

IN THE EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

HIGH COURT OF JUSTICE

(CRIMINAL)

DOMHCR 23 OF 2011

BETWEEN:

THE STATE

And

GARVIN GEORGE

Before Justice Birnie Stephenson-Brooks

**Appearances:**

Mr Gene Pestaina, Director of Public Prosecution and with him Mr Clement Joseph and Miss Arthlyn Nesty  
State Counsel for the State

Mr Wayne Nordé and with him Miss Bernadette Lambert the Defendant

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2012 February 27,  
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**Sentencing**

1. **Stephenson – Brooks J:** By an indictment laid by the Learned Director of Public Prosecutions on the 16<sup>th</sup> day of September 2011, the defendant Garvin George was charged with the offence of murder contrary law.
2. The said indictment alleged that the defendant Garvin George on the 5<sup>th</sup> day of February 2010, at Calibishie, in the Parish of St Andrew in the Commonwealth of Dominica did murder Junior Joseph.

After arraignment he was tried and convicted unanimously by a mixed jury for this offence and he is now before the Court for sentencing.

“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 facts demand. Judges usually try to be consistent and are entitled to consider similar cases”<sup>1</sup>

3. The punishment prescribed by The Offences against the Person Act <sup>2</sup>for murder is death. Section 2 of the said act states “*Any person who is convicted of murder shall suffer the penalty of death*”.
4. The sentence of death as a mandatory or automatic sentence to be imposed upon conviction of murder has been held to be unconstitutional<sup>3</sup> and Judges now have some flexibility in sentencing persons who have been convicted of murder. Judges can now look at the entire circumstances of the case and impose a sentence that is fitting or appropriate in the case and in fact assistance is to be obtained from sentencing guidelines which have been provided and decisions of the courts in similar matters provide guidance in matters such as these.
5. Sir Dennis Byron Chief Justice, as he then was, in discussing the sentencing procedure had this to say.

*“... The sentencing procedure must be modified to include the requirement that before passing sentence on a person convicted of murder, the Court must allow the convicted person to mitigate. The factors that must be taken into account upon a plea of mitigation should include the gravity of the offence, the character and record of the offender, the subjective factors which may have influenced the offenders conduct, the design and manner of execution of the offence and the possibility of reform and social re-adaptation of the offender.”<sup>4</sup>*

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<sup>1</sup> Harry Wilson –v- The Queen Criminal Appeal no 30/2004 (St Vincent & The Grenadines) Per Rawlins JA

<sup>2</sup> Chapter 10:31 of the laws of the Commonwealth of Dominica

<sup>3</sup> Newton Spence –v- The Queen Criminal Appeal No. 20 of 1998 (SVG) & Peter Hughes –v- The Queen Criminal Appeal No 14 of 1997 (SLU)

<sup>4</sup> Newton Spence –v- The Queen & Peter Hughes –v- The Queen supra at para. 57

6. In keeping with the guidelines as set out in **Evanson Mitcham et al –v- The Director of Public Prosecutions**<sup>5</sup>, the learned DPP in the case at bar has informed the court that he does not intend to pursue the position that the death penalty is appropriate in this matter.
7. Saunders JA made this observation *inter alia* that there are factors which should be borne in mind when considering the question of sentencing in murder cases:

*“...murder is a peculiarly a crime that admits of an enormous range both in character and culpability. In other words the circumstances in which murder is committed and the personal background and motive of the offender may vary radically from one accused to another.”<sup>6</sup>*

### Facts

8. The facts as accepted by the jury are that on the 5<sup>th</sup> day of February 2010, at around 7:10 pm there was an altercation between the deceased Junior Joseph and the defendant Garvin George at “Togas Bar” in Calibishie where patrons gathered to lime. It was during the carnival season.
9. The defendant, Garvin George, was in the bar where he had a confrontation with the deceased Junior Joseph. There was an argument followed by a jacking. The defendant and the deceased were seen wrestling (rolling on the ground) and there was an attempt by Miss Ulander Carbon to stop the fight when she pulled the defendant off of the deceased. Thereafter, both the deceased and the defendant went out onto the road and the deceased “jacked” the defendant then he ran into the yard of one, Miss Helen Africa.
10. The defendant followed the deceased and the fight continued in Miss Africa’s yard. The deceased kicked the defendant who fell against a van parked in that yard. Thereafter, the defendant was seen to be punching the deceased and again attempts were made to separate the deceased and the defendant, after which the deceased ran out of the yard and up the road where he collapsed and was transported to the Marigot Hospital where he was pronounced dead on arrival.

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<sup>5</sup> *Evanson Mitcham et al –v- The Director of Public Prosecutions Criminal Appeal Nos. 10,11 & 12 of 2002(SKN)*

<sup>6</sup> *Ibid* at para. 179id

11. The defendant at the time of the offence was 20 years old and the deceased was 18 years old at the time of his death.
12. The court ordered pre-sentence report was presented by Mr Leroy Morvan, Probation Officer. This report informed the court of the views of the members of both the families of the defendant and the deceased and also of members of the community, as it regards both the defendant and the deceased. The defendant was also interviewed by Mr Morvan. Mr Morvan was then able to compile and present this court with an assessment of the defendant.
13. Mr Morvan indicated that the defendant was very remorseful and his relatives and persons who knew him had something good to say about him, even though, it was noted that there were a few negative things that were said about him. The report spoke of the defendant's development which was *"characterized as one of little parental support...that the defendant grew up with no father figure in his life and his own mother was unable to effectively care for him leaving him in the care of his maternal grandmother"*.
14. Mr Morvan opined that the defendant may, due to this situation could, *"well be a victim of circumstances surrounding his development"* and questioned how this along with the "negative pointers" that were imparted about him impacted on his action which resulted in him taking someone's life.

**Submissions by Defence Counsel and Plea in mitigation:**

15. Learned counsel Miss Bernadette Lambert upon invitation from this court made written submissions regarding sentencing in the matter. These submissions were further buttressed by an oral plea in mitigation and oral character reference made on behalf of the defendant.
16. Learned Counsel urged the court to consider that Mr George is a young person in that at the time of the offence he was 20 years old and was convicted at age 22 years and that he had no previous criminal record and that he is a young man of good character as was attested to by the Police officer who gave evidence on behalf of the prosecution and other prosecution witnesses who stated that Garvin was known to be a quiet person.

17. Learned Counsel also submitted that Garvin co-operated with the Police from the inception. He gave no trouble and on the day following the incident he gave an accused statement. It was further submitted that the accused is not, and has never been, a threat to the society and urged the court that in its considerations as to a sentence to consider that he has already spent some time on remand at the State prison. Counsel beseeched the court that the defendant should be allowed the opportunity to leave prison while still a young man and to take up his place as a productive member of society.
18. Counsel submitted that the court should give the case at bar special considerations, in that, the case is exceptional and distinct from other cases in the region and urged the court to depart from the norm of imposing a sentence of life imprisonment and to sentence the defendant to a term of imprisonment not exceeding 10 years.
19. Counsel urged the court to consider the following authorities in making its decision: **Peter Duncan –v- The Queen<sup>7</sup>, Peter Solomon –v- The Queen,<sup>8</sup> Nardis Maynard –v- The Queen<sup>9</sup>, Augustin McPierre –v- The Queen<sup>10</sup>, The Queen –v- Lyndon Lambert<sup>11</sup>**
20. A pre-sentence report was also submitted to the Court. According to the report Garvin George is 22 years old. He was born at the Marigot Hospital and he is the third of his mother's eleven children. He is the only child born out of the relationship between his mother and his father and his siblings range from the ages of 24 years old to 2 years old and save and except two of his sisters who reside in Antigua they all live here in Dominica all in the village of Calibishie.

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<sup>7</sup> Cr. App No 2 of 2004 (Grenada) Even though the decision and sentence in this matter was quashed the Defendant was sentenced to 7 years hard labour upon conviction of murder.

<sup>8</sup> Cr. App No.4 of 2005 (St Lucia) The appellant's sentence of 25 years upon conviction of murder was reduced on appeal to a period not exceeding 15 years.

<sup>9</sup> NO 12 of 2004 (St Christopher & Nevis) The defendant was sentenced to death upon conviction of murder.

<sup>10</sup> Criminal Appeal No 12 of 2002 (St Vincent & the Grenadines) A sentence of Life Imprisonment was upheld when the defendant was found guilty of murdering his common-law wife.

<sup>11</sup> Criminal Case no. 0057 of 2003 (Grenada) The defendant who was 20 years old at the time of the offence and was convicted of murder was sentenced to Life in Prison.

21. Garvin has never really had a relationship with his father and in fact his father has been an inmate at the State Prison whilst Garvin has been on remand there. Garvin at the time of the incident lived with his aged grandmother and has been doing so from birth with his mother and continued to live with her after his mother moved out when he was nine years old.
22. The Social Worker interviewed the defendant, his mother Sylvia George, his grandmother Franciette Drigo and his step aunts. According to these persons Garvin was a well-behaved young man who helped both his mother and grandmother. His mother who is unemployed and in receipt of some welfare assistance from the state says that Garvin made a meaningful contribution to the maintenance of her home. She said that if he did not bring money for her, he brought groceries and this helped with their survival.
23. His grandmother who is 94 years old spoke of how he looked after her and how dependant she was on him to take care of her needs. She expressed her fear of never being able to see him again in her lifetime. His aunts spoke of Garvin in a very positive light and described him as being a very respectful person and that he may have been negatively influenced by bad company.
24. According to members of the Calibishie community who spoke with the Welfare Officer spoke positively of Garvin George and opined that he is not a threat to the community and they expressed shock that he found himself in this kind of trouble. Garvin was described by fellow villagers as one who had a big mouth but was not one known to be violent and it was felt that this was an isolated incident which was not really meant to be.
25. Garvin was also interviewed by the Welfare Officer who indicated that he was calm, relaxed and cooperative at the interview. The Officer noted that Garvin accepted responsibility for the death of Junior Joseph and expressed great remorse for what happened. The general assessment of Garvin is that his development is characterized as one with little parental support; in that he grew up with no father figure in his life and with a mother who was unable to effectively care for him and that as he got older he followed bad company . It was felt by the Welfare Officer doing the assessment that these factors together could have had a negative impact on the defendant. For the most part everyone had something good to say about Garvin.

26. The victim in the matter Julian Joseph was referred to by the witnesses in the case to be troublesome; however his father, mother and sister and members of the Calibishie and Vieille Case who were interviewed by the Welfare Officer described him as being a quiet and cool young man who kept to himself for the most part.
27. The family of the deceased all expressed hurt at what has happened which is to be expected and all expressed the desire to see the defendant punished for his actions and for justice to be done.

### Submissions by the prosecution

28. Learned Counsel for the State Arthlyn Nesty provided a number of judicial authorities on sentencing including **Peter Hughes & Newton Spence –v- The Queen**<sup>12</sup>, **Evanson Mitchum et al –v- The Director of Public Prosecutions**,<sup>13</sup>**R-v-Benjamin**<sup>14</sup>, **The Queen –v- Rudy Monelle**<sup>15</sup>, **Henry Wilson –v- The Queen**<sup>16</sup>, **Nardis Maynard –v- The Queen**<sup>17</sup>,**Kamal Liburd & Jamal Liburd**<sup>18</sup>, **The Queen –v- Lyndon Lambert**<sup>19</sup>,**Regina –v- Patrick Joseph Ryan**<sup>20</sup> **Jerry Martin –v- The Queen**<sup>21</sup>.
29. The aggravating factors identified by the Prosecution were, that the accused was the aggressor and the deceased ran away from the accused. That the accused pursued and confronted the accused and he the accused did not heed any warnings to stop the attacks by his uncle or his

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<sup>12</sup> Criminal Appeals No. 20 of 1998 and 14 of 1997 (St Vincent & The Grenadines)

<sup>13</sup> Criminal Appeals Nos. 10,11 & 12 of 2002 (St Christopher & Nevis)

<sup>14</sup> (1964) 7 WIR 459 (The five objects which comprise the aims of punishment.)

<sup>15</sup> Case number 15 of 2007 (Antigua & Barbuda) (The court should consider a social inquiry report and a psychiatric report)

<sup>16</sup> Criminal Appeal No 30 of 2004 (St Vincent & The Grenadines)

<sup>17</sup> supra

<sup>18</sup> No 9 & 10 of 2003 (St Christopher & Nevis) Two brothers aged 24 and 20 were convicted of murder and manslaughter and were sentenced to life imprisonment for the murder conviction and thirty years for the manslaughter conviction. These sentences were upheld on appeal.

<sup>19</sup> Criminal Case No 0057 of 2003 (Grenada) The Defendant who was 20 years old at the time of the offence was sentenced to life imprisonment upon conviction of murder.

<sup>20</sup> 2007 WL 1484102 (The accused in this matter attributed the cause of his action to self defence and he was sentenced to serve a minimum of 14 years.)

<sup>21</sup> Territory of the Virgin Islands HCRAP 2007/00

friends and that he used violence of an excessive nature which was over and beyond that which was necessary.

30. The mitigating factors identified by the Prosecution that the accused has been on remand since the 10<sup>th</sup> February 2010, and that he expressed remorse from his unsworn statement, his youthfulness and that he had no previous convictions.
31. Counsel for the state is of the view that based on the authorities cited and in keeping with the case law within the Organisation of Eastern Caribbean States Jurisdiction the period of life imprisonment is generally afforded with particular reference to **Nardis Maynard**<sup>22</sup> and **Jerry Martin –v- The Queen**<sup>23</sup>. In both of these cases the defendant was a young person both of whom were sentenced to life imprisonment. In the Jerry Martin Case the court of appeal confirmed the appellants sentence to mandatory life imprisonment.

**Court's Considerations:**

32. *"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."...<sup>24</sup>*
33. In imposing the appropriate sentence on the defendant I must take the following factors into consideration:
- (i) The nature and gravity of the offence;
  - (ii) The facts and circumstances surrounding the commission of the offence including the factors that might have influenced the conduct that caused the murder and the design and execution of the offence;
  - (iii) The character and record of the convicted person.
  - (iv) The aggravating and mitigating factors;
  - (v) The personal and individual circumstances of the defendant;
  - (vi) The possibility of reform and social re-adaptation of the convicted person.<sup>25</sup>

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<sup>22</sup> supra

<sup>23</sup> HCRAP2007/003 (Territory of the Virgin Islands)

<sup>24</sup> Nardis Maynard –v- The Queen Per Rawlins JA at paragraph 9

34. I am also obliged to apply the established legal principles of sentencing which were adopted and applied by our Court of Appeal by Byron CJ in the **Desmond Baptiste –v- The Queen**<sup>26</sup>. It should be noted that this case was a consolidation of twelve magisterial appeals and one high court appeal, and that the Court of Appeal sought to give “an indication as to appropriate sentencing levels for a range of criminal offences”<sup>27</sup>. These principles have been stated as follows:

*“Retribution ...society through the courts, must show its abhorrence of particular types of crimes, and the only way the courts can show this is by the sentences they pass.” . It is rather a reflection of society’s intolerance for criminal conduct. ...*

#### ***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. These sentences tend to lose their potency with the passage of time.*

#### ***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 deterrent 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 with reintegration into society after prison. However the success of*

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<sup>25</sup> Harry Wilson –v- The Queen supra

<sup>26</sup> No 8 of 2003 (St Vincent & The Grenadines)

<sup>27</sup> Ibid page 9 at para 1

*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*<sup>28</sup>

35. Applying the factors and principles as stated to the case at bar.
36. The murder in this case does not fall into the worse of worse cases, it was clearly not a murder that was planned, neither did the victim fall into any of the classifications that would cause the action to be deemed heinous. It was not a murder that was executed in a degrading manner or could be described as brutal.
37. **Retribution**  
From the evidence which was accepted by the jury this crime was not a brutal one. However, a young person lost his life unnecessarily and I am therefore required to punish the defendant appropriately. In the Island state of Dominica violent crimes involving knives, cutlasses, guns and other implements are becoming prevalent, especially involving young people and this is a cause of societal concern. Garvin George must receive a sentence that is commensurate with the crime that he has committed. I note that the prosecution has not been able to refute the defendant's contention that the scissors which was used in the crime was in fact the deceased's own and I am compelled to resolve this issue in favour of the defendant and accept his version of the facts in this case.
38. **Deterrence**  
We have been told that the defendant has no police record so clearly there is no need to deter him. It has also been opined by persons who are familiar with him that this is a one off event and quite surprising that the defendant has got himself involved in such a dilemma.
39. I am, however, concerned at the amount of violent crimes that are being committed in the communities and I am of the considered view that I must consider a sentence that would operate to deter other persons from committing similar offences.

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<sup>28</sup> Ibid pages 19-20, Paras 23 to 25.

40. **Prevention**

Garvin George is a first offender and from the interviews carried out by the welfare officer in preparing the social inquiry report indicates that defendant's actions were out of character where he is concerned. In the circumstances it is clear that there is no need to impose a form of punishment on him to prevent him from committing other offences of a similar nature.

41. **Rehabilitation**

In looking at the circumstances surrounding the murder the court has to also take into account any sign of remorse or contrition shown by the accused after the killing. The report of the Welfare Officer reveals that the defendant has expressed contrition for the crime he committed and regrets the death of the deceased. The defendant was also described as relaxed and cooperative during his interview and also informative. Persons in his community have spoken of him in positive terms and he has not been associated with wrongdoing in the past.

42. It is also noted that the defendant was a young man who took up the mantles of responsibility of assisting his mother to provide for his younger brothers and sister and also looking after his aged grandmother. There have been no factors which can be said that the defendant Garvin George cannot be rehabilitated.

**Aggravating and Mitigating factors:**

43. At this stage of the trial I have to consider and balance the aggravating and mitigating factors and in doing so it is open to me to consider the evidence adduced at the trial. I have done so and I find as follows:

(i) **Aggravating factors:**

- The senseless killing of Julian Junior Joseph;
- The willingness of the defendant to continue fighting inspite of attempts by his uncle and friend to break up the fight;

- The evidence that the defendant pursued the deceased into the yard of Miss Africa to continue fighting;
- The willingness of the defendant to use the scissors to inflict the stab wounds on the deceased.

(ii) Mitigating factors:

- The hitherto clean criminal record of the convicted man;
- That there was no evidence that the incident was planned or premeditated;
- The fact that the defendant co-operated with the police during the investigation from the beginning;
- That Garvin by all accounts seems genuinely remorseful and is a good candidate for rehabilitation.

44. Reviewing the facts as established by the prosecution and accepted by the jury indicates that the defendant's, Garvin George, actions on the night in question were impulsive and it is noted that his defence wanted to suggest that he was provoked by the deceased in that the defendant has maintained that he just tried to speak to the deceased who responded by "jacking" him and also his contention that it is the deceased who was armed with the scissors and that he acted in self defence.
45. In law extreme provocation can operate to reduce the charge of murder to manslaughter and self defence is a total defence to the offence of murder. However it is to be noted that the jury by its verdict was not convinced that there was extreme provocation or that the defendant acted in self defence. I would however consider those factors as mitigating factors even though they did not reach the threshold to be considered as a convincing defence.
46. The offence is a serious one which carries a mandatory prison sentence. After considering sentences imposed in similar matters throughout the region<sup>29</sup> making the appropriate deductions and allowances the sentence of this court is that the defendant Garvin George is sentenced to 14

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<sup>29</sup> Taking into consideration also the cases of **Delano Smith –v- Regina** HCRAP2008/001 (Anguilla) The defendant in this case was sentenced to life imprisonment upon conviction of murder. He was a teenager at the time of the offence and **The Queen –v- Brian Walters** Case no. 3 of 2008 (British Virgin Islands) The Defendant pleaded guilty to manslaughter arising out of an incident that took place at J'ouvert during Carnival and he was sentenced to six(6) years of imprisonment.

years in prison and the two years that he has already spent on remand is to be taken into consideration.

47. I must close by expressing my appreciation to the lawyers involved in this matter for the very careful and thorough manner in which the case was conducted and more particularly the research, preparation and presentation of the written submissions for the sentencing stage. Your submissions were of great assistance.

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M E Birnie Stephenson-Brooks  
High Court Judge