the offender and also those relevant to the offence. From this 30-year starting point the learned judge made the deductions for mitigating factors and pronounced a sentence of 25 years imprisonment. It will be recalled that in sentencing the co-accused Worrell J similarly began with a starting point (a full decade lower at 20 years) that took fully into account all the aggravating factors from which the judge made deductions for mitigating factors resulting in a sentence of 16 years imprisonment.

[45] This approach, which means that the aggravating features are built into the starting point but mitigating factors are not taken into account, has been applied by other courts in the Commonwealth: see e.g. *R v Hooker*.[31] Another approach to the starting point takes into account the aggravating and mitigating features of both offence and offender: *Nadia Pooran v The State*.[32] Still other cases suggest that the starting point signified the opening position before any consideration of aggravating and mitigating factors are considered: see e.g. *R v Mako*.[33]

[30] [2014] CCJ 6 (AJ) at [13] to [15].
[31] C.A. 154 of 2001 (New Zealand Court of Appeal) at para. 7.
[32] Crim. App. No. 32 of 2015.
[33] C.A. 446 of 1999 (New Zealand)

[46] Fixing the starting point is not a mathematical exercise; it is rather an exercise aimed at seeking consistency in sentencing and avoidance of the imposition of arbitrary sentences. Arbitrary sentences undermine the integrity of the justice system. In striving for consistency, there is much merit in determining the starting point with reference to the particular offence which is under consideration, bearing in mind the comparison with other types of offending, taking into account the mitigating and aggravating factors that are relevant to the offence but excluding the mitigating and aggravating factors that relate to the offender. Instead of considering all possible aggravating and mitigating factors only those concerned with the objective seriousness and characteristics of the offence are factored into calculating the starting point. Once the starting point has been so identified the principle of individualized sentencing and proportionality as reflected in the Penal System Reform Act is upheld by taking into account the aggravating and mitigating circumstances particular (or peculiar) to the offender and the appropriate adjustment upwards or downwards can thus be made to the starting point. Where appropriate there should then be a discount for a guilty plea. In accordance with the decision of this Court in *Romeo da Costa Hall v The Queen*[34] full credit for the period spent in pre-trial custody is then to be made and the resulting sentenced imposed.

[47] We note that this was the approach followed by the Court of Appeal of Trinidad and Tobago in *Aguillera v The State*[35] influenced by the New Zealand decision of *R v Taueki Ridley and Roberts*.[36] We also note that *Aguillera* was itself favourably commented on in the Jamaican Court of Appeal in *Clement v R*[37]as signaling a possible line of refinement in arriving at the starting point in sentencing in that jurisdiction.[38]

[34] [2011] CCJ 6 (AJ).
[35] Crim. App. Nos. 5, 6, 7, 8 of 2015.
[36] [2005] NZLR 372.
[37] See esp. para. 31.
[38] Para. 31

[48] Having regard to the seriousness of the crime as outlined in the factors listed by the sentencing judge at [40] (but omitting (i) which is subjective to the Appellant), we consider that the appropriate starting point is 25 years, as recommended by the DPP.

Aggravating factors relative to the Appellant

[49] Mr. Boardi argued that the trial judge erred when she ruled that the following were aggravating factors: (a) the Appellant was aware that the actions of himself and his co-accused were dangerous acts; (b) that the Appellant did nothing to assist the victim; and (c) that the Appellant recklessly stood on the balcony until the inevitable occurred. He said that these omissions were elements of the crime of manslaughter and that there was therefore an element of "double counting" by labelling them as "aggravating facts" and thus penalizing the Appellant twice for the same conduct. He also submitted that this double counting was a prevalent feature of the Appellant's sentencing which led to a fragmentation of aggravating factors. This severely prejudiced the Appellant and led to the judge's remark that the Appellant was "equally, if not more culpable" than his co-accused even though the facts read into the record showed that the co-accused was clearly the primary actor in the commission of the crime.

[50] We agree. Section 37 (3) of the Penal System Reform Act requires that in sentencing the judge should consider "all the circumstances of the offence and the offender." These circumstances must necessarily include the acts and omissions of the Appellant which included awareness of the danger of the actions of himself and the co-accused, and of his doing nothing to assist the deceased and recklessly standing on the balcony until the inevitable occurred. These help to detail the Appellant's culpability and level of involvement in the manslaughter. However, it is to be noted that these factors have already been taken into account in deciding that the *Pierre Lorde* Guidelines did not apply and that a high starting point for sentencing was justified. To then factor these elements into deciding whether to adjust the starting point upwards would indeed involve an exercise in double counting.

[51] On the other hand, we find that the fact that the Appellant personally knew the victim and her parents and the attendant circumstances surrounding his familiarity with the family to be a serious aggravating factor. The Appellant's personal knowledge and past relationship with the deceased and her parents rendered his actions an especially reprehensible breach of trust towards the deceased whom he had known from the time she was a little girl.

Mitigating factors relative to the offender

[52] Putting to one side the discount for the guilty plea, which is dealt with separately, we agree with the learned judge that there were mitigating factors in favour of the Appellant. These were that he had no record of previous offences, cooperated with the police investigations by making oral as well as written statements and his expression of remorse. However, these were outweighed by the aggravating factors peculiar to the Appellant, particularly his breach of trust. In these circumstances we consider that there should be an upward adjustment of the 25 years' starting point of the magnitude of 2 years to account for the predominance of the aggravating factors over the mitigating factors. This therefore leaves a notional sentence of 27 years.

Discount for the guilty plea

[53] Counsel for the Appellant argued that the learned trial judge erred in only giving a 13% discount for the guilty plea of the Appellant. He argued this was out of step with the generally recognized approach of according a significant discount, generally 1/3 of the sentence, for a guilty plea. He placed reliance on The UK Sentencing Guidelines Council Definitive Guideline on the Reduction in Sentence for Guilty Plea (Revised 2007) in which the Council recommended a sliding scale ranging from a recommended one-third reduction (where the guilty plea was entered at the first reasonable opportunity), reducing to a recommended one quarter (where a trial date has been set) and to a recommended one tenth (for a guilty plea entered at the 'door of the court' or after the trial has begun).

[54] Counsel for the Crown made two arguments in response. First, the Appellant initially had chosen a paper committal but later opted for a preliminary enquiry until the DPP made the decision months later to proceed by way of voluntary bill of indictment. Whilst admitting that it was the Appellant's right to proceed by way of preliminary inquiry, counsel argued that he cannot now be given a large discount for the guilty plea when it could not be said that he had pleaded guilty at the earliest opportunity. We cannot agree that the choice to proceed by way of preliminary inquiry is a relevant consideration. An accused is normally entitled to the discount for an early guilty plea once the plea is entered upon arraignment, or at latest, before the trial commences. The Appellant made three appearances in court: the first occasion was on 10 September 2012 when he was not represented by counsel; he was arraigned on 11 September 2012, and on the day fixed for the start of the trial on 22 October 2012, he pleaded guilty to manslaughter, before the commencement of the trial. It is also to be recalled that the Appellant's intention to enter this plea had been communicated to the DPP in advance of the trial date. In the circumstances we consider that the Appellant is entitled to the full discount for an early guilty plea.

[55] The Crown also contended that a one-third discount is not the generally recognized discount in Barbados and cited the case of *Queen v Richard Leon Hurley DPP's Reference No. 2 of 2010.* In *Hurley,* Williams JA stated that in Barbados there is no legislative guidance on the discount to be applied to a guilty plea and that the amount of reduction in sentence was a matter for the discretion of the judges. The learned Justice of Appeal considered the English Guidelines which suggested a "sliding scale" ranging from one third reduction for a plea entered at the earliest opportunity to a tenth where the plea is entered after the trial has begun. He considered that public policy considerations such as overcrowding in prisons, which informed the English guidelines, were not as relevant in Barbados. The learned judge therefore recommended that in Barbados the highest discount should normally be around 20% because otherwise, the terms of imprisonment may be unacceptably low.

[56] There are sound policy reasons for a significant reduction of sentences especially in the case of an early guilty plea. Such a plea is in the public interest as it avoids the need for a trial and saves victims and witnesses from having to give evidence of often traumatic events, shortens the time between charge and sentence, and saves costs. Best sentencing practice suggests that the discount should be approximately one-third (1/3) for a guilty plea entered at the earliest possible opportunity, with a "sliding scale" for later pleas to at least 10% depending on the stage of the trial where the plea is entered. This would be in general accordance with sentencing guidelines not just in England but in several jurisdictions in the Caribbean Community such as the Eastern Caribbean Supreme Court[39] and Trinidad and Tobago.[40] In Jamaica, legislation provides for a sliding scale of 15-50% discount.[41]

[57] We are mindful that immediate implementation of the highest allowances for early guilty pleas in the context of the continued operation of the present *Pierre Lorde* guidelines could result in unreasonably low sentences for very serious offences and that there have been numerous judicial calls for a review of the Guidelines. We hope these calls can be accommodated soon.

[58] In the present case, the *Pierre Lorde* Guidelines were found to be inapplicable by both sentencing judges and by this Court. In considering the appropriate sentence for the Appellant we considered that the starting point of 25 years should be adjusted upwards by two years on the basis of the balancing of the aggravating and mitigating factors to produce a notional term of 27 years. A discount of one-third (nine years) for Appellant's early guilty plea is appropriate resulting in a notional term of 18 years.

[59] We consider that a term of 18 years is justifiable even with consideration of the parity principle given the significant breach of trust committed by the Appellant.

[39] See also Practice Direction No. 1 of 2015 of the Eastern Caribbean Supreme Court which provides for up to a one-third reduction.
[40] Aguillera at para.32(iv)
[41] See for example, s. 42D of the Jamaican Criminal Justice (Administration) Act as amended by the Criminal Justice (Administration) (Amendment) Act 2015 which provides for a sliding scale of 15-50%.

From this notional term of 18 years the full period of 4 years and 26 days spent on remand must be deducted leaving an actual term of 13 years and 339 days.

Disposal

[60] The appeal is allowed.

[61] The sentence of 25 years imprisonment imposed on the Appellant is set aside and the Court substitutes pursuant to section 14 of the Criminal Appeal Act Cap 113A a sentence of 13 years and 339 days to run from the original date of sentence, December 11, 2012.

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ J Wit

The Hon Mr Justice J Wit

/s/ D Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee