

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. 17 OF 2009

BETWEEN:

THE QUEEN

and

DAVID SWAIN

Appearances:

Mr. Terrence F. Williams, Director of Public Prosecutions. With him Mrs. Grace Henry-Mc. Kenzie and Ms. Sarah Benjamin, Crown Counsel for the Crown
Mr. Hayden St. Clair Douglas and Mr. Patrick Thompson for the Defendant

2009: November 04

2009: November 10

JUDGMENT ON SENTENCING

(Criminal Law – murder –mandatory life imprisonment –sections 150 and 23 of the Criminal Code, 1997- the Parole Act – section 9(2) - determination of minimum term in relation to mandatory life sentence – choice of three starting points: “whole life”, 30 years or 15 years - - seriousness of the offence – aggravating and mitigating factors - the character and record of the defendant – announcement of minimum term in open court)

Introduction

[1] **HARIPRASHAD-CHARLES J:** Following a three-week trial, on 27th October 2009, the defendant, David Swain, aged 53 was convicted by a unanimous jury of the murder of his wife Shelley Arden Tyre (“the deceased”) contrary to section 148 of the Criminal Code¹1997¹.

[2] The law regarding the sentencing of persons convicted of murder has undergone some significant changes over the last few months with the enactment of the Parole Act, 2009² (“the

¹ (Act No. 1 of 1997) of the Laws of the Virgin Islands

² (No. 7 of 2009) of the Laws of the Virgin Islands

Act"). Prior to the coming into force of the Act on 20th May 2009³, every person convicted of murder was automatically visited with the penalty of life imprisonment⁴. No consideration whatsoever was given to any mitigating factors that the convicted person desired or was able to put forward. In fact, the trial judge was powerless to alter that sentence and was duty-bound to hand down the mandatory sentence of life imprisonment in every case where there was a conviction of murder.

- [3] Although the Act does not affect the fact that the mandatory sentence for murder remains life imprisonment, it does however, transfer the role of the Executive in determining the minimum term to the trial judge. As a result, a judge upon sentencing a person to imprisonment for life is now required to state whether such person may be eligible to be considered for parole and if such person is found to be so eligible, to state a minimum period of imprisonment that such person shall serve before being considered for parole for the first time⁵.
- [4] Another provision of great significance in the Act (not yet in force) is that although the offender may be released on licence, and the minimum period affects the date on which this may happen, the offender remains at risk of being returned to prison for the rest of his life⁶.
- [5] Pursuant to section 9(2) of the Act, a sentencing hearing was held on 4th November 2009 to determine Mr. Swain's eligibility for parole and if he is so eligible, to state a minimum period of imprisonment that he should serve before being considered for parole.

The facts

- [6] The facts of the case as outlined by the Crown and which the Jury accepted are as follows: on a serene day in March 1999, Mr. Swain, the deceased, their friends Christian and Bemice Thwaites and the Thwaites' son Matthew, then 9 years old, were enjoying their last day of sailing aboard the vessel, Caribbean Soul in the British Virgin Islands ("the BVI"). Shortly after 12.30 p.m., Mr. Swain and the deceased dived to the Twin Wrecks which is comprised of the

³ The Governor has proclaimed that sections 1, 2, 4(5), 9, 23, 29 and 30 of the Parole Act, 2009 shall come into force on 20th May 2009.

⁴ See sections 150 and 23 of the Criminal Code 1997 (Act No. 1 of 1997) of the Laws of the Virgin Islands.

⁵ See section 9(2) of the Parole Act, 2009.

⁶ See sections 14(b) and 15.

wrecks of the tugboats the "Mary L" and the "Pat" off Cooper Island, an underwater attraction in the BVI. They left the Thwaites on board the vessel. There were no other divers in the vicinity at the time.

- [7] About 35 minutes after, Mr. Swain returned to the Caribbean Soul alone. Mr. Thwaites then entered the water. At the stern of the wreck he found the deceased's fin embedded by its blade into the sand with its heel portion up and the heel strap irregularly stretched below the sole. Such finding was unusual. As he came around the stern, he saw the deceased lying on her back with her face upwards. Her regulator was out of her mouth and she was not wearing her diving mask. She was free from any entanglement.
- [8] With all due expedition, Mr. Thwaites brought the deceased to the surface and called for help. He then commenced cardiopulmonary resuscitation ("CPR"). Mr. Swain came by dinghy to where Mr. Thwaites surfaced and together they placed the deceased aboard the dinghy. Mr. Swain performed CPR on the deceased for a short time and thereafter instructed that CPR be discontinued because she was dead. This decision is against diving protocol which is to attempt resuscitation until the rescuers had no more energy left or someone of higher qualifications takes over. Mr. Swain testified that he had training as an Emergency Medical Technician ("EMT"), and taught this very protocol being a dive instructor himself.
- [9] Upon their return to Caribbean Soul, Mr. Swain prevented Mr. Thwaites from sending out a Mayday as he did not want everyone coming around. Thereafter, Mr. Swain contacted the Virgin Islands Search and Rescue ("VISAR"). Mr. Keith Royal responded and on arrival saw the deceased lying on her back. He too offered to do CPR. Mr. Swain refused the offer saying that he was a paramedic, he had seen dead bodies before and there was no need for CPR. Mr. Royal then transported the deceased to Peebles Hospital where she was pronounced dead.
- [10] On the day following the incident, Mr. Phillip Browne, Vice President of the BVI Dive Operations Association and a certified scuba diver, who also has training in the repair and inspection of scuba gear, dived the site of the Twin Wrecks in order to retrieve a camera lost by Mr. Thwaites during the rescue of the deceased. There he located the deceased's fin, mask

and snorkel. He noted the condition of the mask and that the snorkel's mouthpiece was detached and missing. The deceased's slate was never recovered.

- [11] Mr. Browne and Mr. Thwaites secured the deceased's equipment at Mr. Browne's business place in keeping with first level PADI (Professional Association of Diving Instructors) instructions that if there is an accident of any kind, the equipment is to be isolated and kept until the proper authorities can take possession of it. They examined the deceased's equipment the same day of the incident and found that it was in good working order. They checked the air pressure in the tank, that the regulators were breathable and that the buoyancy compensator would inflate and deflate appropriately. They also found that the air was of good quality and operated from all sources.
- [12] There is evidence that the deceased was in good health at the time of her death and was a highly experienced and qualified diver. Indeed, she had logged in 354 dives. There was no evidence that the deceased had any medical condition which attributed to her drowning and the diving conditions at the time of the incident held no hazards. There was evidence that Mr. Swain would have been in the immediate vicinity of the deceased at the time she no longer breathe air from her tank.
- [13] Mr. Swain also displayed strange behavior after his wife's death. Two days after her death, Mr. Swain went to Mr. Browne's business place and told Mr. Browne to get rid of the deceased's equipment. After the autopsy was conducted, Mr. Swain went back to Mr. Browne's shop and once again told him to dispose of the dive gear.
- [14] The deceased's murder was driven by two motives, financial gain and a desire to fully explore a love affair he had begun before his wife's death and which resumed about two to three weeks after her death.

Plea in mitigation

- [15] Learned Counsel for Mr. Swain, Mr. Douglas implored the court to exercise leniency and compassion on Mr. Swain, who will turn 54 later this month. He urged to take into consideration, the numerous character witnesses who have since come forward to attest to Mr. Swain's kindness, integrity and generosity. Of particular importance are the emails from his two

children who described their father as a caring, loving and generous man. Suffice it to say, they were both present throughout the trial and lent support to their father. In the aggregate, there are 45 emails from friends, family members and acquaintances pouring out their support and beseeching me to exercise leniency and to afford Mr. Swain an early parole. The general sentiment of his cohorts is that Mr. Swain is innocent and that he could never have committed such a wicked act.

Family impact assessment

[16] Shortly after the verdict was delivered, Mr. Richard Tyre, aged 84, craved the court's indulgence to speak on the effect of the offence on his family. As a matter of fact, he and his aging wife were also present throughout the trial. An emotional Mr. Tyre said that Shelly was their eldest child and the day she died, their lives came to an end. He spoke of his daughter's love for the environment and for the children she taught at Thayer Academy, the school at which Shelly was the head-teacher. He also said that his family welcomed Mr. Swain into their home as their son-in-law and at last, the jury has spoken.

The legislative framework

(a) The Criminal Code, 1997

[17] Section 150 of the Criminal Code states:

"Any person who is convicted of murder is liable to imprisonment for life."

[18] Section 23 provides that "a person liable to imprisonment for life or any other period may be sentenced to a shorter term, except in the case of a sentence passed in pursuance of section 150".

(b) The Parole Act, 2009

[19] Section 9 (2) of the Act states as follows:

"A judge upon sentencing a person to imprisonment for life, shall state whether such person may be eligible to be considered for parole and, if a person is found to be so eligible, state a minimum period of imprisonment that such person shall serve before being considered for parole for the first time".

Mandatory Life Sentences [U.K.]

[20] Section 269 of the Criminal Justice Act, 2003 ("CJA, 2003") provides for the determination of minimum term in relation to mandatory life sentence.

(1) "This section applies where after the commencement of this section a court passes a life sentence in circumstances where the sentence is fixed by law.

(2) ...

(3) The part of his sentence is to be such as the court considers appropriate taking into account –

(a) The seriousness of the offence, or of the combination of the offence and any one or more offences associated with it, and

(b) ...

(4) If the offender was 21 or over when he committed the offence and the court is of the opinion that, because of the seriousness of the offence, or of the combination of the offence and one or more offences associated with it, no order should be made under subsection (2), the court must order that the early release provisions are not to apply to the offender."

Starting points

[21] Schedule 21 of the CJA, 2003 provides for appropriate starting points depending on the gravity of the offence.

4 (1) If—

(a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and

(b) the offender was aged 21 or over when he committed the offence,

the appropriate starting point is a whole life order.[emphasis added]

(2) Cases that would normally fall within sub-paragraph (1)(a) include—

(a) the murder of two or more persons, where each murder involves any of the following—

(i) a substantial degree of premeditation or planning,

(ii) the abduction of the victim, or

- (iii) sexual or sadistic conduct,
- (b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,
- (c) a murder done for the purpose of advancing a political, religious or ideological cause, or
- (d) a murder by an offender previously convicted of murder.

[22] 5 (1) If—

- (a) the case does not fall within paragraph 4(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high, and
- (b) the offender was aged 18 or over when he committed the offence,

the appropriate starting point, in determining the minimum term, is 30 years.[emphasis added]

- (2) Cases that (if not falling within paragraph 4(1)) would normally fall within subparagraph (1)(a) include—
 - (a) the murder of a police officer or prison officer in the course of his duty,
 - (b) a murder involving the use of a firearm or explosive,
 - (c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),
 - (d) a murder intended to obstruct or interfere with the course of justice,
 - (e) a murder involving sexual or sadistic conduct,
 - (f) the murder of two or more persons,
 - (g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, or
 - (h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence.

Aggravating and mitigating factors

[23] Paragraphs 8–11 of the Schedule read aggravating and mitigating factors. Paragraph 8 states that having chosen a starting point, the court should take into account any aggravating or

mitigating factors, to the extent that it has not allowed for them in its choice of the starting point.

[24] Section 10 lists the aggravating factors that may be relevant to the offence of murder to include-

- (a) "a significant degree of planning or premeditation,
- (b) the fact that the victim was particularly vulnerable because of age or disability,
- (c) mental or physical suffering inflicted on the victim before death,
- (d) the abuse of a position of trust,
- (e) the use of duress or threats against another person to facilitate the commission of the offence,
- (f) the fact that the victim was providing a public service or performing a public duty, and
- (g) concealment, destruction or dismemberment of the body.

[25] Mitigating factors that may be relevant for the offence of murder include-

- (a) an intention to cause serious bodily harm rather than to kill,
- (b) lack of premeditation,
- (c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957) lowered his degree of culpability,
- (d) the fact that the offender was provoked (for example, by prolonged stress) in a way not amounting to a defence of provocation,
- (e) the fact that the offender acted to any extent in self defence,
- (f) a belief by the offender that the murder was an act of mercy, and
- (g) the age of the offender."

UK Case Law

- [26] The Consolidated Criminal Practice Direction (Amendment No.8) (Mandatory Life Sentences)⁷ sets out the procedure that the court should follow in setting the minimum terms in murder cases. In setting the minimum term the court must set the term it considers appropriate taking into account the seriousness of the offence. In considering the seriousness of the offence the court must have regard to the general principles set out in Sch. 21 of the CJA, 2003. In very serious cases where there are a number of aggravating factors as set out in section 10 of Sch.21, a minimum term of 30 years is appropriate.
- [27] In **R v Sullivan; R v Gibbs; R v Elener; R v Elener**⁸, the Court of Appeal heard four conjoined appeals which raised questions as to the correct approach to be adopted by sentencing courts when applying the provisions of the CJA, 2003 in order to set a minimum tariff period. The recommended tariff for very serious murders was 30 years and 14 years for average murders.
- [28] In **R v Tailor**⁹, the defendant's appeal against a specified minimum term of 27 years for the murder of his wife was reduced to 25 years less time spent in custody on remand. The court held that in setting a minimum term pursuant to para 5(2)(c) of Sch. 21 to the CJA, 2003, a case in which a husband murdered his wife with the expectation of gain, in domestic circumstances, was distinguishable from a case in which a professional criminal killed for gain. Further, cases which involved mixed motives would not normally attract a minimum term which did not mitigate from 30 years.
- [29] In **R v Johnstone**¹⁰, the defendant murdered his wife for financial gain and then burnt her body in the back garden. The killing had been entirely unprovoked and the defendant's motive and his appalling behaviour after the killing had been significant factors. The court held that a minimum term of 17 years less time spent in custody on remand was not manifestly excessive.

⁷ [2005] 1 Cr. App. R. 8

⁸ [2004] EWCA 1762; [2005] 1 Cr. App. R. (S) 67.

⁹ [2007] EWCA Crim. 1564

¹⁰ [2007] EWCA Crim. 2661.

BVI Case law

- [30] In **R v Aaron George**¹¹, the Defendant pleaded guilty to the murder of Vincent Connolly. The defendant gave a statement to the police implicating the person he alleged contracted him to kill the victim¹². The victim was found outside his home dead with five gunshot wounds. The Defendant was sentenced to life imprisonment with a possibility of parole after serving 22 years. Time spent on remand was taken into account.
- [31] In **R v. Milton, Campbell and O'Connor**¹³, the defendants Andrew Milton and Dennis Campbell were convicted of murder and conspiracy to murder. The defendants went to the victim's home armed with a gun. The plan was to kill the defendant, Milton's sister but that plan did not materialize. The deceased, the roommate of Milton's sister was strangled rendering her unconscious or dead before she was thrown over the balcony. Both defendants were sentenced to life imprisonment with a possibility of parole after 35 years.

Court's considerations

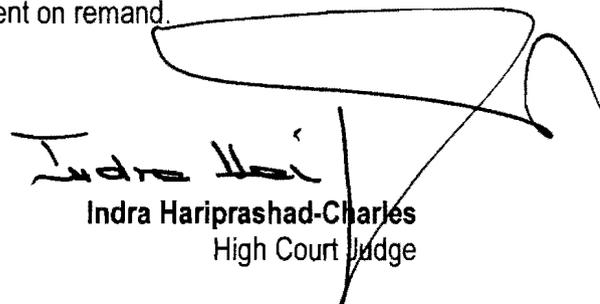
- [32] In a nutshell, the facts of the instant case are that this was a murder which was premeditated and carefully planned. It came on the last day of their vacation. It was done for financial gain and a desire for Mr. Swain to fully pursue a love affair which he had begun prior to the wife's unfortunate death.
- [33] Sch. 21 of the CJA, 2003 provides for appropriate starting points depending on the seriousness of the murder. The instant case is not so serious as to require a "whole life order" but the seriousness of the murder is particularly high as it was a murder done for gain. In my considered opinion, the appropriate starting point is 30 years: see para. 5(2) of Sch. 21 of the CJA, 2003.

¹¹ BVI Criminal Case No. 21 of 2008. Oral judgment delivered on 23rd June 2009.

¹² It is to be noted that at the subsequent trial of the person whom he alleged contracted him to kill, the defendant, the key witness for the prosecution said that he lied to the police as to that person's involvement because he wanted to get a lesser sentence and to appease his friends.

¹³ BVI Criminal Case No. 18 of 2007 [unreported] oral judgment delivered on 6th October 2009 to be reduced into writing.

- [34] The second step after choosing the starting point is to take account of any aggravating or mitigating factors which would justify a departure from the starting point. Taking into account the aggravating and mitigating features the court may add to or subtract from the starting point to arrive at the appropriate punitive period. In the instant case, the Crown has helpfully identified the aggravating features as (i) some degree of premeditation; (ii) killing for financial gain and (iii) the abuse of a position of trust. The sole mitigating factor identified by the Crown is that Mr. Swain has no previous criminal convictions.
- [35] It is important to state that the killing for financial gain cannot be regarded as an aggravating factor as it was already considered in order to determine the appropriate starting point.
- [36] Besides Mr. Swain's unblemished record, I have also taken into consideration his exceptional conduct whilst at Her Majesty's Prisons during his two years of incarceration there on remand awaiting this trial. I do not believe that there will be any departure from that exceptional conduct.
- [37] I also have regard to the purposes of sentencing. It is widely recognized that the four classical principles of sentencing are retribution, deterrence, prevention and rehabilitation.
- [38] It is my view that since this murder was carefully planned and premeditated, it calls for a stiff punishment proportionate to that which was imposed by the English Court in **Taylor** [supra], a case which bears close affinity to the instant case.
- [39] Taking all matters into consideration, I hereby sentence you, **DAVID SWAIN** to life imprisonment with parole eligibility of 25 years less time spent on remand.



Indra Hariprashad-Charles
High Court Judge