THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
CRIMINAL DIVISION

CRIMINAL CASE NO: ANUHCR2010/0029-0030

BETWEEN:

THE QUEEN

AND

AVIE HOWELL
KANIEL MARTIN

Appearances:

Mr. Anthony Armstrong, Director of Public Prosecutions, Mr. Adlai Smith and Ms. Shannon Jones, for the Crown
Ms. Maureen Hyman-Payne and Mr. Ralph Francis for the Defendant, Avie Howell
Mr. Marcus Foster and Mr. Michael Archibald for the Defendant, Kaniel Martin

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2011: September 26
2011: October 3
2011: November 11
2011: December 2
2011: December 8
2011: December 16

JUDGMENT ON SENTENCING

1. FLOYD, J.: Avie Howell and Kaniel Martin, hereafter referred to as the defendants, were convicted by a jury of 3 counts of murder contrary to common law on July 27, 2011. This concluded a trial that had commenced on June 1, 2011. The defendants were convicted of the murders of Catherine Mullany and Benjamin Mullany at the Coco Hotel in St. Mary Parish. The incident occurred on July 27, 2008 although Benjamin Mullany did not die until August 3, 2008. The defendants were also

convicted of the murder of Wonetta Anderson at Browne's Avenue, St. John Parish, on August 8, 2008.

2. At the time of conviction, learned prosecuting counsel, Mr. Smith, on behalf of the DPP, gave verbal notice and reserved the decision to seek the death penalty. This court therefore ordered the preparation of a social investigation report and a psychiatric report for each defendant, for use at the sentencing hearing. These reports were subsequently received and made available to the court, the DPP and defence counsel.

3. At the sentencing hearing, the Crown called 3 witnesses, the author of the psychiatric report, Dr. James A. King, and the authors of the social investigation reports, probation officer Irvin Henry (regarding Avie Howell) and probation officer Alethea L. Byers (regarding Kaniel Martin), no witnesses were called on behalf of the defendants.

FACTS

4. Catherine Mullany and Benjamin Mullany were British citizens on holiday in Antigua and Barbuda, staying at a resort known as Coco Hotel. They had just been married and were on their honeymoon.

5. In the early morning hours of July 27, 2008, police and emergency medical personnel were called to Villa 15 at the Coco Hotel. What they discovered was a male and female who had both been shot in the head. The female was dead and the male was mortally wounded. They were later identified as Catherine Mullany and Benjamin Mullany. Dr. Orieta Zacharia pronounced Catherine Mullany dead at 8:03 am that morning.

6. A post mortem was conducted by pathologist, Dr. Petra Miller-Nanton, in Antigua on July 30, 2008 on the body of Catherine Mullany. Dr. Miller-Nanton described a gunshot entry wound to the back of the head, which resulted in the recovery of a bullet. The cause of death was described as a severe penetrating head injury consequent to a gunshot wound to the head. A supplemental post mortem was conducted on Catherine Mullany by forensic pathologist, Dr. Derrick Simon James. in

Wales on August 5, 2008. Dr. James described a gunshot entry wound behind the left ear at the back of the head and gave the cause of death as a gunshot wound to the head. Dr. James also conducted a post mortem on Benjamin Mullany in Wales on August 5, 2008. Dr. James described a gunshot entry wound to the left side of the back of the head. A bullet was also recovered during this post mortem examination. The cause of death was listed by Dr. James as a gunshot wound to the back of the head.

7. Police retained the bullets recovered from the post mortems and collected further evidence from the scene at Villa 15, Coco Hotel. Polce recovered 3 spent shell casings or cartridge cases from the floor of the villa. Access to the villa was obtained from the verandah through doors leading into the living area and the bathroom. There was damage to the bathroom door consistent with recent forced entry. A bullet hole was found in the east wall of the villa. Entry to the hotel property could be had in 3 ways, one of which was via a steep and unmaintained road which led from the main entry road to a rear gate. This gate was not secured and a path led from that gate to the vicinity of Villa 15. Taken from Villa 15 during what appeared to be a robbery were personal items belonging to the Mullany's, including a camera and two cell phones.

8. In the early morning hours of August 9, 2008, police and medical personnel were called to attend the Morning Glory Sunshine Shop, a convenience store located on Browne's Avenue and operated by Wonetta Anderson and her spouse, Stephen Christian, from their home. On August 8, 2008, Mr. Christian left home late in the evening, leaving the shop locked and Ms. Anderson inside. When he returned about an hour later and noticed some damage to the building, he became alarmed. Mr. Christian entered the shop and discovered the body of Wonetta Anderson. Police were called and attended, as did Dr. Cecil Philip, a registered medical doctor. Dr. Philip attended the house/shop on Browne's Avenue at 4:30 am on August 9, 2008. He examined the body of a female, who was later identified as Wonetta Anderson. He pronounced her dead at the scene.

9. The body of Wonetta Anderson was transported to hospital where a post mortem was conducted by pathologist, Dr. Petra Miller-Nanton. She described a gunshot wound to the right cheek as being an entry wound and she recovered a bullet during the post mortem examination. Dr. Miller-Nanton gave the cause of death as a gunshot wound to the head with severe penetrating injury.

10. Police examined the scene and noted shoe prints in blood on the floor and a blue and white bandana close by. Items taken during this apparent robbery included cash money, several phone cards and two cell phones. Yolanda Bascombe, a neighbour to Ms. Anderson and Mr. Christian, testified that she saw two persons jump over the fence where Ms. Anderson lived and run away. This was around midnight on August 8, 2008. Barrymore Potter, who also lives on Browne's Avenue, testified that on August 9, 2008, he saw two men, one tall and one short (Mr. Martin is tall and Mr. Howell is short), standing, stooping and looking back to see if anyone was coming or following them. It was dark. The shop belonging to Ms. Anderson was close by.

11. Ronnie Christopher testified that on May 26, 2008, his .380 Glock pistol, two ammunition magazines, 14 rounds of ammunition, a holster for the Glock pistol and other items were stolen from his residence during a break in. He had kept a spent cartridge case, ejected from this pistol after firing. Mr. Christopher later passed that cartridge case on to police. Mr. Christopher identified the holster recovered from the yard of the defendant, Avie Howell, as being the one stolen from his home.

12. On August 11, 2008, police recovered a red and black Nokia 5310 cell phone. It was confirmed that this phone had belonged to Benjamin Mullany, up until his death.

13. A good deal of expert forensic evidence was called by the Crown in this case. Forensic biologist, Clare Stangoe, testified that a DNA profile was obtained from the blue and white bandana recovered from Wonetta Anderson's shop. This profile matched a DNA profile obtained from the defendant, Avie Howell. She estimated that the probability of obtaining these matching profiles, if the DNA found on the bandana came from someone other than, and unrelated to, Mr. Howell, was less than one in one billion

14. Police Inspector Graham Husbands, forensic firearm examiner, testified that the .380 calibre cartridge cases given to him to examine were fired from a .380 Glock pistol. These were the cartridge cases obtained from the Coco Hotel and from Ronnie Christopher. Anthony Miller, a forensic scientist specializing in ballistics, testified that the bullets recovered from Benjamin

Mullany and Wonetta Anderson matched and were fired from the same Glock gun. The bullet recovered from Catherine Mullany had similar markings and was likely fired by a Glock gun. The cartridge casings from the Coco Hotel and Ronnie Christopher also matched and Mr. Miller concluded they were fired from the same Glock gun.

15. Christopher Moynahan testified as a scientist specializing in the recovery, identification and interpretation of gunshot residue. He testified that gunshot residue was found in varying amounts on items of clothing recovered from the residences of both defendants.

16. Adrian O'Leary, a technologist specializing in digital electronics relating to SIM cards, memory cards, and cell phones, examined the Nokia 5310 cell phone belonging to Benjamin Mullany. The phone contained a number of audio recordings, including the voice of the defendant, Kaniel Martin.

17. The Crown also called a number of witnesses from telephone service providers and telephone companies. They testified that some of the phone cards stolen from Wonetta Anderson's shop were the same ones recovered by police from the residence of the defendant, Avie Howell, and in a field close by Mr. Howell's residence. Telephone records also show Kaniel Martin's SIM card was inserted into one of the phones taken from Wonetta Anderson's shop on the day after her murder. Telephone records also show Avie Howells's SIM card was inserted into Benjamin Mullany's phone on the day after his murder. Such records also show Avie Howell's SIM card was inserted into the second phone taken from Wonetta Anderson's shop shortly after her murder. Police located the phone in Avie Howell's room during a search of his residence. Telephone records also indicate Kaniel Martin's cell phone received a call via the telecommunications mast in Jolly Harbour at the approximate time of the murders of Catherine Mullany and Benjamin Mullany. That area is close to the Coco Hotel location.

18. Anthony Larkin, a forensic scientist, whose specialization is bloodstain pattern analysis, shoe marks and prints, testified that his comparison of partial bloodstain shoe marks found on the floor of Wonetta Anderson's shop with a shoe belonging to the defendant, Avie Howell, led him to conclude that the shoe probably made those marks in the blood.

19. David Johnston, an expert in telecommunications intelligence, testified that the SIM card or phone chip belonging to the defendant, Avie Howell, was placed into the cell phone belonging to Benjamin Mullany at 13:37 on July 28, 2008. The cell phone belonging to the defendant, Kaniel Martin, was used at 22:54 on August 8, 2008 via the Gray Hill North cell tower, which covers the area where Wonetta Anderson's shop was located. On July 27, 2008 at 05:06 the cell phone belonging to the defendant, Kaniel Martin, received a call from the cell phone of Georgette Aaron (girlfriend of Avie Howell) via the Jolly Harbour East cell tower. At 06:34 Kaniel Martin's cell phone received a call from the Aaron home phone via the Jolly Harbour North cell tower. Jolly Harbour is in the vicinity of the Coco Hotel.

20. Civilian witnesses testified for the Crown that they saw the defendants together in a Jeep rented by Georgette Aaron on the morning of July 27, 2008. Several civilian witnesses testified further that they did not see the defendants with Georgette Aaron at a Carnival gathering at a place known as Lion's Den on July 27, 2008. All of this testimony contradicted and negated the statements given by the defendants to police as to their whereabouts on that date.

21. The defendant, Avie Howell, chose not to give evidence at trial. The defendant, Kaniel Martin, gave an unsworn statement from the dock and essentially said that the reason his cell phone indicated his presence in the Jolly Harbour area was due to his attendance there for a late night swim. The essence of the defence for both Mr. Martin and Mr. Howell, as revealed by the questioning of the Crown witnesses, was that they were not present at either of the crime scenes, did not know the deceased persons and were never in possession of a .380 Glock pistol. The defence was one of putting the Crown to the test of proving its case to the satisfaction of the jury. The Crown clearly met that test, as by way of verdict, the jury rejected the defence and accepted the Crown's evidence.

REPORTS

22. In response to an order from this court, Dr. James A. King, examined the defendants separately to determine their competency to face the sentencing process. The report indicates that Mr. Howell "was cooperative in a surly way, very guarded, and maintained minimal to no eye contact. He sat

hand cuffed with a rigid and defensive posture and never faced the writer." He presented with a "flat, expressionless, affect." His insight was described as "questionable" and his judgement and impulse control were described as "adequate". When asked how he felt for the families of the murder victims he replied "I sorry for them, but how can I feel guilty about it when I didn't do it?"

23. Overall, Mr. Howell was found to be "cognitively intact and met no current criteria for any Axis 1 psychiatric disorders…….other than the possibility of cannabis dependence/abuse". He understood what he was found guilty of, and the possible sentence. Dr. King's opinion was that Mr. Howell "has the capacity to understand all facts presented and is competent to be sentenced".

24. In his testimony, Dr. King confirmed that Mr. Howell had the capacity to face sentencing. Although guarded, Mr. Howell cooperated with the examination. Dr. King found Mr. Howell to be very cool, guarded and distant. In Dr. King's opinion, there was something inherently wrong with Mr. Howell's personality and he is at risk to be diagnosed as having a personality disorder. Dr. King, however, gave this opinion cautiously because his examination did not include an assessment of personality disorder.

25. In cross examination, Dr. King admitted that anxiety was normal in cases like this when patients are examined while handcuffed and in a prison setting.

26. Dr. King also conducted a psychiatric evaluation on Kaniel Martin. When asked how he thought the families of the victims felt, Mr. Martin said "they must feel bad because he felt real bad when his stepbrother was shot dead". Mr. Martin was cooperative with the examination although somewhat guarded and nervous. He maintained good eye contact and displayed a sad affect. He did not exhibit any indication of Axis 1 psychiatric diagnoses. His history revealed significant cannabis abuse/dependence but he was cognitively intact.

27. Dr. King's opinion was that Mr. Martin "has the capacity to understand and process all necessary facts and is therefore competent to face sentencing in court".

28. In his testimony, Dr. King stated that it was normal for a patient to appear guarded during such an examination but eventually a "connection" was made between him and Mr. Martin. This was in contrast to the examination of Mr. Howell. Dr. King went on to say that one actually felt something for Mr. Martin and Dr. King felt empathy towards him. This was in contrast to the results of the examination of Mr. Howell. Dr. King stated that Mr. Martin showed some feelings of sadness for what had occurred.

29. Social investigation reports were prepared for each defendant. Probation officer, Irvin Henry, presented the report for the defendant, Avie Howell. Mr. Howell was described as being born on September 3, 1989. He admitted to using marijuana daily since he was 13 to 14 years of age. Mr. Howell asked the court, through the probation officer, for leniency, considering his age and his recent efforts to change his behaviour. Mr. Howell further reported that he was unable to express regret or remorse for the loss of lives but hoped the true perpetrators would be brought to justice.

30. There is no record of criminal convictions for Mr. Howell and this court takes no notice of any reference to either outstanding charges or charges that were withdrawn, in the sentencing of Mr. Howell for these offences, as it would be improper so to do. Mr. Howell spent time at the Boys Training School in 2007 where his behaviour was described as poor. Mr. Howell was frequently suspended from school for disruptive and violent behaviour. Information indicates he may have been a member of a gang. Mr. Howell, was, however, seen as a student who had the potential to do well academically. He has been gainfully employed and up until the time of his remand on these charges, he worked with his brother.

31. The defendant, Avie Howell, was very quiet and non-committal during his interview with probation staff. There was very little sign of any emotion of any sort, including remorse for the offences. The probation officer did confirm, however, that it was difficult to note any social behavioural changes on the part of Mr. Howell because he has been incarcerated for the past 3 years. Information gathered referred to negatives from the past and it is for that reason that information from prison staff regarding Mr. Howell is particularly important to this court. Mr. Howell has been incarcerated in the maximum security cell block at Her Majesty's prison. Indications are that he was very hostile

towards staff and inmates during the first two years while on remand. However, recently, there have been improvements in his behaviour.

32. Principle officer, Grant Briggs, has been in charge of the maximum security section of the prison for the last 10 years. I quote from the probation report as follows: "(Officer Briggs) acknowledged particular improvements in Avie's mannerism, his dissociation from friends of negative influence within the prison and his overall attitude as it pertains to his perception of "life". Mr. Briggs is further of the opinion that there have been efforts towards rehabilitation, as recently, Avie has been spending most of his free time reading and engaging in positive activities. He appears more patient and he does not exhibit much of the anger shown in the past, which, Mr. Briggs believes is the potential for further rehabilitation."

33. Probation officer Henry testified regarding his report and during cross examination, Ms. Hyman-Payne, learned counsel for the defendant, Avie Howell, confirmed that she was instructed as to the date of birth for her client being September 10, 1989. The behaviour of the defendant, Avie Howell, was described as nonchalant and disinterested, and his body language did not indicate remorse. However, probation officer Henry did concede that he was unable to make a determination or assessment because Mr. Howell has been in custody for a number of years and probation officer Henry therefore accepted what officer Briggs said about Mr. Howell.

34. A social investigation report was prepared by probation officer Alethea L. Byers on behalf of the defendant, Kaniel Martin. Mr. Martin is a 23 year old single father of a 5 year old daughter. He presented as timid, smirking, articulate and maintained eye contact. Probation officer Byers offered that his presenting behaviour could have been caused either by nervousness or a defence mechanism to hide emotion. Mr. Martin has held employment prior to his incarceration. He maintained his innocence regarding these offences and to the interviewer, appeared to show no remorse.

35. Mr. Martin has no criminal record nor any antecedents. Both in school and at work, he was described as a quiet and respectful person. Mr. Martin had a difficult childhood, being abandoned by his mother at an early age.

SUBMISSIONS

36. The learned DPP reminded this honourable court of the need to balance the interests of the public with the interests of the offenders. The defendants were indicted on and convicted of 3 murders. The case for the Crown was based upon the theory that the defendants acted together in an unlawful joint enterprise. There was no direct evidence to indicate which defendant fired the fatal bullets. In this case, there was no evidence to differentiate between the roles played by each defendant in each offence.

37. With regard to the age of the defendant, Avie Howell, which is a critical consideration in this case, the court was directed to the testimony of the mother of Mr. Howell at trial, as well as to the social investigation report. The former referred to his date of birth as being 1990 (although she wavered between 1989 and 1990) and the latter referred to a date of birth of 1989. The issue was resolved, however, when the learned DPP tendered a copy of the official birth certificate for Avie Howell, on consent of counsel, which confirmed his date of birth as being September 10, 1989.

38. Mr. Armstrong submitted, quite rightly, that sentencing is a matter for the court and that neither the Crown nor anyone else can fetter the sentencing judge in that regard. Mr. Armstrong made no specific submissions to the court as to the appropriate sentence, save to suggest that the appropriate punishment for these crimes would include a range from the ultimate penalty, death, to life imprisonment, to detention at the court's pleasure. The learned DPP presented a number of cases outlining the considerations a sentencing court must have regarding the death penalty. Mr. Armstrong reminded this honourable court that the cases indicate that the death penalty is reserved for the most exceptional and appropriate circumstances, often referred to as being "the worst of the worst or the rarest of the rare". The nature and facts of the offence must be considered, along with the situation and circumstances of the offender. There must be no reasonable prospect of reform and it is the imposition of the death penalty that requires justification, not the non-imposition of it. The circumstances of the defendants are set out in the social investigation and psychiatric reports filed. The circumstances of this case reveal unprovoked murders that took place in the victims' residences, where property was taken. Death was caused by a single gunshot to the head of the victim in each case.

39. Learned counsel for the defendant, Avie Howell, submitted to this court that her client had been convicted after entering pleas of not guilty and receiving a proper and fair jury trial. She asked this court to recognize that her client had exercised his constitutional right and merely engaged the obligation on the Crown to prove its case beyond a reasonable doubt. She asked that Mr. Howell not be penalized for that. Ms. Hyman-Payne also urged this court to disregard the international media attention that this case may have generated.

40. I pause at this point to indicate that this honourable court decides each case upon its merits, taking into account all appropriate statutory and case law, as well as the features and facts unique to every case. Media attention and review is unknown to and not considered by this honourable court, either in this case or indeed in any case. Similarly, this honourable court assures counsel that the exercise of a defendant's right to trial and his reliance upon the fundamental principle of the presumption of innocence and the requirement of the Crown to prove its case beyond a reasonable doubt, will not be considered as an aggravating feature.

41. Learned counsel, Ms. Hyman-Payne, went on to refer to the classic principles of sentencing, retribution, deterrence, prevention, and rehabilitation. She reminded this court that Mr. Howell is a young man with no prior criminal record. She submitted Mr. Howell's date of birth to be 1990 which, as I have already noted, I do not accept and therefore will not refer to the cases that were presented to this court by learned counsel, which deal with situations of offenders convicted of murder who were under the age of 18 years. Learned counsel for the DPP had similarly addressed this court on that point and submitted such case law, prior to the presentation of the birth certificate for Mr. Howell, which settled the issue.

42. Ms. Hyman-Payne referred to a number of cases outlining the considerations that a court should bear in mind in sentencing in cases of murder. Most importantly, when the court considers the death penalty, she referred to the question of whether the offence was considered to be the "worst of the worst, or the rarest of the rare" and the need to balance that with the prospect of reform for the offender. It was learned counsel's position that this case was not the worst of the worst and she referred to facts, including the deaths being caused by a single bullet to the head of each

victim, no evidence of either sadistic or ritualistic elements to these murders and the lack of grotesque or gruesome characteristics. All of this must be borne in mind when the court considers the nature and gravity of the offence and the manner in which it was carried out.

43. In considering the social investigation report, Ms. Hyman-Payne urged this court to consider the young age of Mr. Howell. The fact that he appeared or presented as a quiet person should not be taken as revealing a lack of remorse. Body language and demeanour differ amongst individuals. Any perception on the part of the probation officer that Mr. Howell displayed a lack of remorse should be discounted. Ms. Hyman-Payne submitted on behalf of her client that he has advised her of his remorse.

44. Ms. Hyman-Payne described these offences as "robberies gone wrong". Indeed, the learned DPP, while reminding this court that the Crown was not required to prove motive, pointed out that the evidence at trial indicated robbery was the motivation behind these incidents. Learned counsel for the defendant Ms. Hyman-Payne, reminded this court that although there were 3 murders, they did not all take place at one time or as one event. The evidence presented by the Crown was entirely circumstantial in nature and there was no specific evidence as to which of the two defendants actually "pulled the trigger" on each occasion.

45. Ms. Hyman-Payne submitted to this court that her client, Mr. Howell, has been in custody for these offences since August of 2008 and asked the court to consider that. She asked this court to render a determinant sentence rather than a sentence at the pleasure of the court. She asked this court to be merciful, lenient, and balanced when approaching the sentencing of Mr. Howell. There was no evidence as to which of these defendants was the leader nor what role each defendant played in each murder. The circumstantial evidence pointed to a joint enterprise with the defendants acting together. There should be no differentiation between the defendants by way of sentence.

46. Mr. Archibald, learned counsel for the defendant, Kaniel Martin, submitted and referred to a number of cases. He reminded this court that when the death penalty is being considered, the court should take into account whether the case constituted the "worst of the worst", whether there was any prospect of reform for the offender and whether the object of punishment could be

achieved by any sentence other than the death penalty. Learned counsel reminded the court of the four principles of sentencing, retribution, deterrence, prevention and rehabilitation. In the case of Mr. Martin, learned counsel submitted that the need to protect the community, prevention, could be achieved by sentencing Mr. Martin to a term of custody. Furthermore, there is no evidence that Mr. Martin cannot be rehabilitated. Mr. Archibald pointed to the psychiatric evaluation and the testimony of Dr. King. Dr. King stated that there was "always hope" when asked whether the defendants were capable of reform. When asked about recidivism and risk factors for the defendants, Dr. King stated that he could not come to a conclusion as that would require further evaluation. Dr. King said that he felt empathy towards Mr. Martin and was moved by their meeting. He described it as being a productive interview.

47. Mr. Archibald went on to submit when considering whether this case constituted the "worst of the worst" the court should note that there was no evidence of torture, sadism, degradation, or dehumanization of any of these victims. Each event did not appear to be either particularly brutal or prolonged. The court must balance the aggravating factors with the mitigating factors. He submitted that Mr. Martin is a family man with no criminal record. The report of Dr. King indicated a degree of remorse and the probation report revealed a quiet, hardworking man.

48. Mr. Archibald pointed out that there was a lack of premeditation in these offences. There was no evidence of planning involved. Furthermore there was no proof of what role each defendant played in each murder. All of these factors pointed toward mitigation. Although murder is the most serious of offences, the death penalty is not automatic and there is a presumption to the right to life. The death penalty should only be imposed where no other penalty is appropriate.

THE LAW

49. The Offences Against The Person Act, CAP 300 of the Laws of Antigua and Barbuda, provides as follows:

Section 2.

Whomsoever is convicted of murder shall suffer death as a felon.

Section 3. (1)

Upon every conviction for murder, the Court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence, and in respect thereof, may be had and taken in the same manner, and the Court, before which the conviction takes place, shall have the same power, in all respects, as after a conviction for any other felony for which a prisoner may be sentenced to suffer death as a felon:

These sections deal with the sentencing of offenders convicted of murder at common law. The legislation has, of course, been subsequently modified by case law.

50. The Eastern Caribbean Supreme Court, Court of Appeal, has held that the mandatory imposition of the death penalty for the offence of murder is unconstitutional. In the combined case of Newton Spence v. The Queen, Criminal Appeal no. 20 of 1998 and Peter Hughes v. The Queen, Criminal Appeal no. 14 of 1997, Byron, CJ stated at paragraph 30:

The issue here is whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the offender, whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate; whether the unlawful punishment of death should only be imposed after there is a judicial consideration of mitigating factors relative to the offence itself and the offender.

The learned Chief Justice went on to state at Paragraphs 43 and 44:

The experience in other domestic jurisdictions, and the international obligations of our states, therefore suggest that a Court must have the discretion to take into account the individual life circumstances of an individual offender and offence in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process.

In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially prescribed principles and standards, and should be subject to

effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individual sentencing in implementing the death penalty.

51. Following this decision, sentencing became an individualized process unique to every case of murder. I refer to the cases of The Queen v. Rudy Monelle, ECSC Criminal Case No. 0015 of 2007, Antigua and Barbuda and Harry Wilson v. The Queen, ECSC Civil Appeal No. 30 of 2004. Both of these cases set out the balanced considerations a sentencing court must take into account in a murder case. These include the character, record and personal and individual circumstances of a defendant, as well as the facts and circumstances surrounding the commission of the offence, the nature and gravity of the offence, the design and execution of the offence and the possibility of reform and social re-adaptation of the defendant.

52. Sentencing involves many considerations. In the words of Lawton, LJ, in the case of R. v. Sargent, 60 Cr. App. R. 74, the court endeavours to answer the question, "What ought the proper penalty to be?" Sentencing seeks to promote respect for the law and an orderly society. The sanctions imposed by a sentencing court when fashioning the proper penalty are based upon the classic principles of sentencing set out in cases such as R. v. Sargent ibid. Those principles include: a) retribution, the court must reflect society's abhorrence of particular types of crime through punishment of such unlawful conduct, b) deterrence, specific to the offender and generally to likely offenders or persons who may be minded to commit similar offences, c) prevention, to protect the public from offenders who persist in committing crimes by separating them from society, d) rehabilitation, to engage offenders in activities designed to assist them in their reintegration into society.

53. A sentence should be increased or decreased to take into account all aggravating and mitigating factors relating to both the offence and the offender. Sentencing principles in the case of murder were clearly set out by Rawlins, JA (as he then was) in the case of Harry Wilson v. The Queen ibid at paragraphs 16-18:

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….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.

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.

In summary, 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 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.

54. These sentencing considerations were further explored and considered in a case that was frequently referred to in the submissions of all learned counsel and that is Daniel Dick Trimmingham v. The Queen, Privy Council Appeal No. 67 of 2007 found at 2009 UK PC 25 delivered June 22, 2009. In that decision, the approach which a sentencing judge should follow in a case where the imposition of the death sentence is discretionary was defined by Lord Carswell at paragraph 21 as follows:

It can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, "the worst of the worst" or the "rarest of the rare". In considering whether a particular case falls into that category,

the judge should of course compare it with other murder cases and not with ordinary civilised behaviour. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any other means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled.

55. In the Trimmingham case, learned counsel for the appellant contended that although the crime was brutal and disgusting, it fell short of being the rarest of the rare. Counsel submitted that the killing was not planned nor premeditated and although the manner of the killing was gruesome and violent, there was no torture of the deceased or prolonged trauma or humiliation of him prior to death. After considering these submissions, Lord Carswell stated at paragraph 23:

Their Lordships accept the correctness of this contention. It was undeniably a bad case, even a very bad case, of murder committed for gain. But in their judgement it falls short of being among the worst of the worst, such as to call for the ultimate penalty of capital punishment. The appellant behaved in a revolting fashion, but this case is not comparable with the worst cases of sadistic killings. Their Lordships would also point out that the object of keeping the appellant out of society entirely, which the judge considered necessary, can be achieved without executing him.

56. Finally, when considering the unfettered responsibility of the sentencing judge, I refer to the case of Nardis Maynard v. The Queen, ECSC Criminal Appeal No. 12 of 2004, where Rawlins, JA (as he then was) stated:

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

57. To that end, I have reviewed the case law in this jurisdiction for the last several years for the crime of murder and I have found that sentences have ranged from 12 years to life in prison, to the ultimate sentence of the death penalty.

ANALYSIS

58. When I consider these offences, I note that the evidence indicates a break in and robbery took place at Villa 15 of the Coco Hotel and the Morning Glory Sunshine Shop on Browne's Avenue. During the course of these robberies, the defendants shot and killed the occupants at those locations. I am moved by the tragedy of this senseless loss of human life. Two newlyweds on their honeymoon and a hardworking shopkeeper were brutally and callously shot dead at close range. This court attended a locus in quo at both of these locations and it was painfully obvious that the victims must have been at close quarters when they were confronted by these defendants. This court can only imagine the horrible events that took place but I have no doubt that these unfortunate victims were terrified by the presence of these intruders in their residences, before being summarily dispatched by these defendants. It is small comfort to the grieving families that their loved ones did not suffer unduly. Catherine Mullany and Wonetta Anderson passed away at the scene and Benjamin Mullany passed away a few days later, after apparently lapsing into a coma. The impact of the loss of Mr. and Dr. Mullany and Ms. Anderson, upon their family and friends, would have been and indeed still must be tremendous and nothing that this court does or says can ever comfort them or make up for the loss they have suffered.

59. These defendants were convicted after trial and although the case was substantially based upon circumstantial evidence, the weight of that evidence was overwhelming and the jury rightly convicted them and found them guilty. The offences involved a firearm which was discharged at close range, killing the victims. This accentuates the seriousness of the case. The offences are indeed grave ones. The violence inflicted was extreme. The degree of planning involved in the offences, however, was rudimentary. The defendants broke into a hotel villa and a convenience shop under cover of darkness. The motivation appears to have been greed and economic gain. During the course of the robberies, the defendants were either confronted by or simply encountered the occupants. There does not appear to have been a great deal of planning and the

defendants do not appear to have acted in a particularly sophisticated fashion. Other than operating under cover of darkness, they likely also had their faces masked, as evidenced by the blue and white bandana left behind at the Browne's Avenue shop. There is no evidence that the victims were known to the defendants or any evidence that the victims were targeted. They appear to have been the unfortunate occupants of locations randomly selected by the defendants to rob. I pause at this point to lament further the value placed upon the human lives of these innocent victims by these cold hearted killers, Avie Howell and Kaniel Martin. The evidence revealed that the defendants stole a few personal effects and small electronics such as cell phones as well as some cash money and phone cards. I am sad to say that for such a paltry sum and value, three members of their communities lost their lives. I find that repugnant and distasteful. The irony of it all is that the cell phones that cost these victims their lives, acted as poison chalices for Mr. Howell and Mr. Martin. As the defendants calmly and matter of factly converted these items to their own use, they unwittingly left an electronic trail that the authorities were able to follow and eventually trace back to them. It was the use of these items, stained with the blood of their former owners, that eventually led to the downfall of Mr. Howell and Mr. Martin.

60. When this court considers the individual characteristics of these defendants, I note that they have no prior criminal records. They come before this court, therefore, as first offenders. Of course, this court also notes that the more serious the offence, the less relevant the lack of a record is and there is no more serious offence than murder.

61. This court also takes particular note of the ages of the defendants. Avie Howell is 21 years old. He was 18 years old at the time of these offences. Kaniel Martin is 23 years old. He was 20 years old at the time of these offences. Sentencing principles include the concept of a general undesirability of either executing young offenders or imprisoning young offenders for long terms. This must, however, be balanced with a consideration of the facts and the severity of the crime, which in this case was violent and serious in the extreme.

62. I turn now to consider the defendants themselves more closely and I am guided by the reports filed at the sentencing hearing. As I have already noted, they are young men with no criminal records.

They have spent approximately 3 years and 4 months in custody on these charges. The psychiatric report for Mr. Howell concerned me greatly. It showed an individual who was cool, surly, guarded, rigid and defensive. He presented with a flat, expressionless affect, with no emotion. His insight was questionable and there is something inherently wrong with his personality. The psychiatric report, on the other hand, for Mr. Martin showed him to be cooperative, and somewhat guarded, with a sad affect. He appeared to have some empathy for the families of the victims. Dr. King stated that he was able to make a "connection" with Mr. Martin and that he felt empathy for Mr. Martin. That contrasted with his interview of Mr. Howell.

63. The social investigation report for Mr. Howell described him as being quiet and lacking in emotion. Probation officer Henry recommended further psychological evaluation for Mr. Howell. Of great significance, however, was the input from prison officer Briggs. That officer noted improvements in Mr. Howell's demeanour and attitude since his incarceration. Officer Briggs noted efforts made by Mr. Howell towards rehabilitation and officer Briggs believes Mr. Howell has potential for further rehabilitation. The social investigation report for Mr. Martin described a quiet, hardworking man who showed little remorse for his actions.

64. Are the facts in this case the most extreme and exceptional, so as to warrant the imposition of the death penalty? As the Trimmingham case reminds me, one cannot compare a case such as this with ordinary, civilized behaviour. It must be compared with other murder cases. In Trimmingham, the court accepted as correct, submissions that pointed out the killing was not planned nor premeditated, as is the case here. Although the killing was gruesome and violent, there was no torture of the victim nor prolonged trauma, or humiliation of the victim before death, as is also the case here. It was a murder committed for gain, as is the case here. In view of all these considerations, the Privy Council held that the case fell short of being the worst of the worst and therefore not deserving of the death penalty.

65. The second principle for this court to consider is whether there is any reasonable prospect of reform of the offenders and whether the object of punishment can be achieved by any means other than capital punishment.

66. I have considered all of the facts and issues in this case and compared them with the sentencing guidelines laid down in the case law. I have noted that while Mr. Howell and Mr. Martin coldly and without compunction took away the lives of three individuals, I am bound to consider and be guided by the presumption in favour of an unqualified right to life. In the end, I am not satisfied that this case reaches the exceptional and extreme level of the "worst of the worst and rarest of the rare". Perhaps more significantly, I am satisfied that after considering the psychiatric evaluation and the evidence of Dr. King, as they pertain to Kaniel Martin, and the social investigation report containing the information from prison officer Briggs, as it pertains to Avie Howell, I am satisfied that there is a reasonable prospect of reform for these offenders.

67. I am, however, deeply concerned by the multiplicity of killings in this case, as well as the psychiatric report and evidence of Dr. King pertaining to Avie Howell and the social investigation report pertaining to Mr. Martin. I am satisfied of the need to protect the public and keep both of these defendants out of society. The object of punishment can be achieved by means other than the death penalty. There is also a need for sentencing to reflect society's abhorrence of a crime of this magnitude. The offences are heinous and violent made even more so by the use of a firearm.

SENTENCE

68. For all of the reasons noted, this court hereby sentences the defendants as follows:

Count 1: For the murder of Catherine Mullany, Avie Howell is sentenced to life imprisonment and Kaniel Martin is sentenced to life imprisonment.

Count 2: For the murder of Benjamin Mullany, Avie Howell is sentenced to life imprisonment and Kaniel Martin is sentenced to life imprisonment.

Count 3: For the murder of Wonetta Anderson, Avie Howell is sentenced to life imprisonment and Kaniel Martin is sentenced to life imprisonment.

The sentences are to be served consecutively.

RICHARD G. FLOYD
HIGH COURT JUDGE