SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCRAP 2008/008

BETWEEN:

DAVID ROBERTS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins — Chief Justice
The Hon. Mr. Davidson Baptiste — Justice of Appeal [Ag.]
The Hon. Mr. Frederick Bruce-Lyle — Justice of Appeal [Ag.]

Appearances:

Ms. Nicole Sylvester with Ms. Samantha Robertson and Ms. Patrina Knights for the Appellant
Mr. Colin Williams, Director of Public Prosecutions, and Mr. Carl Williams for the Respondent

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2009: June 23;
September 16.

Criminal Appeal – Murder – life imprisonment – appeal against sentence – sentence is too excessive – constitutionality of life sentence – deprivation of personal liberty - section 3 of the Constitution – inhuman or degrading punishment - section 5 of the Constitution – no formalized parole system – whether fixing of maximum punitive penalty is unlawful and unconstitutional – effect of a life sentence.

The appellant was convicted of murder and sentenced to life imprisonment. He appealed against sentence on the ground that it was too severe in all the circumstances, particularly as he was remorseful and had spent thirty-two months on remand before his conviction. The appellant contended further that regard should have been had to the constitutionality of life imprisonment in the Saint Vincent and the Grenadines. Counsel argued on the separation of powers; that the release of the appellant depended entirely on the exercise of the discretion of the prison or executive authorities. At the sentence hearing the Court had a comprehensive Social Inquiry Report and a Psychiatric Report pertaining to the appellant. The Psychiatric Report found that there was no disturbance of the appellant's

thought process, no delusions of hallucination to indicate the presence of a psychotic illness.

Held: dismissing the appeal and affirming the sentence of life imprisonment.

1. That the maximum sentence for murder is death and the appellant was deprived of his liberty in execution of the sentence of the court. It did not fall to the executive to determine the measure of punishment he would undergo; therefore the discretion as to the severity of the punishment to be inflicted was always the province of the judiciary. The judicial exercise of the sentencing was exercised by the judiciary and that it was not entrusted to the executive. As a result the separation of powers was not violated.

   Reyes v R (Belize) [2002] UKPC 11 applied.
   The Director of Public Prosecutions v Mollison [2003] UKPC 6 and **Browne v The Queen** [1999] UKPC 21 distinguished.

2. Under section 65(1) of the Constitution, the Governor General may grant a free or conditional pardon to a person sentenced to life imprisonment, grant a respite of the imprisonment imposed; substitute a lesser punishment or remit the punishment imposed. This indicates that there is a possibility of a future release by executive clemency of a prisoner serving a life sentence. A life sentence therefore would not be incompatible with section 5 of the Constitution.

JUDGMENT

[1] **BAPTISTE J.A. [AG.]:** On 20th June 2007, David Roberts (Mr. Roberts) was convicted of the murder of Darcy Neptune which occurred on 13th May 2005. A sentence hearing was held on 18th December 2007, in which the prosecution sought the imposition of the death penalty. Mr. Roberts was sentenced to life imprisonment on 24th January 2008. Mr. Roberts has appealed the imposition of the sentence of life imprisonment. Mr. Roberts filed three grounds of appeal: (1) the life sentence be adjusted to a lesser sentence taking into account that he had shown remorse for his error; (2) that he be given back the thirty-two months he spent on remand before his conviction and (3) the punishment is too excessive.

[2] At the hearing of the appeal the court heard oral submissions from both counsel. Counsel for Mr. Roberts, Ms. Sylvester, raised the issue of the constitutionality of life imprisonment in Saint Vincent and the Grenadines. The court ordered the

parties to file written submissions within twenty-one days. The court also ordered the Director of Public Prosecutions to provide appropriate affidavit evidence of the working of the parole system in Saint Vincent and the Grenadines to be filed within one month.

[3] The background facts with respect to the murder are that Mr. Roberts went to the home of Ms. Neptune. Ms. Neptune was 75 years old and blind. Mr. Roberts met Ms. Neptune sitting on a chair. Ms. Neptune inquired who was there. Mr. Roberts did not respond. Ms. Neptune threatened to call for help. Mr. Roberts proceeded to choke her with his hands. She died of strangulation. Mr. Roberts carried her to the bedroom, undressed her and had sexual intercourse with her. When he was finished he prepared a meal of macaroni and cheese, sat on a chair and proceeded to eat until he was disturbed by a neighbour who came calling Ms. Neptune. Mr. Roberts fled the scene.

[4] At the sentence hearing the court heard submissions from both sides. The court had a comprehensive Social Inquiry Report pertaining to Mr. Roberts as well as a Psychiatric Report. The Social Inquiry Report covered matters such as the socio-economic status of Mr. Roberts, his health and religious status as well as his educational background. The report indicated that, Mr. Roberts expressed remorse. He was very sorry for himself, the victim, his family and anybody who got hurt in the process.

[5] The psychiatrist opined that the conduct and behaviour of Mr. Roberts on the fateful day was abnormal. Mr. Roberts reported feeling that he was compelled by a force outside of himself and expressed disbelief that he had committed such a crime as he was not a violent person by nature. The psychiatrist found no disturbance of Mr. Roberts' thought process, no delusions or hallucination such as would indicate the presence of a psychotic illness. The psychiatrist concluded that Mr. Roberts did not suffer from a mental disorder and he fully understood the nature and quality of the offence. The psychiatrist stated that Mr. Roberts had a

long history of cannabis dependence and the substance related disorder – cannabis intoxication – may partly explain his actions on the day of the offence.

[6] The position of Ms. Sylvester as articulated in her skeleton arguments is that the cumulative effect of grounds 2 and 3 of the appeal bring into question the constitutionality of life imprisonment and the real meaning and purport of a life sentence. Ms. Sylvester contended that a sentence of life imprisonment in Saint Vincent and the Grenadines where there exists no formalized system of parole or fixing of maximum punitive penalty is unlawful and unconstitutional. Ms. Sylvester noted that section 3 of the **Constitution of Saint Vincent and Grenadines** enshrines the concept of the right of personal liberty and section 5 enshrines the concept of the protection from inhuman and degrading treatment. Ms. Sylvester argued that in circumstances where there is no system of parole, no adequate system for remission of sentence by some independent body and no system for the fixing of a finite punitive period to be served as the punitive maximum, life imprisonment is tantamount to ordering lifelong punitive custody. It constitutes inhuman and degrading treatment; it is manifestly disproportionate and is an arbitrary deprivation of personal liberty in breach of sections 3 and 5 of the Constitution.

[7] Ms. Sylvester placed reliance on **Boucherville v the State of Mauritius**[1] which states at paragraph 23:

> "The Grand Chamber's decision in Kafkaris turned on its finding that the sentence imposed on the applicant did not leave him without any hope or possibility of intermediate release. Thus the safeguards obtaining in Cyprus were held to be sufficient to save an otherwise disproportionate and arbitrary sentence. But no such safeguards avail the State of Mauritius or are available to the appellant, if, as the Supreme Court held, the sentence passed upon him condemned him to penal servitude for the rest of his days. The Board considers the sentence, so interpreted, to be manifestly disproportionate and arbitrary and so contrary to section 10 of the Constitution of Mauritius."

[1] (2008) UKPC 37

[8] It is clear that at paragraph 23 cited above, the Privy Council was commenting in part on the construction placed by the Supreme Court of Mauritius on section 11(1) of the Criminal Code. In referring to the construction placed on that section, the Privy Council stated at paragraph 12: "but on its [The Supreme Court's] construction of section 11(1) … penal servitude for life was a punishment for a specified term, namely life… penal servitude for life could only mean that the penalty was to be served for life." Based on that interpretation, the Privy Council considered the sentence to be manifestly disproportionate and arbitrary and so contrary to section 10 of the Constitution of Mauritius.

[9] Ms. Sylvester referred to **Coard v Attorney General**[2], where, in dealing with the condition attached to the warrant of commutation, Mr. Fitzgerald QC stated:

> "Furthermore, the condition – that the appellants be imprisoned for the rest of their "natural lives" – was unknown to the law and would be an inhuman punishment because it would preclude any account being taken of individual circumstances or progress in prison."

Lord Hoffman stated at paragraph 14… "If the condition attached to the pardon is read literally, there was much in what Mr. Fitzgerald says. But the document should be construed on the assumption that the Governor-General intended to do what he was constitutionally required to do, namely, to give effect to the advice of the Minister. Their Lordships therefore interpret the warrants as having been intended to do no more than substitute a sentence of life imprisonment."

[10] Mr. Sylvester also cited the case of the **State v Tcoeib**[3] where the court stated at page 13:

> "It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances)."

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[2] [2007] UKPC 7
[3] (SA4/93) [1996] NASC1; 1996 (1) SACR 390

At page 14 the court stated:

> "The nagging question which still remains is whether the statutory mechanisms…constitute a sufficiently "concrete and fundamentally realizable expectation" of release adequate to protect the prisoner's right to dignity, which must include belief in, and hope for, in an acceptable future for himself. It must, I think, be conceded that if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and the heart of the prisoner is much too faint and much to unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded."

Ms. Sylvester submitted that the above quotation is clearly the position as it relates to Saint Vincent and the Grenadines.

[11] It is important to make some observations on the **State v Tcoeib**. After the first quotation above, the Chief Justice stated that he was not satisfied that this was the effect of a sentence of life imprisonment in Namibia. The Chief Justice came to that conclusion after referring to sections of the Prisons Act which dealt with the treatment of convicted prisoners with the object of their reformation and rehabilitation, the training and treatment of prisoners upon whom a life sentence has been imposed, machinery for the appointment of a release board which may make recommendations for the release of prisoners on probation, and the powers of the President of Namibia acting on the recommendation of the release boards to authorize the release of prisoners sentenced to life.

[12] In light of the above, the Chief Justice opined that:

> "It therefore cannot properly be said that a person sentenced to life imprisonment is effectively abandoned as a thing without any residual dignity and without affording such prisoner any hope of ever escaping from a condition of helpless and perpetual incarceration for the rest of his or her natural life. The hope of release is inherent in the statutory mechanisms."

[13] With respect to the second quotation cited by Ms. Sylvester, the Chief Justice stated that it would be incorrect to interpret the relevant statutory mechanisms pertaining to the release of prisoners sentenced to life imprisonment as if they

permitted a totally unrestrained, unpredictable, capricious and arbitrary exercise of a discretion by the prison authorities. These mechanisms must be interpreted having regard to the discipline of the constitution as well as the common law. The Chief Justice emphasized the need for the authorities to act in good faith, impartially, fairly and rationally; the need to consider each individual case; as well as the need to eschew irrelevant considerations and arbitrariness (see page 21). I would not assume that these factors would not guide the exercise of executive clemency under the **Constitution of Saint Vincent and the Grenadines**.

[14] I now examine Ms. Sylvester's contentions in light of sections 3(1)(a) and 5 of the Constitution. Section 3(1)(a) states:

> "No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say:
>
> (a) in execution of the sentence or order of a court…in respect of a criminal offence of which he has been convicted';
>
> …"

Section 5 states:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

It is clear that very important rights are protected by sections 3 and 5 of the Constitution, and a court must be vigilant in ensuring that those rights are respected. The position here is that Mr. Roberts was convicted of murder. The maximum penalty for murder in Saint Vincent and the Grenadines is death by hanging. The law in Saint Vincent and the Grenadines does not impose a mandatory requirement of life imprisonment for the offence of murder. After conducting a sentencing hearing the learned judge in the exercise of her discretion, sentenced Mr. Roberts to life imprisonment. The learned judge had before her the Social Inquiry Report as well as the Psychiatric Report. Submissions were also heard from both counsel. In imposing sentence the judge would be obliged to take into account the mitigating and aggravating factors and

the individual circumstances of the offender and the offence[4]. There is no reason to believe that the learned judge did not take into account those factors when the decision was taken to impose a sentence of life imprisonment. Mr. Roberts' detention fell squarely within the scope of section 3(1)(a) of the Constitution and as such would accord with the purpose of the deprivation of liberty ordained by the section.

[15] In **Boucherville v The State of Mauritius**[5] a case relied on by Ms. Sylvester, the Privy Council referred to the leading European case of **Kafkaris v Cyprus**[6] which concerned the mandatory life sentence for murder imposed in Cyprus. The prisoner was sentenced in 1989, and five years later contended that his continued detention violated his rights under Article 3 of the European Convention on Human Rights. Not unlike Ms. Sylvester, the applicant stressed that in Cyprus there was no parole board system and no provision was made for the granting of parole to prisoners. Thus, the principal purpose of the sentence of imprisonment imposed by the Cypriot courts was punitive[7]. This, in the applicant's view, coupled with the mandatory nature of the sentence, was contrary to Article 3 of the Convention. Article 3 provided that: "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." (This corresponds with and is almost identical with section 5 of the **Constitution of Saint Vincent and the Grenadines**). The prisoner could be released by order of the President either pursuant to Article 53 (4) of the Constitution of Cyprus or by ordering release under the Prison Law 1996. Section 14 of the Prison Law provided for the conditional release of prisoners, including life prisoners. Article 53(4) of the Constitution provided that the President of the Republic on the recommendation of the Attorney General, may suspend, remit or commute any sentence passed by a court. The majority judgment noted at paragraph 97 that the imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or

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[4] See Newton Spence v The Queen (Saint Vincent and the Grenadines) Criminal Appeal No. 20 of 1998; Peter Hughes v The Queen (Saint Lucia) Criminal Appeal No. 14 of 1997
[5] [2008] UKPC 37
[6] [2008] ECHR 143
[7] Supra at para. 80

incompatible with Article 3 or any other Article of the Convention. However the imposition of an irreducible life sentence on an adult may raise an issue under Article 3.

[16] The court stated at paragraph 98:

> "In determining whether a life sentence in a given case can be regarded as irreducible the court has sought to ascertain whether a life prisoner can be said to have any prospect of release…where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3…The Court has found this is the case…even when the possibility of parole for prisoners serving a life sentence is limited…It follows that a life sentence does not become "irreducible" by the mere fact that in practice it may be served in full. It is enough for the purpose of Article 3 that a life sentence is de jure and de facto reducible."

The court opined at paragraph 99 that:

> "…the existence of a system providing for consideration of the possibility of release is a factor to be taken into account when assessing the compatibility of a particular life sentence with Article 3."

[17] At paragraph 102 the court noted that in Cyprus the offence of premeditated murder carries a mandatory sentence of life imprisonment which, under the criminal code, is tantamount to imprisonment for the rest of the convicted person's life. The court observed that the law in Cyprus does not provide for a minimum term for serving a life sentence or for the possibility of its remission on the basis of good conduct and industry. However it pointed out that the adjustment of such a sentence was possible at any stage irrespective of the time served in prison. The court referred to Article 53(4) of the Constitution and stated that the President on recommendation of the Attorney General, can at any point in time commute a life sentence to another one of a shorter duration and then remit it, affording the possibility of immediate release.

[18] The propositions enunciated in **Kafkaris** are apt to the circumstances of the instant case and I respectfully adopt them. The imposition of life imprisonment on Mr. Roberts is not in itself prohibited by or incompatible with sections 3 or 5 of the

Constitution of Saint Vincent and the Grenadines. It may well be that considering the matter in the round, including the individual circumstances of the offender and the offence, punishment and deterrent may well be served by the prisoner remaining in prison for life. This would reflect appropriate punishment and deterrence and would not violate section 5 of the Constitution. I am not of the view that a prisoner sentenced to life imprisonment in Saint Vincent and the Grenadines has no possibility of release. Such a sentence is de jure reducible by the exercise of executive clemency under section 65(1) of the Constitution.

[19] It is important to observe the powers granted to the Governor-General under section 65(1) of the **Constitution of Saint Vincent and the Grenadines**. Under section 65(1) the Governor-General may:

> "(a) grant a pardon, either free or subject to lawful conditions, to any person convicted of any offence;
> (b) grant to any person a respite, either indefinitely or for a specified period, of the execution of any punishment imposed on that person for any offence;
> (c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; or
> (d) remit the whole or any part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Crown on account of any offence."

Section 65(2) states:

> "The powers of the Governor-General under subsection (1) of this section shall be exercised by him in accordance with the advice of such Ministers as may from time to time be designated by the Governor-General acting in accordance with the advice of the Prime Minister."

Therefore pursuant to section 65(1) of the Constitution, the Governor-General may grant a free or conditional pardon to a person sentenced to life imprisonment; grant a respite of the imprisonment imposed; substitute a lesser punishment or remit the punishment imposed. From the above it is seen that there is a possibility of a future release by executive clemency of a prisoner serving a life sentence. A life sentence would not be incompatible with section 5 of the **Constitution of Saint Vincent and the Grenadines.**

[20] It is appropriate at this stage to address the issue of separation of powers. Ms. Sylvester submitted that a life sentence imposed on the appellant and then left to the executive through the mercy system to determine the actual length of custody is objectionable because it is conferring a sentencing function to the executive. Ms. Sylvester cited the cases of **Browne v The Queen**[8] and **The Director of Public Prosecutions v Mollison**[9], in support of her submissions.

[21] Mollison was convicted of murder and sentenced under section 29(1) of the Juveniles Act 1951 of Jamaica, to be detained during the Governor-General's pleasure. The murder was committed when he was 16 years old and he was convicted when he was 19. Section 29(1) precluded the death sentence from being pronounced or recorded against a person convicted of an offence if at the time of its commission, the person was under 18. Instead of the death sentence the court shall sentence the person to be detained during Her Majesty's pleasure. Section 29(4) provided that:

> "The Governor-General may release on licence any person detained under subsection (1) or (3) of this section. Such licence shall be in such form and contain such conditions as the Governor-General may direct, and may at any time be revoked or varied by the Governor-General…"

[22] The Privy Council observed that it was a key feature of the sentence of detention during Her Majesty's pleasure in Jamaica, that the decision on release is entrusted to the Governor-General as a member of the executive. Section 29(4) of the Juveniles Act as amended has that express effect. The Privy Council also pointed out that while in a case falling within section 29(1) the judge sitting in court passes sentence, it falls to the executive to determine the measure of punishment which an individual detainee will undergo. It is clear that such determination is for all legal and practical purposes a sentencing exercise[10].

[23] At paragraph 11, the Privy Council reasoned that a person detained during the Governor-General's pleasure is deprived of his personal liberty not in execution of

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[8] [1999] UKPC 21
[9] [2003] UKPC 6
[10] Supra at para. 6

the sentence or order of a court but at the discretion of the executive. Section 29 was thus incompatible with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive.

[24] At paragraph 17 the Privy Council stated:

> "…The nature and purpose of the sentence of detention during the Governor-General's pleasure are clear…The only question is who should decide on the measure of punishment the detainee should suffer. Since the vice of section 29 is to entrust this decision to the executive instead of the judiciary, the necessary modification to ensure conformity with the Constitution is (as in Browne v The Queen [2000] 1 AC 45) to substitute "the court's" for "Her Majesty's" in subsection (1) and "the court" for each reference to "the Governor –General" in subsection (4)."

[25] I now turn to **Browne v The Queen**[11]. Sixteen year old Browne was convicted of murder committed when he was 15. Like in **Mollison**, the law precluded the pronouncing or recording of a sentence of death against a person who was under the age of 18 at the time the offence was committed. In lieu of the sentence of death "the court shall sentence him to be detained during [the Governor-General's] pleasure…" (Section 3(1) of the Offences Against the Person Act 1873 (as amended) of Saint Christopher and Nevis).

[26] In **Browne**, the Attorney General accepted that the decisions in **Reg. v Secretary of State for the Home Department Ex parte Venables and Thompson**[12] and **Hinds v The Queen**[13] applied to the present case. The Privy Council pointed out at paragraph 4 that in **Ex parte Venables** one of the points arising for decision was the character of the sentence of "detention during Her Majesty's pleasure": was it a form of life sentence or was it a sentence for discretionary custody of such duration as should thereafter be decided? The view which prevailed was that it was not a life sentence but was a wholly discretionary sentence. Lord Browne-Wilkinson said at p. 498:-

> "…detention during Her Majesty's pleasure is wholly indeterminate in duration: It lasts so long as Her Majesty…considers appropriate…[It is]

[11] [2000] 1 AC 45
[12] [1998] AC 407
[13] [1977] AC 195

> not a sentence of the same kind as the mandatory life sentence imposed on an adult murderer, the duration of which is determined by the sentence of the court and is for life. In cases of detention during Her Majesty's pleasure the duty of the Secretary of State is to decide how long that detention is to last, not to determine whether or not to release prematurely a person on whom the sentence of the court is life imprisonment."

Lord Steyn said at pp 552-3:

> "Parliament differentiated between the two sentences. An order of detention during Her Majesty's pleasure involves merely an authority to detain indefinitely. That means that the Home Secretary must decide from time to time, taking into account the punitive element whether detention is still justified. Life imprisonment involves an order for custody for life."

[27] After reviewing the above, the Privy Council stated that in Saint Christopher and Nevis under section 3(1) of the Offences Against the Person Act 1873 as amended, the sentence of detention during Her Majesty's pleasure is not one which is determined by the court but one which is determined by the Governor-General, including its punitive element. Under the Constitution of Saint Christopher and Nevis the Governor-General is part of the executive, not the judiciary.

[28] The Privy Council also referred to **Hinds v the Queen**. In **Hinds**, a statute had set up a "Gun court" to try persons charged with firearms offences. Section 8 of the statute prescribed a mandatory sentence of detention at hard labour during the Governor-General's pleasure for certain offences determinable by the Governor-General on the advice of a review board of which only the chairman was a member of the judiciary. Various defendants who had been convicted and sentenced in accordance with section 8 successfully appealed, contending that the sentence was unconstitutional. Lord Diplock giving the opinion of the Board said at pp. 225-6:-

> "…what Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."

The Privy Council went on to hold that section 3(1) is contrary to the Constitution of Saint Christopher and Nevis and that the sentence passed was an unlawful sentence. At paragraph 13 the Privy Council identified the element of unconstitutionality in section 3 (1) as "the fact that the decision on the length of the sentence is entrusted to the Executive not to the Judiciary." The Privy Council went on to say that "it follows from this that what is required to make the provision comply with the Constitution is that the decision should be made by a court. If this is done the only objectionable part of the sentencing process is removed." Accordingly, the Privy Council modified the existing law to read "detention during the court's pleasure" as distinct from detention during the Governor-Governor's pleasure.

[29] Does the imposition of the life sentence in Saint Vincent and the Grenadines violate the doctrine of the separation of powers in that it confers a sentencing function to the executive? Is it an indeterminate sentence that effectively hands over to the executive the decision as to the actual length of sentence for a particular crime or a particular offender? The answer to both questions is in the negative.

[30] As indicated earlier, Ms. Sylvester cited the cases of **Director of Public Prosecutions v Mollison** and **Browne v The Queen** as being relevant to her contention. In **Mollison**, in holding that section 29(4) violated the separation of powers doctrine, the Privy Council expressly found that although the sitting judge in court passes sentence, it fell to the executive to determine the measure of punishment which an individual detainee will undergo. That determination was manifestly a sentencing exercise, the preserve of the judiciary and not the executive. The Privy Council also observed that section 29(4) of the Juvenile Act in Jamaica as amended had the express effect of entrusting the decision on release to the Governor-General, a member of the executive, and that was a key feature of detention during Her Majesty's pleasure. Likewise in **Browne**, the Privy Council found that section 3(1) of the Offences Against the Persons Act as

amended was contrary to the Constitution, as the decision on the length of sentence was entrusted to the executive and not to the judiciary.

[31] The circumstances existing in Jamaica and Saint Christopher and Nevis under the relevant law compelled a conclusion that the separation of powers doctrine had been infringed. Different considerations apply to the present case as the position is quite different. Mr. Roberts was convicted of murder. The maximum sentence for murder is death. After a sentencing hearing he was sentenced to life imprisonment by the court. Mr. Roberts was deprived of his liberty in execution of the sentence of the court. It did not fall to the executive to determine the measure of punishment he would undergo. The decision on the length of sentence was not entrusted to the executive. The discretion as to the severity of the punishment to be inflicted was always the province of the judiciary. The judicial exercise of sentencing was exercised by the judiciary.

[32] I do not accept that when the court passed sentence on Mr. Roberts it was left to the executive through the mercy system to determine the actual length of custody. The court imposed a sentence of life imprisonment. The court determined the measure of punishment. It determined the duration of the sentence. It is true that under section 65(1) of the Constitution the Governor-General may grant a pardon, respite or effect an act of remission in respect of a convicted person. In so doing the Governor-General would not be engaging in or performing a sentencing exercise. It is an act of executive clemency. In the circumstances, the separation of powers doctrine would not be violated. Support for that proposition is found in the case of **Reyes v R**[14].

[33] The issue of the exercise of mercy by the Governor-General was addressed by the Privy Council in **Reyes v R**. Section 52(1) of the Belize Constitution is identical to section 65(1) of the Saint Vincent and the Grenadines Constitution. It deals with the grant of a pardon, respite, substituting a less severe form of punishment and remission. Section 52 (2) provides that the powers of the Governor-General under subsection (1) of this section shall be exercised by him in accordance with the advice of the Belize Advisory Council.

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[14] (Belize) [2002] UKPC 11

Lord Hoffmann stated at paragraph 44:

> "…The Board is mindful of the constitutional provisions…governing the exercise of mercy by the Governor-General. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function…Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter is an executive, responsibility."

I respectfully adopt the views of Lord Hoffman.

[34] In conclusion, I do not consider the sentence imposed to be arbitrary or disproportionate. The maximum penalty for the offence is death. The judge conducted a sentencing hearing and would have taken into account the circumstances of the offence and the individual circumstances of the offender. Invariably, matters such as the age, youth, circumstances of the offender, the offender's remorse and prospects of rehabilitation are considered. The sentencing judge had all those matters before her. Having conducted a sentencing hearing the judge imposed a sentence of life imprisonment. A punishment which the judge undoubtedly thought was merited by the offence. We find no basis to disturb the sentence imposed. The sentence imposed does not disclose arbitrariness nor was it unlawful. The sentence could not be said to be disproportionate having regard to all the circumstances.

[35] The sentence does not violate section 3 or 5 of the Constitution of Saint Vincent and the Grenadines. The separation of powers doctrine has not been violated. The challenge to the sentence based on the Constitution accordingly fails. Likewise the other grounds of appeal also fail. The sentence of life imprisonment is affirmed and the appeal accordingly stands dismissed.

Davidson Baptiste
Justice of Appeal [Ag]

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Frederick Bruce Lyle
Justice of Appeal [Ag]