IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No. BBCR2017/004
BB Criminal Appeal Nos. 6 of 2013

Between

RENALDO ANDERSON ALLEYNE **Appellant**

And

THE QUEEN **Respondent**

Before the Honourables: **Mr. Justice A. Saunders, PCCJ**
Mr. Justice D. Hayton, JCCJ
Mr. Justice W. Anderson, JCCJ
Mme Justice M. Rajnauth-Lee, JCCJ
Mr. Justice D. Barrow, JCCJ

Appearances
Mr. Arthur E. Holder, Ms. Shadia Simpson, Ms. Adonica Spence and Ms. Danielle Mottley for the Appellants
Mr. Anthony L. Blackman and Ms. Olivia M. Davis for the Respondent

JUDGMENT
of
The Honourable Mr. Justice Saunders, President
and the Honourable Justices Hayton, Anderson,
Rajnauth-Lee and Barrow

Delivered by The Honourable Mr. Justice Anderson

and

CONCURRING JUDGMENTS
of
The Honourable Mr Justice Saunders, President
The Honourable Mr Justice Barrow

Delivered on the 2nd day of May, 2019

JUDGMENT OF THE COURT DELIVERED BY THE HONOURABLE MR JUSTICE ANDERSON, JCCJ:

[1] In the evening of Friday, 3 September 2010, around 7:00pm, the Appellant, Mr. Renaldo Anderson Alleyne and another man, entered the *Campus Trendz Clothing Boutique ('Campus Trendz')* on Tudor Street, St. Michael, whilst patrons were shopping, intending to rob it. Both men were armed. The other man, brandishing a knife, approached the owner of the store and demanded money from the cash register. There was a delay in the opening of the register and a struggle ensued between them. The Appellant, who stood nearby wearing a mask, removed a bottle containing flammable liquid from a plastic bag he was carrying, lit it with a lighter he had in his pocket and tossed the flaming cocktail into the store. He then approached and pounded the cash register which opened eventually. The Appellant forcibly removed a sum of money from the till. Having grabbed the money and so succeeded with the robbery, he lit a second bottle and threw the cocktail by the door of the boutique before he and his accomplice ran off, as he admitted in his statement set out below at [5].

[2] The two Molotov cocktails caused a fire. Patrons and staff screamed and ran in different directions. Six females concealed themselves in the bathroom and storeroom towards the rear of the building, not knowing that the conflagration was about to overwhelm the entire store. An alarm was raised, and the Fire Department and Police arrived and took control of the scene. Screams were heard coming from the bathroom and the storeroom. The Fire Department fought valiantly to gain access to the building which by then was engulfed in flames. The fire and the heat were too much. The firemen resorted to breaking a wall at the back of the building to gain access to the bathroom and the storeroom. By then it was too late for the trapped females. The six young women were found huddled together. They were removed. Five had died at the scene and the sixth was transported to the Queen Elizabeth Hospital where, alas, she was pronounced dead. Autopsies revealed that the six ladies all had died of asphyxia resulting from smoke inhalation. Mercifully, there were no signs of substantial burn injuries on the bodies.

[3] The police commenced investigations that very night into this shocking event. Evidence garnered from eyewitnesses led to the arrest of the Appellant. He readily admitted his participation in the incident during interviews with the Police and on 11 September 2010, provided a self-written statement in accordance with the Judges' Rules. He was charged with 6 counts of murder. On arraignment on 1 June 2011, he pleaded not guilty to murder but guilty to six counts of manslaughter. These pleas were accepted by the then Director of Public Prosecution, the late Mr. Charles Leacock Q.C. On 15 August 2012, the Trial Judge, Her Ladyship Madame Justice Elneth Kentish, sentenced the Appellant to six concurrent life sentences.

[4] The Appellant's appeal of his sentence was heard on 9 and 16 November 2016. He raised two grounds of appeal namely that: (i) the sentence of life imprisonment on each count was wrong in law and in principle in that the trial Judge had failed to follow established guidelines in arriving at a sentence of life imprisonment and further that the sentences were excessive; and (ii) that the trial Judge had disregarded and had failed to factor into the sentence the Appellant's entitlement to a discount for his guilty plea. On 4 October 2017, the Court of Appeal dismissed the appeal and affirmed the life sentences. The court held that the life sentences were neither wrong in principle, manifestly excessive nor disproportionate. The court also decided that while the general principle is that a discount can be given on a determinate sentence in the face of an early guilty plea, a discount is incompatible with an indeterminate sentence, such as a life sentence. It is from this decision of the Court of Appeal that the Appellant now appeals to this Court.

High Court Proceedings

[5] In considering the appropriate sentence to be imposed upon the Appellant, the learned trial Judge had recourse to a summary of the agreed facts and the self-written statement of the Appellant given to the police on 11 September 2010 - both read into the record by the then Director of Public Prosecutions, as well as to the customary pre-sentencing report, and, at the request of Defence Counsel, to a psychological assessment of the Appellant. The Appellant's Statement was as follows:

"Two Thursdays ago Jamar came to me and said that he got this little mission to go on he tell me that we going to rob this little clothes store on Reed Street. He didn't say the name of the store. I tell he that I would go with he. He tell me that he going to get back to me. The next day me and Jamar was just sitting down together down Headley Land breezing. Approximately around 6:00 p.m. we leave and went down in the gully in Headley's land. And collect a black haversack and walk and went through the Garden Land down Passage Road and went in St. Leonard's cemetery. Me and Jamar change off we cloths in the cemetery. I put on a blue long jeans pants and a white long sleeve tee shirt. Jamar put on a black long pants and a greenish dress shirt. We leave our clothes in the cemetery to come back for them. We leave and went through a track that take us back out to Baxters Road and we walk straight down Baxters Road and when we got down Tudor Street Jamar nod his head to signal that that was the store. When we got down by KFC he gave me a plastic bag with two banks beer bottles with something that smell like gasoline. The bottles had cloth stuff at the top. Jamar asked me if I frightened and I said yes we walk and come back down and he tell me that when we get by the store to walk straight in. He get into the store before me. He went in one door and I went through the next. I just heard screaming even before I put on my mask. I just put on my mask and walk in. He was there asking a lady to give us the money, give us the money and she resisted. I still had the plastic bag in my hand. I put down the bag tore it open and pull out one of the bottles. I say you taking so long you ain't get through yet. I use a lighter I had in my pocket and I light one of the cocktails and tossed it in the store. I see Jamar struggling with a girl with the cash register. So I just went back with the other cocktail and she tried to open the cash register. I went and start hitting the cash register telling the girl to open it. She open the cash register and I stuck in my hand and grab the money I could get hold in my hand. I light the other cocktail and just through it there right by the door. We ran out and ran through the first track side of the store we ran through the track that lead to the Dog Pound. I kinda like run pass where Jamar turn and he call me back and tell me I was going the wrong way. The tracks that we went through lead us back out by the Post Office. We decided to go and get in a van. The van took us around Harbour Road up the road by Kensington oval and we got off by a bus stop. We went through a gap on the other side of the road and I through my shirt in a blue garbage can. We went back in the cemetery and change off. We come back out through another track from the cemetery which leads to the road by brydens. We went through a housing area and this lead up back to Passage Road. We walk through the Garden Land I went home and bathe and change my cloths. Later the same night I meet Jamar in the yard of Hindsbury Primary School and we count up the money that we got from the store. It was about 12 hundred dollars. I get $600 dollars and he get $600 dollars. About six hours later I hear people saying that Campus Trends burn down and six people trap in it. I feel real sorry about this situation."[1]

[1] *Renaldo Anderson Alleyne v The Queen*, Crim. App. No. 13 of 2012 at [12].

[6] The psychological report dated 8 July 2012, was prepared by Mr Sean Pilgrim, psychologist at Her Majesty's Prisons, Dodds. The report alluded to the Appellant's unpleasant and difficult life which was plagued by a tumultuous relationship between his parents. He encountered difficulties at school and with his academics and began his daily smoking of marijuana from age 10. The psychologist reported that the Appellant expressed deep regret and that he appeared sincerely remorseful for his actions which resulted in the six deaths at the clothing boutique. He indicated that he did not plan to start the fire and was surprised at how rapidly the events unfolded. He was willing to face the consequences for his actions but hoped the Judge would be lenient and that the victims' families would forgive him.

[7] The psychologist further reported that the Appellant's personality style involved a degree of adventurousness, risk-taking, and a tendency to be rather impulsive. The Appellant also scored very high on the Behavioural Coping and Personal Superstitious Thinking Scales (PSTS) which explored the degree to which individuals hold private superstitions directly associated with cynicism, feelings of helplessness and depression. However, the Appellant did not directly suffer from any major psychological disturbances and the psychological problems which affected his personality development and interpersonal relations would benefit from a course of psychotherapeutic treatment which addressed his cognitive deficiencies and allowed for development of an appropriate treatment plan.

[8] The Learned Judge commenced her sentencing remarks by alluding to the fact that under section 6 of the Offences Against the Person Act, the maximum sentence for manslaughter was life imprisonment and that the offences to which the Appellant had pleaded guilty were all violent offences as defined by the Penal System Reform Act. The Judge then adverted to provisions in sections 35 to 41 of the Penal System Reform Act as required when a custodial sentence was being contemplated. Specific reference was made to the requirement in section 36 that the length of the sentence should be commensurate with the gravity of the offence and in furtherance of that mandate the Judge considered the aggravating and mitigating factors.

[9] In having regard to the aggravating factors, the Judge considered that the gravity of the offence could not be overemphasized. She referenced (1) the unlawful taking of six young lives in 'one fell swoop'; (2) the deliberate intention to rob armed with two Molotov cocktails; (3) the plan to change clothes before and after execution of the robbery; (4) the lack of thought and concern as to the horrendous consequences of throwing two highly combustible missiles into a clothing store in which there was a large number of shoppers; (5) the readiness to participate in the scheme to effect the egregious robbery; (6) the reckless, callous and indifferent manner in which the robbery was executed; and (7) the painful and horrible death of the six young women. The Judge found that the mitigating factors were the Appellant's early guilty plea, his clean record, his cooperation with the police during the investigation of the incident and the fact that he was only 20 years of age at the time of the commission of the offence.

[10] The Judge next considered the pre-sentencing and psychological reports, both of which were in similar terms, noting the Appellant's traumatic childhood and the negative impact of drug use on many aspects of his life. The prevailing consideration weighing on the Judge's mind seemed to be that the Appellant constituted a threat to the public's safety. She commented:

> "Of significance in the Psychological Report, is a concern expressed by Mr. Pilgrim on your scores on the behavioural coping and personal superstitious thinking scales which suggest that you do not usually consider challenges in a manner which allows you to resolve problems effectively and it relates clearly to the level of thoughtlessness that you exhibited in the planning of this crime, because I do not accept that not for a moment did it ever cross your mind that those people would die that tragic death, but the problem is why did it not cross your mind and therein lies your danger to this society.
>
> The Psychological Report identifies an automatism that has allowed you to speculate on your life following incarceration even though you are aware of the likelihood of a substantial custodial sentence. That optimism opines Mr Pilgrim reveals that a degree of simple mindedness which was likely to feature heavily in your decision-making process, and it is in that simple mindedness which have earlier described, has a frightening aspect of your character. And Mr. Pilgrim also opines that though it is not immediately obvious you are experiencing significant emotional and psychological problems which have affected your personality development and interpersonal relationships."[2]

[2] At page 70, lines 2-25 of the Transcript of the High Court proceedings.

[11] Notwithstanding the strong and impassioned plea of mitigation put forward by counsel on behalf of the Appellant the Judge was of the view that the mitigating factors did not in any way neutralize the gravity of the offences and that neither the circumstances of the offence nor the Appellant's circumstances as offender counterbalanced the aggravating factors. Having regard to those factors, the seriousness of the offences, the reprehensible conduct of the Appellant and specifically his major character flaw in being easily led, and the horrendous and chilling circumstances in which the young women met their untimely and wholly unwarranted deaths, the Judge concluded that the appellant represented such a grave danger to the society that only a life sentence would be "commensurate with the seriousness of the offences and adequate to protect the public from serious harm" from him. The Judge sentenced the Appellant to imprisonment for six concurrent life sentences and ruled that it was a condition of the sentence that during the period of incarceration the Appellant be included in any treatment programmes that would address his cognitive deficiencies identified in the Psychological Report.

Judgment of the Court of Appeal

[12] The judgment of the Court of Appeal, which was delivered by Madam Justice of Appeal Sandra Mason,[3] emphatically rejected the contention by the Appellant that the imposition of the life sentences on him was wrong in principle. The court accepted that in determining whether a sentence was wrong in principle regard must be had to the "four classical principles" of sentencing, namely, retribution, deterrence, prevention and rehabilitation but considered it "patently evident" that the trial Judge had these principles in mind when she imposed the sentences. The Judge had considered (1) retribution by referring to the appellant's recklessness in the incident and his ready and willing agreement to participate in the plan, (2) deterrence by reference to the necessity to deter the appellant and other likeminded individuals from engaging in similar dangerous activities, (3) prevention in recognizing that a major flaw in the appellant's character was that he was easily influenced and needed to be prevented from being led into further or similar action, and (4) prospects for his rehabilitation, recommending that during his

[3] The other two members of the court were Goodridge JA and Chandler JA (Acting).

incarceration the appellant be included in any treatment programmes which could address his psychological deficiencies.

[13] The Court of Appeal was careful to address the contention on the Appellant's behalf that the trial Judge did not have regard to the *Hodgson* principles,[4] especially the second principle which referenced the mental instability of the offender. Counsel for the Appellant submitted that there was nothing tending to show that the Judge had given due regard to the consideration of whether Alleyne would pose a danger to society for an indeterminate time, particularly in the absence of medical evidence showing that he was unstable and likely to commit such offences in the future. The Crown countered by arguing that although *Hodgson* may be important when a court is considering the imposition of a life sentence, courts have on occasion where the seriousness of the offence requires, disregarded the necessity of medical evidence regarding the offender's instability. The court noted that the Judge's reference to the Appellant's deficiencies was culled directly from the psychologist's report which evidenced that he had "little awareness of the deeper causes of his actions". Furthermore, siding with the Crown, the Court of Appeal highlighted that the preponderance of authority indicated that "the gravity of the offence remains an indispensable condition for the imposition of the life sentence". Thus, while medical evidence relating to the offender's dangerousness was important, it was not always necessary to show that the offender is suffering from a mental or medical disorder. In exceptional cases, such as the present one, a Judge may impose a life sentence without medical evidence of a mental defect.

[14] The court concluded that the "ghastly" facts of the case, although ultimately regretted by the Appellant, were especially harrowing. Considering the relevant legal principles, the sentences imposed were necessary for the safety of the public and in furtherance of the administration of justice. That being the case, the question of a discount for an early guilty plea did not arise.

[4] *R v Hodgson* (1968) Cr App R 113; "Gravity of the offence(s) sufficient to warrant a very long sentence; where nature of offence or offender's history disclose unstable character such that he is likely to commit such offences in future; where if those offences are committed, the consequences to others may be especially injurious as in the case of sexual offences or violent crimes."

Appeal to the CCJ

[15] The Notice of Application for Special leave to appeal to this Court was filed on 15 November 2017 and the application was granted on 10 January 2018 on the basis that the proposed appeal raised points of law of public importance in relation to the relevance of an early guilty plea to the imposition of a life sentence. Following extended procedural delays caused by granting of requests for extensions of time[5] the matter was heard on 5 December 2018. The submissions essentially rehashed the grounds discussed in the court below. Counsel for the Appellant argued firstly, that the Court of Appeal had erred by failing to consider, or to consider appropriately, the prospects of the Appellant for rehabilitation in relation to the pre-sentencing reports of the Probation Officer and the Prison Psychologist. He relied on the authorities of *Daniel Robinson v R,*[6] *Alexander Don Juan Nicholas, Gregory Tan, Oren Lewis v The State*,[7] *Rudolph Lewis v The Queen,*[8] and *Aguillera and others v The State*.[9] Secondly, counsel argued that the Court of Appeal erred by failing to consider the established principles for the awarding of a discount for a plea of guilty and in this regard placed reliance on the dicta of Sir Denys Williams CJ in *Smith (Keith) v R;*[10] *Aguillera*; *Hessell v R;*[11] and the recent decision of this Court in *Teerath Persaud v The Queen.*[12]

[16] The Crown agreed that under section 41 (1) of the Penal System Reform Act rehabilitation of the offender was a required consideration when contemplating a life sentence but pointed out that there was no statutory indication of the weight to be placed on rehabilitation, as compared with other sentencing objectives. Counsel cited several cases,

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[5] This Court issued several Orders granting extensions of time to the Appellant to file the Notice of Appeal. The Notice of Appeal was eventually filed on 22 May 2018. The Respondent also sought and was granted an extension of time to file the Acknowledgment of Service by Order dated 7 September 2018. The Acknowledgment of Service was subsequently filed on 10 September 2018. Notwithstanding, the record of appeal not being filed by the Appellant's Attorney, the Court issued a CMC order dated 25 October 2018 directing the parties to file submissions to eliminate any further delays in hearing of this appeal and set the hearing down for 5 December 2018.
[6] (2010) JMCA Crim 75.
[7] Trinidad and Tobago, C.A. CRIM.1-6/2013.
[8] Saint Vincent and the Grenadines, HCRAP 2009/016.
[9] Trinidad and Tobago, Crim. App. Nos. 5, 6, 7, 8 of 2015.
[10] (1992) 42 WIR 33.
[11] [2011] 1 NZLR 607.
[12] [2018] CCJ 10 (AJ).

including *Hodgson,*[13] *R v Wilkinson,*[14] *Maloney v R,*[15] *R v Horvath,*[16] and *R v Flett,*[17] to support the contention that a sentence of life imprisonment may be justified because of the brutality or seriousness of the crime. Lord Bingham of Cornwall was quoted in *R v Wilkinson*[18] as pronouncing that, "there could be no reason, in principle, why a crime if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment." As regards a discount for the guilty plea Counsel relied on the cases of *R v Leslie Kalache,*[19] *Sharon Elizabeth Costen,*[20] and *R v Wilkinson,*[21] to argue that in light of the impact of the crimes on the public, the trial Judge had correctly exercised her discretion to not apply a discount for the guilty plea and further that there was no guideline in Barbados detailing the approach of awarding a discount on an indeterminate sentence.

The meaning of 'Life Imprisonment'

[17] During the hearing before us the issue arose as to whether the imposition of a life sentence meant incarceration for the natural life of the prisoner or for some shorter term. Neither Mr. Blackman of the Office of the Director of Public Prosecutions nor Mr. Holder for the Appellant was able to provide clarification. The Court invited counsel to collaborate in providing information on the period of imprisonment served by persons sentenced to life imprisonment and any cases where prisoners sentenced to life imprisonment would have been released after reviews of sentence conducted by the Review Committee in accordance with section 42 of the Barbados Prison Rules. Counsel were also asked to provide information on the composition of the Review Committee. The Court, thereafter, reserved its judgment in the matter. The information requested was provided on 11 January 2019.

[13] (1968) Cr App R 113.
[14] [2010] 1 Cr App R (S) 1-00.
[15] Barbados Criminal Appeal No. 15 of 2012.
[16] (1983) 2 CCC (3d) 196 (Ont. C.A.).
[17] 2014 MBCA 111 (Can LII).
[18] [2010] 1 Cr App R (S) 1-00.
[19] [2000] NSWCCA (4 February 2000).
[20] (1989) II Cr App R (S) 182.
[21] [2009] EWCA Crim 1925.

Consideration of evidence/information not before the sentencing judge

[18] Throughout the hearing, and in the record before the Court inclusive of the trial Judge's sentencing remarks, the Appellant was referred to as a man with no previous convictions and as having "a clean record". This was considered a mitigating factor when his Attorney made her plea in mitigation before Justice Kentish and was again reiterated by his current attorney Mr Holder in the appeal before this Court. However, during the Court's Christmas break, it came to the Court's attention that the Appellant had been before Justice Margaret Reifer in the Supreme Court sometime in 2012 for an offence involving robbery and arson and that Mr Alleyne had admitted that on 13 August 2010, (approximately one month prior to the *Campus Trendz* incident), he entered business premises called "Chicken Galore" armed with a cutlass and stole approximately $2,000. He also admitted to damaging the said business place by fire on the same day.

[19] Given this new information, the Court directed a case management conference for 10 January 2019 at which counsel were requested to file submissions as to whether the Appellant's alleged guilty plea, related, as it was to the alleged firebombing of *Chicken Galore*, and preceding as it did, his guilty pleas in *Campus Trendz* matter, ought properly to have been considered in imposing the sentences under appeal. Counsel were also asked to make submissions on whether it was permissible to stipulate a minimum period of incarceration when imposing a life sentence.

[20] This Court is satisfied, based on the submission of the parties,[22] that the guilty pleas in the *Chicken Galore* incident were not relevant to the instant proceedings at the time of sentencing by the learned trial Judge for the following reason. The *Chicken Galore* incident occurred on 13 August 2010, in respect of which the Appellant entered guilty pleas to the offences of Aggravated Burglary and Arson on 20 February 2012, and was sentenced on 13 February 2013, to 12 years' imprisonment for Aggravated Burglary and 8 years imprisonment for Arson, the sentences to run concurrently. It is trite law that a

[22] Submissions were duly filed by Respondent on 17 January 2019; Appellants on 30 January 2019, with Respondent responding on 7 February 2019.

person who enters a guilty plea is entitled to change that plea at any time up to the point of sentencing: *S (an Infant) v Manchester City Recorder and Others;*[23] *Rambarran v The Queen.*[24] It follows that on 15 August 2012, when the Appellant was sentenced in relation to the *Campus Trendz* matter, his earlier guilty pleas in respect of the *Chicken Galore* incident could not properly form part of the record before Justice Kentish, as he was entitled to change that plea any time up to 13 February 2013.

[21] As to whether the guilty pleas could have been factored in by the Court of Appeal in its 2016 decision or can now be considered by this Court in deciding upon the appropriateness of the life sentences imposed, two statutory provisions require attention. First, section 14 of the Criminal Appeal Act (Cap 113A), which caters for alteration of sentence on appeal, states the following:

> "On an appeal against conviction or sentence, the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence authorised by law, whether more or less severe, in substitution therefor as it thinks ought to have been passed; *but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the trial*." (Emphasis added).

[22] Secondly, section 37 of the Penal System Reform Act (Cap 139) provides the following:

> "37. (1) Subject to subsection (2), a court shall obtain and consider a pre-sentence report before forming any such opinion as is mentioned in subsection (2) of section 35 or 36.
> (2) Where the offence or any other offence associated with it is triable only on indictment, subsection (1) does not apply if, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a pre-sentence report.
> *(3) In forming any such opinion as is mentioned in subsection (2) of section 35 or 36 a court*
> *(a) 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; and*
> *(b) in the case of any such opinion as is mentioned in paragraph (b) of that subsection, may take into account any information about the offender which is before the court.*
> (4) A custodial sentence which is passed in a case to which subsection (1) applies is not invalidated by the failure of a court to comply with that subsection but any

[23] [1969] 3 All ER 1230.
[24] [2016] CCJ 2 (AJ).

> court on an appeal against such a sentence
> (a) shall obtain a pre-sentence report if none was obtained by the court; and
> (b) shall consider any such report obtained by it or by that court.
> (5) A "pre-sentence report" in this Act means a report in writing which is made by a probation officer with a view to assisting the court in determining the most suitable method of dealing with an offender." (Emphasis added).

[23] Section 37 (3) refers to subsection (2) of section 35 and section 36. In so far as is relevant, section 35 (2) provides that the court shall not pass a custodial sentence on the offender unless it is of opinion, "(a) that the offence, or the combination of the offence and one other offence associated with the offence, was so serious that only such a sentence can be justified for the offence; or (b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from the offender." Section 36 (2) then provides that custodial sentence shall be,

> "(a) for such term [not exceeding the permitted maximum] as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with the offence; or
> (b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender."

[24] There is evidently a tension between section 14 of the Criminal Appeal Act and section 37 (3) of the Penal System Reform Act. The respective provisions in seeming conflict are italicized above in the text of this judgment. Section 14 seems to rule out the possibility that an appellate court might increase the sentence of the prisoner, "by reason or in consideration of any evidence that was not given at the trial" whereas section 37 (3) appears to empower the appellate court, when considering whether a custodial sentence should be imposed (section 35 (2)), and if so, the length of such a sentence (section 36 (2)), to "take into account any information about the offender which is before the court."

[25] In attempting to resolve this tension, a critical consideration is the relative history of the two enactments. Section 14 of the Criminal Appeals Act resembles, and was probably derived from, the Criminal Appeals Act of 1907[25] of the United Kingdom. The Act of

[25] Chapter 23.

1907 was intended to arm the then new Criminal Appeal court with powers that sufficed to rectify miscarriages of justice, of which there had been many notorious examples.[26] Section 9 provided for the powers of the Criminal Appeals court in relation to several matters with the proviso that, "in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial."[27]

[26] Although the 1907 Act has been repeatedly amended, the scheme of the Act has not been fundamentally altered. By the time the current formulation of section 9 was expressed in the Criminal Appeal Act 1968[28], parliament had moved from prohibiting consideration of evidence not given at trial, to granting the appellate court a discretion to exercise powers to let in additional evidence governed by judicial consideration of what was just. Thus section 23 of the 1968 Act (inserted by the Criminal Appeals Act 1995[29]) provides that the Court of Appeal may, "if they think it necessary or expedient in the interest of justice – … (c) receive any evidence which was not adduced in the proceedings from which the appeal lies."[30] In *R v Pendleton*[31] the House of Lords made clear that section 9 of the 1907 Act was to be treated essentially as equivalent to section 23 of the 1968 Act[32], and emphasized that section 23 was directed to the bringing of evidence before the court. To that end the court could order the production of a document or other object or the attendance or examination of a witness, whether on request or of its own motion, and may receive evidence not adduced at the trial. The House highlighted that section 23 (1) (c) was concerned with the reception of "fresh evidence"; possibly an unfortunate phraseology given that "fresh evidence" has its own peculiar regime in the common law of evidence.

[27] The historical background to the Penal System Reform Act is somewhat different. The Official Reports of the Barbados House of Assembly Debates record then Attorney

[26] *R v Pendleton* [2002] 1 WLR 72 at 76.
[27] ibid., section 9 (e).
[28] Chapter 19.
[29] Chapter 35.
[30] Section 23 (1) (c).
[31] [2002] 1 WLR 72.
[32] ibid, at 78.

General and Minister of Home Affairs, David Simmons Q.C., (as he then was) as stating that the antecedent bill drew, "upon the legislation which exists in the United Kingdom, principally the Powers of Criminal Courts Act, 1973…"[33] Two sections in the 1973 Act appear relevant to section 37 of the Penal System Reform Act. Section 19 concerns restrictions on imposing imprisonment on young offenders and provides that no court shall impose imprisonment on a person under twenty-one years of age unless the court is of opinion that no other method of dealing with him is appropriate. For the purpose of determining whether any other method of dealing with any such person is appropriate, "the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to his character and his physical and mental condition."[34] Section 20 deals with restrictions on imposing sentences of imprisonment on persons who have not previously served prison sentences and provides that no court shall pass a sentence of imprisonment on a person of or over twenty-one years of age on whom such a sentence has not previously been passed unless the court is of opinion that no other method of dealing with him is appropriate. For the purpose of determining whether any other method of dealing with any such person is appropriate, "the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to his character and his physical and mental condition."[35] The sentencing philosophy evident in sections 19 (2) and 20 (1) of the United Kingdom Act of 1973 appears to have been folded into provisions of section 37 of the Penal System Reform Act of Barbados.

[28] As indicated earlier, the UK legislative developments with regard to provisions in *pari materia* to section 14 of the Criminal Appeal Act of Barbados, appear to be converging with the present position in the Penal System Reform Act in investing in the judiciary a discretion to consider "fresh evidence" or "any information" before the appellate court when the appropriateness of sentences is being considered. Further, to the extent that there exists any inconsistency between the two sets of statutory provisions, the Penal System

[33] Hansard, dated December 15, 1998.
[34] Act of 1973, section 19 (2).
[35] Act of 1973, section 20 (1).

Reform Act must prevail. The Criminal Appeal Act was enacted in 1981[36] and went into operation on 1 September 1983 whereas the Penal System Reform Act was passed some seventeen years later, in 1998[37], and commenced on 15 May 2000. The long title of the Act of 1998 specified the objective "to enlarge the powers of the criminal courts", *inter alia*, "to lay down certain principles to be followed by courts when exercising their powers of sentencing". Based upon general principles, therefore, it would seem the power to take into account "any information" before the court when deciding upon the appropriateness of a custodial sentence and the length thereof, must prevail over the earlier prohibition on increasing the sentence by reason of evidence not given at the trial. We venture to suggest that this is in line with sound sentencing principles requiring regard to the nature of the offence and the characteristics of the offender, a point made by this Court in *Teerath Persaud v R*[38]. Indeed, in that case, we specifically used section 37 (3) to consider a disparate sentence imposed on Mr Persaud's co-accused in earlier and separate proceedings as the basis for adjusting the sentence of Mr Persaud on the ground that there should be parity in sentencing. In that judgment we characterized section 37 (3) as being "wide". [39]

[29] We shall return later, (at [38]), to the implication for the present proceedings of our taking account of information before this Court about the Appellant relating to the *Chicken Galore* incident.

Determination of the grounds of appeal

[30] In determining the Appellant's grounds of appeal, it is convenient to first consider whether the courts below erred in failing to give a discount for the Appellant's early guilty plea and secondly whether the prospect of the Appellant's rehabilitation was incompatible with the imposition of the six life sentences. It will be seen that much depends upon what in fact is meant by the sentence of 'life imprisonment', that is, much turns on the period of incarceration likely to be served by the Appellant based on precedents set by the

[36] 1981-14.
[37] 1998-50.
[38] [2018] CCJ 10 (AJ), judgment of the Court delivered by Anderson, JCCJ.
[39] Ibid. at [35].

Review Committee established under the Constitution for the release of prisoners sentenced to life imprisonment. A further question then arises as to whether satisfaction of proper penological objectives of punishment and deterrence require that a judge imposing a life sentence ought to recommend a minimum term of imprisonment before the prisoner is eligible for release.

Discount for Early Guilty Plea

[31] The Court considers the contention of the Appellant that established principles for awarding a discount for an early guilty plea ought to have been applied in this case, to be wholly misconceived. There can be no doubt that a discount for an early guilty plea is appropriate and warranted where a sentence for a determinate number of years is contemplated and appropriate. In its recent decision in *Teerath Persaud v R,*[40] this Court explicitly considered the policy reasons and suggested guidelines for awarding such a discount. But the situation is entirely different where an indeterminate sentence such as the sentence of death or of life imprisonment is properly imposed. A discount for an early guilty plea is wholly incompatible with such sentences.

[32] The principle that a discount is discordant with a life sentence is well established and has been illustrated in several cases. In *R v Leslie Kalache,*[41] the appellant had pleaded guilty to 6 counts of drug related offences. The DPP challenged the determinate sentences imposed on the basis that they were inadequate given that some of the offences carried a statutory maximum penalty of life imprisonment. Sully J reviewed the established principles of sentencing and stated that in the court's view the respondent's criminality was such that despite the utilitarian value of his pleas no discount should have been allowed to him for them. It was stated by Hulme J, in his dissent that, "his criminality was such that judged by the statutory provisions, the only proper conclusion is that he should remain in prison until his death…a discount for the utilitarian value of a plea is granted for the benefit of the criminal justice system and is not a consequence or entitlement

[40] [2018] CCJ 10 (AJ).
[41] [2000] NSWCCA (4 February 2000).

arising from an offender's criminality exhibited in a particular way…"[42] Hulme J was of the opinion that the determinate sentence of 6 years imposed on the third charge should be substituted with the indeterminate sentence of life imprisonment. However, in the result, Sully J proposed a series of determinate sentences significantly greater than those originally imposed. The third judge, Hidden J., agreed with these longer sentences. There was no discounting of these sentences on account of the guilty pleas.

[33] In *R v Wilkinson*[43], the appellant and others were charged with gun related offences for which he received determinate sentences for 3 of the charges and life sentences on 2. On appeal, the Lord Chief Justice in consideration of the indeterminate sentences stated that, "in many cases where a defendant's dangerousness is established there nevertheless will remain room for a sensible difference between sentencing judges whether a particular offence under consideration is or is not serious enough to require the imposition of a sentence of life imprisonment…the sentence of life imprisonment remains the ultimate sentence, to be reserved for the most serious and grave cases."[44]

[34] Before this Court, counsel for the Appellant appeared to have nuanced the argument relating to an early guilty plea to suggest that the Appellant's early guilty plea automatically rendered it impossible for the Appellant to be given a life sentence. To the extent this was intended, the Court similarly finds this argument entirely untenable. In deciding upon the appropriate sentence, the judge must consider all the aggravating and the mitigating factors, the latter of which will include, where factually relevant, an early guilty plea. But it is quite another thing to suggest that the mere fact of the early guilty plea suffices to take a life sentence off the table. To accede to such a suggestion would in effect empower an accused or a convict with a veto over possible sentencing options which would be inconsistent with the proper sentencing principles. In considering the suitability of any sentence the judge must give due consideration to any early guilty plea. For example, it could well be that in appropriate cases the fact of an early guilty plea,

[42] ibid at 201.
[43] [2009] EWCA Crim 1925.
[44] ibid at [99].

especially if accompanied by evidence of genuine remorse, could save a convicted person from a life sentence. But it is equally possible that a judge, having regard to the totality of the evidence may, even in the face of an early guilty plea, nevertheless properly impose a life sentence for manslaughter. As Lord Lane CJ said in the case of *Sharon Elizabeth Costen,*[45] having examined the principle of the discount, there are certain exceptions to the general rule that discount will be allowed for a guilty plea; the first and most important exception is the protection of the public and where it is necessary that a long sentence should be passed in order to protect the public, a guilty plea may not result in any discount.

[35] In the present case the Judge's sentencing remarks made clear that she took account of and applied the relevant statutory framework to the evidence. Justice Kentish considered section 35 (2) of the Penal System Reform Act which, as quoted earlier, mandated deliberation on whether a custodial sentence was justifiable or adequate:[23]. The Judge stated that the offences committed by the Appellant fell within the category of the most serious offences and that only a custodial sentence could be justified and was required to protect society from serious harm by him. The Judge then considered section 36 of the Penal System Reform Act which mandated that the length of the custodial sentence should be commensurate with the seriousness of the offence: [23]. She thereafter considered the aggravating and mitigating factors as indicated above [9]-[10] and concluded that the Appellant represented a danger to the society and therefore only a life sentence would be commensurate with the seriousness of the offence and adequate to protect the public.

[36] It bears emphasis that the learned trial judge was clearly of the view, shared unanimously by the three Justices of Appeal in the Court of Appeal, that the seriousness of the offence merited the life sentences imposed. Having decided that a custodial sentence was necessary the Judge turned her attention to Section 36 of the Penal System Reform Act and reminded herself of the statutory mandate "that in determining the length of the custodial sentence, I am required to impose a sentence commensurate with the seriousness of the offence."[46] She then noted that the gravity of the offences by the Appellant could

[45] (1989) II Cr App R (S) 182.
[46] BBCR2017/004, CCJ Records, page 895 of 904.

not be overemphasized and gave reasons for this view including through reference to the aggravating and mitigating factors. In summing up the essence of her remarks the Judge repeated that having regard to the aggravating factors identified she considered that "only a life sentence would be adequate --- sorry, is commensurate with the seriousness of the offences and adequate to protect from serious harm" from the Appellant.

[37] From a strict puritanical viewpoint it could be said, based on the last remark, that the judge appeared to have conflated imposition of the six life sentences as commensurate with the seriousness of the offences committed by the Appellant, with the imposition of the six life sentences as being necessary to protect the public from serious harm from the Appellant. Section 36 (2) suggests these components can and should be kept separate. Where the offence is a violent or a sexual offence, it may be that a term longer than is commensurate with the seriousness of the offence is necessary to protect the public from the offender. This distinction is not unknown in the sentencing process in Barbados. In *Williams and Bourne v R*,[47] the Court of Appeal noted that apart from questions of the seriousness of the offence, section 36 (2) required, where the offence is a violent one, that a long term such as is necessary to protect the public from the offender, must be imposed.[48] In *Queen v Frederick*[49] Crane-Scott, J. noted that she was minded to impose a custodial sentence longer than was commensurate with the seriousness of the offence and therefore explained to the offender in open court, in accordance with section 36 (3), her reasons for doing so. In many cases, presumably where the seriousness of the offence by itself merited the maximum penalty, the court simply reinforced the imposition of the maximum by reference to the need to protect the public. It is advisable to keep the two separate,[50] but on a fair reading of the summing up in the present case we have no doubt that the sentencing judge considered that the imposition of the six life sentences was commensurate with the seriousness of the offences committed.

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[47] April 27, 2006, Court of Appeal (Simmons CJ, Connell, J.A.; Moore, J.A.).
[48] ibid.
[49] July 30, 2012, Crane-Scott, J.
[50] Even in *Queen v Frederick*, July 30, 2012, Crane-Scott, J. had turned to "section 36 of the Act and to a consideration of the length of the custodial sentence which will be necessary to reflect the seriousness of both offences as well as to protect the public from serious harm" from the offender.

[38] We are also of the view that the imposition of the life sentences in this case was appropriate. The factors considered by the sentencing judge and the Court of Appeal would have sufficed, but this Court also has before it, additional damaging and damning information not available to the trial judge and not considered by the Court of Appeal. For the reasons given earlier, at [28], this Court is entitled to consider that information in deciding on the appropriateness of the sentences. Accordingly, we cannot ignore the fact that the Appellant had pleaded guilty to offences of robbery and arson committed less than 3 weeks earlier when he entered the *Chicken Galore* business premises on 13 August 2010. But for the intervention of Providence, another tragedy could also have ensued from that incident. The action of the Appellant revealed a callous and/or reckless disregard for human life that must attract the stern condemnation of this Court.

[39] Accordingly, save for the issue of the prospect for rehabilitation, to be considered shortly, it cannot reasonably be contended that the judge failed to follow established guidelines in arriving at the sentences she imposed. We therefore now turn the arguments related to rehabilitation.

Compatibility of life imprisonment with the objective of rehabilitation

[40] The Appellant made much of the fact that a discussion of rehabilitation did not feature in any significant way in the sentencing process in the courts below. Counsel relied on several cases to argue that this was a significant, and even a fatal flaw, in the sentencing remarks. It suffices to mention three of these cases. In *Daniel Robinson v R*[51], the appellant pleaded guilty to manslaughter on an indictment for murder and was sentenced to 20 years imprisonment with hard labour. He appealed his sentence on the basis that the sentence was harsh and manifestly excessive. The Court of Appeal of Jamaica found that while the trial judge had taken into account factors such as the guilty plea, that the accused had shown remorse, had a previous conviction for a minor offence over 20 years ago, and had no previous history of violence recorded against him, it was evident that the Judge had focussed his attention in the end solely on the deterrent aspect of punishment and as

[51] (2010) JMCA Crim 75.

such had taken too restrictive a view in sentencing. The court therefore set aside the sentence of 20 years and substituted it with a sentence of 15 years.

[41] *Alexander Don Juan Nicholas, Gregory Tan, Oren Lewis v The State*[52] involved the appellants' guilty pleas to murder and their sentence to life imprisonment without the possibility of parole. On appeal, the court considered the circumstances in which a life sentence is appropriate. It was stated by the Court of Appeal of Trinidad and Tobago that where a life sentence is at all a consideration, the first factor to be determined is the rehabilitative possibilities of the convict. Counsel for the Appellant in the instant case quoted extensively from the judgment in *Nicholas et al*. Reliance was placed on the dicta which specifically considered the imposition of a sentence of life imprisonment, and factors which the judge had to take into account such as: 1) the seriousness of the conduct of the appellant; 2) the expression of genuine remorse; 3) probation reports to gauge whether the appellant is fit for social re-adaptation; 4) the antecedents of the appellant; and 5) the presence of pre-meditation. Therefore, a life sentence is inappropriate where on a consideration of all these circumstances, the balance is tipped in favour of the appellant[53].

[42] Further, it was stated at paragraph [37] of *Nicholas* that apart from the circumstances of the offence, what must loom large in considering whether a life sentence is appropriate is the possibility or likelihood of the appellant being rehabilitated to the extent that he could be safely returned to society. Where there is evidence or information to suggest that this goal is achievable, a court must be slow to incarcerate an appellant for the rest of his natural life.

[43] The jurisprudence of the Eastern Caribbean Supreme Court emanating from *Rudolph Lewis v The Queen*[54] concerned an accused sentenced to life imprisonment upon a guilty plea. On appeal the court found that the appellant had strong mitigating factors in his favour and the sentence of life imprisonment did not sufficiently take into account his

[52] Trinidad and Tobago, C.A. CRIM.1-6/2013.
[53] ibid at [36].
[54] Saint Vincent and the Grenadines, HCRAP 2009/016.

personal circumstances leading up to the offence. The court re-emphasized the importance of rehabilitation relative to sentencing and stated that, "It is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person."[55]

[44] This Court agrees that in imposing a life sentence the sentencing judge must have regard to the relevant statutory requirements and the principles of sentencing. Section 41 (2) of the Penal System Reform Act[56] requires that the "rehabilitation of the offender is one of the aims of sentencing" which must be considered by the court in the sentencing process. In 2018, this was worded to require judicial consideration of "the need for the rehabilitation of the offender, and the need to promote a sense of responsibility on the part of the offender for the harm done to the victim".[57] The classical principles of sentencing also require that consideration be had to retribution, deterrence, prevention and rehabilitation.[58] It is the case, and regretfully so, that the learned trial Judge did not advert in any significant way to the issue of the rehabilitation of the Appellant. The word 'rehabilitation' does not appear anywhere in the sentencing remarks. The closest the Judge came to the concept is where she made it a condition of the Appellant's sentence that, during the period of incarceration, he be included in any treatment programmes that would address his cognitive deficiencies as identified by the Psychological Report. With respect, the possibilities for the rehabilitation of the Appellant ought to have been discussed more frontally and any factors identified as obstacles to rehabilitation identified and addressed.

[55] ibid at [33].
[56] Cap. 139.
[57] S. 41 (2) (h) of the Penal System Reform Act, as amended on 19 November 2018.
[58] *R v James Henry Sergeant* (1974) 60 Cr. App. R. 74.

[45] However, that cannot be the end of the matter. Rehabilitation is one of the aims of sentencing and a very important aim, but not the only one and in some circumstances, not the overriding one. The classical principles of sentencing reference three others: retribution, punishment, deterrence; a more modern formulation would be content only to reference punishment, deterrence and rehabilitation. Further, the Penal System Reform Act does not state the weight to be accorded by the sentencing judge to any of the proper objectives of sentencing. The case of *Hodgson*[59] outlined the circumstances in which a sentence of life imprisonment is merited. In this case the Court of Appeal of England stated that a sentence of life imprisonment is justified if the following criteria are satisfied:

> "The offence must be grave enough to warrant a very long sentence; The nature of the offence or the defendant's history must show that he is unstable and likely to commit such offences in the future; and the consequences of the offences to others may be especially injurious, as in the case of sexual offences or crimes of violence."

[46] In *Maloney,*[60] the appellant was sentenced to life imprisonment for raping an elderly lady of 80 years, who had suffered a stroke some 6 years before the date of the offence. In a unanimous judgment, the court concluded that the imposition of a life sentence on the accused was justified having regard to the seriousness of the offence. It was submitted that a sentencing judge in considering the matter in the round, including the individual circumstances of the offender and the offence, punishment and deterrence may be served by the prisoner remaining in prison for life.[61] The Respondent submitted that this very view was elucidated by Lord Bingham of Cornwall in *R v Wilkinson*[62] where he stated that, "there could be no reason, in principle, why a crime or crimes if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment."

[47] Australian jurisprudence is also relevant. In *Kuzimski v The State of Western Australia*,[63] the appellant was convicted of two counts of murder after a trial and was sentenced to life

[59] (1967) 52 Cr App R 113.
[60] Barbados Criminal Appeal No. 15 of 2012.
[61] David Roberts v R, Criminal Appeal No. 8 of 2008.
[62] [2010] 1 Cr App R (S) 1-00.
[63] [2012] WASCA 202.

imprisonment with a minimum period of 32 years for each offence. The facts were that the appellant had intentions of committing a robbery. He drove the deceased and another female to an area in a highway, where he killed them and then set the vehicle on fire. The sentencing judge commented that the attack on the victims was ferocious and had continued for a significant period of time. She also found that none of the victims died immediately. On appeal, it was determined that the sentencing judge did not overestimate the seriousness of the offence.

[48] The seriousness of an offence is also a crucial consideration in the imposition of a life sentence in Canada. In *R v Horvath*,[64] circumstances that would justify a life sentence were identified by the Ontario Court of Appeal. These are where the offence had been accompanied by unusual features of brutality, where the offence is part of a pattern of violent behaviour which threatens the physical safety of others. In the case of *R v Flett*[65] the appellant sought leave to appeal against a sentence of life imprisonment for 5 counts of manslaughter and 6 months imprisonment for one count of arson. The sentences were imposed after a guilty plea was entered. The appellant had deliberately set fire to a couch in her boyfriend's house where his mother resided. The act was in retaliation against his mother and sister. When the fire started the appellant had full knowledge that there were occupants in the house and given the time of the night, they were likely to be asleep. The Court of Appeal of Manitoba held that the sentencing judge had weighted the systemic factors and the unique factors such as the accused's lack of education, exposure to violence, and alcoholism and her own substance abuse problem. However, the court agreed that given the serious nature of the offences and the circumstances under which they were committed, the principles of denunciation and deterrence were overriding.

[49] In Barbados, the offence of manslaughter carries a maximum penalty of life imprisonment. The imposition of such a sentence lies within the discretionary range of punishment options available to the sentencing judge. In the present case, Justice Kentish considered the relevant principles of sentencing, the circumstances surrounding the

[64] (1983) 2 CCC (3d) 196 (Ont. C.A.).
[65] 2014 MBCA 111 (CanLII).

commission of the offences, the Pre-sentencing Report, the Psychological Report, the Penal System Reform Act, the aggravating and mitigating factors, the seriousness of the offence. It is evident she concluded, in light of all of these considerations, that the principles of punishment and deterrence were overriding factors. There were ample grounds on which to come to this conclusion. Accordingly, there can be no reasonable basis for the contention that the judge acted improperly in imposing the life sentences.

The practical meaning of a sentence of 'life imprisonment'

[50] The trial Judge clearly considered that the seriousness of the offence and considerations of deterrence and protection of the public warranted, even required, imposition of life sentences upon the Appellant. This Court agrees with the Court of Appeal that in so deciding the Judge acted in accordance with established sentencing principles. In consequence, the further question arises as to whether these objectives will necessarily be achieved by the bare imposition of a life sentence, or whether recommendation of a minimum period of incarceration is required. This question requires interrogation of what in practice is meant by a sentence of life imprisonment in Barbados.

[51] It is not always clear as to what is meant by life imprisonment. In *Naresh Boodram v The Attorney General of Trinidad and Tobago* the Court of Appeal of Trinidad and Tobago was faced with this very question and the Chief Justice admitted that "there is up to now no definitive exposition of the meaning of 'life imprisonment'."[66] It is the case that the common sense notion that 'life imprisonment' necessarily means imprisonment for the rest of the natural life of the prisoner enjoyed widespread acceptance in an earlier era. In *R v Foy*[67] the U.K. Court of Appeal stated,

> "... Life imprisonment means imprisonment for life. No doubt many people come out while they are still alive, but when they do come out it is only on licence, and the sentence of life imprisonment remains upon them until they die. Accordingly, if the court makes any period of years consecutive to life imprisonment, the court is passing a sentence which is no sentence at all, in that it cannot operate until the sentenced man dies." [68]

[66] Civ. App. No. 177 of 2010, para. [31].
[67] R v Foy (1962) 2 All ER 246.
[68] ibid, per Lord Parker C.J.

[52] But times have changed. The global trend towards the abolition of the death penalty has been mirrored by an increasing use of sentences of life imprisonment[69]. The ruling in *Pratt v Morgan*[70] resulted in many prisoners on death row in Caribbean countries having their sentences commuted to life imprisonment. In a manner of speaking these prisoners received life after death. Increased focus on restorative justice and prison reform, including the introduction of parole systems, has meant that prisoners sentenced to life imprisonment do not necessarily remain incarcerated for the rest of their natural lives. In some jurisdictions there are clear guidelines. For example, in Belize life can be 15–20 years[71] and in Trinidad and Tobago, the range of incarceration is 15-25 years[72] although in some cases considered to be the 'worst of the worst' the Trinidad and Tobago judiciary has imposed minimum sentences which ranged from 30-35 years.[73] In one of these cases, *Shawn Parris v The State*,[74] Parris had pleaded guilty to a charge of manslaughter and was sentenced to life imprisonment, not to be released before the expiration of 30 years. The Court of Appeal upheld this sentence on the application of the basic principle of sentencing that a maximum sentence is reserved for the most heinous circumstances and that in the view of the Court, the circumstances of Shawn Parris' case qualified as 'most heinous'.

[53] As indicated earlier, upon request by this Court, information was provided by counsel in this appeal regarding the periods served by prisoners in Barbados convicted of manslaughter and sentenced to life imprisonment or convicted of murder and sentenced to death, which sentence was subsequently commuted to life imprisonment. The Court noted with some concern the varying range of periods of incarceration served by offenders sentenced to life imprisonment. In one case the prisoner was released after serving 8 years and in another case after serving 10 years. However, in other cases, prisoners have been

[69] For example, see Penal Reform International, The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda, 2012, p7; Penal Reform International, Life after death: What replaces the death penalty? 2012, p1.
[70] (1993) UKPC 1; 2 AC 1.
[71] *August and Gabb v The Queen*, [2018] CCJ 7 (AJ).
[72] *Seepersad & Panchoo v The State* Cr. App. 68/1983; *Horace Stephen v The State* C.A. Crim. 15/1999.
[73] *The State v Fazal Mohammed* HCA 24/72/2003; *The State v Sangit Chaitlal* HCA 2476/2003.
[74] C.A. Crim. 12/2004.

incarcerated for 25, 26, and 33 years, with no indication of whether they were likely to be released before their deaths and, if so, the time-frame and the conditions for such release.

[54] The Court accepts that the circumstances of each murder or manslaughter will necessarily be unique and consequently that the sentences imposed, and the period of actual incarceration, will differ. Accordingly, no adverse comment is necessarily intended by drawing attention to the disparity between prisoners in the time served for the same sentence. For present purposes it suffices to indicate that the imposition of the life sentences on the Appellant does not necessarily mean that he will spend the rest of his natural life in prison. At least theoretically, based upon the precedents available to us, he could be released after 8 years. This was probably what the Appellant's earlier attorney had in mind when she made the cryptic remark at the sentencing hearing that life imprisonment could be more beneficial to her client than a determinate sentence of incarceration for a specific number of years.

[55] From the sentencing remarks of the trial Judge it is most unlikely that she would have considered the incarceration of the Appellant for 8 years to be sufficient to serve the penological objective of punishment and deterrence in this case. Yet the requirement of review under Rule 42 makes this a possibility. Also, from those remarks, it is not clear whether the Judge would have considered that incarceration for 33 years was necessary before there could be any consideration of the possible rehabilitation of the Appellant. Yet the operation of the review system under Rule 42 also makes this a possibility. The question therefore arises as to whether judges in Barbados, in imposing a life sentence, ought to recommend a minimum period of incarceration before the Appellant could be released.

Recommendation of a minimum term to be served

[56] This Court was informed by the parties in this appeal that in Barbados at present when a sentence of life imprisonment is imposed, no minimum tariff is set. There is no legislation, regulation or sentencing guidelines authorizing or guiding the imposition of a tariff. The

result has been a rather opaque system in which prisoners serve vastly differing periods of incarceration for the same sentence, a point illustrated earlier.

[57] The recommendation of a minimum period of sentence when imposing a life sentence, sometimes referred to as issue of tariffication, has been addressed in some jurisdictions through legislation which charts the maximum and minimum sentences for statutory offences often encountered in practice. In Jamaica, for example, where a sentence of life imprisonment is imposed pursuant to section 3 (1) (a) of the Offences Against the Persons Act, the court must specify a minimum period of not less than 20 years which the convicted person should serve before becoming eligible for parole[75]. For attempts to murder pursuant to sections 14–17 where the maximum penalty is life imprisonment, the normal range is 10–20 years with a starting point of 12 years[76]. Further, the statute states that where life imprisonment is the penalty, it is the duty of the sentencing judge to determine where in that extended range of sentencing possibilities to place the specific offender, bearing in mind the accepted principles of sentencing, the circumstances of the offender and other relevant considerations[77]. Further, there are statutory bases in some other countries on the setting of the minimum period to be served in murder cases[78].

[58] But judicial recommendation of a minimum period of incarceration when handing down life sentences is not fundamentally based on the authority of legislation. There are, rather, more profound considerations at stake. Sentencing is quintessentially a judicial function and is first and foremost an exercise of judicial discretion. That discretion cannot properly be exercised by non-judicial bodies. Regard to established sentencing principles requires that the sentencing judge must consider punishment, deterrence, and rehabilitation in

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[75] Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts (December 2017), Appendix A-1.
[76] ibid at Appendix A-2.
[77] *Meisha Clement v R* [2016] JMCA Crim 26, (2016) 88 WIR 449, para. [62].
[78] In the United Kingdom the Criminal Justice Act 2003 sections 269 to 277 and Schedules 21 and 22 contain guidance on setting the minimum term in murder cases; in Canada, the Criminal Code, RSC 1985, c C-46, s 745 prescribes the sentence to be pronounced against a person who is to be sentenced to imprisonment for life. Note that in New South Wales, the average prison term for murder is 25 years, despite the Crimes Act 1900 (NSW) stating the maximum sentence to be for the remainder of the offender's 'natural life'."

fashioning a just and appropriate sentence. Rehabilitation is inextricably linked to the prospect of release but cannot be definitively evaluated or pronounced upon at sentencing. Much will depend upon the correctional systems in place for rehabilitation and the response to them by the prisoner, as well as the prisoner's overall attitude and conduct. These matters will necessarily be assessed sometime after sentencing, by others, although the judiciary may nonetheless be involved.[79] A sentence of life imprisonment rarely means that the prisoner will remain in prison for the rest of his natural life. That being so, it follows that a life sentence is not itself a sentence of punishment or deterrence; it is the imposition of the tariff which carries the greater force as punishment and deterrence. And the appropriate sentence to serve the purposes of punishment and deterrence must necessarily remain, as a constitutional imperative, a matter exclusively for the judiciary.

[59] In this regard, the decision by the House of Lords in the seminal case of *R (Anderson) v Secretary of State for the Home Department*,[80] is highly instructive. In that case, statute conferred a discretion on the Home Secretary to release on licence a convicted murderer serving a sentence of life imprisonment if recommended to do so by the Parole Board. The practice of the Home Secretary was to look to the judiciary for advice on the time to be served to satisfy the requirements of retribution and deterrence, to the Parole Board for advice on risk to the public, and to consider separately the requirements of maintaining public confidence in the administration of justice by not engaging in premature releases. Generally, the Home Secretary would set a minimum period of incarceration in line with the judicial recommendations but in a small minority of cases the period set was either longer or shorter than the judges had recommended. The Judge had recommended that the appellant serve a minimum term of 15 years for two murders and the Lord Chief Justice had made the same recommendation, but the Home Secretary set the term at 20 years.

[60] The House was unanimous in holding that the exercise by the Home Secretary of a discretion to impose a minimum period of incarceration was incompatible with the

[79] *R (Anderson) v Secretary of State for the Home Department* [2003] 2 LRC 703 at page 2.
[80] [2003] 2 LRC 703.

appellant's right under Article 6 of the European Convention on Human rights to have a sentence imposed by an independent and impartial tribunal. Giving effect to the decision of the Grand Chamber of the European Court of Human Rights in *Stafford v United Kingdom*,[81] delivered 6 months earlier,[82] their Lordships accepted that a defendant had a right to a fair trial by an independent and impartial tribunal; that the imposition of sentence was part of the trial; that the fixing of the tariff was legally indistinguishable from the imposition of sentence; and, therefore, that the tariff should be fixed by an independent and impartial tribunal. The Home Secretary, as part of the Executive, was not an independent and impartial tribunal and therefore should not fix the tariff. Lord Steyn stated:[83]

> "The power of the Home Secretary in England and Wales to decide on the tariff to be served by mandatory life sentence prisoners is a striking anomaly in our legal system. It is true that Parliament has the power to punish contemnors by imprisonment. This power derives from the medieval concept of Parliament being, amongst other things, a court of justice… Subject to this qualification, there is in our system of law no exception to the proposition that a decision to punish an offender by ordering him to serve a period of imprisonment may only be made by a court of law… It is a decision which may only be made by the courts. Historically, this has been the position in our legal system since at least 1688. And this idea is a principal feature of the rule of law on which our unwritten constitution is based."

[61] The reference by the learned law lord to 'mandatory life sentence prisoners' is not relevant for present purposes it being accepted by the House that the ECHR was correct in holding that there was:[84]

> "… no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and offender represents the element of punishment."

[62] The proposition from the case of *R (Anderson)* that tariff-fixing is a sentencing exercise which should be carried out by a judge or judicial tribunal, has been followed in several

[81] (Application No. 46295/99, 28 May 2002).
[82] Delivered on 28 May 2002.
[83] ibid., at para [51].
[84] ibid., at para [17].

subsequent cases, including the following: *R v Selassie and another*;[85] *Regina v Bell (Martin)*;[86] and *Ludawane v R.*[87] Notwithstanding the existence in these cases of a statutory regime providing for parole after a specified amount of years served, the courts reiterated that the minimum sentence is to be set by the judicial officer as part of the sentencing process at trial.

[63] In *Ludawane,* the Solomon Islands Court of Appeal considered the case in which the Appellant had brutally murdered his son by beating him horrifically several times daily over a ten-day period. The sentencing judge imposed a mandatory sentence of life imprisonment and recommended that the appellant serve at least eight years before being considered for release on licence. The Correctional Services Parole Regulations 2014, provided that prisoners serving a life sentence who had served at least ten years in prison, were entitled to apply to the Parole Board for parole. Having accepted that sentencing, including setting the minimum term of imprisonment was part of the trial and thus a function reserved for the judiciary, the court considered the appropriate minimum. It was of the view that the term of eight years failed properly to reflect the gravity of the offence and was manifestly inadequate. In the circumstances, the appropriate starting point would be 20 years, which would be reduced through mitigation to 18 years.

[64] The court noted the potential for conflict between the regulations and a judicially determined minimum term of imprisonment and made the following interesting remarks worth quoting in full:[88]

> "[30] In this case, the Regulations provide for a substantially shorter minimum term than we believe should be served. The conflict here falls in favour of the prisoner. Whilst we can appreciate the intellectual argument in favour of resolving the potential conflict in future cases which may result in a position less favourable to an appellant in other cases, this is not one of them and therefore the imperative to resolve the matter does not arise.
> [31] We further note that the Regulations as they presently appear are necessary to guide the Parole Board in dealing with those cases where life sentences have been imposed without any corresponding imposition of a minimum term. Such

[85] [2013] UKPC 29.
[86] [2015] EWCA Crim 1426.
[87] [2018] 1 LRC 598.
[88] ibid., at paras [30]-[32].

> sentences will be in the majority given that there was, prior to this legislation, no purpose to be served in making any minimum term recommendation.
> [32] We express the hope that before any potential conflict becomes actual … legislation or regulations are drafted acknowledging that the minimum term be set as part of the sentencing process and regarded by the Executive and the Parole Board as the time at which an offender may make application to be considered for parole. It would, we note, require an amendment to the Constitution to provide otherwise. The Regulations will still be required to specify a minimum term before which parole may be sought for that category of offenders whose sentence does not provide for any minimum term. The new category, where a minimum term has been set, could be catered for through a provision recognising the minimum term recommendation as the time at which parole may be sought for the first time."

[65] This Court has emphasized its unhesitating acceptance that the rehabilitation of the offender is a factor that must be considered by the sentencing judge in fashioning the appropriate sentence and that it will be for others in the criminal justice system to ascertain when rehabilitation has been accomplished. However, in discharging its judicial function to fashion an appropriate sentence we are equally sanguine in the view that the sentencing judge when imposing a life sentence (as distinct from a determinate sentence) not only has the authority but, we venture to say, the responsibility to recommend the tariff or minimum period of sentence to be served for purposes of deterrence and punishment. The judge, having within his or her purview, the detailed knowledge of the facts of the case, any instructive reports, should weigh up all the factors, aggravating as well as mitigating, and recommend, as a term of the sentence of life imprisonment, a tariff or minimum period to be served before there is any possibility of release. Recommending a minimum period of incarceration is consistent with the constitutional rights to a fair hearing before an independent and impartial tribunal, protection of the law and equality before the law. Of course, such a recommendation is necessarily without prejudice to the constitutional regime and powers of the Barbados Privy Council specified in sections 76-78 of the Constitution.

[66] In the present case there is the appearance of conflict between the judicial imposition or recommendation of a mandatory minimum term of imprisonment and the provisions of Rule 42 of the Prison Rules allowing for review of sentence after 4 years. This mandatory review process could carry the implication that a 'lifer' may be released after serving 4

years' incarceration. As was suggested in *Ludawane* in relation to a similar seeming tension, this is only the appearance of a conflict. We also agree with the suggestion in that case that any apparent conflict should not be allowed to exist for any longer than it takes for the Legislature to resolve the situation with suitable amendments to the Prison Rules following the spirit of this judgment. As proposed in *Ludawane*, a suitable amendment may be a provision recognising the recommended minimum period of incarceration as the time at which the review is undertaken for the first time. It may also be that the Legislature of Barbados would wish to undertake such amendments in the broader context of legislating for a modern parole system.

[67] In the circumstances of the present case, the factor which the sentencing Judge considered as meriting a life sentence was, essentially, the need to protect the public from the Appellant. Justice Kentish in her sentencing remarks stated:

> "Regrettably, neither your cooperation with the police or your clean record, or your guilty plea, or your expression of remorse which I indeed do accept, is sufficient to detract from or neutralise in any way whatsoever the gravity of the offences to which you have pleaded guilty and the senseless and callous and horrific manner in which those six young women met their tragic and untimely deaths. Nor do the circumstances of the offence or your circumstances counter balance the aggravating factors of this case…I consider that you represent such a grave danger to this society that only a life sentence would be adequate, sorry is commensurate with the seriousness of the offences and adequate to protect the public from serious harm from you."

[68] The aggravating and mitigating factors were identified and discussed by the Judge and by the Court of Appeal. They have already been recounted by this Court in this judgment. Taking these factors into account and in order to secure the sentencing objectives evident in the sentencing remarks by the Judge, whilst not ruling out the possibility of rehabilitation, it appears necessary that a recommendation be made for the minimum period of incarceration. We therefore recommend that a minimum period of incarceration for twenty-five (25) years is necessary to satisfy for the objectives of punishment and deterrence.

CONCURRING JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS, PCCJ:

Introduction

[69] Renaldo Alleyne appealed against six concurrent life imprisonment sentences imposed upon him. Alleyne had originally been charged with murder, but he sensibly pleaded guilty to manslaughter. The Director of Public Prosecutions accepted that plea and chose not to proceed with the murder charges.

[70] The facts and the circumstances that led to the charges of murder being laid are captured in the judgment of the Court delivered by Anderson JCCJ. I agree with him that Alleyne's life sentence should not be disturbed for the reasons he sets out. I wish, however, to make the following additional brief comments.

[71] The Record of Appeal did not tell us much about Shana Griffith or Kelly-Ann Welch or Pearl Amanda Cornelius or Kellishaw Kamar Ollivierre or Nikkita Dionne Samantha Belgrave or Tiffany Harding. What we do know is that they were all innocent women who fell victim to Alleyne's dreadful acts. They had huddled together in the back of the store where they had concealed themselves, seeking protection from Alleyne and his criminal accomplice. As they succumbed to the noxious flames, their gut-wrenching screams, before they died, could be heard by those powerless to save them. When rescuers reached them, it was thought that Shana Griffith could be saved. She was rushed to the hospital but, unfortunately, she was pronounced dead on arrival.

[72] None of these women deserved this cruel fate. Their respective families and loved ones must now forever bear the deep anguish of living with a huge void; a gaping hole that not even time will ever fully close. The grief of the bereaved was not just shared. It was multiplied. As the trial judge rightly noted, 'the whole society was shocked and traumatised by this experience'.

Barbados' sentencing regime

[73] In the proceedings before us, a variety of cases on sentencing policy was cited. There is in place in Barbados a dedicated statutory framework for sentencing and so judges should exercise some caution when resorting to precedents from other jurisdictions. Sentencing must be premised on each country's unique statutory regime, the adoption by the judiciary of appropriate sentencing guidelines to accompany that regime and consideration of precedents that are relevant.

[74] In sentencing an offender, a judge in Barbados must look to the Penal System Reform Act[89] ("the Act"). Before imposing a custodial sentence, the judge must determine that the offence is so serious that only imprisonment is justifiable[90] or that imprisonment is required in order to protect the public.[91] Where imprisonment is appropriate, the sentence handed down must be *commensurate* with the seriousness of the offence.[92] In the case of violent or sexual offences, however, a term of imprisonment in excess of the commensurate sentence may be imposed (but not exceeding the maximum permissible sentence) if the judge considers that to be necessary for the public's protection.[93]

[75] In order to determine what is 'commensurate', the judge must take into account any information available to the court concerning the circumstances of the offence, including any aggravating or mitigating factors.[94] Equally, before deciding whether a longer prison term is required for the public's protection, the judge may take into account any information about the offender that is available.[95] As to mitigating features, s 39(1) of the Act provides that the judge may consider any number of relevant factors. These could include the offender's age and other particular circumstances such as social or economic conditions; whether and at what point in the proceedings the offender offered a guilty plea; the facts or circumstances of the offence and the offender's degree of involvement;

[89] CAP 139.
[90] Penal System Reform Act CAP 139, s 35(2)(a).
[91] Penal System Reform Act CAP 139, s 35(2)(b).
[92] Penal System Reform Act CAP 139, s 36(2)(a).
[93] Penal System Reform Act CAP 139, s 36(2)(b).
[94] Penal System Reform Act CAP 139, s 37(3)(a); See also *Teerath Persaud v The Queen* [2018] CCJ 10 (AJ).
[95] Penal System Reform Act CAP 139, s 37(3)(b).

as well as any attempt by the offender to make reparation for the offence.[96] The judge is obliged to observe the sentencing guidelines set out at s 41 of the Act.

[76] The Act tells us what the ultimate goal is when a court passes a custodial sentence. The aim is to arrive at a sentence that is *commensurate* or, in the case of a violent or sexual offender, the imposition of a term that is appropriately longer than what is commensurate. See: s 36(2)(a) and (b). If the judge considers that a custodial sentence for a term longer than is commensurate is appropriate, s 36(3) requires the sentencing judge to give certain explanations in open court. Section 36(4) states:

> "A custodial sentence for an indeterminate period shall be regarded for the purposes of subsections (2) and (3) as a custodial sentence for a term longer than any actual term."

[77] I do not interpret s 36(4) as limiting the imposition of indeterminate sentences only to offences that fall within s 36(2)(b) (that is, those where terms in excess of that which is commensurate may be given). I would be most reluctant to find that, by a side wind, Parliament withdrew from the judiciary the possibility that a judge might find that a life sentence in a particular case is a commensurate sentence. Where, however, a judge regards a life sentence as being commensurate (because it is not reduced by mitigating circumstances), it is obvious that such a sentence cannot be further increased for the public's protection from the prisoner. I interpret s 36(4) to mean that whenever a judge imposes a sentence of an indeterminate period, that sentence is to be regarded and treated by the judge in the same manner as the judge must treat the handing down of a sentence that is longer than what is commensurate. In practical terms this means that, in imposing a life sentence, the judge is obliged in ordinary language to explain fully why the sentence is for such a term.

[78] Although the Act gives us certain factors that must be considered in sentencing an offender, the Act does not indicate precisely how the judge must go about the sentencing exercise. The Court of Appeal in *Pierre Lorde*[97] established very helpful guidelines for

[96] Penal System Reform Act CAP 139, s 39(1) as amended by the Penal System Reform (Amendment) Act 2018.
[97] (2006) 73 WIR 28.

determining, for various kinds of offences, a suitable starting point for trial judges. Further, in *Teerath Persaud*,[98] this Court broadly adopted the commendable approach to sentencing outlined by the Court of Appeal of Trinidad and Tobago in *Aguillera and Ors v State*.[99] This Court stated that the sentencing court should factor:

> "all possible aggravating and mitigating factors…concerned with the objective seriousness and characteristics of the offence…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*[100] full credit for the period spent in pre-trial custody is then to be made and the resulting sentence imposed."

Sentencing where life imprisonment is a possibility

[79] Life sentences fall into a unique category of sentences. If, after considering all of the aggravating and mitigating circumstances of the offence (as distinct from those of the offender), a judge is initially disposed to impose a life sentence, that disposition can be softened, in appropriate cases, upon a consideration of the mitigating circumstances that relate to the offender. That would be because matters such as the offender's early guilty plea or his age or level of remorse or social or economic circumstances, cause the judge to moderate his or her original disposition in favour of a lesser sentence measured in terms of years or months.

[80] Alternatively, however, a) the circumstances relating to the offence may be so ghastly that the judge is inclined to regard life imprisonment as being eminently appropriate and therefore *commensurate* notwithstanding the mitigating circumstances the offender put forward. In other words, the judge may consider that a particular offence and its consequences are so serious that neither an early guilty plea nor any other mitigating factor can, in that particular case, serve to reduce the life sentence. Or, having found that

[98] [2018] CCJ 10 (AJ).
[99] (2016) 89 WIR 451.
[100] *Teerath Persaud v The Queen* [2018] CCJ 10 (AJ) at [46].

the circumstances of the offence initially suggest that life imprisonment might be appropriate, in considering next the aggravating and mitigating factors relating to the offender, the judge may b) conclude that the mitigating factors put forward are outweighed by aggravating ones. In this regard, the judge may find that, despite the existence of some mitigating factors, the offender has, for example, such an appalling record that it cancels out the mitigating circumstances. In either of these two situations, that is a) or b), the sentence of life imprisonment is "commensurate".

[81] In Alleyne's case, in my view, it was open to the sentencing judge to conclude, as she did, that lobbing two Molotov cocktails into a crowded boutique, resulting in the horrific deaths of six persons, deserved no less than a life sentence even after hearing any and all mitigating circumstances that Alleyne put forward. Alternatively, the Court of Appeal could have found that Alleyne's early Guilty plea, his youthfulness and the remorse he exhibited were outweighed by the seriously aggravating circumstance that he had recently been involved in another incident of firebombing premises used by the public.

[82] The trial judge was criticised for failing to address, in any significant way, Alleyne's rehabilitation prospects in her sentencing remarks. The need for offender rehabilitation is listed in s 41 of the Act as a guideline to be observed during sentencing. I do not accept that this reference to rehabilitation was intended to serve as a factor to reduce a commensurate sentence of life imprisonment or a sentence of life imprisonment imposed for the protection of the public. In the context of life sentences imposed in such circumstances, the reference to rehabilitation expresses the concern that, while incarcerated, the offender's character should improve so that he can ultimately function as a law-abiding member of society; that in carrying out the sentence the prison authorities must make available suitable rehabilitative programmes.

Minimum term recommendations on sentencing

[83] Life imprisonment is an indeterminate sentence. In practical terms, its execution could mean different things to a 20-year-old than to a 70-year-old offender. We must also bear in mind that, as pointed out in the main judgment, life imprisonment in practice in

Barbados rarely ever means that the prisoner dies in prison. The historical experience suggests that he may spend anywhere from 8 (the shortest mentioned minimum) to 33 (the longest) years in prison. Indeed, at the sentencing hearing, Alleyne's lawyer candidly acknowledged that for Alleyne, 'the possibilities under a life sentence are better than a lengthy sentence'.

[84] I believe this case provides the first instance where in Barbados a recommendation is being made as to the minimum length of time a prisoner should remain incarcerated before being eligible for release. Given the disparities and inconsistencies involved in the execution of life sentences, I believe that, without in any way compromising the constitutional powers of the Barbados Privy Council, the recommendation suggested by the Court is appropriate.

Conclusion

[85] Alleyne's crime was a serious one deserving of a stiff sentence. For the premeditated act of setting a fire in a crowded and confined clothing store causing the deaths of six persons, the trial judge was fully entitled to regard a life sentence as being commensurate. In other circumstances, Alleyne's early guilty plea and youth might have served to reduce his sentence. But these factors were cancelled out firstly, by the seriously aggravating circumstances of the offence and, moreso, by the fact that Alleyne had, shortly before this incident, committed and pleaded guilty to torching premises to which the public had access.

CONCURRING JUDGMENT OF THE HONOURABLE MR JUSTICE BARROW, JCCJ:

[86] I have had the benefit of reading in draft the preceding judgments and after anxious and protracted consideration I agree that the appeal should be dismissed, and the life sentences upheld.

Location of discretion

[87] Sentencing can be notoriously difficult because it is so much a matter of discretion. There is no objectively correct sentence. Appellate courts have no right to substitute for the

sentence the sentencing court has imposed, the sentence the appellate court would have imposed. This is for the simple reason that the discretion is not given to them. The law is settled that an appellate court must only interfere with the sentencing judge's discretion if the sentence was wrong in principle or manifestly excessive.

[88] As did the Court of Appeal, my colleagues have decided to uphold the sentencing judge's decision as justified by the established sentencing objectives of punishment and deterrence. I remind myself that it is not enough to dissent because I may have placed greater emphasis on just desert or rehabilitation. Or given more weight to the guilty plea or the lesser criminality of the appellant. I will not develop the point, but simply say I think it would be a mistake to take as conclusive of the seriousness of Alleyne's offence and his moral blameworthiness the fact that he caused the shocking deaths of six young persons. In the Canadian case of *R v Sidhu*[101] the offender caused 16 deaths (as well as 13 serious injuries) by demolishing with his semi-tractor unit a bus carrying a school hockey team and associated persons. The sentencing court imposed eight years imprisonment and not the maximum of 14 years. It did so because, notwithstanding the unprecedented number of deaths, it carefully examined the degree of criminality of the offender, including the fact that his actions were not deliberate.[102] Therefore, even where an offender has caused the most shocking harm it does not automatically exclude the operation of mitigating factors.

Public confidence

[89] In this case, an acceptance of the sentencing court's decision as justified by the principles of retribution and deterrence is strengthened by a recognition of the importance of the society's sense of justice. While a court must not abdicate its decision making in favour of popular opinion, or be dictated to by this undoubted pressure, courts must be sensitive to the community's sense of justice. A court must be concerned about public confidence in the administration of justice and the rule of law.

[101] [2019] SKPC 19.
[102] ibid at [103].

[90] *R v Sargeant*[103] is an early English case in which the classical principles of sentencing were stated, as being retribution, deterrence, prevention and rehabilitation. It contains a helpful statement[104] on the impact of public opinion on the sentencing decision:

> "The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentence they pass. The courts do not have to reflect public opinion. On the other hand, courts must not disregard it. Perhaps the main duty of the court is to lead public opinion. Anyone who surveys the criminal scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence.

[91] The stake that the society has in the sentencing process was pithily captured by the Supreme Court of Canada in *R v M. (C.A.)*[105] in their discussion of denunciation, which is regarded as an element of retribution and deterrence. The court stated:

> "[81] … The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law …"

[92] The principle noted above in *Sargeant,* that it is a limited effect that popular opinion may be allowed to have on a court's decision making, was recently discussed in *Layne v Attorney General of Grenada*.[106] There the Privy Council was divided as to the weight to be given to public opinion in arriving at a determination of the good character of an applicant for admission to practice law but were agreed that it was, at least, a relevant consideration. In that context, full regard was given to the importance of public confidence in the preservation of the rule of law.

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[103] (1974) 60 Cr App R 74.
[104] ibid at p. 77.
[105] [1996] 1 SCR 500.
[106] [2019] UKPC 11.

Society's code of values

[93] In the present context, it is fundamental that the apex Court of Barbados must be conscious of the need to maintain public confidence in the sentencing decision of the court. It must be guided by that consciousness by upholding a sentence if it is satisfied the sentence is consistent with the existing sentencing practices and philosophy of Barbados. In this case, there is simply no precedent of a sentence for a similar offence by which to measure consistency. Attention to the Barbadian "society's basic code of values" must serve as the guide in this case. Those values are readily confirmed by two references.

[94] First, it is indicative that while the mandatory death penalty was struck down as unconstitutional by this Court a little less than a year ago, in *Nervais v R*,[107] in common with most common law Caribbean states, Barbados retains the death penalty for murder. Along with its common law neighbours, the society has not seen fit to abolish this punishment as some common law countries in other parts of the world have done. The point is not whether our Caribbean countries may be labelled as progressive or backward, it is that our societies will change at their own pace, and the courts must be respectful of this even as the courts must accept their role in bringing about changes. That role is to decide on constitutional challenges to existing laws brought by persons in the society. It is not to initiate policy changes or lead (as opposed to guide) public opinion. One must accept that it remains part of the society's code of values that the sentence of death remains a penalty, (of course subject to possible challenge; certainly in individual cases). So too, one must accept that in this case, the imposition of the maximum penalty laid down by law for this offence accords with the society's code of values.

[95] Second, when the sentence was imposed there were no applicable judicial decisions to serve as a guideline for the commensurate sentence, but now there is a guideline available to this Court. This is by virtue of the fact that the case has reached this stage where four judges in the two courts below, who decided on what was a fair sentence for Alleyne, were satisfied that the sentence of life imprisonment was just. Further guidance comes from the fact that the majority in this Court also thinks so. It is clear that even if the two

[107] [2018] CCJ 19 (AJ).

grounds that counsel for Alleyne argued were decided in his favour, that would not be enough to upset the overall decision. This is because the Court of Appeal and the majority are satisfied that neither the guilty plea nor the consideration of rehabilitation is capable, in this case, of producing a reduced sentence. On that view, the sentences imposed on Alleyne were not manifestly excessive or wrong in principle.

[96] In the end, therefore, I accept that overall justice requires this Court to uphold the sentences of life imprisonment. I would also accept that the time has come when legislation is needed to provide for the courts to stipulate minimum or qualifying periods before early release, and for the significant considerations that must go into that regime.

Orders

[97] Having regard to the preceding judgments, the Court issues the following orders.

a. The Appeal is dismissed.
b. The sentence of six concurrent life sentences imposed upon the Appellant is upheld.
c. The Appellant should not be eligible for release before serving a minimum period of twenty-five (25) years' incarceration
d. The minimum period of incarceration shall include the period spent on remand.

/s/ A. Saunders

Mr. Justice A. Saunders, PCCJ

/s/ D. Hayton

Mr. Justice D. Hayton, JCCJ

/s/ W. Anderson

Mr. Justice W. Anderson, JCCJ

/s/ M. Rajnauth-Lee

Mme Justice M. Rajnauth-Lee, JCCJ

/s/ D. Barrow

Mr. Justice D. Barrow, JCCJ