ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

NO. OF CASE: ANUHCR2008/0037

THE QUEEN

V

KEVIL NELSON

Appearances:

Mr. Anthony Armstrong Director of Public Prosecutions and Mr. Adlai Smith, Crown Counsel , for :	The Crown
Sir Richard Cheltenham Q.C. with Mr. Cosbert Cumberbatch for:	Kevil Nelson

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2009: November 27
2009: December 11
.....

JUDGMENT ON SENTENCING

1. **Harris, J.:** On the 29th day of October, 2009, Kevil Nelson was convicted of the murder of Denfield Thomas otherwise known as "Toady", on the 24th October, 2006 at Table Hill Garden, Liberta, Antigua & Barbuda.

2. The facts of this case are that on the night of the 23rd of October 2006, The deceased live-in girlfriend, Nasha Edwards, having been put out of the deceased house at Table Hill Gardens some

time after 11:00 pm that night, returned to the said house approximately 1:30 am on the 24th October 2006, with two police officers, after retrieving her 8 month old son from the home of the deceased mother. Ms Edwards was desirous of returning to the house of the deceased to retrieve a baby bag containing miscellaneous baby supplies.

3. On arrival at the home of the deceased Ms Edwards entered the yard, called out to the deceased and was subsequently joined by the two police officers one of which was the convicted man, PC Kevil Nelson. The yard was in darkness and illuminated only by the lights of the vehicle parked outside. Kevil Nelson had been picked up earlier from his station at All Saints by PC Francis of the Liberta station who had requested his assistance to deal with the complaints made by telephone to the Liberta station by the deceased girlfriend, Nasha Edwards.

4. The deceased, Denfeild "Toady" Thomas came walking from the outside of the house with the baby bag on his shoulder. The evidence of what transpired hereonin varies significantly between the prosecution and the defence. What is clear though is that words were spoken between the deceased and the prisoner and an altercation ensued between the prisoner and the deceased, and between the prisoner and the other police officer, PC Francis, the latter of which ended up with PC Francis and the deceased on the ground. Nasha Edwards testified in effect, that what happened that night is that the prisoner told the deceased that he, the deceased, was wanted down at the station, the deceased told the police to leave his premises, and that before the shooting took place she asked the police to leave with her, having earlier retrieved her son and now retrieved the bag she had come for.

5. Ms Edwards testified that the prisoner attempted to grab Denfeild's both hands and Denfeild pulled away. Then the prisoner hit the deceased *for no reason* and the deceased retaliated by punching the prisoner in his face twice. At this time PC Francis jumped on the deceased, they fell to the ground. Whilst the two were on the ground the prisoner shouted out, "Watch yourself" to PC Francis, 3 times. PC Francis moved away from the deceased who then proceeded to get up. While still on the ground, the prisoner stepped up to him, firearm out and shot him in the chest. The evidence from both the prosecution and defence is that the deceased fell forward and never moved

thereafter. He was pronounced dead by a district medical officer. The cause of death according to the pathologist resulted from the gunshot injuries.

6. Ms Edwards testified that after the shooting she asked Kevil Nelson why he shot the deceased and he responded "you don't see he almost burst my eye, what do you want me to do." ... "He started pushing me away from the scene telling me that it is a crime scene now". The two officers alone were left on the immediate scene and subsequently were joined by several other officers.

7. On conviction, the Office of the Director of Public Prosecution announced that it was not seeking the death penalty. The sentencing hearing was adjourned to the 27th of November, 2009 and a Social Inquiry Report was ordered and subsequently prepared and submitted to the Court and the prisoner.[1] The hearing took place on the appointed day.

8. The jurisprudence arising out of the cases of the Queen v Peter Hughes and Newton Spence and butteressed by the cases of Harry Wilson v The Queen (Criminal Appeal 30 of 2004, St. Lucia) and Mervyn Moise v The Queen (Criminal Appeal 8 of 2003), Desmond Baptiste v Queen (consolidated criminal appeals No's 8, 10, 16, 22, 26, 29, 34, 35, 37, 41, and 46 of 2003), Evanson Mitchum et al v The DPP (Criminal Appeals No. 10, 11, and 12 of 2002 of St. Christopher and Nevis) and the Queen v Rudy Monelle (Criminal case No. 0015/2007 of Antigua and Barbuda) provide that in every case of a conviction for a murder, a person must be afforded the opportunity to raise mitigatory factors in relation to the circumstances of the murder and the convicted murderer.

9. The convicted person can lead evidence which mitigates his culpability in the crime for which he had been convicted and that which affects the nature and extent of the sentence to be imposed.

10. Learned Counsel for the convict, Mr. Cumberbatch, availed himself of the opportunity to make a plea in mitigation, drawing the courts attention to the various factors and considerations that the court should take into account in arriving at its sentence. Mr. Cumberbatch indicated that no useful

[1] Since the Landmark decision in the Queen v. Peter Hughes Appeal No. 91 of 2001 (St. Vincent & The Grenadines) on which was held that the mandatory death sentence was unconstitutional, a sentencing hearing is to be held to determine the appropriate sentence in a case.

purpose would have been served by calling witnesses at this point and directed the Court's attention to the witnesses at trial, who gave evidence in support of the good character of the convict. Mr. Cumberbatch accepted the contents of the social enquiry report almost in its entirety, except for one issue in the section where the Probation Officer expressed his own view on the prisoner, and over which learned counsel Mr. Cumberbatch examined the maker of the report and which, in my view, was resolved in the prisoners favour.

11. The Court is guided by the established approach to sentencing for the conviction of murder. This approach is captured in the all the judgments referred to above, including the judgment of The Honourable Sir. Denis Byron CJ (as he then was) at paragraph 42 in Peter Hughes v The Queen.

> *"A person who is convicted of a murder could have committed the crime with various degrees of culpability. The mandatory death penalty precludes the court from considering whether the penalty is appropriate to the peculiar offence and offender and there is no possibility of review from a higher Court. The mandatory imposition of death deprives the person of their right to life solely upon the category of crime for which the offender is found guilty thereby eliminating reasoned basis for sentencing a particular individual to death and failing to allow a rational and proportionate connection between individual offenders their offences and punishment imposed upon them." (**emphasis mine**)*

12. The principle is the same in a matter where the prosecution is not pursuing the death penalty and the Court is determining the duration of the prison term to be imposed. In reference to the Inter-American Convention on Human Rights, (ACHR) the learned Chief Justice further opined;

> *"The convention requires an effective mechanism by which a defendant may present representations and evidence to the sentencing Court...The mitigating factors may relate to the gravity of the offence as the degree of culpability of the particular offender and may include such factors as the offenders character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offence and possibly reform and social re-adaption of the offender".* **(emphasis mine)**

13. In determining the appropriate sentence to impose on the defendant, I must take into consideration such factors, to include, the character of the defendant, the nature and gravity of the offence, the design and manner of the execution of the offence, the subjective factors which may have influenced the defendant's conduct and the degree of the defendant's culpability. Also, the sentencing guidelines stated in **The Queen v Spence and Hughes** enjoin me to take into account any mitigating factors obvious from the evidence and the pre-sentencing reports or otherwise adduced by the defendant.

14. In **Evanson Mitchum,** Saunders J.A. further stated, that at the sentencing hearing, in relation to establishing the mitigating circumstances, the prosecution has to disprove the mitigating factors and, *"The burden of proof shall lie on the prosecution and the standard of proof shall be beyond reasonable doubt".*

15. In considering the appropriate sentence to impose on Mr. Nelson, I find guidance in the judgment of Rawlins JA, in **Harry Wilson v The Queen**:

> *"The sentencing Judge is required to consider, fully, two fundamental factors. On the one hand, the judge must consider the facts and circumstances that surround the commission of 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".*

16. The Court must weigh the mitigating and aggravating factors. In **Harry Wilson v The Queen**, Rawlins JA stated that even though the mitigating factors were detailed, the trial Judge did not weigh them. His Lordship, Justice Rawlins, stated the way in which the Court should approach the weighing of the mitigating and aggravating factors, in order to objectively analyse the defendant's prospects for reform and social re-adaptation. I have done so in this case. In that case - Harry Wilson - based on the very strong mitigating factors, including the defendant's good chances of rehabilitation, coupled with his clean record, the Court quashed the sentence of death and substituted a sentence of life imprisonment.

17. Further, in **Harry Wilson v The Queen**, Rawlins JA stated *"that it is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence, the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder, the design and execution of the offence, and the possibility of reform and social re-adaption of the convicted person"..*

18. It is submitted by counsel for the convicted person that there are no aggravating factors in this matter and that many mitigating factors are evident. It is said, that it is neither possible nor desirable to compile an exhaustive list of relevant aggravating and mitigating factors[1]; the categories of which are never closed.[2] Although I accept that this matter is replete with mitigating factors, I do not accept that there are no aggravating factors. I consider for instance, the circumstances of the commission of the offence and note that the in the use of a firearm the prisoner could not have been under any illusion as to the prospect of the deceased surviving what was the clearly intended shot to the chest of the deceased.

Mitigating and Aggravating factors

19. **The type and gravity of the murder** is not extreme. It does not fall to be considered as an exceptionally or even grave or heinous murder when compared with other murders. The convict in the course of his duty used one single shot from a revolver to effect his deed. A single shot from a firearm lawfully in his possession.

20. **The mental state of the convict** has not either at trial or at the sentencing stage been in issue.[3] It has not been raised by the D.P.P or counsel for the convict and nothing has arisen before the Court to suggest that the convict was laboring under a mental state that would impact on the commission of the crime or the sentencing.

[1] See Conteh CJ in R v Reyes (25th Oct. 2002 Belize)
[2] Page 21 paragraph 37, A guide to Sentencing in Capital cases by E. Fitzgerald Q.C. and Kier Stamar Q.C.
[3] Other than that which attends provocation or Self defence.

21. I consider under this head the acts alleged and testified to at the trial in support of **provocation and self defence.** Counsel for the defence has not raised any of these factors for the Court to consider. However, In R v Olgivie (14th July, 2004) the High Court in Grenada said that;

*"Although the jury has rejected provocation in the legal sense, the Court for the purpose of sentencing is not precluded from taking into account and acting on the behavior of the deceased towards the accused from the time the sexual abuse began to the date of the incident".(**emphasis mine**)*

22. I therefore consider the conduct of the deceased at the time of the commission of the offence. I recognize the difference between the recount of the events on the fateful night between the convict and that of the prosecution. The burden of disproving the mitigating circumstances lie with the prosecution, on the criminal standard of proof; beyond a reasonable doubt. The facts of the case, on both the prosecution and the defence versions, portray the deceased at some point in a physical altercation with the police on the scene, culminating in him punching the convict Kevil Nelson and wrestling with the other officer, PC Francis. The jury appear to have rejected the defence of Self Defence. It is not clear to me whether the rejection of the self defence argument was on the basis of the Kevil Nelson's response being considered excessive in the circumstances or that they were of the opinion that the necessity for self defence simply did not arise. Similarly, the jury appear to have rejected the defence of provocation by words and actions of the deceased, that was left to them as a lesser offence. In both cases however, there was sufficient evidence of acts on the part of the deceased to leave these defences for the jury's consideration. I have considered the said circumstances, falling short of satisfying a jury as they did, as a mitigating circumstance.

23. **The lack of pre meditation** is a factor to which I must give consideration. *"Malice aforethought"* does not necessarily imply significant premeditation. Indeed, there are degrees of pre meditation. There is nothing in the evidence for the prosecution or the defence, that suggests anything but a short moment of pre meditation – seconds even. But, whether on the prosecution's or the prisoner's version of the facts, pre meditation is in my view patent. Clearly, the lengthier the pre meditation the more deliberate the killing appears to be and the premeditation factor can move from being considered a mitigating circumstance to an aggravating circumstance.

24. **The character and social enquiry report.** The testimony of the witness at trial who spoke of the good character of the accused along with those whose opinion form part of the social enquiry report (albeit for the most part, relatives, friends and colleagues) , speak of the prisoners good character, his good standing in the community, reputation for helpfulness, a good family man and church goer, a good hardworking police officer with no disciplinary charges or bad reports from the public in his 18 years of service, his expression of remorse and absence of evidence to suggest future dangerousness. The content of the report suggests that the conduct of the accused giving rise to the murder was out of character. Indeed, several of the persons interviewed expressly said that the conduct was in their view out of character. The social enquiry report included the police records of the accused showing the favourable reports of the accused from his trainers and superiors during his eighteen year police career. The report indicated that the prisoner came to Antigua specifically to join the police force in response to an advertisement the Government of Antigua had published at the time. From all accounts, the accused was a good police officer and would have been considered an asset to the police force notwithstanding the fact that he had not been promoted during that period.

25. **Remorse**: The presence of remorse is a mitigating factor. The prisoner has expressed remorse. There is no evidence or for that matter suggestion by the prosecution to the contrary

26. **Time served**: Counsel for the convict said that the convict has spent what amounts to be 4 ½ prison years in custody to date and that the court should take into account time served in arriving at its sentence. The D.P.P contends that because the convict spent this time at the Police headquarters cell - which has been lawfully designated a prison under the prison Act - therefore kept in circumstances far more comfortable than at the usual Prison, commonly referred to as "1735", that the 4 ½ "prison " years ought not to be given full 'credit' as it were.

27. For my part, I know neither building nor their condition and am in no position in any event, to assess their relevant comforts. Even if I were to be able to lawfully consider the arguments of the DPP, as a consequence of my not being able to distinguish the relative comforts of the respective jails, I cannot discount the convicts time spent at the prison located at the police headquarters. In

any event I imagine that if the Commissioner of Prisons or other lawful authority so determines, he will spend the greater part of his prison term which is ahead of him, at 1735.

Antecedents and Age: The convict has no prior criminal convictions or charges. Neither does he have any disciplinary charges of substance in his 18 yrs of service.

28. In this case, I am of the view that the circumstances of the commission of the offence should be accorded significant weight. The degree of criminality involved in this murder, does not render it a special case. I cannot identify any distinguishing feature other than the fact it was committed by a law enforcement officer on duty. I do not lose site of the fact that somebody was killed. A relatively young man was killed in circumstances in which he ought not to have lost his life. When I say that there was no distinguishing feature I refer to features such as that:

    The murder was not particularly brutal; Or that there was no evidence of circumstances that the defendant was provoked or; that he was attacked by the deceased; or that the murder was substantially premeditated and carefully executed.

29. The offence for which Kevil Nelson had been convicted is very serious - murder. In fact, it is peculiarly objectionable when one considers that he is a Police officer with the duty to protect and serve the public and to do so with a level of professionalism. Crimes like this set back the all important but already deteriorating relationship between the Police and the citizenry. The prosecution evidence was that upon the deceased being shot, the deceased girlfriend and eye witness to the event, was I think, unnecessarily pushed out of the scene and out of eye sight and out of earshot, there after not being in a position to see what evolved on the crime scene.

30. I consider, that upon the DPP indicating that he was not pursuing the death sentence, in effect the maximum term of imprisonment was there set at Life imprisonment – whole life. Is this the appropriate sentence in the circumstances of this case?

    Barrow JA, in Kent Calderon v Queen, and Derek Desir v Queen, Court of Appeal No. 9 of 2006 and 10 of 2006 respectively, quoted Belle J; "*In general it should be said that a life sentence when*

it is other than mandatory, as was the case here, is to be reserved for cases where the defendant is someone in respect of whom there is some relevant factor which cannot be determined at the time when the judge is passing sentence. The usual example of that will be some mental condition which affects the degree of risk which the release of the defendant into the community will present. Where there is no such imponderable feature, and where the question is simply that of punishment and the necessity to deter others, these matters can be gauged at the time of sentence, and so as a rule an indeterminate sentence would be inappropriate."[1] Can it be said on the evidence in this case and on the evidence and other information received at the sentencing hearing, that the defendant poses a risk to society for an indeterminate period?

31. The social enquiry report , including the character of the accused or the facts and circumstances of the case do not suggest that the convict poses a indeterminate risk to society or lacks the capacity for reform or social re adaptation in the future. I want to take a look at these issues and the whole matter before me, in the context of the four pillars of sentencing. In Desmond Baptiste v The Queen No. 8 of 2003, Byron CJ following the classical principles of sentencing as enunciated by Lawton LJ in R V Sargeant [2], stated as follows:

"Retribution

This limb should reflect the society's intolerance to criminal conduct. The Court must show society's abhorrence of particular types of crimes by the sentence I pass.

Deterrence

Deterrence is general as well as specific in nature. The former is intended to be a restraint against potential criminal activity by others whereas the latter is a restraint against the particular criminal relapsing into recidivist behavior. Of what value however are sentences that are grounded in deterrence? Specific deterrence may be an ineffective tool to combat criminal behavior that is spontaneous or spawned by circumstances such as addictions or necessity. Drug and alcohol addiction as well as need may trigger high rates of recidivism. Experience shows that general deterrence too is of limited effect.

[1] Callistus Bernard and others, Grenada, Case No. 19 of 1984, Belle J.
[2] 60 Cr App R 74 at 77.

Prevention

The goal here is to protect society from those who persist in high rates of criminality. For some offenders, the sound of the shutting iron cell door may have a different effect. Some however never learn lessons from their incarcerations and the only way of curbing their criminality is through protracted sentences whose objective is to keep them away from society. Such sentences are more suitable for repeat offenders.

Rehabilitation

Here the objective is to engage the prisoner in activities that would assist him in reintegration into society after prison. However the success of this aspect of sentencing is influenced by executive policy. Furthermore, rehabilitation has in the past borne mixed results. Of course sentencing ought not to be influenced by executive policy such as the availability of structured activities to facilitate reform".

32. These four principles apply in this case as follows; **Retribution**: The sentence is one that should clearly reflect societies intolerance and abhorrence of murder. I am of the view that in this case, in order to achieve this, a sentence of imprisonment is necessary.

33. **Deterrence:** The sentence should act as restraint on Kevil Nelson in committing offences of a similar nature. Although the report and my assessment of the convict generally does not rule out his capacity to be in a similar situation again, I cannot peg him absolutely as a potential recidivist. In addition, and in this case perhaps more importantly, the sentence should act as a deterrent to others in the protective services and the larger society. I am of the view that a sentence of imprisonment is necessary to achieve this goal in relation to other potential criminals and to a lesser extent in relation to the convict;

34. **Prevention**: This overlaps with deterrence. This principle does not apply to the same extent as the others in relation to this convicted person;

35. **Rehabilitation**: The social enquiry report suggests that the convict has prospects for social re-adaptation upon completing his term of imprisonment. The Defendant would have no realistic

chance of gaining employment in the protective or security services upon serving any sentence for murder. The convict from all accounts has the focus and work ethic to enable him to engage in the activities at the prison designed to equip him with new skills that would assist him in reintegration into society.

36. It is always useful and I think just and fair to consider the sentences of others within the OECS jurisdiction in order to create a context within which to fix a sentence in this case. There are a number of decisions from our Court, in which the Court has imposed the sentence of life in prison for the offence of murder. Several of these were set out in the sentencing judgment of Blenman J in Queen V Rudy Monelle.[1] I repeat them hereafter along with other precedents of sentences for the crime of murder to assist in the understanding of my sentence and for the reader's edification. It is worth noting that the mitigating and aggravating circumstances in these cases vary from case to case.

37. So, in **Nardis Maynard v The Queen No. 12 of 2004, Saint Christopher and Nevis**, the appellant was convicted of murder and sentenced to imprisonment for life. At the time of the sentencing, he was 22 years old and had an impeccable record. He grew up without a father and lacked parental guidance. On appeal, the sentence and conviction were upheld. Rawlins JA, as he then was stated:

> *"Sentencing in murder cases is at the discrescion of the Judge, who may impose such sentence as the circumstances of the crime and aggravating and mitigating factors demand. Judges usually try to be consistent and are entitled to consider similar cases".*

38. In **Kamal Liburd and Jamal Liburd, Criminal Appeal No. 9 & 10 of 2003**, two brothers ages 24 and 20 years, were convicted of murder and manslaughter. Kamal was convicted for the offence of murder and was sentenced to life imprisonment, and Jamal was sentenced to thirty years for the offence of manslaughter. On appeal, their sentence and conviction were upheld.

[1] Supra.

39. In **The Queen v Lyndon Lambert Criminal Case No. 0057 of 2003, Grenada**, the defendant, who was 20 years old at the time of the offence, was convicted of murder. The Court sentenced him to life in prison.

40. In **Java Lawrence v The Director of Public Prosecutions, Criminal Appeal No. 1 of 2008**; the appellant who was convicted of murder and sentenced to life in prison has had his conviction and sentence upheld.

41. In **Roger George v The State, Criminal appeal No. 4 of 1999**, the appellant was convicted of murder. On appeal, his conviction of murder was quashed and the conviction of manslaughter was substituted. On appeal he was sentenced to life imprisonment. Byron CJ stated:

> *"We are asked to exercise leniency and to impose a fixed term of years on a young man of 25 years who could be rehabilitated after serving a custodial sentence. The crime, however, falls within the category of domestic violence. This man who killed his woman because she was going to leave him and because she had been having an affair with another man for a long time. The community is paying more attention to these crimes which are on the increase".*

42. In **Augustine Mc Pierre v The Queen, Criminal Appeal No. 12 of 2002, Saint Vincent and the Grenadines**, the appellant was convicted for the murder of his common law wife and sentenced to life imprisonment. On appeal, both his conviction and sentence were upheld.

43. In **DPP v Crispin Prentice, SKBHCR 2004/0061, St Christopher and Nevis**, the accused, a 23 year old with no previous convictions was convicted of murder and sentenced to 25 years imprisonment.

44. In the **DPP v Che Gregory Spencer**, SKBHCR 2008/0004, St Christopher and Nevis, the acc was convicted and sentenced for a murder using a firearm. The DPP asked for the death penalty. The accused was sentenced to 18 years H.L.

45. In **Elvon Barry/Zoyd Clement/Kenton Phillip v Queen**, Criminal Appeals Nos. 5, 9 and 10 of 2004, Grenada, the sentence ranged from life imprisonment to 18 years imprisonment.

46. In **Michael David and Stephen Sandy v The Queen, Criminal Appeal 5 & 6 of 2002**, Grenada, the first accused was sentence to life and the second to 18 years.

47. In **Keith Mitchell v The Queen, Crim. Appeal 11 of 2005, Grenada,** the accused was convicted and sentenced for murder. On appeal the conviction and sentence of 12 years was confirmed.

48. This Court is of the view that the indeterminate sentence of life imprisonment is appropriate where the defendant has committed a very violent and serious offence. In considering whether a case falls within that category the court is required to compare this case with other murder cases and not with ordinary civilized behavior.[1] Up against ordinary civilized behavior all murders are violent and serious. In sentencing however, there are different levels of seriousness and indeed of culpability. The Probation Report does not raise any aggravating circumstances sufficient to override the mitigating circumstances. In any event, on the balance, the mitigating circumstances outweigh the circumstances that may amount to aggravating circumstances. It is worth noting though that, the sentence of life could also be imposed on a defendant who may have many mitigating and other circumstances in his favour. The outcome of the courts deliberation over sentencing is influenced by the extent to which the individual considerations are weighted in any particular case.

49. I have given attention to the aggravating and mitigating factors, including the character of the prisoner, the circumstances of the case, including the age of the prisoner, his clean criminal and disciplinary record and I have considered the fact that someone was killed and killed in a premeditated manner, albeit a somewhat fleeting period of premeditation, and then, weighted them all accordingly. The content of the social enquiry report and its attachments have been given due attention and weighted along with all the other considerations.

[1] See Lord Carswell in PC Appeal No. 67 of 2007, Daniel Trimingham v The Queen [2009] UKPC 25 at para. 21

CONCLUSION

50. I have sought and I believe achieved consistency and justice in this sentence. I have considered and taken into account time already served in arriving at the appropriate sentence that in all the circumstances fits the crime. I do not believe that an indeterminate sentence is appropriate to meet the objectives of the sentencing principles as applied in this case.

51. Kevil Nelson you were convicted for murder; the most severe offence known to us and perhaps to mankind. The justice of the situation calls for an extensive term of imprisonment. A young man is dead as a result of your actions.

ORDER

52. You are hereby sentenced to 22 years imprisonment with Hard Labour.

David C. Harris
High Court Judge
Antigua & Barbuda