ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 32 OF 2004

BETWEEN:

DANIEL DICK TRIMMINGHAM

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal

Appearances:

Ms. Kay Bacchus Browne for the Appellant
Mr. Colin Williams, DPP [Ag.] and Mr. Richard Williams for the Respondent

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2005: October 12; 13.

JUDGMENT

[1] BARROW, J.A.: The appellant, Daniel "Dick" Trimmingham, also known as "Compay", was convicted of the murder of Albert "Bertie" Brown in furtherance of a robbery and was sentenced to death. We upheld the conviction and sentence and now deliver our reasons for decision.

A gruesome[1] murder

[2] Felix "Ding" Browne, who was rightly treated by the trial judge as an accomplice to the murder, was the prosecution's eyewitness to the murder. Browne testified that on 8th January 2003 he and the appellant, both farm workers, had been at the farm in Kelbourney at which they were employed. Browne said he had been cutting grass while the appellant had been cleaning a firearm that the appellant was in the habit of carrying. Around 5:30 that evening they left the farm and went to Carriere and on to the land where the deceased kept his goats. They saw the deceased pass by but apparently the deceased did not see them. They went to another area where there was a shed and the appellant called a halt. Ding saw the deceased coming with his goats. The appellant told Ding to hide and they hid in separate spots. From the shed in which Ding hid he heard the voice of the appellant and when Ding peeped out he saw the appellant had the deceased on the ground. Ding said that the appellant had the deceased 'stick up' with a gun; the appellant had taken away the cutlass that the deceased had been carrying. Ding said he heard the appellant ask the deceased for money and the deceased replied that he had given away to his daughter the last $900.00 that he had gotten. Ding said he then told the appellant to leave the deceased alone. The deceased told the appellant that if he wanted the goats he could take them and leave the deceased alone. In response the appellant asked Ding if Ding wanted the appellant to leave the deceased for the deceased to lock up the appellant.

[3] After that the appellant made the deceased get off the ground, he held the deceased's hand behind his back and started to wrench it up. The appellant took the deceased further into the land and to a contour. The witness described a contour as something you dig on sloping land to collect or channel rain water and so prevent the land from eroding. Ding said when the appellant got the deceased by the contour the deceased was bawling and the appellant used his hand to give three thumps to the deceased in his stomach which caused the deceased to fall face down on top of the bank of the contour. The deceased was groaning after he fell. The appellant took the cutlass that belonged to the deceased,

[1] This is the description that the appellant's counsel used in her mitigation plea: p. 629, l. 4 of the record of appeal.

got down in the hole, cleared away some bushes and dug up some sand with the cutlass. Then the appellant held the deceased by the shoulder and threw him down into the hole of the contour. The deceased lay on his belly with his face down. The appellant held back the head of the deceased, took the cutlass and started to saw his throat. The appellant allowed the blood to run for about five minutes. When the blood had finished running the appellant took the cutlass and started to saw from the back of the neck until he reached the bone. Then the appellant raised the cutlass and chopped off the head. The appellant held the head by the ears and rested the head on the bank of the contour. Ding said when he saw that he voided his bladder.

[4] After decapitating the deceased the appellant cut off the shirt of the deceased, removed the water boots from the feet of the deceased, took off the pants of the deceased and tied both ends of 'the pants foot.' The appellant put the head inside the pants. The appellant went back down into the hole, held the penis of the deceased, shook it and said, "Man, you have tolo like me, man."

[5] The appellant then positioned the body in the hole feet upwards, took the cutlass of the deceased and 'buss he belly across by the side.' The appellant explained to Ding that he did this to prevent the corpse from swelling. Ding said when the appellant cut the belly he saw the 'tripe' of the deceased. After this the appellant dug the hole deeper to cover the body, he stood on the body to press it into the hole and then covered it. Next, the appellant and Ding went to another spot, in a banana field, and the appellant stuffed the pants containing the head of the deceased into a hole. He also stuffed the water boots of the deceased into the hole.

[6] Ding and the appellant returned to the shed where the goats had been left. There the appellant proposed that they go to the home of the deceased to look for money. Ding said he resisted. The appellant then picked out six goats of the deceased and the two of them took the goats away and tied them on the farm where they had been working. The two of them later attempted to sell the goats that they had stolen.

Appeal against conviction

No notification that new evidence was to be given.

[7] The first ground of appeal that the appellant argued was that the prosecution introduced new evidence, which was not given at the preliminary inquiry, without notifying the defence of the intention to introduce this evidence, in violation of section 191 (3) of the Criminal Procedure Code. That section provides:

> "(3) Where the prosecution becomes aware that a witness who was called at the preliminary inquiry proposes to give material evidence which he did not give at the preliminary inquiry, the prosecution shall, as soon as possible, give the accused notice in writing of the substance of the new evidence, and such notice shall be deemed to form part of the depositions."

The complaint was made in relation to a number of pieces of evidence but was said to be of greatest significance in relation to the new evidence of an explanation of why the investigating police officers failed to find any blood. The defence relied heavily on the absence of any finding of blood to support its case that the story of the killing told by Ding was untrue and that the murder did not take place where the body was found. The defence case was that it was Ding who had killed the deceased, at another location. Defence counsel argued that no witness had said before that the blood had been covered up in the contour and therefore the prosecution had a duty to serve notice that this additional evidence would have been given.

[8] The complaint was made also in relation to the evidence of the prosecution witness, Ava Charles, who was the woman with whom the appellant had been living at the time of the murder. Ava Charles testified that on the night of the murder she opened the door of their residence in response to the appellant's knocking. Counsel for the appellant argued that the prosecution relied on this testimony as corroborating evidence and that it was therefore important evidence but it had never been given before and the defence was not notified that it would be given. Counsel also argued that the evidence of Ding, who at the time had been living in the appellant's household, that the appellant knocked on the door and Ava got up to open it, was also new evidence of which no notice had been given.

[9] It did not appear to us that the aspects of the evidence of which the appellant complained amounted to new evidence as distinct from details of evidence already given. The decapitation of the deceased could hardly have been new evidence; nor could the flow of blood. What became of the blood was only an issue because the defence made it an issue, as appears from the following portion of the transcript of the cross-examination of Ding:[2]

> "Q. Tell this Court why no trace of blood at all was found in the contour, or sighted no blood at all. Explain it.
> A. Which part Daniel cut he throat in the contour, all the blood run out, and when the police them carry me dey, I notice that dirt cover up all the blood in the contour.
> Q. You noticed that dirt covered up all the blood?
> A. Yes. Please.
> Q. How did you notice that, Felix?
> A. Because they carry me dey, and I see.
> Q. You saw dirt cover up the blood?
> A. Yes, over from which part they move the body from.
> Q. Tell us where the blood was then.
> A. In the hole.
> Q. You saw the blood there?
> A. I saw when Daniel cut the throat all the blood run down in the hole.
> Q. When you went with the police you saw –
> A. No, please, my lady, I don't saw no blood.
> Q. Why is that, Felix?
> A. I just say I don't saw no blood.
> Q. Why?
> A. Because it was cover up.
> Q. Felix, your uncle was not killed at that spot, and you know that.
> A. Yes please, my lady, killed right dey."

We, therefore, did not see any justification for the complaint that the prosecution introduced new evidence without giving prior notice to the defence. In any event, as counsel for the appellant was obliged to accept, she had no basis on which to state that the prosecution was aware that this evidence was going to be given. Since such knowledge was the statutory and logical pre-condition to an obligation to notify the defence that such evidence would be given there was no breach of duty by the prosecution.

[2] P. 197, l. 18 and following of the record of appeal.

[10] We reached a similar conclusion in respect of the complaint that it was new evidence that Ava Charles and Ding gave when they testified that the appellant knocked on the door when he arrived at home on the night of the murder. The knocking on the door was of no significance whatever; it is not the case that Ava Charles was asleep when the appellant and Ding arrived at home and it was this knocking that made her aware that the appellant had come home. Her testimony was that she was awake and was watching television when the appellant and Ding arrived. The evidence that the appellant knocked on the door – that in fact he knocked on two doors because the first door was not opened when he knocked on it – was simply a matter of detail and there was no obligation on the prosecution to notify the defence that this matter of detail would be emerging in the course of the testimony. And again, there was no basis for stating that the prosecution was aware that this evidence would be given.

[11] These complaints that new evidence was given without notifying the defence that it would be given were mixed with a complaint that counsel who the Crown engaged to prosecute the case in the High Court bore a personal grudge against the appellant, that counsel made an intemperate comment after the verdict about the fate of the appellant and that counsel exceeded the limits of his duty to act as a minister of justice who does not seek a conviction at all costs. The conclusion that we have reached on the complaint that the prosecution introduced unheralded new evidence, which the appellant identified as the conduct of the prosecutor that made the trial unfair and that amounted to an excess of duty, disposes of the complaint of prosecutorial misconduct.

The directions to the jury on previous inconsistent statements

[12] The second ground that the appellant argued was that the judge's direction to the jury on inconsistencies in the testimony of witnesses misled the jury and tended to cause the jury to ignore glaring inconsistencies. Counsel argued that it was a misdirection to tell the jury that an inconsistency merely went to credibility and, also, that it was a misdirection to fail to warn the jury such evidence should be regarded as unreliable.

[13] The principal direction that the judge gave to the jury on inconsistent statements was as follows:[3]

> "I will refer now to previous inconsistent statement, and what the law has to say about that. Because in the course of the trial there were occasions where it was put to the different witnesses that they said different things in the Magistrate's Court, they said different things in the other Court, they said different things to the police. The law is that even if you feel that the witness said something different to the police, to the Magistrate, or even to another judge, you must be warned that these previous or prior statements which are inconsistent with what the witness said in this Court in that box is not in any way part of the evidence in this trial. The only evidence in this matter is what was stated in this court in that witness box. You must therefore put the contents of any prior statement out of your mind when you consider the evidence in this case."

[14] That is a standard direction to a jury and a proper statement of the law.[4] The complaint, one infers, is not that the direction is wrong in principle but that it misled the jury and tended to cause them to ignore glaring inconsistencies. That complaint is met by reference to the judge's other direction on inconsistent statements when she said:[5]

> "During the evidence, you may have heard several inconsistencies and discrepancies in the evidence. But, as you know, Mr. Foreman and members of the jury, people hear and see things differently. You should not be surprised to find innocent discrepancies in the testimony of a witness. Such discrepancies do not necessarily mean that you must reject the entire testimony of a witness. You have to examine the discrepancies to see whether they are important, or whether they are unimportant. If the discrepancies are minor or unimportant, you may decide nonetheless to accept the witness' testimony. If, however, the contradiction or the inconsistency is major, you may decide to treat the witness as unreliable. This is exclusively for you to decide."

[15] Rather than leading the jury to ignore glaring inconsistencies, as counsel contended the judge did, the judge told them to examine the inconsistencies to rank them as unimportant or important and to decide whether to accept or reject the testimony as unreliable.[6] It was a sensible direction, it seems to me, and cannot be faulted. Counsel referred to the pronouncement in Leonard Harris[7] that if a witness is proved to have made a statement that is in distinct conflict with his evidence on oath the proper direction to the jury is that his

[3] P. 518, l. 12 of the record.
[4] See R. v. Golder [1960] 3 All E.R. 457
[5] P. 511, l. 12 of the record.
[6] It is a direction that the judge also gave at p. 519, l. 1 to 11 of the record of appeal.
[7] (1927) 20 Cr. App. R. 144.

testimony is 'negligible' and that their verdict should be founded on the rest of the evidence. That pronouncement was made in the context of a child testifying on oath that her father had not committed incest with her when she had previously stated to the police that he had so done, which led to the child being treated as a hostile witness. That circumstance raised the classic question as to the value, if any, of the testimony of a hostile witness. Counsel has not pointed to any discrepancy or inconsistency in the instant case remotely approaching that in Harris and a general reference to that case does not advance the appellant's argument.

[16] Counsel also submitted in the instant case that the judge erred in failing to tell the jury that if a witness adopts a previous statement they can act on it. There is no need to discuss the limits on that proposition because the witness, Ava Charles, to who counsel for the appellant referred in this regard, did not adopt her earlier statement; rather, she accepted that she had said certain things in that earlier statement that counsel challenged as inconsistent with her testimony. The relevance of what Ava Charles said before was purely as to credibility. There was no basis for the judge to direct the jury on the effect of the witness having adopted previous statements. With no disrespect to counsel's industry in referring to them, there is no point discussing the passage in Blackstone[8] and the cases of R v Maw[9] and R v Nelson[10] which all dealt with hostile witnesses and two of which dealt with the consequence of such a witness adopting a previous inconsistent statement.

[17] One specific target of the appellant's criticisms was the previous inconsistent statement of Sergeant Trevor Bailey, a member of the search party that found the corpse. Bailey testified that he could not recall drawing footprints to anyone's attention. It was put to him that he had said in another court that he had drawn the footprints to the attention of another member of the search party. After pointing out this aspect of the evidence to the jury the judge told them "this is an occasion also where my direction to you on previous inconsistent statements, and how to treat it … applies to this information." I find no fault with this treatment.

[8] Paragraph F6:22, 2005 Edition.
[9] [1994] Crim. L.R. 841.
[10] [1992] Crim. L.R. 653.

[18] Counsel for the appellant relied in a general way on a number of other grounds including the complaint that the judge failed to put the defence case to the jury and counsel mentioned in this regard the evidence of the forensic analyst and of Sergeant Bailey. We saw neither substance nor significance in the complaint because the judge drew the attention of the jury to the pith of the evidence of both these witnesses. We saw even less substance to the complaint that the jJudge failed to address the jury on the probability of collusion between Ava Charles and Ding Browne who both gave new evidence that the accused knocked on the door. Counsel pointed to no evidence (as distinct from argument) to found this complaint, and to which the judge could have directed the jury, or to which she should have adverted to consider that the witnesses had colluded, and which could have rendered impossible a fair trial.

[19] Although counsel did not argue the ground that appeared in her skeleton argument that the verdict is unsafe having regard to the evidence it was a matter to which we gave appropriate consideration. We satisfied ourselves that there was no substance to the complaint. Counsel apparently recognized that the treatment that the judge gave in the summing up to the accomplice aspect of the case was unimpeachable and did not pursue the reference to it that appeared in the skeleton argument.

[20] None of the grounds of appeal against conviction succeeded and we accordingly proceeded to consider the appeal against sentence.

Appeal against sentence

The approach to sentencing for murder

[21] When an appellate court is performing its task of determining whether the sentence imposed by a trial judge should stand or be altered it must apply afresh the principles of sentencing, as the Privy Council confirmed in Kumar Ali v The State and Leslie Tiwari v

The State.[11] The principles that a court must consider in sentencing in murder cases were helpfully summarized by Rawlins JA in Wilson v The Queen[12]:

> "The applicable principles
>
> "[15]. In the jurisdiction of this Court, the legal principles that relate to sentencing in murder cases are fairly well settled. They flow from the fountainhead, which is the decision of this Court in Spence and Hughes, and subsequent kindred cases. Alleyne J.A., as he then was, rationalized the principles in Francis Phillip and Kim John v The Queen, St. Lucia Criminal Appeal No. 4 of 2003. He considered the initial statements that Sir Dennis Byron, CJ, made in Spence and Hughes. He also considered the subsequent statements, which Lord Bingham of Cornhill made in Patrick Reyes v The Queen, Privy Council Appeal No. 64 of 2001. He considered as well a statement that Saunders J.A. (Ag.), as he then was, made in a dissenting Judgment in Christopher Remy v The Queen, St. Lucia Criminal Appeal No. 6 of 2002, and statements that Byron J.A., as he then was, made in Abraham v The Queen, St. Vincent Criminal Appeal No. 12 of 1995.
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> "[16]. The foregoing cases establish that the first principle by which a sentencing Judge is to be guided in these cases is that there is a presumption in favour of an unqualified right to life. The second consideration is that the death penalty should be imposed only in the most exceptional and extreme cases of murder. At the hearing, the convicted person must raise mitigating factors by adducing evidence, unless the mitigating factors are obvious from the evidence given at the trial. The burden to rebut the presumption then shifts to the Crown. The Crown must negative the presence of mitigating circumstances beyond a reasonable doubt. The duty of the sentencing Judge is to weigh the mitigating and aggravating circumstances that might be present, in order to determine whether to impose a sentence of death or some lesser sentence.
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> "[17]. 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. The death sentence should only be imposed in those exceptional cases where there is no reasonable prospect of reform and the object of punishment would not be achieved by any other means. The sentencing Judge is fixed with a very onerous duty to pay due regard to all of these factors.
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> "[18]. In summary, the sentencing Judge is required to consider, fully, two fundamental factors. On the one hand, the Judge must consider the facts and

[11] Privy Council Appeals Nos. 56 of 2004 and 63 of 2004, from Trinidad and Tobago, judgment delivered 2nd November 2005.
[12] Criminal Appeal No. 15 of 2002, St. Vincent and the Grenadines, `written judgment delivered 28th November 2005.

> circumstances that surround the commission of the offence. On the other hand, the Judge must consider the character and record of the convicted person. The Judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case."

[22] The unqualified right to life that the cases affirm means that there is no mandatory death penalty.[13] It means as well that there must be no implicit approach that a bad case of murder will attract the death penalty unless there are mitigating circumstances. The death penalty can only be imposed if the judge is satisfied beyond reasonable doubt that the offence calls for no other sentence but the ultimate sentence of death.

[23] It follows from the emphasis on the primacy of the right to life and the approach that this emphasis requires that, in the language of Saunders JA in Christopher Remy v The Queen, it will be only in the worst and most extreme case of murder that the death penalty should be imposed. [14]

Categories of murder

[24] The trial judge described this as a most "exceptional and extreme case of murder. " She stated:

> "It also falls within the category, in my view, of the rarest of rare. … And for the reasons that I have discussed earlier, I am satisfied beyond a reasonable doubt that the Prosecution have proven to me that this case warrants my imposition of the ultimate sanction. I have no doubt that no useful purpose would be served by the continued presence of the prisoner in the community in Saint Vincent and the Grenadines. And I am fortified in my view, having examined the nature of the offence, his antecedents, his character, the circumstances, and also I have to look at the interest of the community and the safety of the community [and] the sanctity of life also. It is my view that a case like this justifies a retention of the death penalty as the ultimate sanction. There is nothing before me to persuade me that Mr. Trimmingham is deserving of my leniency. I am not convinced that any lesser penalty would do justice to this matter despite the able submission of his lawyer. I am convinced that the prisoner dehumanised Mr. Albert Browne in the manner in which he executed his murder"

[13] This is settled law as a result of the decisions in Spence v The Queen and Hughes v The Queen, Criminal Appeal No. 20 of 1998, St. Vincent, and Criminal Appeal No. 14 of 1997,St. Lucia, from the Eastern Caribbean Court of Appeal, and Patrick Reyes v The Queen, Privy Council Appeal No. 64 of 2001

[14] St. Lucia Criminal Appeal No. 6 of 2002, at paragraph [8].

[25] In England, before the abolition of the death penalty by the Murder (Abolition of Death Penalty) Act 1965, the Homicide Act 1957 identified murders, which attracted the death penalty as including those that were committed in the course or furtherance of theft. The principle on which that approach rested was discussed by the Privy Council in Evon Smith v The Queen.[15] In that case Lord Hope of Craighead explained:

> "The vice in these cases, which was thought by the United Kingdom Parliament in 1957 to justify the death penalty, was that the defendant resorted to killing his victim in the course or furtherance of committing the theft. It was the wanton and cynical nature of the killing, the debasing in the context of a comparatively minor criminal act of the value that is to be attached to human life, that was regarded as particularly reprehensible."

But even where a murder is committed in the furtherance of a theft it seems to me that there must still be a careful examination of the particular circumstances of the crime since there will be variations in the degree of culpability even in such cases. A court may well view differently a burglar who is surprised in the course of his crime by an armed householder and responded to the householder's challenge with fatal violence to the householder from how it views a burglar who kills a startled child who presented no physical threat. Each case must be examined for the degree of culpability that it presents and a determination made as to the appropriate sentence rather than simply be examined to see if there are present or absent certain features that place it into a category that attracts the sentence of death.

The worst of the worst.

[26] In the instant case there was clear evidence that the appellant killed Mr. Browne to prevent him from reporting to the police that the appellant had attempted to rob him. The decision to steal the 6 goats that belonged to the deceased was formed after the killing had occurred and so that intent cannot be relied upon as the motive for the murder. The intent to rob the deceased of his money, however, preceded the murder and the concealment of that crime was the motive for the killing. That is sufficient to bring the murder committed by the appellant within the compass of the 'particularly reprehensible', as Lord Hope

[15] Privy Council Appeal No. 44 of 2004, from Jamaica, judgment delivered on 14th November 2005.

described it. What made that reprehensible murder heinous was the manner of the killing. The old man's throat was cut while he was alive[16] and then his head was cut off and he was eviscerated. It was not just cold blooded; it was as inhuman as one can imagine. There can be no doubt that it was a killing that the society would condemn as the worst of the worst.

The object of sentencing

[27] The object of sentencing, it must be remembered, is not to reflect the court's subjective reaction to a crime but to impose a sentence that reflects the abhorrence[17] of the society. Judged by that standard it was an exceptional case of murder that required a consideration of the death penalty that our society has retained even against the tide of abolition. But it is important to emphasize, again, that this conclusion as to the extremity of the murder does not lead to the further conclusion that the appellant deserves the death penalty. The appellant continues to be entitled, even at this stage of the sentencing process, to the benefit of the right to life and there must be no presumption or inclination to the contrary. The appellant's right to life can only be forfeited if the case for doing so has been established beyond all reasonable doubt. On that approach, as against the aggravating features of the murder, the appellant is entitled to the benefit of all mitigating features, even those not raised by him. It is then the duty of the crown to show beyond a reasonable doubt that, notwithstanding these mitigating factors, the court should nonetheless impose the death penalty. It is not merely that there is a presumption against the imposition of the death penalty; it is that such a penalty must not be imposed unless it is shown that there is no other penalty that may suffice to do justice to the case.

The factors that the judge considered

[28] In considering the appropriate penalty to impose in this case the trial judge identified the factors that she needed to consider as including the gravity of the offence, the character

[16] This was the evidence of Dr. Ronald Child; p. 22 l. 4 of the record of appeal.
[17] Desmond Baptiste v The Queen ; High Court Criminal Appeal No. 8 of 2003 St. Vincent and the Grenadines , Paragraph 22 of the judgment.

and record of the offender, the subjective factors which may have influenced the offender, the character and design and manner of execution of the offence, and the possibility of reform and rehabilitation. Omitted from the judge's list of factors when compared to those listed by Rawlins J.A. were the personal and individual circumstances of the appellant and matters that may have influenced the conduct that caused the murder. The omission may have been because there was nothing in the evidence before the judge that spoke to such circumstances or influences. Thus, the psychiatrist who testified at the sentencing hearing said the appellant reported that he had a happy childhood[18] and there was nothing in the report of either the psychiatrist or the probation officer that was significant in these respects.

[29] The character and record of the appellant, as conveyed in the report of the probation officer, attracted vigorous cross-examination by defence counsel. Counsel denounced the report as biased and emotionally charged against the appellant. The picture of the appellant that the report painted was that of a frightening and dangerous person, suspected of taking a number of lives before. The jJudge said the report indicated that the prisoner "has a very despicable character and is regarded as a menace to society." She said:[19]

> "Mr. Trimmingham has an awful record. In a word, most of his life has been one of crime. He has had numerous previous convictions involving the use of a cutlass. His antecedents are deplorable and quite disconcerting. Many of his convictions are for offences against the person. While he does not appear to have had any brushes with the law for the last ten years; this is but only one of the factors I must take into consideration in my determination of the appropriate sentence. I am not impelled to believe that the violence Mr. Trimmingham meted out against [the deceased] was out of character. I note with concern that several of the offences for which he had been convicted previously even though they were over ten years ago involved using cutlass.
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> I am convinced that Mr. Trimmingham is a dangerous man who is not adverse to using offensive weapons against his victims based on his antecedents and the fact of this particular matter, and in this case he did use a weapon; in this matter a cutlass with which he murdered the deceased who from reports was an innocent, easygoing elderly gentleman. There are many aggravating factors in this matter, and very little mitigating factors in support of Mr. Trimmingham's case.

[18] P. 597, l. 4 of the record of appeal.
[19] P. 632, l. 21 of the record of appeal.

> I have listened to the psychiatric report … and there is no evidence before me of the prisoner having any mental illness or personality disorder. I have no evidence before me that the prisoner is amenable to rehabilitation and reform as submitted by learned counsel for the prisoner. In fact, the evidence presented by the Prosecution impose (sic) me to the view that the prisoner is a man who should be kept out of society entirely by the imposition of the ultimate sanction."

[30] That passage shows that the sentencing judge placed strong reliance on the appellant's character and reputation in imposing the death penalty. I consider such reliance was wrong. It has to be fundamental that a person cannot be sentenced to death for anything other than the offence for which he has been convicted and for which he is before the court for sentencing. Therefore, the 'awful' character of the appellant should not have operated against the appellant to assist the case for the death penalty. In considering the imposition of the death penalty[20] the character and record of the appellant can only work in his favour, if good, and cannot work against him if bad. Character should have operated as a factor in the sentencing of the appellant only to the extent that he did not have a good character to mitigate the sentence that would otherwise be appropriate.

[31] The judge found there was no evidence of the prospect of reform and social re-adaptation of the appellant. The vigour with which counsel for the appellant attacked the probation officer's report showed a full awareness of the impact that such a report could have on the sentencing of the appellant and therefore assures me that there was no likelihood that counsel omitted through inadvertence to put before the court such material as could have benefited the appellant in this regard. The material in favour of the appellant that was relied on by counsel for the appellant on the sentencing hearing was the testimony of the appellant's sister, the fact that the appellant had applied for and obtained custody of four of his children from his former wife, that the appellant had not resorted to violence against the former wife and the man that had replaced the appellant in the wife's affection, and the probation officer's report of the positive statement of one of the appellant's sons.

[20] It is otherwise when a term of life imprisonment is being considered in the case of a repeat offender who is determined to be a future danger from whom the society must be protected.

[32] The sister testified that the appellant loved his children, took good care of them and was raising them well and as regular church–goers. She testified that the people of his community were not afraid of the appellant. She was cross-examined by counsel for the prosecution and the judge rejected her testimony. It is apparent that the sister's testimony was not persuasive that there was the possibility of reform and re-adaptation of the appellant. It was, therefore, open to the judge to conclude, as she did, that there was no evidence before the court that the appellant was amenable to rehabilitation and reform.

[33] What was not open to the Judge, in my respectful view, was the conclusion that the appellant was a man

> "who should be kept out of society entirely *by the imposition of the ultimate sanction*". (Emphasis added):

Imposing a sentence of life imprisonment can attain the objective of keeping the appellant out of society entirely. Therefore, the objective of protecting the society from the appellant cannot justify the imposition of the death sentence. It was therefore wrong to impose the death penalty on that basis. It was also wrong to impose the death penalty on the kindred basis, or perhaps it was an alternative formulation, expressed by the judge that:

> "no useful purpose would be served by the continued presence of the prisoner in the community of St. Vincent and the Grenadines."

Removing a presence from the society does not require executing the person.

A fresh exercise of discretion

[34] Because the sentencing judge erred in principle in the exercise of her discretion it became the duty of this court to consider afresh, and to exercise our own deliberate judgment on, the sentence that this murder required.[21] After considering afresh the factors that must be taken into account a number of clear conclusions emerged.

[21] For a statement of the principle that the Court of Appeal will interfere with a sentence when it is wrong in principle see **Francis Phillip and Kim John v The Queen**, Criminal Appeal No. 4 of 2003, St. Lucia, per Alleyne J.A., at [46].

[35] Beyond falling into the category of particularly reprehensible killings, because it was committed in furtherance of a robbery, the murder that the appellant committed was heinous because it was cold blooded and inhuman. It is the criminal culpability, the degree of moral guilt, present in this specific murder that made it appropriate to consider it as one of the 'rarest of the rare' cases in which the death penalty may be appropriate. The character and record of the appellant were not capable of significantly mitigating the punishment that this murder deserved. The most that his counsel was able to urge by way of mitigation was that the appellant had had no convictions for ten years and this showed that he was capable of reform. It was a valid argument and we weighed it in the balance. There were no mitigating factors in the motive and circumstances that led to the murder. Apart from the fact that the last decade of his life has been conviction-free there was no evidence that showed any possibility of reform and social re-adaptation of the appellant. The appellant neither expressed nor showed remorse; he continued to insist on his innocence. The individual circumstances of the appellant provided no assistance in determining whether the death penalty can and should be imposed.

[36] When the aggravating and the mitigating factors were weighed afresh in the balance we were satisfied, beyond reasonable doubt, that this particular murder required consideration of the imposition of the death penalty. After due consideration we were further satisfied, beyond reasonable doubt, that there was no basis upon which we could say that the object of punishment could be achieved by a sentence other than death. It is on that basis that we dismissed the appeal against the death penalty.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice Appeal

I concur.

Michael Gordon, QC
Justice of Appeal