THE FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SAINT CHRISTOPHER CIRCUIT

IN THE COURT OF APPEAL

ON REMISSION FROM THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

HCRAP 2008/002

BETWEEN:

ROMEO CANNONIER

Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

HCRAP 2008/019; 2008/020; 2008/021; 2008/022

BETWEEN:

[1] SHELDON ISAAC
[2] ROMEO CANNONIER
[3] RUEDENEY WILLIAMS
[4] LOUIS GARDINER

Appellants

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

Appearances:

Mr. Edward Fitzgerald, QC, Ms. Angela Inniss with him, for Romeo Cannonier and Louis Gardiner

Mr. Julian B. Knowles, QC, Ms. Angela Inniss with him, for Sheldon Isaac and Ruedeney Williams

Sir Richard Cheltenham, QC, Ms. Pauline Hendrickson, Director of Public Prosecutions with him, for the Respondent

2011: July 21
2012: March 21.

Criminal appeal against conviction and sentence – Murder – Death penalty – Section 10(1) of Saint Christopher and Nevis Constitution Order 1983 – Whether section 52(2) of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act, Cap. 3:11, is unconstitutional and in contravention of section 10 of the Constitution – Whether time should be extended to file notice of appeal where appellant sentenced to death – Whether trial judge erred in refusing to admit alibi evidence – Joint enterprise – Whether trial judge erred in failing to give jury good character direction in relation to propensity when evidence of appellant's good character not adduced by counsel at trial

This appeal involves two separate criminal appeals based on the same or similar facts and issues. Romeo Cannonier, the sole appellant in the first appeal, was tried for the murder of Delvin Nisbett, an off-duty police officer. Cannonier was convicted and sentenced to death. The four appellants in the second appeal, namely, Sheldon Isaac, Romeo Cannonier, Ruedeney Williams, and Louis Gardiner, were later tried for the murder of Gavin Gilbert, who was due to appear as a prosecution witness in Cannonier's murder trial. All four appellants were convicted, and sentenced to death.

Cannonier filed his Notice of Appeal on 8th February 2008, two days outside the fourteen day time limit prescribed by the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act ("the Court Act"). On 30th October 2008, the Court of Appeal dismissed Cannonier's application for extension of time to appeal, on grounds that it had no jurisdiction to extend the time for filing his Notice of Appeal based on the wording of section 52(2) of the Court Act. The Privy Council subsequently made a conservatory order staying the execution of Cannonier, and, on 13th May 2010, directed the Court of Appeal to consider arguments on the constitutionality of section 52 of the Court Act, the extension of time to appeal, and the merits of the appeal.

The appellants in the second appeal filed their Notices of Appeal one day outside the 14-day time limit provided for in section 52(2) of the Court Act. Their applications for leave to appeal out of time were dismissed by the Court of Appeal, which held that in view of the absolute language of that section and prior judgments by the Privy Council, they had no discretion to extend time in capital cases. However, the Court granted a stay of execution and a further extension on that stay in order to allow the appellants the opportunity to apply to the Privy Council for special leave to appeal. The Privy Council made the same order in this appeal, which was that the death penalty not be carried out on the appellants until the determination of their appeals, and that the Court of Appeal consider the constitutionality of section 52(2) of the Court Act, the application for extension of time to appeal and the merits of the appeal.

Held: (In the first appeal) dismissing Cannonier's appeal against conviction and upholding his conviction but quashing his sentence and imposing a sentence of life imprisonment instead; (and in the second appeal) allowing Isaac's appeal against conviction and accordingly quashing his conviction and sentence; dismissing Cannonier's appeal against conviction and affirming his conviction but allowing his appeal against sentence, setting aside the death sentence imposed on him and substituting a sentence of life imprisonment which is to run consecutive to the life sentence imposed on him in the first appeal (Mitchell J.A. [Ag.] and Edwards J.A. a majority, with Rawlins C.J. dissenting); dismissing Gardiner's appeal against conviction and affirming his conviction but allowing his appeal against sentence, setting aside the death sentence and substituting a sentence of life imprisonment; dismissing Williams' appeal against conviction and affirming his conviction but allowing his appeal against sentence, setting aside the death sentence and substituting a sentence of life imprisonment, that:

1. Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (1953) which is ratified and adopted in Saint Christopher and Nevis provides an accused with the right to a fair trial. Contained in that right is his entitlement to a public hearing within a reasonable time by an independent and impartial tribunal. Section 10(1) of the Saint Christopher and Nevis Constitution Order 1983 ("the Constitution") is similar. The power of the Court to refuse the appellants' application for extension of time was conferred by section 52(2) of the Court Act, which restricted the appellants' access to the Court of Appeal. The right to appeal is of particular importance in death penalty cases. In a civilized and democratic society, statutory restrictions must be shown to be reasonably justifiable. The objectives of these restrictions must be deemed sufficiently important to justify limiting a fundamental right; there must be a rational connection with the objective; and the means used to impair the right or freedom should be no more than is necessary to accomplish the objective. The time limit imposed by section 52(2) constituted an arbitrary limitation of the appellants' substantive right to appeal and has infringed upon their right of access to the Court of Appeal and the right to have the Court review the convictions and sentences. The phrase "except in the case of a conviction involving sentence of death" ought to be removed. The aim of a just and fair legal system is to ensure that citizens are afforded their guaranteed rights and protection. (per Mitchell J.A. [Ag.])

   Sooriamurthy Darmalingum v The State [2000] 1 W.L.R. 2303 applied; De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others [1999] 1 A.C. 69 applied.

   Section 10(1) of the Constitution did secure to the appellants the right to have their proposed appeal proceedings brought before the Court of Appeal. Notwithstanding that the appellants, who had already been convicted, could no longer be described as "charged" for the purposes of section 10(1) of the Constitution, the guarantee in this section would also apply to appellate proceedings. Section 10(1) of the Constitution embodies the "right to a court", which includes the right of access, that is, the right to institute appellate criminal proceedings before the Court of Appeal. Implicit in this right of access to the Court

of Appeal, are the guarantees laid down by section 10(1) of the Constitution as regards both the organization and composition of the court, and the conduct of the proceedings and together they make up the right to a fair hearing. The appellants' right of access to the Court of Appeal would also involve the right to present their case properly and satisfactorily to a court that is independent and impartial and has full jurisdiction over the subject matter and to have a hearing in this court so that their applications for extension of time and/or their complaints in their grounds of appeal may be resolved. This is to be implied in the meaning of fair hearing in the context of Article 10(1) of the Constitution, likewise Article 6(1) of the European Convention on Human Rights. To the extent that section 52(2) of the Court Act precludes the Court of Appeal from exercising jurisdiction to extend the time for convicted persons appealing or applying for leave to appeal their conviction involving the death sentence, that section has failed to respect the appellants' right to access the Court of Appeal as guaranteed by section 10(1) of the Constitution. Furthermore, any law not in conformity with the Constitution ought to be brought into conformity with it. (per Edwards J.A. and Rawlins C.J.).

De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others [1999] 1 A.C. 69 applied; Golder v United Kingdom (A/18) (1979-80) 1 E.H.R.R. 524 applied; Sooriamurthy Darmalingum v The State [2000] 1 W.L.R. 2303 applied; Delcourt v Belgium (A/11) (1979-80) 1 E.H.R.R. 355 applied; Tolstoy Miloslavsky v United Kingdom (A/323) (1995) 20 E.H.R.R. 442 cited.

2. Section 33 of the Criminal Procedure Act governs the procedure for producing alibi evidence. Additionally, the judge has a further discretion to admit such evidence within the trial. The Court will not lightly upset the exercise by a trial judge of his judicial discretion unless it is clear that the exercise was wrong. In the first appeal, the appellant gave notice of an alibi to the police only and at the close of the prosecution's case requested permission to call two previously unmentioned witnesses. Judging from the evidence, this was seemingly a last-minute device being used by the appellant to assist his case, and therefore the trial judge rightly exercised his discretion in refusing to admit the alibi evidence. In the event that is wrong, the proviso should be applied on the basis that, even if the trial judge had admitted the alibi evidence, the overall evidence against the appellant was of such a magnitude that he still would have been convicted if the irregularity had not taken place and the alibi witnesses had turned up to testify. (per Mitchell, J.A. [Ag.]).

R v Colin Thomas Sullivan [1970] 2 All E.R. 681 distinguished.

There is no evidence in the transcript which showed that the first appellant was informed about the provisions of Section 33 of the Criminal Procedure Act. Furthermore, there is no documentation of the judge's ruling on the appellant's late application to call the two alibi witnesses and no indication that he took into account section 33(3) of the Criminal Procedure Act in exercising his discretion to refuse the application. As such, it can be concluded that the learned trial judge

exercised his discretion in refusing to allow the alibi evidence wrongly. On the issue of whether the trial judge's refusal prevented the appellant from presenting his defence, the trial judge mitigated for any possible prejudice resulting from his ruling by giving proper and adequate directions concerning the appellant's defence of alibi. The other evidence on the prosecution's case pointing to the guilt of the appellant, leads to the conclusion that no substantial miscarriage of justice occurred and the proviso should be applied. (per Edwards J.A. and Rawlins C.J.).

3. A trial judge has a discretionary power to discharge a jury, and it is incumbent upon him to consider exercising this power whichever party might invite him to do so or though no party invited him to do so, or even where both parties opposed the discharge of a jury. A mere reminder to the jury of the statutory basis for the admissibility of a deceased's statement does not give rise to a real possibility or danger that the jury would have been prejudiced against the deceased's evidence.

   Barnes, Desquottes and Johnson v R; Scott and Walters v R (1989) 37 WIR 330, [1989] A.C. 1242 at 1255 to 1260; [1989] 2 All E.R. 305, [1989] 2 W.L.R. 924; (1989) 89 Cr. App. R. 153 applied.

4. Good practice and good procedure ought to prevail throughout the entirety of a trial, for an accused is innocent until proven guilty. However it is not every departure from good practice which renders a trial unfair. An accused is entitled to a fair trial, not to an unblemished one. Intervention by the judge to clear up ambiguities and to enable him to make certain that he is making an accurate note are perfectly justifiable. The harsh words used by the trial judge in the first appeal during defence's closing speech did not amount to a breach of the principles relating to judicial intervention. For that reason, Cannonier was not deprived of his right to a fair trial.

   Michel v The Queen [2009] UKPC 41 applied.

5. Donell Stevens' evidence was not the only or even the main evidence against Cannonier, Williams and Gardiner. There was an abundance of other evidence which tended to implicate the three of them. However, the learned judge failed to direct the jury properly or adequately in relation to the acts and declarations of those of the appellants which were relied upon, as evidence as against other of the appellants. Notwithstanding this, applying the Maxo Tido principles, the evidence against the appellants in this case was sufficiently overwhelming that the jury would have convicted them if they had been properly directed as to the inapplicability of the statements made by one accused as evidence against another accused. The proviso should therefore be applied.

   Maxo Tido v The Queen [2011] UKPC 16 applied.

6. It is trite law that when a defendant is of good character he is entitled to the benefit of a good character direction from the judge when summing up to the jury. This direction is essential in every case in which it is appropriate for such a direction to

be given. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself. In the instant case, the circumstances did not arise for the judge to give a good character direction on behalf of the appellant in the second appeal namely, Louis Gardiner. Such circumstances include where the defendant has testified, called witnesses or where there were suggestions made in cross-examination of prosecution witnesses about the defendant's character. None of these circumstances arose. Moreover, the evidence presented against the appellant was so insurmountable that, even with a good character direction given to the jury, his conviction was inevitable.

R v Vye and Others (1993) 97 Cr. App. R. 134 applied; Eversley Thompson v The Queen [1998] A.C. 811 applied; Teeluck and John v The State of Trinidad and Tobago [2005] UKPC 14; [2005] 2 Cr. App. R. 25; [2005] 1 W.L.R. 2421 applied.

7. The trial judge has a discretion whether or not to sentence an accused to death. This discretion must be exercised in light of recent decisions taken on this issue. A trial judge, in deciding whether or not a case would fall into the "worst of the worst" category, ought also to determine the question of an accused's possibility of reform. The murders committed in both of these appeals are not considered as the "worst of the worst" so as to have the imposition of the death penalty. (per Mitchell, J.A. [Ag.] and Edwards, J.A.; Rawlins, C.J. dissenting).

   Daniel Dick Trimmingham v The Queen [2009] UKPC 25 applied; Ernest Lockhart v The Queen [2011] UKPC 33 applied.

8. A particular murder may not in its actual revolting and sadistic execution be rendered the worst of the worst or the rarest of the rare so that those who actually executed it may not be liable for the death penalty. This does not prevent the role of another participant in that murder, say a mastermind who plans and orders the murder, from causing that person's role to fall within the category that constitutes the worst of the worst. It would be necessary to look at all of the circumstances. In the present appeals where the actual killing of Gilbert was not sadistic, the role of those who carried it out does not render their acts to the worst of the worst attracting the death sentence. It does not however preclude the role of Cannonier, the mastermind, from falling into the worst of the worst category. That role, in all of the circumstances of this case did fall into the worst of the worst category in relation to the death of Gilbert and the evidence and reports are not convincing that Cannonier has a reasonable possibility of reform. (per Rawlins, C.J.).

JUDGMENT

[1] MITCHELL J.A. [Ag.]: On the night of 25th July 2004, Delvin Nisbett, an off-duty police officer, was shot multiple times and robbed on Dieppe Bay Road in St. Kitts. He died on the spot. The post-mortem examination revealed the cause of death to be gunshot injuries to the head, neck, chest and abdomen with haemorrhage and shock. Romeo Cannonier was subsequently arrested for the murder, for which he was tried and convicted by the jury. He was sentenced to death by Justice Belle. Eight months after PC Nisbett's death, and before Cannonier's trial, on 21st March 2005, Gavin Gilbert, a witness to the killing of PC Nisbett, was shot dead at Saddlers Village. The four appellants, Sheldon Isaac, Romeo Cannonier, Ruedeney Williams, and Louis Gardiner were convicted by a jury for his murder and they were sentenced to death by Justice Redhead.

The First Appeal: Romeo Cannonier – Criminal Appeal No. 2 of 2008

[2] The prosecution case against Cannonier was that on the night of 25th July, at approximately 10:30 p.m., Cannonier ambushed PC Nisbett on the island main road just past Parsons Village. The evidence of Deon Daniel, a bus driver, was that he saw an unidentified man shoot at PC Nisbett twice and, when he fell to the ground, the shooter approached him and shot at him four more times. Shortly after, Cannonier was seen by Calvin Greene, an off-duty police officer, in the area. He saw Cannonier on the road flashing his torchlight, and he saw him wash his hands and feet at a standpipe on the roadside.

[3] Cannonier's girlfriend, MaKenya Lucas, was the main witness against him. She testified that he told her the following day that he and a partner had killed a policeman in Parsons Ground by shooting him and that he had hidden the gun in some grass. He told her that he had taken some money off the policeman. The reason he gave for the shooting was that the policeman had roughed him up in jail. The gun used in the shooting was subsequently recovered. This gun was found to belong to MaKenya Lucas' employer, Michael Powell, from whose house it had previously been stolen. She testified that Cannonier later told her that he had

stolen it from Powell. The police took Cannonier from her house along with several hundred dollars in both United States and Eastern Caribbean banknotes.

[4] Vincent Warner testified that Gavin Gilbert and Lionel Warner had brought him a gun and that he had hidden it for them under his step. It was later found there by the police. Lionel Warner testified that while he was in prison, Cannonier asked him when he got out to tell "Hot Boy" to get rid of the girl and Gilbert. After Warner was released from prison he had found the gun and taken it to Vincent Warner for safekeeping.

[5] An FBI Forensic Examiner testified that one of the banknotes taken from Cannonier had on it DNA which matched a sample from PC Nisbett. Gavin Gilbert's statement was put in evidence. By the time of the trial he had been murdered, and his murder was the subject of the trial which forms the second Cannonier appeal. Gilbert's statement to the police before he (Gilbert) was murdered was to the effect that Cannonier had told him where to find the gun in the grass. According to Gilbert's statement, Cannonier had told him that the gun was used to kill the police officer. Cannonier had also told him that MaKenya was telling lies about him.

[6] Cannonier gave the police a statement in which he denied killing PC Nisbett. He claimed to have been at home with his nephew Shane Cannonier. According to the statement, on the night of the killing he (Cannonier) had gone down the road flashing his torchlight and had seen several people in a shop. He admitted washing his hands and feet at a standpipe on the roadside. His story was that MaKenya was upset with him because he had promised to pay her rent, but had not done so.

[7] At his trial for the policeman's murder, Cannonier did not testify in his defence. However, he sought to call two witnesses, Shelly Cannonier and Cleon Doyling, to give alibi evidence on his behalf. The learned trial judge refused to permit the witnesses to be called as the statutory requirements for the calling of alibi witnesses had not been complied with.

[8] Cannonier was convicted by a majority verdict of 11-1. On 20th December 2007, the trial judge held a sentencing hearing. He had before him a Social Inquiry Report prepared by a probation officer and a psychiatric report prepared by Dr. Sharon Halliday, a general consultant psychiatrist to the Federal Government of St. Kitts and Nevis. The judge sentenced Cannonier to death, holding that the case was sufficiently exceptional to warrant the death penalty.

[9] On 8th February 2008, two days outside the fourteen day time limit prescribed by the local Eastern Caribbean Supreme Court Act,[1] ("the Court Act") Cannonier filed his Notice of Appeal. Section 52 of the Court Act states as follows:

> "52. Time for appealing
> (1) Where a person who is convicted desires to appeal under this Act to the Court of Appeal or to obtain the leave of the Court of Appeal, he or she shall give notice of appeal or notice of his or her application for leave to appeal in such manner as may be directed by rules of court within fourteen days of the date of conviction.
>
> (2) Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given may be extended at any time by the Court of Appeal."

[10] On 30th October 2008, the Court of Appeal dismissed Cannonier's application for extension of time to appeal on grounds that it had no jurisdiction to extend the time for filing Cannonier's Notice of Appeal. On 16th January 2009, the Court heard Cannonier's application for conditional leave to appeal to Her Majesty in Council against the decision of the Court of 30th October and his application for stay of execution. The Court dismissed his application for leave to appeal to Her Majesty in Council. However, in the interests of justice and having regard to the rules, the Court gave the applicant's counsel a reasonable time within which to comply with the rules by granting a stay of execution to the 16th February 2009.

[1] Cap. 3:11, Revised Laws of Saint Christopher and Nevis 2002.

[11] The Privy Council subsequently made a conservatory order staying the execution of Cannonier and on 13th May 2010 directed the Court of Appeal to consider arguments on the constitutionality of section 52 of the Court Act, the extension of time to appeal, and the merits of the appeal. The nine grounds of Cannonier's appeal as eventually framed in the case substantially read as follows:

> (1) Section 52(2) of the Court Act violates the fair trial provisions of the St-Kitts-Nevis Constitution[2] in so far as it does not permit extensions of time in which to seek leave to appeal against conviction and sentence beyond the statutory period of 14 days in capital cases, irrespective of the cause for the failure to lodge the notice of application for leave to appeal within that period. This limitation on the right of appeal is arbitrary and disproportionate and violates his right to a fair trial and appeal. By virtue of section 2 of the Constitution, section 52(2) of the Court Act is void to the extent of the constitutional infirmity.
>
> (2) His conviction is unsafe because his counsel wrongly failed to comply with the statutory requirement to give notice of alibi witnesses to the Registrar, and the judge thereafter wrongly refused to allow the applicant to adduce alibi evidence.
>
> (3) The conviction is unsafe because the trial judge improperly failed to exercise his exceptional power at common law to refuse the admission of the statement of Gavin Gilbert in order to uphold the applicant's right to a fair trial.
>
> (4) The conviction is unsafe because the judge (a) failed to prevent prejudicial references in the presence of the jury to threats to witness safety and insinuations that Cannonier was trying to do away with witnesses; and (b) made these kinds of prejudicial comments to the jury in his summing up. In the alternative, the conviction is unsafe because trial

[2] Section 10 of the 1983 Saint Christopher and Nevis Constitution Order 1983. See the Fourth Schedule of the West Indies Act Cap. 1:01, Revised Laws of Saint Christopher and Nevis 2002.

counsel failed to ensure that the jury was absent when the admissibility of the statement was being discussed.

(5) The conviction is unsafe because the judge failed to properly direct the jury to exercise caution in its consideration of the statement of Gavin Gilbert on the basis that the defence was deprived of the opportunity to cross-examine the witness on its contents.

(6) The conviction is unsafe because the judge improperly disrupted the closing speech of Cannonier's trial counsel thereby depriving him of his right to a fair trial.

(7) The conviction is unsafe because the judge gave an unbalanced summing up by implying that more weight ought to be accorded to the testimony of police witnesses as opposed to civilian witnesses. [Not pursued at the hearing of the appeal.]

(8) The sentence imposed on Cannonier is unlawful as the judge failed to consider his prospects for reform when determining the appropriate sentence.

(9) The sentence of death imposed on him is excessive and disproportionate having regard to the alleged offences and his mitigating circumstances.

The Second Appeal: Cannonier, Isaac, Williams and Gardiner Appeals Nos. 19, 20, 21 and 22 of 2008

[12] The four appellants were convicted on 17th June 2008 for the 21st March 2005 murder of Gavin Gilbert who was due to appear as a prosecution witness in the murder trial of Cannonier for the murder of PC Nisbett. The prosecution's case was that Cannonier had ordered the murder whilst in prison, which had then been carried out by his three co-defendants.

[13] Lionel Warner testified that while he was in prison, Cannonier was there as well. Cannonier told him that when he got out of prison he (Warner) had to tell Gardiner to get rid of (kill), Gilbert. When he (Warner) left prison, he passed the message to Gardiner. He also spoke to Isaac who told him that everything was all right; that Gilbert was going to testify against Cannonier and that he (Isaac) was going to get rid of him. Gardiner was present during that conversation with Isaac.

[14] Donell Stevens testified that Gardiner told him that he and Isaac waited in the bushes for Gilbert. Gardiner told him that Williams was the watchman and that Isaac fired the shots at Gilbert. About a month later Gardiner told him that the reason they shot Gilbert was to free Cannonier.

[15] Vincent Warner testified that Gilbert brought him the gun and that it was found at his (Warner's) house. He had spoken to Williams who told him that he was angry because Gilbert was supposed to have given the gun to Gardiner to change something in the mechanism of the gun.

[16] Kimia Evelyn was Williams' girlfriend. On the night of Gilbert's killing she was with him earlier in the evening. She saw him cleaning a gun. Later, he went out in his car with Gardiner and Isaac. He returned later and told her that Gilbert was dead. They went to the scene where Gilbert's body was lying and he (Williams) told her that if anyone asked her she was to say that he had been at home all night. By the following day she began to suspect Williams and told him that she believed the gun she saw him cleaning was used in the murder. Williams denied it and said he did not know what gun she was speaking about.

[17] Sheldon Isaac did not give any evidence on his behalf but relied on statements he had given the police denying involvement in the killing. Gardiner similarly gave no evidence. Cannonier gave evidence denying that he had given Lionel Warner the message in prison. Williams testified on oath, denying Kimia's story and claiming he knew nothing about Gilbert's murder. The appellants were unanimously convicted by the jury for Gilbert's murder.

[18] On the 14th and 15th July 2008, the trial judge held a sentencing hearing. He had Social Inquiry Reports for each appellant, and also a psychiatric report for each prepared by Dr. Halliday. Dr. Halliday had recommended the psychological testing of each appellant, but this was not carried out. The judge sentenced each of the appellants to death, holding that the case was sufficiently exceptional to warrant the death penalty and that there was no prospect of reform for any of the appellants.

The Court of Appeal's earlier dismissal of the appeals and the remission to it of the issues by the Privy Council

[19] Each of the appellants had a similar experience as Cannonier in his first appeal. Their Notices of Appeal were filed on 29th July 2008, one day outside the 14 day time limit provided for in section 52 of the Court Act.[3] On 28th October 2008, their applications for leave to appeal out of time were dismissed by the Court of Appeal. The Court held that in view of the absolute language of section 52(2) of the Court Act and prior judgments on the provision by the Privy Council, the Court had no discretion to extend time in capital cases. The Court granted a stay of execution until 30th November 2008 in order to allow the appellants the opportunity to apply to the Privy Council for special leave to appeal. The Court subsequently extended the stay of execution until 16th February 2009. On 10th February 2009, the Privy Council granted a conservatory order directing that sentence of death not be carried out on the appellants until the determination of their appeals. Subsequently, the application for leave to appeal was heard by the Privy Council.

[20] On 13th May 2010, the Privy Council directed that the case be remitted to the Court of Appeal for the issues raised to be determined by the Court of Appeal. The Board's order stated as follows:

> "The Judicial Committee having heard submissions from Counsel for the parties order that there be remitted to the Court of Appeal of Saint Christopher and Nevis

[3] See para. 9 of this judgment.

(1) the argument on constitutionality of section 52

(2) irrespective of the Court's view on section 52, to consider whether they would extend the time for applying for leave to appeal

(3) irrespective of the Court's view on whether time should be extended, to consider the merits of the appeal against conviction and sentence."

[21] The five grounds of appeal of the four appellants as eventually framed in this case substantially read as follows:

1. Section 52 of the Court Act[4] violates the fair trial provisions in section 10 of the Constitution[5] in so far as it does not permit extensions of time in which to seek leave to appeal against conviction and sentence beyond the statutory period of 14 days in capital cases, irrespective of the cause for the failure to lodge the notice of application for leave to appeal within that period. This limitation on the right of appeal is arbitrary and disproportionate and violates the appellants' right to a fair trial and appeal. By virtue of section 2 of the Constitution, section 52(2) of the Court Act is void to the extent of the constitution infirmity, and the Court of Appeal has jurisdiction to extend time for lodging notices of appeal in capital cases.

2. The learned judge failed to direct the jury properly or adequately in relation to the acts and declarations of those of the appellants which were relied upon as evidence as against other of the appellants, and wrongly directed the jury as to the admissibility of such declarations as against those other appellants.

3. The conviction of Louis Gardiner is unsafe because his counsel failed to adduce that he was of good character and the judge failed to give the jury a good character direction in relation to propensity.

[4] See para. 9 of this judgment.
[5] Supra note 2.

4. Sheldon Isaacs was unfit to stand trial by reason of his severe brain damage, and his conviction is therefore unsafe.

5. The sentences of death imposed on the appellants are excessive and disproportionate having regard to the alleged offence and their individual mitigation. The sentences of death imposed on Isaacs and Williams are unconstitutional by reason of their brain damage and learning disability respectively.

Ground 1 in both appeals: The section 52 argument

[22] This ground of appeal is common to all of the appeals and is dealt with first. Bundles of additional material were admitted in evidence before the Court of Appeal in relation to the appeals on this ground with leave and in the absence of any objection. The new evidence revealed that after his first sentence Cannonier instructed his trial lawyer to appeal against both the conviction and the sentence. It appears that the trial lawyer had been awaiting a copy of the written sentence from the court office to prepare the Notice of Appeal, instead of filing the appeal immediately on hearing the sentence delivered and receiving instructions from the client. The written sentence was not received until the day before the deadline expired. Accordingly, there was not enough time to prepare the Notice. He had attempted to file the Notice, but the court office refused to accept it as being out of time. Hence, his subsequent filing of a Notice seeking an extension of time. Included in the Additional Bundle are statements from the other appellants to the effect that they had also given instructions to their trial lawyers to file appeals on their behalf and had got no explanation as to why they were not filed.

[23] Mr. Fitzgerald, QC, on behalf of Cannonier and Gardiner, submitted that it was clear in this case that the reason why the deadlines had been missed was the inadvertence of counsel as a written copy of the transcript or of the sentence is not a prerequisite for the filing of an appeal. He said that for the court to stick to an inflexible time limit imposed under colonial times for reasons that are no longer applicable, in the days when the sentence was executed in a matter of weeks after

it was imposed, was in breach of the constitutional guarantee of a fair trial. According to learned Queen's Counsel, it may have been good law in England in 1910, but that law was no longer applicable in this jurisdiction. It is a universal principle that basic injustice will not be allowed to stand. Where there is an injustice there must be a remedy. No system of justice can operate without some power to extend in a deserving case a time limit. If even a shoplifter can have his time limit extended, then how can it be right to have no possibility of extension for someone sentenced to death? It was also a breach of the constitutional protection of law, guaranteed by section 3, that a citizen could be deprived of his right to life due to the inadvertence of his counsel. It would be arbitrary, disproportionate and unconstitutional to execute a person in those circumstances, counsel insisted.

[24] Mr. Fitzgerald, QC summarised his submissions into three short propositions: (1) The protection of law is a guarantee of due process; (2) In a death penalty case the right of appeal is a fundamental right; (3) The inflexible rule is contrary to the Constitution. He also relied on the underlying principle of justice that wherever there is a discretion a party should not be penalised for a de minimis excess of the time limit due to the party's lawyer's ineptitude. He invited the Court to rule that the section should be read to give a discretion even in capital cases. Mr. Knowles, QC adopted these submissions on behalf of the appellants Isaac and Williams.

[25] Sir Richard Cheltenham, QC submitted on behalf of the respondent that the Court of Appeal must not permit itself to distort the appeal procedure. He said that he was concerned that the approach adopted by the Privy Council in remitting the matter to the Court of Appeal for the jurisdictional point as well as the appeals to be heard on their merits was a circuitous way of providing the appellants with leave to appeal and securing a result which was not in consonance with the Constitution and statute law of St. Kitts. He urged the Court to stand its ground and maintain its position that it had no jurisdiction to hear the matter. He urged the Court not to engage in mental gymnastics which would result in introducing uncertainty where none existed hitherto and in the process distort West Indian constitutionalism. He submitted that the State has the right by legislation to

regulate the movement of cases from one tier of the court system to another. He relied on the following words of Lord Bingham in the Rodionov case[6]:

> "It is plainly open to the State to regulate access from one tier of its courts to another. It is not surprising that a State should require appellate remedies before its local courts to be exhausted before a litigant seeks access to the Board; and not very surprising that a State should preclude an appeal to the Board from a High Court decision where it has itself precluded an appeal to the Court of Appeal. The Board is constrained to conclude that is what St. Kitts has done."

Section 52

[26] The time limit or deadline that is in issue is contained in section 52 of the Court Act.[7] It is convenient, at the risk of repetition, to repeat here what section 52(1) and (2) state. They read as:

> "52. Time for appealing
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> (1) Where a person who is convicted desires to appeal under this Act to the Court of Appeal or to obtain the leave of the Court of Appeal, he or she shall give notice of appeal or notice of his or her application for leave to appeal in such manner as may be directed by rules of court within fourteen days of the date of conviction.
>
> (2) Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given may be extended at any time by the Court of Appeal."

[27] The traditional rationale for fixed time limits in which to seek leave to appeal in capital cases was explained in Twynham's case.[8] There the English Court of Appeal explained that the court had no power to extend the time within which to appeal a conviction involving sentence of death because the mere giving of a notice of appeal had the effect of postponing the date of the execution. If it were possible to extend the time it would be open to a murderer having failed in one appeal to give notice asking for an extension of time in order to bring some other

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[6] The Attorney General for St. Christopher and Nevis v Alexandre Yakovlevich Rodionov [2004] UKPC 38 at para. 14.

[7] See para. 9 of this judgment.

[8] R v Thomas William Twynham (1921) 15 Cr. App. R. 38 at 39-40.

matter before the court in order to provide for a further extension of time. It was for that reason that the Legislature had deliberately declared that an appeal from a conviction involving a sentence of death must be made within the prescribed time. The Court directed that in future the Registrar of the Court was to refuse to receive any application filed out of time in a murder appeal.

[28] The rule has long been applied in this jurisdiction. So, in the Saint Vincent case of Pollard[9] the Privy Council said that the Court of Appeal had no alternative but to refuse a defendant's application to extend time for lodging a notice, and they referred to Twynham's case.

[29] No issue of the constitutionality of fixed time limits was addressed to the Privy Council in Pollard, and the issue therefore now falls to be determined against the background of the fair trial provisions in section 10 of the St. Kitts-Nevis Constitution.

The protection of the Law

[30] Section 10 of the Constitution is the familiar provision to secure protection of law. It provides that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. He is to be presumed innocent until he has been proved or has pleaded guilty. He is to be given adequate time and facilities to prepare his defence and must be permitted to defend himself at his own expense either in person or by a legal practitioner of his own choice. He is to be afforded facilities to examine the witnesses called by the prosecution and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to the prosecution's witnesses.

[31] Section 10 of the Constitution applies not only to trials at first instance but also to appellate proceedings. The Privy Council so held on similarly worded

[9] Pollard v The Queen [1995] 1 W.L.R. 1591 at 1593.

constitutional provisions in Darmalingum's case.[10] Similarly, in relation to article 6(1) of the European Convention on Human Rights, which language is similar to that of section 10,[11] although the article does not guarantee a right of appeal from a decision of the court of first instance, wherever domestic law provides for a right of appeal, the corresponding appellate proceedings must be treated as "an extension of the trial process" and are therefore subject to the requirements of article 6 of the Convention.[12] This principle has been held to apply to leave to appeal applications.[13]

[32] The right of access to a court is inherent in these fair trial provisions.[14] The State is entitled to have procedural rules in place in order to regulate the right of access to a court. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired.[15] In relation to article 6, the European Court has said[16] that such limitations will not be compatible with article 6(1) if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Thus in the Perez de Rada case, at paragraph 45, the European Court said:

> "The rules on time-limits for appeals are undoubtedly designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty. Those concerned must expect those rules to be applied. However, the rules in question, or the application of them, should not prevent litigants from making use of an available remedy."

[33] The inflexible time limit for appealing in capital offences dates back to the period when executions were expected to be carried out quickly after sentence, namely within a matter of weeks. The rule was intended to facilitate that process. However, the ability of defendants in the Federation of Saint Christopher and

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[10] Sooriamurthy Darmalingum v The State [2000] 1 W.L.R. 2303 at 2309-2310 from Mauritius.
[11] Minister of Home Affairs v Fisher [1980] A.C. 319, 328-329.
[12] Delcourt v Belgium (A/11) (1979-80) 1 E.H.R.R. 355, para. 25; Tolstoy Miloslavsky v United Kingdom (A/323) (1995) 20 EHRR 442 para. 59; Edwards v United Kingdom (1993) 15 E.H.R.R. 417, para. 34.
[13] Monnell and Morris v United Kingdom (1988) 10 E.H.H.R. 205.
[14] Golder v United Kingdom (A/18) (1979-80) 1 E.H.R.R. 524; R v Weir [2001] 1 W.L.R. 421 at para. 16.
[15] Ford v Labrador [2003] W.L.R. 2082 at paras. 17-19.
[16] Perez de Rada Cavanilles v Spain (2000) 29 E.H.R.R. 109, para. 44.

Nevis to apply to the Privy Council means that executions can no longer be carried out within such a short time frame. Execution dates are no longer set immediately after sentence in St. Kitts & Nevis. Defendants who allege they have been denied a merits review of their conviction and sentence in the Court of Appeal because of inflexible procedural rules have the right to apply to the Board for conservatory orders and stays of execution while the application for leave to appeal is being prepared, as was demonstrated in this case. In England, where the death penalty has long been abolished, appeals after a delay of 12 years are not unknown. In Ashley King's case[17] the appellant was convicted in 1986 of murder and sentenced to life imprisonment. He sought leave to appeal over 12 1/2 years later. Being satisfied that the conviction was unsafe, the Court of Appeal allowed the appeal.

[34] The UN Human Rights Committee has confirmed in its General Comment 32 on article 14 of the ICCPR that the right of appeal is of particular importance in death penalty cases. The importance of this right is such that a denial of legal aid for an appeal (which effectively precludes an effective review of the conviction and sentence by a higher instance court) breaches not only the right to legal assistance but also the right to an appeal.[18]

[35] Where the Court of Appeal refuses to hear an appeal a defendant is not deprived of the right to petition the Privy Council. However, the ability of defendants to apply to the Privy Council for leave to appeal is not an adequate substitute for an appeal to the local Court of Appeal. This is because the Board applies a strict test when deciding whether or not to grant leave to appeal.[19] In particular, the Board is reluctant to interfere in relation to sentences passed in particular cases unless some clear issue of principle is involved, instead preferring to defer to the courts of appeal which have appropriate local knowledge. It is therefore always appropriate

[17] R v Ashley King [2000] 2 Cr. App. R. 391.
[18] La Vende v The State (1979) 30 WIR 460; Robinson LaVende v Trinidad and Tobago, Communication No. 554/1993, U.N. Doc. CCPR/C/61/D/554/1993 (17 November 1997).
[19] Linton Berry v The Queen [1992] 2 A.C. 364, 384.

that issues of sentence be dealt with by the Court of Appeal before they are dealt with by the Privy Council.

[36] The issue of proportionality arises. The correct approach to proportionality was set out by Lord Clyde in the de Freitas case[20] on appeal from Antigua and Barbuda. There, he observed that in determining whether a limitation by an Act, Rule or decision is arbitrary or excessive the court should ask itself:

> "... whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

This and other cases establish that a statutory restriction must be shown to be reasonably justifiable in a democratic society. There must be shown to be a sufficiently important objective for the restriction, a rational connection with the objective, the use of the least drastic means, and no disproportionately severe effect on those to whom the restriction applies. The provision under challenge must be shown not to be arbitrarily or excessively invasive of the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of individuals.

[37] Criminal defendants in St. Kitts bringing appellate proceedings face very real difficulties. Some of these difficulties were recognised by the House of Lords in Weir's case[21] as follows:

> "It is not hard to infer why Parliament should have drawn a sharp distinction between the position of a defendant and that of a prosecutor. A defendant unsuccessful in the Court of Appeal may well be in prison and experience difficulty in giving instructions, obtaining legal aid and perhaps instructing different solicitors and counsel for an appeal to the House."

Appellate review of convictions and sentence of death is obviously of especial importance given the final and irrevocable nature of the penalty. Having regard to

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[20] Elloy de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others [1999] 1 A.C. 69, 80.

[21] Supra note 14.

the discretionary nature of the death penalty in St. Kitts, appellate review by the Court of Appeal is also important to ensure the consistent application of the death penalty and to safeguard against arbitrariness and excessive use. The fixed 14 day time limit in section 52 serves no legitimate purpose, but has the capacity to cause very real injustice. The rule therefore fails to satisfy the first of Lord Clyde's criteria in the de Freitas case.[22]

[38] The inflexible 14 day time limit in this instance has infringed Cannonier's right of access to a court more than is necessary in order to achieve the aim of speedy appeals. The rule has operated in a way which has absolutely prevented him from having the Court of Appeal review his conviction and sentence, even though no fault or blame attaches to him for the failure of his attorney to comply with the time limit and the notice was lodged only one day outside the time limit. It therefore fails the third of Lord Clyde's criteria in de Freitas.

[39] The need for expeditious disposals of appeals in capital cases could be equally met by a discretionary time limit, with the Court of Appeal only granting extensions where properly appropriate to do so. In my view, that objective can be best achieved by reading section 52(2) as if the words "Except in the case of a conviction involving sentence of death" were deleted. With that amendment made, I would give leave to Cannonier to appeal against his sentence and conviction and I would proceed to consider the merits of his appeal against conviction and sentence. I would do the same for the four appellants in the second appeal.

The New Evidence

[40] At the hearing, the Court gave leave to adduce new evidence relative to the mental health of the four accused persons. The evidence of an English psychologist, Dr. Tim Green, and an English forensic psychiatrist, Professor Nigel Eastman, for the appellants and of a Trinidadian forensic psychiatrist, Dr. Hazel Othello, for the Crown were admitted by consent and they were received as

[22] See para. 36 of this judgment.

experts. There was a suggestion that further new evidence by way of an affidavit from Ms. Inniss, local counsel, about other unrelated issues and other grounds of appeal might be received by the Court with its leave at this stage, but the Crown had not been served and the Court refused leave.

Ground 2 in Cannonier's First Appeal: The exclusion of the alibi defence

[41] At the close of the prosecution's case, Cannonier had sought to call two witnesses to give alibi evidence on his behalf, namely, Shelly Cannonier and Cleon Doyling. He had not previously mentioned their names. The prosecution objected on the basis that Cannonier had not previously notified the Registrar of his intention to call either of these witnesses, as required by the Criminal Procedure Act.[23] In his objection, counsel for the prosecution had also noted that Cannonier's defence of alibi, which he had raised in his 28th July 2004 statement to the police, had mentioned a Shane Cannonier but had not mentioned either Shelly Cannonier or Cleon Doyling, the persons he was now seeking to call as alibi witnesses.

[42] No notice of the alibi evidence was given at the Magistrate's Court, where Cannonier was unrepresented. No written notice was tendered to the court at any later date. The only place where he mentioned an alibi was in his answers to the police tendered in evidence. He had then indicated that he was at home from about 9:00 p.m. to 1:00 a.m. on the night in question. He said that Shane Cannonier, his nephew, was there lying on the bed. It was on the day he was to have given evidence at his trial that he indicated that he would not testify on his own behalf, but he applied for permission to call two previously unmentioned witnesses, Shelly Cannonier and Cleon Doyling. The prosecution objected to this evidence on the basis of the failure to notify the Registrar. Although the judge's ruling on this request was not contained in the trial transcript, in his summing up he observed that Cannonier was not allowed to bring any additional alibi evidence because the statutory requirements were not complied with.

[23] Section 33 of the Criminal Procedure Act, Cap. 4.06.

The relevant provision and law

[43] The relevant provision is found in the Criminal Procedure Act. This prohibits any accused from adducing evidence in support of an alibi unless, before the end of 28 days[24] after his committal he has given notice of particulars of the alibi. The notice must include the name and address of the witness or, if the name and address are not known to the accused, any information which may be of material assistance in finding the witness. The court is not to refuse leave to call a witness of whom notice was not given if it appears that the accused was not informed by the Magistrate at the time of committal of the requirements of the section.

Judge's wrongful refusal to allow Cannonier to adduce alibi evidence

[44] Mr. Fitzgerald, QC submitted that Cannonier's conviction was unsafe because the judge had wrongly refused to exercise his discretion to allow Cannonier to adduce alibi evidence. This refusal was a breach of Cannonier's fundamental right to present a defence case and his entitlement to call defence witnesses. He relied on dicta in the Privy Council decision in Brad Boyce.[25]

[45] Mr. Fitzgerald, QC submitted that even in light of the failure to give statutory notice of alibi witnesses, the judge ought to have exercised his discretion in this case to allow the evidence to be adduced and then to have provided the prosecution an adjournment or an opportunity to call evidence in rebuttal; and/or to have given a direction in his summing up about the possible falseness of the alibi given the late notification of the particular alibi witnesses which were relied upon.

[46] Sir Richard's reply was that there was nothing that stopped Cannonier from putting his alibi defence forward. It was open to him to have taken the stand and to have put forward that defence even without supporting witnesses. He chose not to testify. The trial judge had no alternative in the circumstances but to exercise his discretion as he did and to follow the statutory provision. The prosecution would

[24] Although, in an apparent slip in the drafting, sub-section (6) refers to "the seven days period", a hold-over from the UK provision which had been adopted and badly adapted.
[25] See para. 50 of this judgment.

have been at a distinct disadvantage, having closed its case with no warning of Cannonier's intention to offer these witnesses. The police would have had no time to examine the witnesses whose names were given for the first time or otherwise to investigate them. Sir Richard insisted that the judge had therefore rightly exercised his discretion to exclude the evidence.

[47] In any event, Sir Richard submitted, the judge had put Cannonier's alibi defence to the jury. He had explained the notion of alibi and had given them a full and proper direction. He had reminded the jury that even if they disbelieved the alibi that was not an end of the matter, that alibis are sometimes invented to bolster a genuine defence. He had reminded them that it was for the prosecution to disprove the alibi and that the accused had no burden of proof. The evidence against Cannonier was overwhelming and even if the judge had wrongfully exercised his discretion, the jury could not have come to any other conclusion.

[48] In the English courts, the mere failure to give notice of particulars of an alibi within the prescribed period does not, as a general rule, constitute grounds for the court to refuse leave for the alibi evidence to be called. In Sullivan's case,[26] recently-appointed legal aid counsel for the defendant gave the prosecution late notice of the alibi. An adjournment of the trial had been granted by the court to permit the alibi witnesses to be investigated. However, at the resumed trial date the prosecution contended that the notice was too late, and they objected to the admission of the evidence. The judge exercised his discretion and refused to permit the calling of the alibi evidence. On appeal to the Court of Appeal the conviction was quashed. The Court held that the trial court has a discretion to allow alibi witnesses to be called in such circumstances. There may be circumstances when it would not be possible to give the information, or when there may be some reason why the information is not given within the seven days, but nevertheless justice demands that the alibi evidence shall be heard at the trial. The discretion to admit late alibi evidence must be exercised judicially. The mere fact that the necessary information has not been given within the seven days does

[26] R v Colin Thomas Sullivan [1970] 2 All E.R. 681.

not by itself, as a general rule, justify the court in exercising its discretion by refusing permission for the evidence to be called. The Act has introduced a most salutary provision into the criminal law for the purpose of seeing that justice should be done. In the past some defendants had at the last moment produced seemingly reputable witnesses to speak to an alibi and thereby secured an acquittal. Subsequently, it was discovered that these seemingly respectable witnesses were, in fact, disreputable and that their evidence had been entirely false.

[49] The discretion is similarly exercised in the West Indian jurisdictions. Teeluck and John's case[27] from Trinidad is an example. The argument in the Privy Council turned on the need for a trial judge to give a good character direction and the consequences of counsel's failure to raise his client's good character and to ensure that the appropriate directions were given to the jury by the judge. It is evident from the judgment that Teeluck's defence was an alibi, which the trial judge permitted him to put forward even though no notice of an alibi had been served. John's defence was also an alibi, which the judge had permitted him to put forward though no notice of alibi had been served. The prosecution was permitted by the judge to adduce rebutting evidence because they had given no notice of alibi.

[50] The need for due process and fairness in the criminal trial process is supreme. The Brad Boyce case[28] was an appeal by the prosecution to the Privy Council from the Court of Appeal of Trinidad and Tobago. The respondent was charged with the offence of manslaughter for the death of the deceased arising out of an altercation outside a nightclub. Boyce had put forward two defences, one that he had acted in self-defence, and two that the blow he inflicted was not the cause of the death. He insisted that the death was instead attributable to the negligent medical treatment the deceased received in hospital. The defence had called a medical expert who testified that, in his opinion, the cause of death was the

[27] Teeluck and John v The State of Trinidad and Tobago [2005] UKPC 14; [2005] 2 Cr. App. R. 25; [2005] 1 W.L.R. 2421, at paras. 16, 19 and 23.
[28] The State v Brad Boyce [2006] UKPC 1 at para. 13.

deceased's treatment in hospital. The judge then called back the prosecution medical witness to ask him about his qualifications in forensic pathology. It appeared he had only a certificate in the nature of an apprenticeship and was employed as a forensic pathologist on the recommendation of the Chief Medical Officer under whose general supervision he acted. The judge ruled that the prosecution medical witnesses were not qualified and the other evidence did not provide a sufficient basis for a finding by the jury that Boyce had caused the deceased's death. The judge directed the jury to acquit. The prosecution appealed under the statutory provisions in that State. The Court of Appeal found that the statutory provision permitting the prosecution to appeal was unconstitutional as derogating from the fundamental rights and freedoms under the Constitution. The Privy Council came to the conclusion that the Court of Appeal was wrong. In considering what was involved in the notion of due process the Board said this:

> "In one sense, to say that an accused person is entitled to due process of law means that he is entitled to be tried according to law. In this sense, the concept of due process incorporates observance of all the mandatory requirements of criminal procedure, whatever they may be. If unanimity is required for a verdict of a jury, a conviction by a majority would not be in accordance with due process of law. If the accused is entitled to raise a defence of alibi without any prior notice, a conviction after the judge directed the jury to ignore such a defence because it had not been mentioned until the accused made a statement from the dock would not be in accordance with due process of law."

[51] The circumstances in Sullivan's case[29] referred to earlier can be distinguished from the present one. In that case, once the solicitors came on board they provided the prosecution with the names and addresses of the witnesses. They had done this as soon as they possibly could. That was not the position in this case where the names of the alibi witnesses were only mentioned at the close of the prosecution case. Besides, from the Record it does not appear that Cannonier gave any addresses or particulars of the alibi witnesses even at this late date.

[29] See para. 48 of this judgment.

Teeluck's case[30] does no more than remind us that the judge has a discretion at common law to allow the defence to call the witnesses though no prior notice had been given. The Brad Boyce case[31] does not assist us in relation to the calling of an alibi witness when there had not been notice. The decision deals with fairness and due process, and the reference to the alibi defence was by way of obiter dicta.

[52] In this case I cannot see that any consideration of fairness required the learned trial judge to accede to Cannonier's request to be permitted to call the alibi witnesses he claimed to have available to him. The Court will not lightly upset the exercise by a trial judge of his judicial discretion unless it is clear that the exercise was wrong. The evidence against Cannonier in this case was so compelling, and the attempt to call alibi witnesses so desperately smacking of a last-minute device, that I am satisfied that no injustice was done. The jury would inevitably have convicted him if the irregularity had not taken place and the alibi witnesses had turned up to testify. In the event that I am wrong and it is considered that the trial judge should have permitted Cannonier to call his alibi witnesses, then the most appropriate course is to apply the proviso.

[53] The proviso is the proviso to section 44(1) of the Court Act.[32] Section 44(1) reads

> "(1) The Court of Appeal on any such appeal against conviction shall (subject as hereinafter provided) allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law; or that there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal:
>
> Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

[30] See para. 49 of this judgment.
[31] See para. 50 of this judgment.
[32] See para. 9 of this judgment..

[54] The principles governing the application of the proviso has been set out afresh in the Maxo Tido case[33] originating from the Bahamas. The case concerned an inadequate direction given to a jury by a trial judge as to the failure by the police to conduct an identification parade without any explanation and then permitting one of the main witnesses to identify the accused from the dock without any adequate warning as to the dangers of identification without a parade. The judgment of the Board was delivered by Lord Kerr who cited with approval the judgment of Lord Hope in Stafford's case[34] where he said:

> "The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence: see Woolmington v. Director of Public Prosecutions [1935] A.C. 462, 482-483,per Viscount Sankey L.C. In Stirland v. Director of Public Prosecutions [1944] A.C. 315, 321 Viscount Simon L.C. said that the provision assumed: "a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict." As he explained later on the same page, where the verdict is criticised on the ground that the jury were permitted to consider inadmissible evidence, the question is whether no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken on the ground of its inadmissibility. Where the verdict is criticised on the ground of a misdirection such as that in the present case, and no question has been raised about the admission of inadmissible evidence, the application of the proviso will depend upon the examination of the whole of the facts which were before the jury in the evidence."

Applying this approach, the Board had no doubt that the proviso should be applied. Apart from the dock identification, the evidence against the appellant had been simply overwhelming.

[55] Following the Maxo Tido principles, there is no merit in this ground of appeal, in my view, and I would apply the proviso and dismiss it.

Counsel's failure in his duty to his client in relation to alibi

[56] In support of his contention that Cannonier's counsel, in failing to give a late alibi

[33] Max Tido v The Queen [2011] UKPC 16.
[34] Giselle Stafford and Another v The State [1999] 1 W.L.R. 2026 (Note), 2029-2030.

notice to the court upon his appointment and upon learning that Cannonier's defence was principally an alibi, had failed in his duty to his client, and that this failure was fatal to the trial, Mr. Fitzgerald, QC relied upon the decision in Teeluck and John[35], where the Board said:

> "38. It should now be regarded as established law that in some circumstances the mistakes or omissions of counsel will be a sufficient ground to set aside a verdict of guilty as unsafe. Their Lordships feel obliged, however, to issue a reminder of the remarks made by the Board in Bethel v The State (1998) 55 WIR 394 that ordinarily they will not even entertain a ground of appeal based upon allegations of incompetence by counsel when raised for the first time before the Board. In the present case they are prepared to do so because of the importance of the issue to the appellant John and because, on account of the frankness of his former counsel in furnishing information, they are in a good position to determine the issue without having to deal with any conflicts of fact.
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> 39. In Sealey v The State 61 WIR 491, para 30 their Lordships stated, citing R v Clinton [1993] 1 WLR 1181 and R v Kamar The Times, 14 May 1999:
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> > 'Whilst it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of defence counsel to discharge a duty … which lies on counsel … can lead to the conclusion that a conviction is unsafe and that there has been a miscarriage of justice …'
>
> There may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude: see Boodram v The State [2002] 1 Cr App R 103, para 39; Balson v The State [2005] UKPC 2; and cf Anderson v HM Advocate 1996 JC 29.
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> 40. Their Lordships are of opinion that this case falls into the exceptional category of those where the omissions of counsel had such an effect on the trial and verdict that it cannot be said with sufficient certainty that the conviction was safe. …"

[57] Mr. Fitzgerald, QC submitted that in the absence of evidence to the contrary, the failure to comply with the basic procedural requirement of filing an alibi notice

[35] See para. 49 of this judgment.

indicates the negligence of trial counsel. Indeed, Cannonier's denial of the prosecution case against him was primarily based on his alibi of being at home with his nephew, Shane Cannonier, at the time of the killing. According to learned counsel, the trial counsel was therefore under a clear professional duty to advise his client as to the need to adduce alibi evidence and to comply with the statutory requirements as to notification of such witnesses. There could have been no strategic reason for not providing the requisite notice of witnesses intended to support Cannonier's alibi. Moreover, argued counsel, the importance of the issue to Cannonier, who was facing a death penalty if he were to be convicted, was clear.

[58] In response, Sir Richard submitted that it was difficult to fault counsel for ineptitude when he would only have been instructed about these alleged witnesses at the last second at the close of the prosecution's case.

[59] I am quite satisfied that there is no reason to believe that Cannonier's counsel was negligent in his conduct of the alibi defence. It is far more likely that he was given the names at the last moment than at any earlier time in the trial. I find no merit in this ground of appeal and would accordingly dismiss it.

Ground 3 in Cannonier's First Appeal: The admission of the statement of Gavin Gilbert, deceased

[60] Cannonier's third ground of appeal was that his conviction was unsafe because the trial judge had improperly failed to exercise his exceptional power at common law to refuse the admission of the statement of Gavin Gilbert in order to uphold Cannonier's right to a fair trial.

[61] Mr. Fitzgerald, QC submitted that this was a situation where, due to the poor quality of the evidence contained in the statement of Gavin Gilbert – deriving as it did from a cellmate confession – that it was proper for the judge to have exercised his exceptional common law discretion to exclude the statement. The exceptionally poor quality of the evidence of cellmate confessions is such that

there is particular guidance on the nature and scope of the judicial warnings which must accompany this type of evidence: see for example the Privy Council decision in Pringle's case[36] from Jamaica. In advising on how to deal with the problem of the cell confession the Board reminded us that there has long been an obligation on judges to warn a jury about the special need for caution in cases which are analogous to those of accomplices. These would include cases where the witness' evidence may have been tainted by an improper motive. Prison informants have a strong motivation to lie when they approach the police, particularly when they perceive that some benefit could be exchanged for their testimony. It would only be in exceptional cases that a prison informer would not fall into the category of witnesses about whom a warning should be given by the trial judge of the dangers of convicting on evidence which is potentially unreliable.

[62] Mr. Fitzgerald, QC submitted that, as this case demonstrated, the strong possibility that Gavin Gilbert's evidence was tainted by an improper motive meant that it was of such a poor quality that it was not safe for the jury to have relied on it. Gilbert's statement was a classic cell confession case. He was facing criminal charges. This was not a witness of whom there was no taint. As such, it was Cannonier's submission that the judge's wrongful failure to exercise his exceptional common law discretion to exclude the statement led to an unfair trial and, as a corollary, an unsafe conviction.

[63] Sir Richard Cheltenham, QC, on behalf of the Crown, submitted in reply that the reason why a cellmate confession is regarded in law as inherently unreliable and unsafe arises from the fact that the motive for testifying is informed by self-interest, namely, the urge to ingratiate himself with prison authorities and, in consequence, secure personal advantage. In this case, there was no report by Gavin Gilbert to the prison authorities. There was no advantage to be gained by him and no benefit to enjoy. There was no reason to doubt its reliability and accuracy. Gilbert had not, driven by some base and ulterior motive, reported to the prison authorities. He had confessed his actions to the police only after the gun was

[36] Michael Pringle v R [2003] UKPC 9 at para. 25.

found. As such, argued Sir Richard, Gilbert's testimony may be seen as another layer of confirmatory material in the case.

[64] The Privy Council advised in Scott and Barnes[37] from Jamaica that although a trial judge has no statutory discretion to exclude the sworn deposition of a deceased witness, in the exercise of his duty to ensure a fair trial for the defendant he has a power at common law, which should be exercised with great restraint, to refuse to allow the prosecution to adduce in evidence a deposition even though it was highly probative of the offence charged. The mere inability to cross-examine the deponent; the fact that the deposition contained identification evidence; or indeed the only evidence against the accused, would not justify exercising this common law power to exclude the deposition. Rather, the common law discretion to exclude such a deposition can only be utilised in exceptional circumstances where the judge considers that: (a) in view of the quality of the evidence it would be unsafe for the jury to rely on it; or (b) where there was identification evidence in the deposition and that directions in the summing up would be insufficient to guarantee a fair trial. In reaching this conclusion the Board noted[38] that, "it will be unwise to attempt to define or forecast in more particular terms the nature of such circumstances."

[65] The Privy Council in Benedetto's case[39] from the British Virgin Islands observed that the problem which is presented by the cell confession is that the evidence of a prison informer is inherently unreliable, in view of the personal advantage which such witnesses think they may obtain by providing information to the authorities. Such witnesses have no interest in the proper course of justice. They are men who tend not to have shrunk from trickery and a good deal worse. They will almost always have strong reasons of self-interest for seeking to ingratiate themselves with those who may be in a position to reward them for volunteering confession evidence. The prisoner is at a disadvantage in that he has none of the

[37] Barnes, Desquottes and Johnson v R Scott and Walters v R (1989) 37 WIR 330; [1989] A.C. 1242 at 1255 to 1260; [1989] 2 All E.R. 305; [1989] 2 W.L.R. 924; (1989) 89 Cr. App. R. 153.
[38] Ibidem, p. 1259.
[39] Alexander Benedetto v The Queen and William Labrador v The Queen 2003 [UKPC] 27, paras. 32-33.

usual protections against the inaccurate recording or invention of words used by him when interviewed by the police. It may be difficult for him to obtain all the information that is needed to expose fully the informer's bad character. It is thus the duty of the trial judge to sift narrowly the circumstances in which the cell confession has been obtained and to remind the jury that it is always of a suspicious character and often proceeds from a hoped for exemption from prosecution in consideration of the evidence so tendered and generally flows from the most worthless of the community.

[66] In Boodram,[40] ten persons were charged in Trinidad with four murders and were committed for trial. On the day before the trial began one of the ten persons, one Morris, was arraigned and pleaded 'guilty' to the murders. He was sentenced to death on each of the charges, but a conditional pardon was then read out commuting the sentences of death to sentences of life imprisonment. One of the conditions to which the pardon was subject was that he should give evidence in accordance with a statement which he had made a few days earlier and that such statement was true. At the beginning of the trial proper a voire dire was held into the admissibility of the deposition of one Huggins, who had turned State evidence. The prosecution case was built around the deposition of Huggins and the evidence of Morris. Before the trial Huggins gave evidence at the Preliminary Inquiry (which provided the deposition) and was given protection as a witness. However, he had left his safe house for a while and met his death. The objection to the deposition was that the accused was not given a full opportunity to cross-examine the witness. The trial judge ruled that his deposition should be admitted in evidence. In giving the decision of the Trinidad and Tobago Court of Appeal upholding the decision of the trial judge, de la Bastide C.J. stated as follows:

> "The statutory discretion to exclude is simply a re-statement of the common law and must clearly be exercised in the same way and in accordance with the same principles as the common-law discretion. The Privy Council in *Scott and Walters* laid down the following guidelines: (i) the only justification for excluding an otherwise admissible deposition is

[40] Nankissoon Boodram, Ramsingh (Joel), Ramiah (Joey), Ramkalawan Singh, Sankeralli (Russell), Bhagwandeen Singh, Thomas (Clive), Gopaul (Robin) and Eversley (Stephen) v The State (1997) 53 WIR 352.

> when that is essential in order to ensure a fair trial for the accused; (ii) the determining factor in the exercise of the discretion must be the quality of the evidence in the deposition; and (iii) provided that the judge is careful to (a) warn the jury of the danger of acting on evidence which has not been the subject of cross examination before them, (b) point out any discrepancies and weaknesses in the evidence contained in the deposition, (c) give them any other necessary warning such as the *Turnbull* direction (cf *R v Turnbull* [1977] QB 224) with regard to the danger of acting on identification evidence, and (d) exclude any evidence which is hearsay or inadmissible for any other reason, it is only very rarely that it will be appropriate or necessary to exclude the deposition. (iv) it is not a ground for exclusion that the deposition contains the principal, or even the only evidence, on which the accused could be convicted.
>
> In counseling restraint in the exercise of the power to exclude, Lord Griffiths (37 WIR at page 340) said this:
>
> > 'If the courts are too ready to exclude the deposition of a deceased witness it may well place the lives of witnesses at risk particularly in a case where only one witness has been courageous enough to give evidence against the accused or only one witness has had the opportunity to identify the accused.'
> >
> > This warning has a special piquancy in a jurisdiction like ours in which witnesses are murdered, or refuse through fear to testify, with alarming frequency."

[67] For all the reasons set out in the cases above, I cannot fault the trial judge for having admitted the statement of the deceased Gilbert. The statement satisfied the statutory requirements, and the trial judge gave the jury a detailed direction on how it should be treated. In particular, he warned them of the care that they should take in considering its truthfulness, bearing in mind that he had not been cross-examined. In my view there is no merit in this ground of appeal and I would accordingly dismiss it.

Ground 4 in Romeo Cannonier First Appeal: Threats to witness safety

[68] Cannonier's fourth ground of appeal was that his conviction was unsafe because the judge had: (a) failed to prevent prejudicial references to threats to witness safety and insinuations that he had been trying to do away with witnesses in the

presence of the jury; and (b) made these kinds of prejudicial comments to the jury in his summing up. In the alternative, the conviction was unsafe because trial counsel failed to ensure that the members of the jury were absent when the admissibility of the statement was being discussed.

[69] Cannonier relied on the following matters of law to establish this ground of appeal:

1. Matters extraneous to admissible evidence in a criminal trial, which have the capacity to risk prejudicing a jury against a defendant, ought to be raised in their absence: see Mitchell's case[41] (jury required to withdraw for the purposes of a voir dire on the admissibility of a confession); and Crosdale's case[42] (jury required to withdraw during a submission of no case to answer).

2. A trial judge has a discretionary power to discharge a jury, and it is incumbent upon him to consider exercising this power whichever party might invite him to do so or though no party invited him to do so, or even where both parties opposed the discharge of a jury: Azam's case.[43]

3. That duty is not necessarily precluded by the fact that no consideration was given by either the court or the parties during the first instance proceedings: Shuker and Shuker.[44] If justice required the jury to be discharged, silence on the part of the defence is not definitive, a point which is akin to the duty of the trial judge to consider whether to direct the jury on alternative verdicts even when the defence have not raised the matter: Coutts case.[45]

4. The question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility or

[41] David Mitchell v The Queen [1998] A.C. 695 at 702-704.
[42] Rupert Crosdale v The Queen [1995] 1 W.L.R. 864 at 873.
[43] R v Azam (Usman Ali) [2006] Crim. L.R. 776, CA.
[44] R v Shuker and Shuker [1998] Crim. L.R. 906.
[45] R v Coutts [2006] 1 W.L.R. 2154.

danger that the jury would have been prejudiced against the defendant: Porter v Magill;[46] Montgomery;[47] and In re Medicaments.[48]

5. Failure to raise a challenge to the impartiality of a tribunal does not constitute a waiver of the right to a fair trial in this regard: Millar's case.[49]

[70] Mr. Fitzgerald, QC submitted that in the present case, several police officer witnesses made prejudicial remarks in the course of their testimonies establishing the provenance of Gavin Gilbert's statement. In addition, there was a prejudicial interchange which took place during the trial in the presence of the jury as to the admissibility of this statement. Finally, there had been highly damaging commentary by prosecution counsel in his closing submissions and inopportune and improper remarks by the judge in his summing up on this same topic.

[71] Mr. Fitzgerald, QC relied on Scott and Barnes[50] as being of assistance in showing the type of comments which were considered damaging for the jury to hear. In that case, a complaint was made that the judge had given the impression to the jury that the witness of identification had been deliberately liquidated to prevent him giving evidence. The judge had in the presence of the jury delivered a long ruling setting out his reasons for admitting the deposition of the deceased witness. In the course of doing so he said that the witness was called at the preliminary inquiry and after having given evidence, and before the start of the trial, he was shot and killed. He explained in his ruling that it did not matter whether the witness was deliberately liquidated to prevent him testifying or if he had died of natural causes, the deposition would still be admissible. He said that it would be a serious thing if a man could commit an offence and those acting on his behalf, or even with his assistance, could eliminate the chief witness to secure his own acquittal. Finally, in the course of his summing up he directed the jury that the principal and only eye witness was shot to death two months after he gave

[46] Porter v Magill, Weeks v Magill [2002] 2 A.C. 357 at [103].
[47] Montgomery v HM Advocate and Another [2003] 1 A.C. 641 at 667 and 672.
[48] In re Medicaments and Related Classes of Goods (No 2) [2001] 1 W.L.R. 700 at [85-86].
[49] Millar v Dickson [2002] 1 W.L.R. 1615.
[50] See para. 64 of this judgment.

evidence at the preliminary examination. The Board expressed themselves as feeling considerable unease that the judge's remarks may have implanted in the jury's mind the suspicion that the witness was killed to prevent him giving evidence that identified the accused. The judge should have heard the arguments and given his ruling on the admissibility of the evidence in the absence of the jury and should have avoided language that could be interpreted as carrying any implication that the witness had been killed to prevent him giving evidence.

[72] Gilbert's statement of 26th November 2004 was taken on oath before a Commissioner for Oaths. The law provides that a statement made by a person in a document may be admissible in any criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if the person who made the statement is dead and the statement was made to a police officer or some other person charged with investigating offences. Such a statement shall be made on oath before a person empowered to administer oaths in the form stipulated. The law thus enables a statement made to a police officer by a person who is now dead to be admitted at the trial of an accused person if the statement had been made on oath before a Commissioner for Oaths.

[73] Police officer Sgt. Diana Mills had testified that:

> "Taking Gavin Gilbert to a Commissioner for Oaths is not done to every witness. We wanted to have his evidence on oath in the likelihood of him not being able to give his evidence. He is now dead."

I consider this to be completely innocuous and proper evidence. It established for the jury a basis for their hearing the contents of the statement.

[74] Likewise, police officer Glenroy Browne testified in relation to this statement that:

> "It was necessary to take statement based on what inquiries revealed that is the threat level. My supervisors along with myself thought it best to record the statement on oath in the case where if any unfortunate situation arise then the said statement can be still made available to the court. If the individual should be killed, or too afraid to give evidence or out of the Federation and we are unable to locate him then that statement can be used owing to the fact that we used that course of action to record the

statement. The statement was free and voluntary. No force was inflicted on him, no promises held out, no inducements made."

"MaKenya Lucas was taken before Commissioner for Oaths around 7th December 2004. That was necessary because we had concerns for her safety. We wanted to ensure that if she should be killed, or too afraid to give evidence or she should be overseas and we were unable to locate her that we would be able to make the statement available to the Court via that process. She first gave a statement on 29th July 2004. This said statement she gave before the Commissioner for Oaths. Approximately three persons were subjected to this procedure: Gavin Gilbert, MaKenya Lucas and Mr. Warner. It might have been the two Warners: Lionel Warner and possibly Vincent Warner."

Given the various reasons stated by PC Glenroy Browne as to the need for these witness statements to have been taken before a Commissioner for Oaths, I cannot see anything prejudicial or objectionable in his testimony or that of Sgt. Mills. His testimony did no more than set out the statutory rationale for the procedure followed in relation to Gavin Gilbert's statement.

[75] An interchange between counsel in relation to the admission of this statement was conducted in front of the jury. Mr. Fitzgerald, QC submitted that this had been highly prejudicial in nature. The record reveals the following:

"Sir Richard Cheltenham QC*:* Asking that evidence of Gavin Gilbert be received in evidence pursuant to No. 10 of 1998 the Law Reform Miscellaneous Provisions Act section 52(a)(2).

Mr Hesketh Benjamin: Objection – the jury can stay. Objection is that this is no evidence. This section does not pounce (sic) procedural aspect of the stage where we have reached. We ought to have something more than this. If orally given and person dies or was abroad I wouldn't have much quarrel with my friends. Something more should be said about Mr Gilbert's whereabouts during the Preliminary Inquiry. Something should be said about that. This does not oust the procedure for bringing him during the inquiry. A person may go off to another country and then it be said that he is not available. It puts the accused at a disadvantage. Cannot cross-examine paper.

Sir Richard Cheltenham QC: Learned friend describes approach as novel and delicate. The Act is 9 years old. The Miscellaneous Provisions Act became law in 1998. Not novel – Use of word 'evidence' is only quoting the Act 52(a)(1). Statement may be admissible as evidence simply

> quoting the first limb of 52(a)(1). Page 197 of the record is reflected. The fact that at Preliminary Inquiry Magistrate received the very statement. At Preliminary Inquiry Gilbert was already dead. Counsel cannot claim to be caught by surprise. There are two positions in this jurisdiction. (1) Where statement is made in a Preliminary Inquiry and thereafter he died. (2) The other is where police has concern about survival of a witness. They made sure that statement was on oath lest he perish. The Act was already brought into force. Preconditions for invoking provisions of the Act have been in existence. Respectfully urge in the circumstances that learned friend's resistance be overruled.
>
> Decision: As I see it the provision specifically addresses the circumstances of this case. Mr Benjamin does not question the procedure in making the statement. He only questions whether the witness was available for the Preliminary Inquiry. The witness Browne said he saw Gilbert dead on 21st March 2005. He saw him buried April 2005. The record appears to speak for itself. The Legislation is specifically designed for these circumstances. [Statement of Gavin Gilbert admitted and marked 'GB3']."

It seems clear that defence counsel's objection was procedural only. He was not objecting to the admissibility of the statement or to the procedure that had been followed in taking it. Such objection should be heard in the absence of the jury. He submitted only that, in his view, a proper foundation, thus establishing the death of the witness, was not laid prior to the application to admit his statement. In the circumstances, there was no need for him to have requested the withdrawal of the jury. He specifically did not: he said that they could have stayed. Accordingly, no prejudice appears to have been caused to Cannonier.

[76] Mr. Fitzgerald, QC also submitted that prosecution counsel had been allowed in his closing address to the jury to make a remark in relation to this statement which had been enormously prejudicial:

> "I go back to Gavin Gilbert. You may think that he knew too much to that extent he could not live. You watch a lot of things people of your age group Mr Foreman and Your Members which men who are much older than women had no opportunity of watching, but 40 years or so ago if there was a cinema nearby some people would go and for the most part they were Westerns, characters like Bob Steele, Johnny King and so on. In one of the classic Westerns the words were uttered 'Dead men tell no tales'. Often in life you must run when you are being told certain things

> because if you know you become vulnerable, 'Dead men tell no tales'. But Gavin Gilbert said it was 7th September 2004 …"

The circumstances in this case differed from the Scott and Barnes case. The whole basis of the prosecution case was that Gilbert was murdered in order to stop him from testifying at Cannonier's trial for the murder of PC Nisbett. The evidence of the witnesses in the case was to this effect. I can see nothing improper in the prosecution reminding the jury of this.

[77] Mr. Fitzgerald, QC submitted that the judge in his summing up had also made comments in relation to the statement of Gavin Gilbert which did not properly dissuade the jury of the underlying allegation that Cannonier had arranged for the murder of the deceased witness. He had not clearly directed the jury to exercise caution in considering Gilbert's statement. He had given an "axe to grind" warning, but had then remarked, "Dead men tell no tales". The trial judge directed the jury in these terms:

> "There is also the procedure that was used in relation to Gavin Gilbert as pointed out during the trial. You obviously haven't seen Gavin Gilbert. He hadn't been cross-examined. He didn't give evidence at Preliminary Inquiry. The reason for that is that he was already dead. The police in their wisdom apparently were able to anticipate difficulty in bringing this witness before the Court as a live witness and they therefore adopted a procedure which Parliament has provided for in the law to deal with that eventuality. You heard all sorts of arguments about whether it is fair or not, but you have to balance that against the issue of the inability to conduct trials if the witnesses are dead. And the statement 'Dead man tells no tales' you can ponder on that. This allows a dead man to tell a tale and the law provides for it.
>
> It is a matter for you when you look at evidence it would be in your possession if you so desire the statement of Gavin Gilbert anything that counsel has said in relation to the facts because this is not the place to challenge the law, anything that he may have said in relation to take that into account. What I said earlier as well in relation to whether or not he was acting as an accomplice or I don't see why he would have been anyone with an axe to grind. You haven't heard he had anything against the accused so whether or not he himself was in someway embarrassed by his position and made the statement to get out of it. There was no possibility of him giving evidence at the Preliminary Inquiry and it would have been quite unusual for him to have given the statement in the

> presence and hearing of accused because they could not have anticipated that he would have been dead by the time of the Preliminary Inquiry. The expectation would have been that he would have been available for the Preliminary Inquiry and that the accused would have had his opportunity to cross-examine at that time and thereafter if there was a committal he would have had another opportunity to do so. So no one could have anticipated that he would have been dead, but the precaution, just in case, they do this procedure and in this particular case it worked out in favour of the Prosecution because they had the statement to offer you in this Court.
>
> … The question was asked whether or not that may have occurred in relation to the evidence of Gavin Gilbert [him being pressured or offered inducements to give this statement]. Again, we don't have Gavin Gilbert to say that and it is really a matter for you, but there has been no allegation made that he was forced to make that statement but you can take into account all of the circumstances in which the statement was made in coming to your conclusion as to whether to accept or reject it."

[78] Later in his summing up, in dealing with the evidence of Glenroy Browne, the police officer who had taken Gavin Gilbert's statement, the judge said:

> "He said it was necessary to take the statement in this manner because of a threat level in relation to this particular witness. It was taken on oath. He said it was done in this way if the witness should have been killed he would not have been able to give evidence at trial."

In all these directions, the judge was reminding the jury of the statutory basis for the admissibility of this evidence. I can see nothing improper in the judge reminding the jury of the evidence before them which underlay the right of the prosecution to produce the statement of the deceased as an absent and deceased witness.

[79] It was Mr. Fitzgerald, Qc's submission that the conviction was unsafe because the judge failed to ensure that the argument and ruling on the admissibility of the statement of Gavin Gilbert was conducted in the absence of the jury. Cannonier harboured the same concerns in relation to the statements by several police witnesses as to the threat level surrounding this witness, the commentary by prosecution counsel in his closing submissions that 'dead men tell no tales' and the adoption of this reference by the judge in his summing up. Contrary to

Mitcham's case[51] the risk of prejudice in this case was much more than 'minimal'. Here, the references to threats were not merely 'fleeting and oblique' and did refer specifically to Cannonier's actions. Through hearing these discussions and remarks, he submitted, the jury was left with the distinct and highly prejudicial impression that Cannonier had set about eliminating all of the witnesses seeking to testify against him. Such a view, he submitted, undoubtedly coloured their efforts to deliberate impartially on his responsibility for the killing of Delvin Nesbitt.

[80] In the alternative, Mr. Fitzgerald, QC submitted, trial defence counsel had neglected his professional duties by failing to request the removal of the jury during the discussion of the admissibility of Gavin Gilbert's statement and that this omission had deprived Cannonier of a fair trial. In this regard, Cannonier relied on the submissions outlined above with respect to the ineffective assistance of counsel. There can be no strategic basis, he submitted, for failing to object to statements made in the presence of the jury which damage the interests of one's client. Where a defendant was deprived of the necessities of a fair trial, even if due to the actions of his own advocate, an appellate court is obliged to quash the conviction in the event of a miscarriage of justice: Sankar's case.[52]

[81] Finally, Mr. Fitzgerald, QC submitted, the prejudice to Cannonier caused by the commentary outlined above is material and should have caused the judge to discharge the jury (on his own motion if not raised by trial defence counsel). Accordingly, he argued that Cannonier's trial was unfair and his conviction is unsafe and should be quashed.

[82] I am satisfied that there was nothing unfair or improper in what was said by either prosecuting counsel or the trial judge. They were both justified in indicating to the jury the statutory basis for what had been done in having the witness' statement taken by a Commissioner for Oaths and in admitting the statement into evidence

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[51] Evanson Mitcham, Vincent Fahie and Patrice Matthew v The Director of Public Prosecutions, St. Christopher and Nevis Criminal Appeal Nos. 10, 11 and 12 of 2002 (delivered 3rd November 2003, unreported).

[52] Sankar v The State of Trinidad and Tobago [1995] 1 All E.R. 236 at 240.

after he had died. Similarly, I find no neglect on the part of defence counsel. In my view, there is no merit in this ground of appeal and I would accordingly dismiss it.

Ground 5 in Cannonier's First Appeal: Failure to direct the jury on the statement of Gavin Gilbert

[83] It was Mr. Fitzgerald, QC's submission that the conviction was unsafe because the judge failed to properly direct the jury to exercise caution in its consideration of Gavin Gilbert's statement on the basis that the defence was deprived of the opportunity to cross-examine the witness on its contents. He relied for this ground on Scott and Barnes[53] to contend that when a sworn deposition of a deceased witness is admitted into evidence the judge should warn the jury that the evidence was untested by cross-examination and to take that into account in deciding what reliance could be placed upon it.

[84] Mr. Fitzgerald, QC submitted that although the trial judge had noted in his summation that, "You obviously haven't seen Gavin Gilbert. He hasn't been cross-examined", he had not given a specific warning about the dangers of accepting evidence in statement form which is incapable of being tested by cross-examination. According to learned counsel, the judge also failed to point out the discrepancies between the statement of Gavin Gilbert and the other evidence in the case, as was required by the ruling in Scott and Barnes.[54] As a result, the jury did not exercise the degree of caution which was required in considering the statement of Galvin Gilbert and were bound to have accorded it a greater amount of evidential weight than was in fact appropriate in their deliberations. It was on these bases that counsel submitted that the conviction was unsafe.

[85] Sir Richard Cheltenham submitted, on behalf of the Crown, that the trial judge had repeatedly told the jury that Gavin Gilbert was not present and so he could not be subjected to cross-examination. According to Sir Richard, in effect, the judge told

[53] At p. 1259. See also para. 64 of this judgment.
[54] Ibidem.

the jury that it would be for them to give his statement what weight they would. To the extent that Gilbert was only a side issue in the case, the judge, if he had gone on at length, would have been in danger of shifting the main focus from the question of the circumstances surrounding PC Nisbett's death and who and been responsible for it. On the question of prejudice against Cannonier, the fair-minded and informed observer would be presumed to know, he submitted, that

(a) Cannonier made a confessionary statement to MaKenya in which he admitted using the gun and hiding it;

(b) there was unchallenged evidence from the DNA expert that the deceased's blood was found on an EC$5 note in the pocket of Cannonier who had admitted to robbing the deceased;

(c) the 3 cartridge cases found at the scene were traced back to a gun which was found and presented in the case and which was admitted by Cannonier to have been used by him in committing the crime; and

(d) Cannonier had the opportunity to commit the crime in that he was seen in the Parsons/Dieppe Bay area on the night in question.

[86] I am satisfied that there nothing was said in the trial that should have caused the trial judge to have discharged the jury, as suggested. While the trial judge did not specifically warn the jury that the evidence was not tested in cross-examination and that they should take that into account in deciding what reliance to place on it, or of the dangers of accepting evidence in statement form that is incapable of being tested in cross-examination, or as to the discrepancies between the statement and the other evidence in the case, I am satisfied from the general directions that the jury would have understood that they must exercise the required degree of caution with respect to such a statement, and would not have given it more weight in their deliberations than was proper. I cannot see any failure on the part of the trial judge as complained of. Nor was there anything improper in the remarks made by prosecuting counsel or the witnesses, in my view. Neither was any neglect established, in my view, on the part of defence counsel, in requesting that the jury remain during the discussion on the admissibility of Gilbert's

statement. In summary, I have no doubt that the conviction was not unsafe on this ground of appeal. I would accordingly dismiss this ground of appeal.

Ground 6 in Cannonier's First Appeal: The judge's disruptions of the closing speech

[87] This ground of appeal stated that the conviction was unsafe because the judge had improperly disrupted the closing speech of Cannonier's trial counsel thereby depriving Cannonier of his right to a fair trial.

[88] Mr. Fitzgerald, QC submitted that the judge's interventions during the closing speech of Cannonier's trial counsel were improper and gave the jury the impression that he was hostile to trial counsel, to Cannonier and to Cannonier's case more generally. According to learned counsel, the denigrating nature of the interventions was such that a reasonable observer having attended the closing arguments would have left court feeling that Cannonier had not received a fair trial. The trial judge had so breached the principles relating to judicial intervention during the closing speech of defence counsel that Cannonier was deprived of a fair trial, and his conviction was therefore unsafe.

[89] The law on improper judicial interventions was recently clarified by the opinion of the Board delivered by Lord Bingham in Michel's case.[55] According to that opinion, interventions to clear up ambiguities and to enable the judge to make certain that he is making an accurate note are perfectly justifiable. Interventions which give rise to a quashing of a conviction are threefold. There are those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury. The second is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence. The third is where the interventions have had the effect of preventing the accused from doing himself justice and telling the story in his own way. It is not

[55] Michel v The Queen [2009] UKPC 41.

every departure from good practice which renders a trial unfair. However, the right of a criminal defendant to a fair trial is absolute. There will come a point where the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair, and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, because a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.

[90] The judge's interventions are designed to promote the orderly elicitation of the evidence, not needlessly interrupting the flow. He must not cross-examine witnesses. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make it obvious to all his own profound disbelief in the defence being advanced.

[91] The judicial comments which Cannonier challenges are outlined below. The first comment was in response to an objection by the Prosecution to the following statement made by defence counsel:

> "MR HESKETH BENJAMIN: ... They have endless exhibits there: clothing, shoes, hair, all sorts of things the list is there. Nothing whatsoever in all of those exhibits which were sent on for DNA nothing whatsoever attached to him but this single $5.00 where the police have the deceased blood. The police have their clothes –
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> SIR RICHARD CHELTENHAM QC: Objection. The theory that the police somehow plant blood on that $5.00 was never canvassed with the police witnesses. It is now not opened to my friend to put that as the theory of the defence to the jury because he did not put it explicitly to the policeman, you all took the money and somehow plant the deceased blood on the money and send it off. That theory with respect, Sir, cannot be put to the jury because that was never canvassed before the police witnesses. I would respectfully ask the court for a ruling on that. Now that I am on my feet sir I will correct something else. The critical exhibits in this case: the blood and the money found at MaKenya were never kept in any superintendent office. Those three (3) elements always were with the

> exhibit keeper Browne. And that must be borne carefully in mind. I respectfully ask the court for a ruling with respect to whether my friend can put that theory of the defence to the jury when it was never canvassed with the police witnesses that they planted the evidence on the $5.00 the blood of the deceased.
>
> MR HESKETH BENJAMIN: My Lord, I am not putting it I am saying what happened. That is what Dr Jones said he gave the police those exhibits. That is all I am saying.
>
> THE COURT: It's apparently an ethical ruling, Mr Benjamin. How can you raise an argument that was never raised in the trial? It is an adversarial system yes, but it is not an adversarial system based on making up things and bringing in more blows after the evidence has been led. That is not how we do the adversarial system. It is not based on trick or low blows you do it up front. This is by theory: You planted the evidence what you have to say to that and give them a chance to answer. The jury would then have an opportunity to decide whether they telling the truth about that or not, but you leave it alone and now you want to speak to it to the jury. I rule in favour of the Prosecution. You must not canvass that theory any further. That's the ruling of the court. As to the other point we will have to check the notes to see what inferences can be drawn from the evidence of Pearline Tross which I am not sure at the moment. I will have to check her evidence, but clearly what is coming through is that the Prosecution has a particular view which I will hope be able to clarify. But the ruling is based on what is clearly an incorrect approach to this issue of the adversarial system whereby you can pull things out of a hat and introduce them in a speech even though you have not in anyway confronted the Prosecution's evidence with this issue and given them any opportunity whatsoever to respond. I agree with the Prosecution on that matter".

[92] Mr. Fitzgerald, QC submitted that the judicial comment characterising defence counsel's submissions as "based on trick or low blows" and "pulled out of a hat" were not only improper but even more alarming it was misrepresentative of the cross-examination conducted by trial defence counsel. Cannonier's counsel had questioned several police officers as to the state of the money obtained from Cannonier at MaKenya's home, and although he had not specifically put to them that they had switched the money with that obtained from the deceased, he obtained admissions from officers testifying that neither batch of monies was marked for identification when they were collected. Trial counsel had also confirmed this with the pathologist who found the money in the underclothes of PC

Nisbett, and clarified with MaKenya Lucas during her cross-examination that she had not seen any blood on the money which was found at her home.

[93] Sir Richard conceded that the judge's characterisation of defence counsel's remarks, on the first occasion in response to an objection taken by prosecuting counsel, was unfortunate. He contended, however, that in his view the objection by the prosecutor was properly taken and the judge's ruling was properly made.

[94] I agree with Mr. Fitzgerald, QC that the judge's characterisation of the remarks was unfortunate. It was not only harsh, it was misrepresentative of defence counsel's cross-examination. Counsel was justified from the admissions he obtained in cross-examining the witnesses in suggesting to the jury that there was a possibility, however remote, that the evidence had been tampered with. However, the evidence in support of the theory was so weak and insubstantial that I do not believe that the jury would have given it any weight even if counsel was not stopped by the trial judge.

[95] There was a further problematic exchange with the judge during Cannonier's counsel's closing arguments. The submission was that in this interchange trial counsel was improperly admonished for perfectly and properly telling the jury that they could accord weight as they saw fit to the DNA evidence given by expert witness Ms. Craig. The interchange was as follows:

> "MR HESKETH BENJAMIN: When you look at all these reports you would note beginning with Ms Zervos. You would see in her findings she told you she received these items unsealed and tampered tape. Whatever you want to make of that about the exhibits and at the end of the day Ms Craig want to tell you this DNA evidence it is like Jesus Christ it is unblemished. I want to tell you all that she stands there and says that to you when even on the TV people hear every now and again the problems they have with DNA testing –
>
> THE COURT: Mr Benjamin you brought somebody to testify about the problems with DNA testing? Did you bring a witness to testify about the problems of DNA testing? Stay clear of that insinuation if you haven't brought a witness. You have to stay clear of assertions which you have not made by way of evidence in this case. You did ask somebody about it and they denied it that there was any such problem.

MR HESKETH BENJAMIN: That's Ms Craig –

THE COURT: And that's the evidence and there no scientist who came here and said that there was a problem with it. You can't get up and say there is for then you will be giving the evidence. You understand! So please desist from doing so.

MR HESKETH BENJAMIN: Mr Foreman you heard Ms Craig answer and it is a matter for you whether you believe it or not, I leave that with you. But what I want to tell you that you all don't be carried away with no expert here! The expert is not all ...."

[96] Sir Richard submitted that the interruption was proper and had the desired effect of putting defence counsel on the right track once more. He stated that immediately after the judge's interjection defence counsel had quite rightly made the observation that it was up to the jury to accept or to reject the DNA expert's evidence.

[97] I consider it unfortunate that defence counsel should have been stopped in this way from suggesting to the jury that DNA evidence did not have the same degree of credibility that is sometimes given to the words of Christ. It was proper for counsel to make the point that the DNA evidence was a matter for the jury as any other evidence. However, I do not consider that any harm was done to the defence case by the judge's intervention. The DNA evidence was a small part of the evidence before the jury that tended to link Cannonier to the killing.

[98] Mr. Fitzgerald, QC submitted that, later in his closing address, trial counsel was unfairly reprimanded by the judge for drawing to the jury's attention the unfairness which was implicit in his inability to cross-examine witnesses who were unavailable and whose evidence was therefore adduced by way of sworn statement. Such commentary, he submitted, was clearly relevant to the weight which could properly be accorded to such evidence but was nevertheless criticised by the judge. The relevant extract from the Record reads as follows:

"MR HESKETH BENJAMIN: As I said earlier if nothing is unjust that clearly has to be an unjust state of affairs that's not a level playing field in so far as justice is concerned. In that regard to hold Mr Cannonier

> responsible for what Gavin has purported to say in his absence is very very difficult and I suppose such a law clearly whether expressly or influentially has been depriving the defence of some sort of right which he ought to be afforded in so far as representing himself is concerned in a matter of this magnitude. So if a law says that a person who expects to die can give a statement against a person on oath in his absence and then the authorities who going to have the use of that statement – they said they had knowledge of what would have happened to Mr Gilbert in the future and do not give the accused an opportunity to confront Mr Gavin something has to be wrong with that. It seems as if the law is saying you don't even have to die even if you are not there. So one can make up a statement swear it on oath –
>
> THE COURT: Mr Benjamin, please, please, please. I've let you say a few things about it, but at the end of the day it is clearly not for the jury to make a legal judgment as to how just the law is the jury must make a judgment on the facts. It is clearly not for the jury to make any judgment as to how just that law is.
>
> MR HESKETH BENJAMIN: All I say Mr Foreman in that exercise the accused has no choice whatsoever in terms of questioning credibility of such a statement and you think about that. As I said that law says you don't even have to say if you die it says you can even be absent but you have no chance to question that situation. That is what I am saying a great disadvantage. It is a matter for you."

[99] In response, Sir Richard Cheltenham argued that counsel was trying to mislead the jury in suggesting to them that the police knew that Gilbert was going to die but did not give Cannonier an opportunity to confront his accuser. The effect, said counsel, was to suggest an obligation on the police which did not exist in law. According to counsel, once again, the judge's interjection had the desired effect of steering counsel back onto the right path. He had immediately reminded the jury that they should remember that Cannonier had had no opportunity to test Gilbert's credibility which was a disadvantage to the defence but that, at the end of the day, it was a matter for the jurors themselves.

[100] Mr. Fitzgerald, QC submitted that at the end of Cannonier's closing address the judge had also engaged in a prejudicial interchange about a comment made earlier in trial counsel's speech. During this interchange, he submitted, the judge had unfairly accused counsel of being "extremely misleading" as to the evidence

and had not permitted him the opportunity to explain his submissions, thereby undermining counsel's general credibility in front of the jury. The intervention to which the complaint is addressed occurred when trial counsel said "You would see in her findings she told you she received these items unsealed and tampered tape":

> "THE COURT: Before you sit Mr Benjamin – it's on a matter of fact you referred to something you are saying that the serologist said about tape being tampered…
>
> MR HESKETH BENJAMIN: One yellow envelop unsealed, labeled –
>
> THE COURT: No, no, don't try to introduce something else now Mr. Benjamin, please. You spoke to the word 'tampered' I am asking you –
>
> MR HESKETH BENJAMIN: No I said tamper tape sealed.
>
> THE COURT: What does that mean, tamper tape sealed?
>
> MR HESKETH BENJAMIN: Shut down real tight.
>
> THE COURT: It means it was sealed with something called tamper tape. Please do not mislead. That's all I'm telling you to desist from doing. I'm not asking you to introduce anything else at this point because you didn't refer to anything else you just referred to this tape being tampered. I am saying looked at the page I'm seeing tamper tape sealed. So please.
>
> MR HESKETH BENJAMIN: My Lord, what I was saying is the envelope unsealed.
>
> THE COURT: You did not mention anything about an envelope, Mr Benjamin you talked about the tape being tampered with.
>
> SIR RICHARD CHELTENHAM QC: Yes.
>
> THE COURT: That is what I referred to. I am not asking you anything about an envelope Mr Benjamin. They will read it but you focused on the tape and I am saying to you that the issue in relation to the tape was extremely misleading because what it said it was tamper tape sealed which means it was sealed with something called tamper tape.
>
> MR HESKETH BENJAMIN: I understand that My Lord but I said I read the whole thing.

> THE COURT: No, no, no. I am not asking you to discuss anything else. You made your address to the Jury and I want you to clarify an issue of fact. The rest of it they can read the report for themselves and come to their own conclusion but as to that particular fact there is nothing factual about any insinuation that it was tampered with.
>
> MR HESKETH BENJAMIN: Thank you My Lord.
>
> THE COURT: It speaks to a tamper tape sealed. So please."

The denigrating nature of the interventions, Mr. Fitzgerald, QC submitted, were such that a reasonable observer having attended the closing arguments would have left court feeling that Cannonier did not have a fair trial. According to counsel, the trial judge had so breached the principles in the authorities above in his interventions during the closing speech of his defence counsel that he had been deprived of a fair trial and his conviction was therefore unsafe.

[101] In my view, a reading of the trial transcript indicates that the judge's intervention was caused by counsel's inadvertent use of the expression "tampered tape" instead of "tamper-tape". The first would have suggested to a listener that the tape had been tampered with, while the correct expression would have suggested that it was a tape used to prevent tampering with an exhibit. While the judge might have tempered his language, an accused is entitled to a fair trial, not to an unblemished one. I am satisfied that this intervention, as with the previous ones complained of, did not fall into one of the categories listed in Michel's case[56] which might render a trial unfair, thus:

(a) those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury;

(b) where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence; and

(c) where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way.

[56] See para. 89 of this judgment. .

For the foregoing reasons I would also dismiss this ground of appeal.

[102] In conclusion, I would deny Cannonier's appeal against conviction and confirm the finding by the jury of his guilt of the murder of PC Nisbett is confirmed. For the avoidance of duplication, I deal with his appeal against sentence (grounds 8 and 9) when dealing with the same issue on his second appeal.

The Second Appeal: Sheldon Isaac, Romeo Cannonier, Ruedeney Williams and Louis Gardiner - Criminal Appeals 19, 20, 21 and 22 of 2008

[103] The four appellants seek to appeal against their conviction and sentence for the subsequent murder of Gavin Gilbert. The appeals were argued together. Some of the filed grounds of appeal[57] relate to all of the appellants, while other grounds relate only to a particular appellant. It is appropriate, therefore, to apply the grounds to each appellant in turn.

Ground 1: The Section 52 Argument - Sheldon Isaac

[104] This ground of appeal applied to each of the four appellants in the second appeal and to Cannonier in the first appeal. The submissions, authorities and my view on this issue are to be found at paragraphs 22 to 39 above in the first appeal, and there is no need to recapitulate any of it.

Ground 2: Acts and declarations admitted against other appellants - Isaac, Cannonier and Williams

[105] The second ground of appeal applied to all four appellants, but more particularly to Isaac, Cannonier and Williams. It is that the learned judge failed to direct the jury properly or adequately in relation to the acts and declarations of those of the appellants which were relied upon as evidence as against other of the appellants, and wrongly directed the jury as to the admissibility of such declarations as against those other appellants.

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[57] See para. 21 of this judgment.

[106] The principles relating to the admissibility of the acts and declarations of co-conspirators against another party are as follows:[58]

1. Ordinarily, acts done or words uttered by an offender will not be evidence against a co-accused absent at the time the acts or declarations were made. However, the acts and declarations of any conspirator made in furtherance of the common design may (if the relevant conditions are satisfied) be admitted as part of the evidence against any other conspirator. Such acts and declarations may provide evidence not only of the existence, nature and extent of the conspiracy, but also of the participation in it of persons absent when those acts or declarations were made.

2. The acts and declarations of co-conspirators made before another person joined the association are only admissible against the newly joined conspirator to prove the origin, character and object of the conspiracy, and not his own participation therein: Walters,[59] Governor of Pentonville Prison.[60]

3. The act or declaration relied upon must also have been made in furtherance of the common design. Thus, matters recorded by one conspirator for his convenience, mere narratives, descriptions of past events or records made after the conclusion of the conspiracy are not acts in furtherance of the common design, and are thus not admissible against anyone other than the maker: Blake.[61] Usually the question of admissibility will relate to directions, instructions or arrangements or to

[58] See Archbold 2009, para. 33-65 et seq.
[59] R v Terrence Walters, R v George Tovey, R v David Albert Padfield, R v Colin John Padfield [1979] 69 Cr. App. R. 115.
[60] R v Governor of Pentonville Prison, Ex parte Osman [1990] 1 W.L.R. 277, 316.
[61] Blake (1844) 6 Q.B. 126.

utterances accompanying acts: Tripodi,[62] approved by Glidewell L.J. in Gray;[63] see also Jones.[64]

4. It is a matter for the trial judge whether any act or declaration is admissible to prove the participation of another. The judge must be satisfied that the act or declaration (i) was made by a conspirator, (ii) that it was reasonably open to the interpretation that it was made in furtherance of the alleged agreement, and (iii) that there is some further evidence beyond the document or utterance itself to prove that the other was a party to the agreement: Devenport;[65] Jones;[66] Platten.[67]

5. Even if no submissions are made that evidence was inadmissible, the judge still has a duty not to allow evidence that is inadmissible to go before the jury: Platten.[68]

6. The judge's directions must be tailored to the facts of the individual case. However, to avoid the danger of a jury rejecting the independent evidence of participation and relying solely upon the acts and declarations of others outside the presence of the accused, a judge should remind the jury: (i) of any shortcomings in the evidence of the acts and declarations of the others including, if it is the fact, the absence of any opportunity to cross-examine the actor or maker of the statement in question; (ii) if it be the case, the absence of corroborative evidence; and, where appropriate, (iii) not to conclude that an accused is guilty merely upon the say so of another: Jones.[69]

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[62] Tripodi v R (1961) 104 C.L.R. 1, 7.
[63] R v David John Gray, R v William James Liggins, R v Mark Riding, R v Catherine Mary Rowlands [1995] 2 Cr. App. R. 100.
[64] R v Brian Jones, R v Roy Williams, R v Edward Barham [1997] 2 Cr. App. R. 119, 127-128.
[65] R v Derrick Devenport, R v Vincenzo Pirano [1996] 1 Cr. App. R. 221.
[66] Jones (ibidem).
[67] R v Platten [2006] EWCA Crim 140.
[68] Ibidem at para. 23.
[69] Supra note 76 at pgs. 132-134.

[107] The prosecution in this case placed reliance on declarations made by certain of the defendants as evidence against other defendants. For example, Donell Stevens testified that Gardiner had told him that he and Isaac had waited in the bush for Gilbert to arrive. Williams had acted as look out. When Gilbert arrived, Isaac had shot him repeatedly. They then ran away from the scene. About a month later he had another conversation with Gardiner who told him that the reason they had shot Gilbert was to free Cannonier. Sometime later he spoke to Williams about the shooting. Williams told him that Gilbert was supposed to have passed on the gun used to kill PC Nisbett to Gardiner and Williams. Gardiner warned him that if he said anything they would kill him. Gardiner had explained to him that he had stayed away from work on the day in question by calling in sick. On this evidence, the trial judge directed the jury, "So notwithstanding once you find that there was a joint enterprise that evidence can be used against all of them."

[108] Mr. Knowles, QC submitted that this direction was an error. He insisted that Stevens' evidence was inadmissible against Isaac, Cannonier and Williams, and was only admissible as against Gardiner. He submitted that this was plainly highly incriminating and damaging evidence, and the judge's misdirection therefore rendered the convictions of Isaac and Cannonier, in particular, unsafe. In addition, Mr. Knowles submitted that Gardiner's alleged utterance was not admissible evidence against Williams because there was no other evidence reasonably capable of proving his involvement in the joint enterprise. It was not sufficient, as the judge had directed the jury, for the jury to be satisfied that there was a joint enterprise before relying on acts and declarations. They had to be satisfied, in relation to the defendant whose case the jury were considering, that there was independent evidence to prove his involvement in the joint enterprise. There was no such evidence against Williams. The judge's directions were therefore erroneous for this reason.

[109] Mr. Knowles, QC contended further, that Stevens' evidence as to what Gardiner told him was a narration of a past event, namely the murder. Therefore the

evidence of what Gardiner said was not an utterance in furtherance of the common design. It was therefore only admissible, he submitted, as against Gardiner (the maker of the statement) and was inadmissible against the other three defendants. The judge had therefore erred when he directed the jury that they could rely on Stevens' evidence as against Isaac, Cannonier and Williams. Mr. Knowles, QC also submitted that the judge had failed to give any directions in relation to the principles summarised above in paragraph 106. Hence, there was a real danger in this case that the jury had convicted the defendants merely on the evidence of co-defendants two of whom, Isaac and Gardiner, had not given evidence and therefore could not be cross-examined.

[110] Additionally, Mr. Knowles, QC submitted that Donell Stevens' evidence was the only evidence against Cannonier, Williams and Gardiner. He argued that the judge misdirected the jury on his evidence. According to counsel, Vincent Warner's evidence was only that he had been told that "things were going to happen". That was said some months before the killing. The words were ambiguous, and there was no other real evidence. Kimia Evelyn had given evidence of comings and goings and telephone calls and seeing Gardiner cleaning a gun. Her testimony had fallen short of providing cogent evidence against the men. The prosecution had considered their evidence so inconsequential that it had not been opened to the jury. Sir Richard had opened only on the evidence of Donell Stevens and Lionel Warner. Yet, now he was submitting that Stevens' evidence had not implicated Cannonier. What Stevens had narrated was that the killing of Gilbert was intended to free Cannonier. The evidence had implicated him, suggesting that he was the architect of the killing. It did amount to evidence of an admission by Gardiner. However, this was a case of joint enterprise. Once the erroneous direction impacted on the others, it impacted his conviction too. His conviction would therefore be unsafe. Once the jury found the others guilty based on this inadmissible evidence and the erroneous direction, then Gardiner would have been found guilty too. Given the centrality of Stevens' evidence, and the misdirection given in relation to it, the convictions were unsafe and ought to be

overturned. Learned counsel invited the Court to quash the convictions on a misdirection as to a central issue in the trial.

[111] Mr. Knowles, QC's submissions applied to Isaac as well. Sir Richard had no response to this ground of appeal so far as Isaac was concerned for the reasons which appear in the Crown's response to ground 4. Isaac's appeal is upheld and his conviction and sentence are therefore as a consequence set aside. I consider what the result of this would be later at paragraphs 134 to 149 below.

[112] Sir Richard submitted in response that Stevens' evidence concerning Gardiner's words did not implicate Cannonier in the commission of the offence either directly or indirectly. According to counsel, Stevens gave no evidence of Cannonier's role or degree of participation, and his testimony could not have been interpreted by a reasonable jury to be evidence against Cannonier. The most that could be said is that Cannonier's imprisonment was a motive for the killing of Gilbert by the others. For that reason, he submitted, there was no merit in this ground with respect to Cannonier.

[113] At the same time, Sir Richard submitted that Stevens' testimony had pointed to Gardiner's involvement in the conspiracy and in Gilbert's murder. According to counsel, independent evidence of his truthfulness came in the form of a witness from Gardiner's workplace who testified as to Gardiner sending in a sick certificate. Stevens could only have known about this if Gardiner had told him so.

[114] Additionally, Sir Richard submitted, while the Crown accepted that one of the exceptions to admissibility, ie, that the act or declaration must have been made in a common design, was not applicable to Steven's evidence, which was really only a narrative account of what had already transpired, and while the judge had been required to emphasise to the jury that the confession of one accused which implicated his co-accused defendant was evidence against him who confesses and cannot be used without more against the others, and while the judge had misdirected the jury when he had told them that: “once you find that there was a

joint enterprise that evidence can be used against all of them", he urged that the misdirection had not caused a substantial miscarriage of justice and that the proviso[70] should be applied as there was other compelling and formidable evidence of an independent nature concerning each appellant's participation in the conspiracy to kill Gilbert which was adduced at trial.

[115] An examination of the Record reveals that there was other evidence besides Stevens' of Williams', Gardiner's and Cannonier's involvement in the conspiracy and commission of Gilbert's murder. Lionel Warner had been in prison for child maintenance for a term of 6 weeks. He testified as to his conversations in prison with Cannonier. According to Warner, Cannonier had asked him if he had got the gun from Gilbert. He told him no. In a later conversation in prison, he told Cannonier that the police found Gilbert with a gun. Cannonier told him that when he got out of prison to tell Gardiner to get rid of Gilbert. He had understood "get rid of" to mean "kill". Once out of prison, he passed that message on to Gardiner. He also had a conversation with Isaac who told him that Gilbert was going to testify against Cannonier and that he would get rid of Gilbert. Gardiner was present at the time of that conversation. He had understood that Cannonier's reason for getting rid of Gilbert was that Gilbert was a witness against him. He saw Gilbert in St Paul's Village on the day that he had died. After the death of Gilbert, he spoke to Gardiner concerning Isaac. He told Gardiner that he heard that Isaac had been locked up. Gardiner had replied that everything was okay, by which he understood that no one would know anything about Gilbert's death. In cross-examination he denied that he was promised a month's pay by the police for testifying against Cannonier. He stated that he was at the time of the trial in prison on an unrelated charge of murder.

[116] While Lionel Warner's evidence contained discrepancies, in my view, the trial judge dealt with them and gave the appropriate directions to the jury. Additionally,

[70] See para. 53 of this judgment.

the trial judge emphasised to the jury the inherent unreliability of Lionel Warner's evidence as an accomplice and the danger of convicting on that evidence.

[117] Additionally, Vincent Warner testified at the trial that sometime in September 2004 (two months after PC Nisbett's murder on 25th July 2004) Gilbert came to his home and showed him a black-handled gun. Gilbert gave him the gun to hide. On 21st November the same year, the police searched his (Warner's) house and found the gun. They took him into custody and then released him after about 3 days. The following day, he was at Saddlers main road when Williams came and spoke to him and told him that he had heard what had happened. Williams asked him what he told the police and he replied, "nothing". After a while Gardiner came in his car and called Williams. Williams told him he was "vex like fuck" because Gilbert was supposed to have given "Guloo" the gun to change something in its mechanism. Williams told him that he had better leave because things were going to happen, by which he understood a death or something. Subsequently, on the day of the night that Gilbert was killed, he (Warner) was standing on the island main road at Saddler's Village. He saw Gilbert jump out of a bus. It was then a few minutes before 9:00 p.m. Gilbert left in another car in a westerly direction towards St. Paul's Village. About 5 minutes later, Williams' distinctive black Nissan car pulled up on the left hand side of the road. He could not see who was in it due to the tint on the car's windows. It left after about 15 minutes heading in the same westerly direction towards St Paul's. This was sometime after 9:00 p.m. When he (Warner) arrived home he heard something and went over to where Gilbert lived. There, he saw Gilbert lying on the ground, dead. Warner's evidence, while not conclusive provided material from which the jury could have found an inference of Williams' involvement in Gilbert's murder, in my view.

[118] Kimia Evelyn had a child for Williams. The transcript reveals that she testified that Williams, Isaac, Gardiner and Cannonier were good friends. On 21st March 2005, the date of Gilbert's death, she was picked up from work by Williams in his car. Williams had received a telephone call from Isaac whose voice she recognised. Later that day she saw Williams cleaning a gun. It was then about 6:00 p.m.

Williams received another telephone call and had gone outside. She peeped through the window and saw Williams, Gardiner and Isaac walking towards the car. They were wearing clothing that was almost identical to the clothing that the witness Olivia James described at the trial as having been worn by the two men she had seen running from the scene of the crime. They had driven off. Williams returned about 15 minutes later and left the house at about 7:00 p.m. saying he was going to look for a CD. He left with the gun that he had been cleaning. She received a phone call in which someone told her something. Williams returned to the house about 15 minutes later. She had told him that she received a telephone call from someone who had told her that he had been up the road driving around Saddlers. Williams told her that he did not know what they were speaking about, not him. He became angry, walking back and forth, and cursing. She became suspicious. He left again between 9:00 p.m. and 10:00 p.m., saying that he was going to check for the CD. He later returned to the house and told her that "Jaw Flex" told him that Gilbert had just got shot and died. She asked him to take her to see what was going on. He at first refused to go, but then put on a blue hoodie that he had not been wearing before and they walked down to the scene. On the way, he told her that if anyone asked her anything she was to say that she did not know what they were talking about as he had been home all night. She understood that he wanted her to help him out. Her evidence was not challenged in any material respect in cross-examination and remained unshaken in its main aspects.

[119] Cannonier and Williams gave evidence in their defence. Gardiner did not testify and called no witnesses.

[120] Cannonier testified that he never told Lionel Warner to send a message to Gardiner to kill Gilbert. He and Warner were not friends at that time because Warner had failed to repay a loan, and Warner had accused him of having an intimate relationship with the mother of one of Gardiner's children. This had been contradicted by the testimony of prison officer Vasquez who saw Warner and Cannonier conversing several times while they were in prison. Cannonier denied

that he had ever had any conversation with Isaac. He and Gardiner had been in a fight in the 90s, and they were enemies. He denied being friends with Williams. Their evidence was before the jury for the jury to accept or not. In the event, the jury appears to have rejected it.

[121] I find no merit in Mr. Knowles, QC's submission that Stevens' evidence was the only or even the main evidence against Cannonier, Williams and Gardiner. There was an abundance of other evidence, outlined above, which tended to implicate the three of them. However, in my view Mr. Knowles, QC's submission concerning the incorrectness of the judge's directions to the jury on acts and declarations is valid. The only question is whether the proviso[71] should be applied. In this case, applying the Maxo Tido principles, I have no doubt that the evidence against the appellants was sufficiently overwhelming and that the jury would have convicted them if they had been properly directed as to the inapplicability of the statements made by one accused as evidence against another accused. I would therefore dismiss ground 2 of their appeal.

Ground 3: Louis Gardiner's Good Character

[122] The third ground of appeal related solely to Louis Gardiner. This was that his conviction was unsafe because his counsel had failed to adduce evidence of his good character and the judge had therefore failed to give the jury a good character direction in relation to propensity.

[123] Mr. Fitzgerald, QC submitted that Louis Gardiner was of good character. Although he did not give evidence, he was entitled to a good character direction, namely that his character was relevant to lack of any propensity to have committed the offence charged. He further submitted that in the present case the failure of defence counsel to have put the matter of Gardiner's good character in issue clearly and unambiguously had been such a significant breach of his professional

[71] See para. 53 of this judgment.

duty that the conviction was rendered unsafe. He submitted that his case was analogous to that of the appellant, John, in Teeluck and John.

[124] Sir Richard responded that it was not in dispute that Gardiner was a man of good character at the time of his trial and that he had been entitled to a good character direction. He noted that it was not disputed that his counsel failed to adduce good character evidence and that the trial judge had, in turn, no evidential basis for giving this direction. However, he submitted that, in the absence of any evidence from Gardiner or any witnesses on his behalf, the court should be reluctant to infer that this had been negligence on the part of counsel. There was nothing before the Court of Appeal to allow it to speculate as to why such evidence had not been led. The defence had consisted of ensuring, if it could, that the Crown proved its case.

[125] Sir Richard submitted that a good character direction as to Gardiner's credibility was not relevant. Gardiner had given no evidence and his credibility as a witness was not in dispute. The ground of appeal was limited to propensity and did not refer to the credibility limb. Gardiner's position was not analogous to the appellant John in Teeluck and John's case. John's credibility had been a live issue in the case and his attorney had been extremely forthcoming about his failure to have adduced good character evidence and his reasons for not so doing. The Board was able to characterise counsel's reasons as both mistaken and inadequate and a serious departure from the standard to be expected of defence counsel. Gardiner's case was closer to Teeluck's scenario. The Court was being invited to speculate in the absence of cogent evidence why good character evidence had not been led. The Crown's case against Gardiner was a substantial one. Gardiner did not challenge the evidence against him. Lionel Warner had testified that he had delivered a message of death from Cannonier to Gardiner. All that his counsel asked Warner was how many times the two spoke in the months of March and what they spoke about in 2005. It had not been suggested to him by Gardiner's counsel that he was not a truthful witness. Then, there was the confessionary statement Gardiner had made to Donell Stevens. This evidence

had not been challenged in cross-examination. Kimia Evelyn had testified as to the three co-accused dressed in dark clothing similar to that seen by Olivia James leaving together, but that she only saw her boyfriend Williams come back.

[126] The law now is certain that a good character direction is essential to a fair trial where the credibility of the defendant is a central question, thus, where he has testified as to his innocence, or where he relies on a statement to the same effect made to the police. As Lord Carswell said in Teeluck and John:[72]

> "… it had been made clear in Barrow v The State [1998] AC 846 … that the practice in Trinidad should follow the practice approved by the House of Lords in R v Aziz [1996] AC 41, that a good character direction is essential for a fair trial, certainly where the credibility of the defendant is a central question."

[127] In Teeluck and John, the Board quashed the appellant's conviction because of his counsel's failure to adduce evidence of his good character, which had resulted in the judge failing to give a good character direction. Lord Carswell set out the relevant principles:[73]

> "(i). When a defendant is of good character, ie has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: *Thompson v The Queen* [1998] AC 811, following *R v Aziz* [1996] AC 41 and *R v Vye* [1993] 1 WLR 471.
>
> (ii). The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given: *R v Fulcher* [1995] 2 Cr App R 251, 260. If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial: *R v Kamar* The Times, 14 May 1999.
>
> (iii). The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

[72] At para. 37.
[73] At para. 33.

(iv). Where credibility is in issue, a good character direction is always relevant: *Berry v The Queen* [1992] 2 AC 364, 381; *Barrow v The State* [1998] AC 846, 850; *Sealey and Headley v The State* [2002] UKPC 52, para 34.

(v). The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State* [1998] AC 846, 852, following *Thompson v The Queen* [1998] AC 811, 844.. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson v The Queen, ibid*.

[128] In the subsequent case of Nyron Smith,[74] Lord Carswell, in giving the opinion of the Board, had said that:

> "It is the duty of defence counsel to ensure that the defendant's good character is brought before the court, and failure to do so and obtain the appropriate direction may make a guilty verdict unsafe: *Sealey and Headley v The State* [2002] UKPC 52, (2002) 61 WIR 491 and *Teeluck v The State* [2005] UKPC 14, (2005) 66 WIR 319. It has, however, been emphasised by the Board in recent cases that the critical factor is whether it would have made a difference to the result if the direction had been given: see, eg, *Bhola v The State* [2006] UKPC 9 at [17], (2006) 68 WIR 449 at [17] per Lord Brown of Eaton-under-Heywood. In the present case the appellant did not give evidence and merely made an unsworn statement from the dock, so that the credibility limb of the direction would have been of lesser consequence."

[129] On the issue of counsel's failure to bring his client's good character before the court and its consequences for the fairness of the trial, Lord Carswell also said in Teeluck and John:

> "36. ... His counsel could and should have ensured that the issue was raised so that John could obtain the benefit of the good character direction to which he was entitled. It was clearly material in the trial, for his credibility was of material importance in the issue of the conflict between his evidence and that given on behalf of the prosecution in relation to his treatment in police custody and the making of the confession statements attributed to him.

[74] Nyron Smith v The Queen (2008) 74 WIR 379; [2008] UKPC 34 at para. 30.

…

"38. It should now be regarded as established law that in some circumstances the mistakes or omissions of counsel will be a sufficient ground to set aside a verdict of guilty as unsafe. Their Lordships feel obliged, however, to issue a reminder of the remarks made by the Board in Bethel v The State (1998) 55 WIR 394, 397 that ordinarily they will not even entertain a ground of appeal based upon allegations of incompetence by counsel when raised for the first time before the Board. In the present case they are prepared to do so because of the importance of the issue to the appellant John and because, on account of the frankness of his former counsel in furnishing information, they are in a good position to determine the issue without having to deal with any conflicts of fact.

"39. In Sealey v Headley v The State [2002] UKPC 52 at paragraph 30 their Lordships stated, citing R v Clinton [1993] 1 WLR 1181 and R v Kamar The Times, 14 May 1999:

> 'Whilst it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of defence counsel to discharge a duty, such as the duty to raise the issue of good character, which lies on counsel … can lead to the conclusion that a conviction is unsafe and that there has been a miscarriage of justice …'

There may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude: see Boodram v The State [2002] 1 Cr App R 103 at para 39; Balson v The State [2005] UKPC 2; and cf Anderson v HM Advocate 1996 JC 29.

"40. Their Lordships are of opinion that this case falls into the exceptional category of those where the omissions of counsel had such an effect on the trial and verdict that it cannot be said with sufficient certainty that the conviction was safe. The prosecution case against John depended entirely on the oral and written confessions attributed to him, the authenticity and reliability of which he strongly contested. His credibility in making his allegations against the police was a crucial issue in the trial. That being so, it was vital for him to have the benefit, to which he was in law entitled, of both limbs of a good character direction from the judge. Their Lordships do not find it possible to speculate about the view which

the jury might have taken if such a direction had been duly given. They cannot hold, however, that the verdict of any reasonable jury would inevitably have been the same if it had been given. That is sufficient to make the conviction unsafe."

[130] Similarly, in Muirhead,[75] the appellant had given evidence in his first trial in Jamaica and evidence had been adduced of his good character. The jury had been unable to reach a verdict. He had been convicted following a retrial at which he had been advised by his counsel not to give evidence. No evidence of his good character had been called and the judge did not give the standard Vye[76] direction. There was no explanation from the appellant's trial counsel why such evidence was not adduced, nor why he was advised not to give evidence. Lord Hoffman, delivering the opinion of the Board, held:[77]

> "… we are concerned with two important decisions on which counsel have not been able to give the Board any assistance. That leaves too great a risk that the appellant did not have a fair trial. The Board will therefore humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of Appeal of Jamaica to decide whether a retrial should be ordered."

[131] In Nyron Smith's case,[78] the Privy Council advised that:

> "It was not the judge's duty to give a good character direction if evidence of good character had not been brought before her; rather it was the responsibility of defence counsel to ensure that it was so brought. A defendant was entitled to have a good character direction from the judge when the facts warranted it and its absence might be a ground for setting aside a verdict of guilty. It was the duty of defence counsel to ensure that the defendant's good character was brought before the court, and failure to do so and obtain the appropriate direction might make a guilty verdict unsafe. The critical factor was whether it would have made a difference to the result if the direction had been given. In the present case, the appellant had not given evidence and merely had made an unsworn statement from the dock, so that the credibility limb of the direction would have been of lesser consequence. The propensity limb might have been of some relevance, but would not, looking at the trial as a whole, have made any difference to the verdict."

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[75] Gerald Muirhead v The Queen [2008] UKPC 40.
[76] R v Vye and Others (1993) 97 Cr. App. R. 134.
[77] At para. 31.
[78] Supra note 75.

[132] In the case of Jagdeo Singh,[79] the Privy Council advised that:

> "The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of the conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated. This was accordingly a case where, depending on the circumstances, the 'proviso' in section 44(1) of the Supreme Court of Judicature Act might have been applicable. In considering whether it was, the Court of Appeal was right to consider whether, properly directed, the jury would 'inevitably' (Woolmington v Director of Public Prosecutions [1935] AC 462, 483) or 'without doubt' (Stirland v Director of Public Prosecutions [1944] AC 315, 321) have convicted."

[133] I am satisfied that it would have been preferable if the learned trial judge had given a good character direction to the jury in relation to Gardiner's propensity or lack of it. However, I do not consider that the omission of a good character direction was necessarily fatal to the fairness of his trial or to the safety of his conviction. The above authorities indicate that a full good character direction is only essential when an accused person of previous good character has testified or called witnesses. In this case, Gardiner did not testify and called no witness on his behalf. In the absence of any suggestion made in cross-examination of the Crown's witnesses that put his character in issue the trial judge was not obliged to give a good character direction as to propensity. It would have been preferable if he had nevertheless done so as this was a capital case and Gardiner was entitled to have every point in his favour put to the jury. Nor is there any evidence upon which I can properly find that Gardiner's counsel fell down in his duty to his client in failing to lead the appropriate evidence or ask the necessary questions. It would not be appropriate for me to speculate as to why this might have occurred. In the circumstances, given the abundance of evidence tying Gardiner to the commission of the murder, I am satisfied that the jury would, even with a propensity direction, inevitably have come to the conclusion they did and

[79] Jagdeo Singh v The State [2005] UKPC 35.

would have convicted Gardiner of the murder of Gavin Gilbert. I would also dismiss this ground of appeal.

Ground 4: Sheldon Isaac's Fitness to Stand Trial

[134] Ground 4 relates solely to Sheldon Isaac. It is that he was unfit to stand trial because of severe brain damage. The evidence on this issue was admitted at the hearing of the appeal and was given by Dr. Tim Green, Professor Eastman, and Dr. Othello.

[135] Dr. Green testified that Isaac's intellectual functioning had been significantly compromised as a result of a severe traumatic head injury he had received when he was shot. He was of the view that Isaac's compromised intellectual functioning made him incapable of understanding a trial process or suitably instructing his legal team. He did not understand why he had been imprisoned. It was highly unlikely that there would be any significant improvement in his condition spontaneously. He required neurological assessment and appropriate neuropsychological rehabilitation.

[136] Professor Eastman testified that Isaac suffered an inability to understand other than the most simple of questions. He had a strong tendency to give answers inappropriate to questions and to talk 'tangentially' which would have made it a major handicap in instructing his lawyers to a level sufficient to make a proper defence. He would not have been able to follow the trial in an 'ongoing' fashion to any meaningful degree. He was, in his view, unfit to give evidence.

[137] Dr. Othello for the Crown accepted that Isaac had severe brain injury and she agreed, consistently with the views of the other doctors, that he was not fit to stand trial, was not now competent to be executed, and ought to be treated in hospital.

[138] I therefore have no difficulty in finding that Sheldon Isaac is severely brain damaged as a result of having been shot in the head after the date of the

Gilbert murder. The question is what is to be done with him. This requires an examination of the law in St Kitts-Nevis. The Court invited submissions from both the appellant and the Crown on this aspect. No submissions or authorities from the Crown were forthcoming, so that I accept the uncontroverted advice of Isaac's counsel as to the law of the Federation.

[139] Sections 39 to 64 of the Court Act govern criminal appeals from the High Court. Section 44(1) provides the grounds upon which an appeal may be allowed:

> "Determination of appeals in certain cases
>
> (1) The Court of Appeal on any such appeal against conviction shall (subject as hereinafter provided) allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal …"

Section 44(2) confers power upon the Court of Appeal to quash a conviction and either enter a verdict of acquittal or to order a new trial where it has allowed an appeal against conviction under section 44(1):

> "(2) Subject to the provisions of this Act, the Court of Appeal shall, if it allows an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial."

[140] The Court of Appeal has no specific power to substitute for a conviction a finding that Isaac was unfit to plead and to order his detention as a person of unsound mind. This is in contrast to with the position where, on an appeal against conviction, it appears to the Court of Appeal that the proper verdict would have been a special verdict of not guilty by reason of insanity. In those circumstances, section 45(4) of the Court Act empowers the Court to "quash the sentence passed at the trial and order the appellant to be kept in custody

as a prisoner of unsound mind in the same manner as if such special verdict had been found by the jury".

[141] The Court has no power to 'import' or imply a power analogous to that contained in section 6 of the English Criminal Appeal Act 1968, which empowers the English Court of Appeal, Criminal Division, to substitute a finding that an appellant was unfit to plead and to make an appropriate order that he be detained in custody as a person of unsound mind. The jurisdiction of this Court of Appeal is governed by Part III of the Court Act which is titled "The Court of Appeal - Jurisdiction of the Court of Appeal". Section 30 provides:

> "30. Jurisdiction vested in the Court of Appeal.
>
> Subject to the provisions of this Act, there shall be vested in the Court of Appeal
>
> (a) the jurisdiction and powers which at the prescribed date were vested in the former Court of Appeal;
> (b) the jurisdiction and powers which at the prescribed date were vested in the British Caribbean Court of Appeal;
> (c) such other jurisdiction and powers as may be conferred upon it by this Act or any other law."

The jurisdiction is to be contrasted with that of the High Court, which is governed by sections 6 and 7 of the Court Act which provide:

> "6. Jurisdiction of former Supreme Court vested in High Court, and law in force in the Court.
>
> (1) There shall be vested in the High Court all jurisdiction which was vested in the former Supreme Court by the Supreme Court Act, Cap. 79 or by any law of the Legislature of the State or by any other law applicable to this State or adopted or applied to and in force in this State, save and except as otherwise provided for in this Act and any other jurisdiction conferred by this or any other Act. ...
>
> 7. Jurisdiction of High Court.
>
> (1) The High Court shall have and exercise within the State the same jurisdiction and the same powers and authorities incidental to

such jurisdiction as may from time to time be vested in the High Court of Justice in England.

(2) The High Court shall have and may exercise, in relation to the custody of the persons and estates of idiots, lunatics and persons of unsound mind in the State, all such jurisdiction as is vested in England in the Lord Chancellor or other person or persons entrusted by Her Majesty with the care and commitment of such persons and estates."

[142] The High Court of Justice in England has an inherent jurisdiction to regulate its own procedure and, by virtue of section 7(1) above, so does the High Court of Saint Christopher and Nevis. By contrast, the Court of Appeal, Criminal Division, in England is created by statute and has no such inherent jurisdiction.[80] The former Courts of Appeal of our jurisdiction were similarly wholly statutory. There is thus no inherent jurisdiction in this Court of Appeal to substitute a finding of unfitness to plead rather than to direct Isaac's acquittal.

[143] By section 31 of the Court Act, this Court of Appeal, where there is no special provision in the Court Act or rules of court in a particular matter concerning practice and procedure, may adopt the practice and procedure found in England. The section reads where relevant:

"31. Practice and procedure in the Court of Appeal.

The jurisdiction of the Court of Appeal so far as it concerns practice and procedure in relation to appeals from the High Court shall be exercised in accordance with the provisions of this Act and of the rules of court and where no special provisions are contained in this Act or rules of court such jurisdiction so far as concerns practice and procedure in relation to appeals from the High Court shall be exercised as nearly as may be in conformity with the law and practice for the time being in force in England,

(a) in relation to criminal matters, in the Court of Appeal (Criminal Division) ..."

This provision enables the Court of Appeal to import any rule of court from the Court of Appeal Criminal Division where domestic statutes and rules of court are silent. However, a very clear distinction is to be drawn between section 31

[80] R v Medway [1976] QB 779, 799-800.

(which is limited to 'practice and procedure') and section 30 (which relates to the jurisdiction of the Court of Appeal). A power to substitute a conviction for some other disposal (such as a finding of unfitness to plead) goes beyond what may be termed 'practice and procedure' and relates to the substance of the Court of Appeal's jurisdiction. Accordingly, section 31 does not provide a mechanism for introducing a power analogous to section 6 of the English Criminal Appeal Act 1968.

[144] The Court of Appeal has jurisdiction to order a retrial under section 44(2), whereupon it may order the appellant's continuing detention pending the retrial under section 44(6). At the retrial the High Court may order a jury to be empanelled to try the question of whether the appellant is 'insane' and therefore unfit to be tried under section 62 of the Criminal Procedure Act. In the event that the jury concludes he is unfit to be tried under section 62, then by section 65 of the Act the High Court may order him to be detained in custody until further order of the Court of Appeal (on an appeal) or of the Governor-General who may order him to be dealt with as a prisoner of unsound mind under section 66 of the Act.

[145] However it seems to me that a retrial would be inappropriate and unnecessary. First, the only public interest in ordering a retrial would be to enable the High Court to return a finding that the appellant is unfit to be tried under section 62 of the Act which will allow for the appellant's detention to be effected under sections 65 and 66 thereof. However it is open to the respondent to secure the appellant's continued detention in any event under section 9 of the Lunacy and Mental Treatment Act.[81] Second, detention under the Lunacy and Mental Treatment Act is preferable to detention under the Criminal Procedure Act, for three reasons.

[146] One reason is that if the appellant is found unfit to be tried under section 62 of the Criminal Procedure Act he will be detained as a "prisoner of unsound

[81] Cap. 9.14, Revised Laws of Saint Christopher and Nevis 2002.

mind" under sections 65 and 66 without any finding having been made that he committed the *actus reus* of the offence and in circumstances where he has not pleaded guilty because he is unfit to do so. There is no provision in section 62 for a finding by a jury that the appellant "did the act or made the omission charged". A contrast is to be drawn with the position under section 64 of the Criminal Procedure Act, by which a jury cannot return the special verdict of "not guilty by reason of insanity" without first concluding that the accused "did the act or made the omission charged". It is instructive that under the law in force in England and Wales, before an accused may be found unfit to be tried the jury must determine not only that he is "under a disability" that bars him from being tried but also that he "did the act or made the omission charged against him".[82] As Pill L.J. said in Kenneally:[83]

> "To pass sentence, even a sentence one of the objects of which is to assist the defendant, without first convicting him is a drastic step, one that should be taken only in exceptional circumstances."

[147] The second reason is that there is no provision under section 62 of the Criminal Procedure Act once a finding of unfitness has been made for the matter to be remitted to the High Court for trial if the appellant were subsequently to become of sound mind, by contrast with the position under section 63. However unlikely it may be that the appellant will become fit to be tried in future, it is a serious deficiency in the procedure that there is no mechanism by which he could be tried. In any event, it seems clear that the time within which he could be retried would have run.

[148] The third reason is that there is no provision for any finding by the High Court under section 62, or any order made for detention under sections 65 or 66, to be appealed to the Court of Appeal. Again, however, unlikely this scenario, the absence of such a right of appeal is a serious deficiency in the procedure.[84]

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[82] See ss. 4 and 4A of the Criminal Procedure (Insanity) Act 1964, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.
[83] R (Kenneally) v Snaresbrook Crown Court [2002] Q.B. 1169, para. 35.
[84] See by analogy Kenneally (ibid), at paras. 51-52.

[149] For the foregoing reasons I would quash Isaac's conviction under this ground and direct his acquittal.

Ground 5: The Sentences of Death were Excessive and Disproportionate

[150] Ground 5 of the Second Appeal applies to all four appellants. It is that the sentences of death imposed on the appellants were excessive and disproportionate having regard to the alleged offence and their individual mitigation.

[151] Mr. Fitzgerald, QC and Mr. Knowles, QC submitted that the murder in this case does not constitute the 'rarest of the rare' case where the death penalty is properly justified. They submitted, further, that each of them has substantial personal mitigation which warrants the imposition of a penalty less than the death penalty. They urged that their individual mitigation, their personal and individual circumstances, and in particular their possibility of reform and social re-adaptation weigh against the imposition of the death penalty. In the case of Isaac and Williams, they submitted that imposition of the death penalty amounts to inhuman and degrading punishment. The evidence was that both Isaac and Williams suffer from severely impaired mental functioning. The imposition on them of the death penalty in that circumstance amounts to inhuman and degrading punishment and is therefore prohibited by section 7 of the Constitution. There are, thus, ten separate issues: the nature of the murder as it applies to each of them; the individual mitigation of each of the four of them; and the inhuman and degrading punishment question in relation to two of them.

[152] In response, Sir Richard submitted that this case fell into the category of the worst of the worst. It had been an assault on the justice system in attempting to secure the freedom of a murder suspect by murdering one of the principal witnesses against him.

[153] The learned trial judge in the Gilbert murder trial had a discretion whether or not to sentence the appellants to death. He imposed the death penalty. In his judgment he said that there was no prospect of reform for any of the appellants:[85]

> "I entertain no doubt that the collective conscience of the St. Kitts/Nevis community is shocked by this outrage, particularly in light of the fact that it was an obvious attack on the justice system. In this regard I view this is an exceptional case. I, therefore, have no alternative but to impose the death penalty on each of the accused men. As I can see no justifiable reason why they should not face the ultimate penalty (see State of Rajasthan v Karaj Ram [2003] 3 LRI 692 the Supreme Court of India (Criminal Appeal Division at paragraph 39)."

[154] The law on the duty of a sentencing judge in considering imposing the death penalty in this jurisdiction is now well established. The cases,[86] to quote Rawlins C.J. in the recent case of Elias George[87] from Saint Lucia, require a sentencing court to find:

> "(a) that the case on the facts of the offence is the most extreme and exceptional: "the worst of the worst" or "the rarest of the rare", and
>
> (b) that there is no reasonable prospect of reform of the defendant, and that the object of punishment could not be achieved by any other means than the ultimate sentence of death. For this latter purpose, the character of the offender and any other relevant circumstances are to be taken into account insofar as they may operate in his favour by way of mitigation and are not to weigh in the scales against him."

[155] Morrison J.A. in a lucid and comprehensive judgment in the recent Jamaica Court of Appeal decision in Peter Dougal's case[88] has reviewed the relatively recent history of the evolving law on the imposition of the death penalty in the Eastern Caribbean in the light of "the march of international jurisprudence". There is no need at this stage to go over again the advice and learning in the cases. They have resulted in the need for a sentencing process which

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[85] See para. 38 of the Judgment on Sentencing (delivered 15th July 2008), Record of Proceedings (Vol. 1) for Second Appeal.

[86] Mervyn Moise v The Queen, Saint Lucia Criminal Appeal No. 8 of 2003 (delivered 15th July 2005, unreported).

[87] Elias George v The Queen, Saint Lucia HCRAP 2009/005 (delivered 25th July 2011, unreported) at para. 8.

[88] Peter Dougal v R [2011] JMCA Crim 13.

Morrison J.A. has described as now an onerous task, second only in importance to the trial itself.

[156] What the cases establish is that the starting point when considering a sentence for a person convicted of murder is life imprisonment. The burden of proof lies on the prosecution to establish beyond reasonable doubt that the case is a fit one for the imposition of the death penalty. The task before the sentencing judge is truly an onerous one. The sentencing judges in both of these cases have to be commended for having striven, without much assistance with the law and the procedure from either the defence or the prosecution it must be said, to follow the complex procedures that have developed in this area of law in recent years. Applying the law above to the four appellants in the Second Appeal, I find as follows.

Sheldon Isaac

[157] It is not strictly necessary to deal with this ground in relation to Isaac, he having already been found not fit to have stood trial. However, for completeness, I do so. On the first issue, whether the murder of Gilbert can be classified as the worst of the worst, and whether therefore the sentence of death imposed on him was excessive or disproportionate, I am compelled on the authorities to conclude that it was not, in that:

i. Whilst it was a premeditated murder, it was not carried out in an especially brutal or sadistic fashion.

ii. There was no torture of the deceased, nor prolonged trauma or humiliation of him prior to death.

iii. There was only a single victim, and the appellants did not cause a risk of death to more than one person.

On that basis the sentence of death imposed on him was excessive and disproportionate and in breach of section 7 of the Constitution, and must be set aside. This finding will apply to each of the other three appellants in the Second Appeal.

[158] The second issue on Isaac's death sentence required to be dealt with is Isaac's mitigating factors. Mr. Knowles, QC submitted that the execution of a person with brain damage of the severity suffered by Isaac would be inhuman and degrading punishment, and is therefore prohibited by section 7 of the Constitution. He referred us to Atkins[89] (execution of the mentally retarded violates the Eighth Amendment to the US Constitution); and to Ford v Wainwright[90] (execution of the insane violates the Eight Amendment) both of the United States of America. In Ford v Wainwright, Marshall J. famously said:

> "For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. ... Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."

[159] Given the evidence above at paragraphs 135 to 137 on which I based my finding that Isaac was unfit to have stood trial, I would have no hesitation in upholding his appeal this additional ground. I would find that the sentence of death imposed on him was excessive and disproportionate and in breach of section 7 of the Constitution. I had earlier also set aside his conviction and sentence (at paragraph 149).

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[89] Daryl Renard Atkins v Virginia 536 U.S. 304 (2002) (Supreme Court of the United States).
[90] Ford v Wainwright 477 U.S. 399 (1986), at 409.

Romeo Cannonier

[160] Before we deal with the issue of whether the sentence of death imposed on Cannonier in the Second Appeal for the murder of Gilbert was excessive and disproportionate, we must pause to consider the same issues in the matter of the First Appeal, the murder of PC Nisbett which was earlier deferred to be dealt with at this stage.

Ground 8 of Cannonier's First Appeal: His prospects of reform

[161] Cannonier grew up in an impoverished and unstable environment, and had been exposed to extreme violence as a child. His father had committed suicide which had been witnessed by Cannonier who had been aged 8 at the time. It is apparent from the Social Inquiry Report that this experience had a profound effect upon him.

[162] Both in her report and during the sentencing hearing Dr. Halliday had expressly recommended that a forensic psychiatrist be instructed to evaluate Cannonier in order that a risk assessment be carried out on him. She said that it would be important to do a risk assessment. There was a need for evidence relevant to the kind of rehabilitation that he required. Would he ever be able to be released back into society? Would any particular restrictions need to be imposed on his movements? For all these matters she thought that the court would benefit from him being seen by a forensic specialist.

[163] At the beginning of the hearing of the appeal, this Court admitted further evidence on the prospects of reform without objection. This came from Dr. Tim Green, Professor Nigel Eastman, and Dr. Hazel Othello. Dr. Green opined that Cannonier showed some reasonable prospect of reformation. Since he had been incarcerated in the prison he had not caused any management problems that had been reported to him. When people were contained in such an environment, such containment usually improved their

behaviour. Cannonier had the intellectual capacity which made him a good candidate for psychological treatment which would result in a reformed character. It was his view that Cannonier would make a positive response to treatment, assuming he served a life sentence and lifelong incarceration. If he was not executed but served a prison sentence for the rest of his life he was likely to conform to prison rules and not be a risk to other persons.

[164] Professor Eastman was also of the view that Cannonier was not beyond any reasonable capacity for reform. On the assumption that Cannonier would spend a very long time in prison, that environment would provide him with very low risk of danger to others. There was a tendency for people with disorders similar to Cannonier's to burn out as they get older.

[165] Dr. Othello agreed that Cannonier suffered from a mixed personality disorder of long standing. She did not dispute the psychometric tests conducted by Dr. Green in which he had identified paranoia, lack of empathy and lack of control. She agreed that this type of disordered personality from early adolescence would predispose a person to anti-social behaviour. She agreed that it was a mitigating factor that he could not have controlled himself. She also agreed that he was likely to improve with the passage of time as that happened with a majority of persons suffering from such a disorder. She also agreed that assuming he was going to spend a very long time in custody, the likelihood was that he would conform to the rules and his behaviour would modify. In the context of long-term incarceration there was hope of improvement.

[166] In addition, the evidence was that Cannonier had behaved well in prison, and had responded to the stability and structure of prison life. It is plain, therefore, that Cannonier has available to him under the test approved in the cases previously referred to[91] substantial personal mitigation justifying the imposition of a lesser sentence than death.

[91] See para. 154 of this judgment.

[167] Mr. Fitzgerald, QC submitted that the judge's failure to secure the requisite psychiatric reports dealing with Cannonier's prospects for reform and, as a corollary, his failure to consider Cannonier's prospects for reform meant that the sentencing exercise in the First Appeal was carried out without vital information. Accordingly, the court was not in a position to properly assess Cannonier's personal and individual circumstances and culpability. This failure made the sentence ultimately imposed unlawful.

[168] He submitted further that in sentencing Cannonier, the judge had been obliged to consider whether or not he had reasonable prospects of reform. He had failed to do so at any point during his sentencing judgment, and in fact had noted that Dr. Halliday had regretted not being able to provide a risk analysis of the propensity of the prisoner for reform or repeated criminal behaviour.

[169] Sir Richard submitted in response that the trial judge had referred to the authorities on the point and had discharged his discretion in accordance with law and he invited the Court to so find.

[170] It is likely that if the learned trial judge had had the evidence on the possibility of Cannonier's reform before him that was presented to this Court, he might well have considered that Cannonier was entitled to a finding that he had a reasonable prospect of reform and that the object of punishment in this case was not only to be achieved by the imposition of the death penalty. I would, therefore, uphold this ground of appeal, set aside the death sentence imposed on him, and substitute a sentence of life imprisonment.

Ground 9 of Cannonier's First Appeal: The sentence of death and the nature of the offence and Cannonier's mitigation

[171] Cannonier's ninth ground of appeal in the First Appeal is that the sentence of death imposed on him was excessive and disproportionate having regard to the alleged offence. I deal with it for the sake of completeness although it is

not strictly necessary for me to do so in view of his sentence of death having been substituted under the previous ground of appeal. This ground of appeal involved two different factors, one the nature of the killing and, two, the matters of mitigation that affected Cannonier. The first is a matter of law, while the second requires a consideration of the new evidence admitted at the sitting of the Court of Appeal.

[172] Mr. Fitzgerald, QC submitted on behalf of Cannonier that the sentence of death imposed on him was excessive and disproportionate having regard to the alleged offence, and that the murder in this case did not constitute the "rarest of the rare" case where the death penalty is properly justified.

[173] The trial judge had a discretion whether or not to sentence Cannonier to death. He imposed the death penalty. In his sentencing judgment he said:[92]

> "… this was one of the most brutal slayings to be seen in this country even in a sea of violent crime. The fact that it was committed against a police officer as an act of revenge is an affront to the law abiding citizens and a threat to the social fabric which is required to maintain law and order and peace in this island. In the context of St Kitts it is a case in which the collective conscience of the society is shocked and persons would expect that the courts would respond by imposing the penalty of death. I therefore do not hesitate to do so at this time."

[174] Given the ruling of the Board in the Trimmingham case I have to conclude that the murder of PC Nisbett was neither extreme nor exceptional in that:

(i) it was not carried out in an especially brutal or sadistic fashion.

(ii) There was no torture of the deceased, nor was there any prolonged trauma or humiliation of him prior to death.

(iii) There was only a single victim, and Cannonier did not cause a risk of death to more than one person.

This killing cannot be said to fall into the category of the worst of the worst or the rarest of the rare. It is my view that on that basis, the trial judge should not have imposed a sentence of death and imposed a sentence of life

[92] See para. 17 of the Judgment on Sentencing (delivered 24th January 2008), Record of Proceedings for First Appeal.

imprisonment instead, given the nature of the murder. Accordingly, I would set aside the death sentence and impose a sentence of life imprisonment on Cannonier for the murder of PC Nisbett.

Cannonier's mitigation

[175] Again, though it is not strictly necessary for me to consider this ground of appeal, I do so for the sake of completeness. Mr. Fitzgerald, QC submitted that Cannonier also had substantial mitigation, and on this basis his sentence of death was unfair. His prior criminal history did not include any previous convictions for murder and his longest previous prison sentence had been of 18 months duration for the charge of receiving in 2000. During his incarceration prior to his conviction for murder he was reported to "have behaved appropriately for his stay in prison" and to have caused "no problems" in prison. Moreover, Cannonier had grown up in an impoverished and unstable environment, and had been exposed to extreme violence as a child. His father had committed suicide which had been witnessed by Cannonier who had been aged 7 at the time. It was apparent from the Social Inquiry Report, he submitted, that this experience had had a profound effect upon him. Then, there was the matter of the new evidence.

[176] Dr. Tim Green, after setting out the inquiries he had made and the tests he had carried out, opined that Cannonier had significant interpersonal difficulties which amounted to a personality disorder. His father had committed suicide when he was 8 years old. His mother had been too busy in the past for him to form a proper relationship with her. He had only intermittently attended school after the death of his father which had caused him to become distressed and he had no one to talk to about it. He had finished school at 16 without taking any exams. He encouraged women to hit him as it gave him a sexual thrill and made him "feel great". He had recently cut his penis with a razor blade. He had been, in his own words, in and out of jail all the time since leaving school. He had been convicted of breaking and entering on several

occasions, including with intent to commit rape, burglary. He had been tried for the double murder of a mother and child, but the case had been dismissed for lack of evidence. He viewed the world as being split between victims and perpetrators. He was fearful and mistrustful of others, perhaps even developing paranoia and watchful tendencies. This had resulted in him feeling justified in acting in entitled ways in order to meet his needs and put himself first. He believed that no one else would care for him, and he must be in control of situations. He was not well able to hold an understanding that others might have needs and wants as well as him. This tendency was evident in his preferred sexual practices in which he enjoyed and was drawn to sadomasochistic sexual acts. He regulated his guilt and his behaviour by organising how he received punishment. This way of understanding the world and interacting with others was reflected in the psychometric test results, where he was anxiously watchful of others and needed to control them, whilst also enjoying placing himself in self-defeating situations.

[177] Professor Nigel Eastman testified that Cannonier had told him that he had learned of his father's suicide and had gone with a friend to where the body was hanging in a mango tree. He reported that he had heard in the village that his father had killed a man and his sons were going to work Obeah on whoever had done it. It appeared that Cannonier believed that Obeah had caused his father to hang himself. Though he found no evidence of suffering from symptoms of mental illness, he did exhibit a personality disorder best described in the terms given by Dr. Green. His description of “unusual experiences” was most likely reflective of the fragility of his disordered personality. By virtue of his personality being disordered he more easily slipped into beliefs and experiences which verged on psychosis but which did not amount to psychosis *per se*. As regards the legal implications of his disorder, it did not lay the foundation for a mental condition defence. He would satisfy the legal definition of abnormality of mind in terms of diminished responsibility within English law. But, the nature of his disorder was not such as a jury would be likely to conclude that the disorder laid the foundation for

substantial impairment of mental responsibility. In his view, Cannonier's lifelong abnormality of mental functioning might reasonably be seen as relevant to an imposition of the death penalty. In his view, Cannonier was mentally abnormal by way of developmental personality disorder, and the court might reasonably see this as relevant to sentencing.

[178] Dr. Green had found that Cannonier suffered from a personality disorder. Professor Eastman had concurred in this view, and opined that:

> "…the appellant's personality disorder would come within 'personal circumstances' and, therefore, the appellant's lifelong abnormality of mental functioning, in the terms particularly well described in Dr Green's report, might reasonably be seen as relevant to an imposition of the death penalty. Put simply, the appellant is mentally abnormal by way of developmental personality disorder and the Court might reasonably see this as relevant to sentencing."

Dr. Othello had accepted that Cannonier suffered from a long-standing personality disorder which had begun in childhood. Witnessing his father's suicide had further added to his condition. She accepted the findings of Dr. Green in relation to the issues of paranoia, lack of empathy and the need for control. The things he had experienced in his youth had made him more likely to act anti-socially, and this she accepted to be a mitigating factor.

[179] The evidence from the three consultants was that, in addition, Cannonier had behaved well in prison, and had responded to the stability and structure of prison life. There was, therefore, substantial personal mitigation justifying the imposition of a lesser sentence than death. On the basis of the unanimous agreement of the psychiatric witnesses, and given the sentencing approach approved by both the Court of Appeal and the Board previously referred to,[93] it is clear that the sentence of death was disproportionate and his sentence should be commuted to life imprisonment if it had not already been so done.

[93] See para. 154 of this judgment.

[180] Sir Richard accepted that the learned trial judge had not dealt with the question of reform in any detail. The judge did not have the advantage of the detailed reports that the Court of Appeal had received. However, the judge had applied his mind to all the relevant factors. He had the various pre-sentencing reports before him from which he would have learned of Cannonier's past 14 years of criminal convictions. The evidence was that the deceased had been shot while running, and had fallen to the road. The shooter had then gone over to him and fired four more shots. So, we were safe in drawing the inference that he had intended to kill the deceased. The question of reform in the context of long-term imprisonment was not realistic. There was no suggestion that the necessary therapeutic treatment was available to the prison in St. Kitts. The only real hope offered by the experts for Cannonier's reform was that he might in time suffer "burn out". He had before him the evidence that it had been a revenge killing. He had killed PC Nisbett because he thought that Nisbett in the course of his duty had "roughed him up". The judge put the killing among the gravest of the grave. He found the killing to have been an affront to the justice system. He was satisfied that the collective conscience of the society had been shocked, and he had not hesitated to impose the death penalty.

[181] Taking into account the above matters raised in mitigation on behalf of Cannonier, I cannot be certain that he has been shown to deserve that most condign of punishments, the death sentence. Unless I am so satisfied, I would be required by the authorities previously cited to quash his sentence of death and to substitute a life sentence, if that had not already been done.

Ground 5: Cannonier's Second Appeal

[182] We now return to considering the Second Appeal. Cannonier's mitigation remains the same as in the First Appeal. Additionally, he is entitled to the benefit of the earlier finding in relation to Isaac that this murder, though it was an attack on the justice system in that he had been convicted of instructing his

companions to execute a witness to his first murder, was not capable of being classified as being the worst of the worst kind of a murder.

[183] On this basis I would, as with the other appellants, quash his death penalty and substitute a sentence of life imprisonment. This sentence is to run consecutively to the first.

Ruedeney Williams

[184] Williams objects to the death penalty imposed on him on three separate grounds. The first relates to the nature of the murder, the second to the extent of his mitigation, and the third is a constitutional point based on his low intelligence. Williams' history indicates that he was born as the result of a rape of his mother. He grew up without a father and was raised by a great aunt whilst his mother held down two jobs. Dr. Green reported that he had experienced considerable violence and abuse as a child. The aunt had died when he was 16, which had a serious effect on him.

[185] Dr. Green testified that Williams' intellectual functioning was so poor that he fell on the borderline of being learning disabled. He had a low IQ of 73 which was well below average. He fell within the lowest 4% of the population in terms of his intellectual functioning. Such a score suggested that 96% of the population would achieve a better score than he had. The evidence was that individuals scoring in this range of functioning are noted to have difficulty in understanding the ramifications of their decisions and thinking through the consequences of their behaviours. Additionally, he had a "desirability" score of 94. This was very high. Any score over 85 is considered disordered. It suggested that he responds to other persons in a way to suggest an emotionally welcoming state. He had developed a style of wishing to please others to avoid confrontation. He attempts to ingratiate himself with others in an acquiescent way. Professor Eastman agreed with Dr. Green's analysis of Williams. Dr. Othello accepted the findings of Dr. Green. She agreed that if

there were rehabilitation programmes made available to Williams there was a prospect of his reform. Someone with the personality traits of Williams can be assisted by talking therapies.

[186] Mr. Knowles, QC submitted that given these diagnoses, the imposition of the death penalty on Ruedeney Williams constituted inhuman and degrading punishment and thus was prohibited by section 7 of the Constitution.

[187] For the reasons set out above in relation to Isaac and Cannonier, the death penalty imposed on Williams must be set aside on each of the three grounds of his appeal. I would substitute his sentence of death with one of life imprisonment.

Louis Gardiner

[188] Mr. Fitzgerald, QC submitted that Gardiner is of good character and has no previous convictions so that the imposition of the death penalty on him was disproportionate and excessive. Additionally, the argument previously made as to the nature of the killing not placing this murder in the category of the worst of the worst applied to him.

[189] Dr. Green had found that Gardiner had an especially compliant personality, which when coupled with his low intellectual functioning meant that he had significant difficulty in both understanding his situation and being able to act for himself effectively.

[190] In addition, the evidence was that Gardiner was capable of reform. The Social Inquiry Report produced before the trial judge had concluded: "Placed in the right environment with the right individuals, he will be able to place together a scenario and execute it once he is willing to." This conclusion was supported by Dr. Green, who testified that in relation to risk, he could find no evidence that Gardiner was a significant risk of violence. He had no history of violence that he was aware of other than the index offence. He had not appeared to

hold anti-social attitudes when assessed by both psychometric measurement and clinical interview. Psychometric measures of risk rated Mr. Gardiner as a low risk of violent offending for the future. Additionally, the evidence was that Gardiner suffered from post-traumatic stress disorder and associated depression as a result of his having been placed by his warders in a position to be a near witness to the hanging of fellow death-row inmate Charles Laplace in the prison in St. Kitts in December 2008. As a result he was suffering from a recognised form of personality disorder which would mean that if he faced execution his symptoms would worsen again.

[191] Sir Richard accepted that the trial judge had not dealt in any detail with the question of the possibility of reform. However, the trial judge had concluded that Gardiner was incapable of reform. He urged the court to maintain the death penalty.

[192] However, for all the reasons given above for the other persons convicted with him for Gilbert's murder I would quash his sentence of death and substitute a sentence of life imprisonment.

Order

[193] In conclusion, having answered the questions posed by the Board, and determined the issues as requested, I would order that:

(1) Section 52 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act contravenes section 10 of the Saint Christopher and Nevis Constitution Order 1983 for the reasons set out at paragraph 39 above, and should be considered amended as there described to bring it within section 10 of the Constitution;

(2) the appellant Romeo Cannonier's conviction in the First Appeal be upheld;

(3) the appellant Romeo Cannonier's death sentence in the First Appeal be quashed and a sentence of life imprisonment imposed;

(4) the appellant Sheldon Isaac's appeal against conviction in the Second Appeal be allowed, and, accordingly, his conviction and sentence be quashed;

(5) the appellant Romeo Cannonier's appeal against conviction in the Second Appeal be dismissed and his conviction affirmed;

(6) the appellant Romeo Cannonier's appeal against the death sentence imposed on him in the Second Appeal be allowed and the death sentence set aside and a sentence of life imprisonment be substituted to run consecutive to the life sentence imposed on him in the First Appeal;

(7) the appellant Louis Gardiner's appeal against conviction in the Second Appeal be denied and his conviction affirmed;

(8) the appellant Louis Gardiner's appeal against the death sentence imposed on him in the Second Appeal be allowed and the death sentence set aside and a sentence of life imprisonment be substituted ;

(9) the appellant Ruedeney Williams' appeal against conviction in the Second Appeal be dismissed and his conviction affirmed; and

(10) the appellant Ruedeney Williams' appeal against the sentence of death imposed on him be allowed and the death sentence set aside and a sentence of life imprisonment be substituted

[194] Finally, I must express my appreciation to all counsel for the excellent submissions on the law and on the evidence that they provided to the Court and for the efficient and effective manner in which they used the time of the Court.

Don Mitchell
Justice of Appeal [Ag.]

[195] EDWARDS J.A.: I have read and considered the judgment of my learned brother Mitchell J.A. [Ag.]. While I agree with his reasoning and conclusions on most of the issues, I approach three of the issues from a different

perspective in arriving at the same conclusion. I also agree with the result of the 2 appeals and the Order proposed by Mitchell J.A. [Ag.]. I am grateful to him for his statements of the relevant facts and submissions of counsel which I agree with. In that regard, there is no need for me to repeat them.

The Constitutionality of Section 52 of the Court Act

[196] Section 52(2) of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act[94] ("the Court Act") limited the appellants' access to the Court of Appeal by barring them procedurally from initiating or instituting appellate proceedings under section 41(a) and (b) of the Court Act after the 14 day time limit for appealing expired.

[197] I am of the view that the potential injustice of section 52(2) would be mitigated somewhat by The Constitution[95] which provides that where the appellants were complaining that any of the provisions in the Constitution guaranteeing their fundamental rights and freedoms is being or is likely to be contravened, that they could apply to the High Court for redress pursuant to section 18 of the Constitution after the deadline for appealing their conviction had passed.

[198] Otherwise, the appellants would also be able to invoke the jurisdiction of Her Majesty in Council where the Court of Appeal made a final decision involving a question as to the interpretation of the Constitution in their criminal proceedings.

[199] It would also be open to the appellants as an alternative recourse, to petition the Governor General to exercise the prerogative of mercy and grant a pardon to them or commute their death sentence, or substitute a less severe punishment, or remit wholly or partly the punishment imposed on them, pursuant to sections 66 to 68 of the Constitution.

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[94] Supra note 1.
[95] The Saint Christopher and Nevis Constitution Order 1983.

[200] However, none of these measures would have engaged the appellate jurisdiction to correct any alleged wrong decisions made during the course of their trial where they are dissatisfied with the outcome of their case. It was apparently their resort to section 99(3) of the Constitution which provides for appeals to Her Majesty in Council with the special leave of Her Majesty from any decision of the Court of Appeal in any criminal proceedings which ultimately enabled this hearing.

[201] Although the Constitution does not guarantee a right of appeal, section 41(a) of the Court Act gives the appellants a right to appeal their conviction on questions of law only. Otherwise, the law is that they can appeal on questions of mixed law and facts or on questions of fact only where the court grants them leave to appeal. The question arising therefore in my view is whether section 52(2) of the Court Act constitutes an arbitrary limitation of the appellants' substantive right to appeal.

[202] A convicted person who seeks to appeal against his conviction after trial on indictment is no longer a person "charged" for the purposes of applying the guarantee in section 10(1) of the Constitution to his trial. Section 10(1) states that: "If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[203] In considering the delay in appellate proceedings and whether the guarantee in section 10(1) of the Mauritius Constitution[96] was wide enough to cover such post-conviction delay, the Privy Council opined in Sooriamurthy Darmalingum v The State[97] that:

> "It would be strange if a defendant were afforded protection in a Bill of Rights against undue delay in his trial but left wholly unprotected in respect of oppressively delayed appellate proceedings. A purposive and

[96] Section 10(1) provides: "Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."
[97] [2000] 1 W.L.R. 2303 at 2309C.

generous interpretation, which avoids "the austerity of tabulated legalism," is necessary: *Minister of Home Affairs v Fisher* [1980] A.C. 319, 328-329, *per* Lord Wilberforce. On these grounds alone their Lordships would hold that the guarantee in section 10(1) extends to appellate proceedings. This view is, however, strongly reinforced by the view which has prevailed on the interpretation of article 6[98] of the European Convention for the Protection of Human Rights and Fundamental Freedoms. ... In their Lordships' view section 10(1) of the Constitution of Mauritius must be construed like article 6(1) of the Convention. It extends to appellate proceedings."

[204] The similarity existing in the provisions in section 10(1) of the Saint Christopher and Nevis and Mauritius Constitutions leads to the inexorable conclusion that the guarantee in section 10(1) of the Saint Christopher and Nevis Constitution also applies to appellate proceedings. However, the question arises as to whether the procedural rights guaranteed in section 10(1) would automatically accrue to the appellants prior to their valid commencement of appellate proceedings where there is this formidable obstacle created by section 52(2) of the Court Act. The leading case, Golder v United Kingdom (A/18),[99] by a majority decision, transcended such an obstacle posed for a prisoner to whom the Home Secretary denied permission to correspond with and consult a solicitor in order to start legal proceedings for libel, after he was accused of participating in a prison riot and wished to exculpate himself from the charge. Mr. Golder claimed a violation of his rights under Article 6(1) and Article 8 (respect for correspondence) of the Convention.

[205] Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) ("the Convention") states:

"Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[98] See para. 205 below.
[99] (1979-80) 1 E.H.R.R. 524.

[206] The European Court, by a process of extensive interpretation of Article 6, enunciated the 'access to court' doctrine from a systemic construction of different clauses of the Convention. Although Article 6(1) unlike section 10(1) of the Saint Christopher and Nevis Constitution, manifestly places civil and criminal proceedings on the same footing, and deals with the matter of a fair trial in both context, the majority of the Court focused on civil claims. At paragraphs 35 to 37 of the majority judgment, the Court decided that: "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognized' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles. Were Article 6(1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook. … 36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6(1). … The Court thus reaches the conclusion … that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6(1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing."

[207] There is no reason why this approach of the European Court in Golder should not be adopted and applied in the instant appeal in relation the applicability of

section 10(1) of the Saint Christopher and Nevis Constitution to the proposed appellate criminal proceedings that the appellant Cannonier desired to institute on 8th February 2008, and the appellants in the second appeal desired to institute on 29th July 2008. This approach was applied to criminal proceedings by the European Court of Human Rights in Delcourt v Belgium (A/11).[100]

[208] In that case, the representatives of the Belgian Government argued that in appellate proceedings arising from Delcourt's conviction for several offences involving fraud, the appellate court does not make a determination either of civil rights or obligations or of a criminal charge against him within the meaning of Article 6(1) of the Convention. The European Court was asked to determine whether the participation of a member of the Procureur general's department at the deliberations of the appellate Court of Cassation in Belgium on 21st June 1965 violated the rights and freedoms guaranteed by the Convention, namely: the principle of "equality of arms" under article 6(1). The European Court concluded at paragraphs 25 and 26 that a criminal charge is not really "determined" as long as the verdict of acquittal or conviction has not become final and the appellate cassation proceedings are one special stage of the criminal proceedings and the consequences of that cassation proceedings may prove decisive for the accused. A State which has appellate courts is required to ensure that persons amenable in the law shall enjoy before these courts the fundamental guarantees contained in Article 6(1). The Court stated also that: "The way in which it [article 6 (1)] applies must, however, clearly depend on the special features of such proceedings."

[209] In Tolstoy Miloslavsky v United Kingdom (A/323)[101] the European Court gave further guidelines as to how to apply Article 6(1) to appellate proceedings though Article 6(1) does not guarantee a right of appeal. The Court stated that the State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees

[100] (1979-80) 1 E.H.R.R. 355, para. 25.
[101] (1995) 20 E.H.R.R. 442, para. 59.

in Article 6(1). In applying article 6(1), account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein.

[210] Applying the reasoning in Golder and Delcourt to these proposed appeals I reach the conclusion that section 10(1) of the Saint Christopher and Nevis Constitution did secure to the appellants the right to have their proposed appeal proceedings brought before the Court of Appeal. Section 10(1) of the Constitution embodies the "right to a court", which includes the right of access, that is the right to institute appellate criminal proceedings before the Court of Appeal. Implicit in this right of access to the Court of Appeal, are the guarantees laid down by section 10(1) of the Constitution as regards both the organization and composition of the court and the conduct of the proceedings, and together they make up the right to a fair hearing. The appellants' right of access to the Court of Appeal would also involve the right to present their case properly and satisfactorily to a court that is independent and impartial and has full jurisdiction over the subject matter and to have a hearing in this court so that their applications for extension of time and/or their complaints in their grounds of appeal may be resolved. This is to be implied in the meaning of fair hearing in the context of Article 10(1) of the Constitution.

The Limitation on the Right to Access the Court of Appeal

[211] Many of the fundamental rights guaranteed by sections 3 to 19 of the Constitution are qualified in various ways. Some of these qualifications exist within those provisions where such provisions permit a violation of the guaranteed right in certain stipulated circumstances under an established criteria. Section 3 of the Constitution states that: "… the provisions of this Chapter [sections 3 to 20] shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any

person does not impair the rights and freedoms of others or the public interest." (My emphasis). Apart from this, the Courts have developed principles for assessing how limitations imposed by statute on the rights of persons are to be tested for compliance with the Constitution.

[212] In Golder, the European Court regarded the Home Secretary's denial of permission to Golder to communicate with his solicitor as an implied limitation. The Court decided[102] that: "Since the impediment to access to the courts, … affected a right guaranteed by Article 6(1), it remains to determine whether it was nonetheless justifiable by virtue of some legitimate limitation on the enjoyment or exercise of that right." Concerning the limitations which a State may place upon the right of access to the courts, the European Court said in Tolstoy[103] that although the right of access to the courts secured by Article 6(1) may be subject to limitations in the form of regulations by the State, "In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved." (My emphasis). Also, in the Antigua case De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others[104] the Privy Council stated the test to be: "... whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

[102] At para. 37.
[103] At para. 59.
[104] [1999] 1 A.C. 69 at 80.

[213] Having taken these tests into account, I have concluded that there would be no justification for retaining the limitation in section 52(2) on the grounds that it is in the public interest to do so. All human systems are fallible, and any justice system can miscarry. It is in the public interest that the courts be able, through the appeal process, to correct error in a timely and expeditious manner. This is extremely important for public acceptance of the criminal trial process by judge and jury, particularly in murder cases involving the death penalty. One such safeguard would be to have a legal system in place in the Caribbean, similar to Arkansas in the United States of America, which would permit an automatic appeal and mandatory review by the Court of Appeal in all murder cases involving a death sentence, immediately following the imposition of the death penalty.

[214] The English equivalent of the questioned limitation in the appellants' case, exists in section 7(1) of the Criminal Appeal Act 1907 (UK) which established the English Criminal Court of Appeal. Section 7(1) was enacted at a time when the Human Rights Act 1998 (UK) and the European Convention on Human Rights and Fundamental Freedoms (1953) did not exist. This provision became part of the law of Saint Christopher and Nevis from the colonial days when there were no fundamental rights and freedom provisions in existence. With the desire to reform the criminal law so that it would be less out of accord with contemporary standards and expectations, the death penalty for murder was temporarily abolished in England in 1965 for 5 years and then permanently in 1969. Section 7(1) thus became an anachronism in England.

[215] The legitimate aim of the limitation was described by the English Court of Appeal in Twynham.[105] The aim was said to be, to prevent murderers from postponing their executions by prolonging their opportunity to appeal, and thereafter seek any other redress they perceived to be open to them after their appeal is heard and determined by the Court of Appeal. The landscape for

[105] Supra note 8.

this legislative objective in 1907 and 1920 is now completely different. The legislative objective must be viewed in light of the existence of the fundamental rights and freedoms guaranteed to persons under the sentence of death in the Constitution of Saint Christopher and Nevis; as well as the timeline laid down by the Privy Council in Earl Pratt and Another v The Attorney-General for Jamaica and Another[106] for carrying out the death sentence, taking into account all of the available legal processes open to persons awaiting the sentence of death. Consequently, section 52(2) must be assessed by applying the contemporary standards of justice and humanity in our democratic and civilized society.

[216] It is in the public interest that the judicial and jury functions of the trial process be conducted with fundamental fairness in accordance with the Constitution, especially where the irreversible sanction of the death penalty is involved. Though section 4(1) of the Constitution of Saint Christopher and Nevis sanctions the imposition of the death penalty for murder offences, however, it is a different matter altogether as to whether the limitation in section 52(2) of the Court Act is inconsistent with the fundamental rights provision existing in section 10(1) of the Constitution since 1983. I would say therefore without any hesitation, that to the extent that section 52(2) of the Court Act precludes the Court of Appeal from exercising jurisdiction to extend the time for convicted persons appealing or applying for leave to appeal their conviction involving the death sentence, that section has failed to respect the appellants' right to access the Court of Appeal as guaranteed by section 10(1) of the Constitution.

[217] Section 2 of the Constitution states that this Constitution is the supreme law and if any other law is inconsistent with this Constitution this Constitution shall prevail and the other law to the extent of the inconsistency be void. Section 2 of Schedule 2 to the Constitution Order[107] provides:

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[106] [1994] 2 A.C. 1.

[107] See the Fourth Schedule of the West Indies Act, Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2002.

> "2. (1) The existing laws shall, as from 19th September 1983, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order."

[218] Consequently, I would modify section 52(2) of the Court Act and bring it in conformity with section 10(1) of the Constitution by deleting the words "Except in the case of a conviction involving sentence of death." In the circumstances, I too would extend the time for filing their notices of appeal against conviction and sentence of death, while granting to the applicants the necessary leave they require to appeal their conviction on questions of facts, or questions of mixed law and facts.

The Refusal of Alibi Evidence

[219] Concerning the judge's refusal to permit the appellant Cannonier to call alibi witnesses, I have come to a different view from my brother Mitchell J.A. [Ag.] on this issue because of: (a) the absence of any evidence on the record that Cannonier, who was unrepresented at the Preliminary Inquiry, was informed by the magistrate at the time of his committal that he had 28 days after his committal to give notice of particulars of his alibi and the names and addresses of his alibi witnesses; (b) the absence of the trial judge's ruling on the appellant's late application to call the two alibi witnesses; and (c) any indication on the record that the learned trial judge did take into account section 33(3) of the Criminal Procedure Act in exercising his discretion to refuse the application. I would resolve this in favour of the appellant and conclude that the learned judge wrongly refused leave under section 33.

[220] The trial judge's refusal raises the question as to whether in the circumstances of the case the appellant was prevented from presenting his defense. There is no indication that the appellant or his counsel explained the reason for prior non-disclosure of the alibi witnesses. Merely to mention the names of the two persons without stating any other particulars or their address is no indication

that these persons would have in fact testified on his behalf or given favourable evidence supporting his alibi. There is no evidence before us that Cannonier had previously instructed his counsel of these alibi witnesses and that his counsel was negligent in carrying out Cannonier's instructions. Although Cannonier's caution statement did disclose that Shane could support his alibi, interestingly enough, his nephew Shane was not one of the two persons named in the last minute application. I am satisfied that the trial judge mitigated for any possible prejudice resulting from his ruling by giving proper and adequate directions concerning the appellant's defense of alibi. The other evidence on the prosecution's case pointing to the guilt of the appellant leads me to conclude that no substantial miscarriage of justice occurred. I agree that the proviso should be applied in light of the compelling evidence against the appellant.

Sentencing for Cannonier in the First and Second Appeals

[221] Cannonier was convicted for 2 murders involving premeditation, and the cruel use of a firearm to snuff out the lives of the unfortunate deceased persons. In the second murder, it was a conspiracy masterminded by Cannonier nearly one year after the first murder in order to prevent the deceased witness from testifying at his trial. The killing and robbery of the off duty police officer was premeditated, brutal, cold blooded. It also sprung from the wickedness of Cannonier to get back at the police officer who had in the past "roughed him up" while he was in prison. The killing of the witness, equally brutal and cold blooded, was an evil attempt to undermine one of the essential pillars of the foundation of our justice system – the testimony of witnesses. This premeditated behaviour in both instances should be met with the harshest penalty available in law in my view.

[222] The use of firearms by dangerous and aggressive criminals is an undoubted social evil in the Federation of St Christopher and Nevis. So long as the death penalty is retained, there may well be murders by shooting which justify a

sentence of death.[108] However, the Privy Council has said that "... the death penalty cannot be justified by the prevalence of murder or other similar offences."[109]

[223] My views (previously stated at paragraph 220 above) are of course circumscribed by the law concerning the imposition of the death penalty in murder cases. This law has within the last decade in the Caribbean evolved to the stage where the Privy Council has decreed and recently confirmed in Trimmingham (a case from St Vincent and the Grenadines), that the death sentence should only be imposed in the most extreme and exceptional murders which are the "worst of the worst" or the "rarest of the rare" and only after determining the question of the killer's possibility of reform. The Privy Council has also said in Lambert Watson v The Queen[110] that prevailing levels of crime and violence, however great the anxiety and alarm they understandably cause in the society, cannot affect these underlying legal principles.

[224] A close analysis of the Privy Council decision in Trimmingham begs the question as to what type of murders may be regarded as most extreme and exceptional in the Federation of Saint Christopher and Nevis. The principles laid down by the Privy Council in Trimmingham, require that the sentencing court should make comparisons with other murders in order to determine whether the appellant's murder falls within the category of "the worst of the worst" or "the rarest of the rare". In Trimmingham, the appellant, armed with a firearm, went to the 68 year old deceased's land where the deceased kept his goats. The appellant intended to rob the deceased who told him he had no money, but he could take his goats and leave him alone. The appellant then took the deceased to a contour, threw him in the ditch, cut his throat with a cutlass which he took from the deceased, cut off his head with the cutlass, removed the deceased's trousers from the body and wrapped the head in

[108] Per Lord Bingham of Cornhill in Patrick Reyes v The Queen [2002] UKPC 11 at para. 43.
[109] See Earlin White v The Queen [2010] UKPC 22 at para. 17.
[110] [2004] UKPC 34 at para. 64.

them. He handled the penis of the deceased and made a ribald remark about it. He slit the deceased's belly, explaining to his accomplice that he did so to stop the body from swelling. He covered up the body and stuffed the trousers containing the head into a hole under a plant in a nearby banana field. The sentencing judge in Trimmingham thought, as other judges in the Caribbean society would think, that it was an exceptional and extreme case of murder in Caribbean context. The Privy Council held that the death penalty should not have been imposed in this case as it fell short of being among the "worst of the worst".

[225] At paragraphs 22 and 23 of the Privy Council Judgment in Trimmingham, Lord Carswell stated:

> "22. Mr Fitzgerald readily accepted that the appellant's crime was a brutal and disgusting murder, involving the cold-blooded killing of an elderly man in the course of a robbery. He contended, however, that it fell short of being in the category of the rarest of the rare. He submitted that the killing did not appear to have been planned or premeditated and although the manner of the killing was gruesome and violent, there was no torture of the deceased, nor prolonged trauma or humiliation of him prior to death.
>
> "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 judgment 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." (My emphasis)

[226] It may be said therefore on the authority of Trimmingham, that "a bad case of murder committed for gain" and "a gruesome and violent" killing may not qualify for the death penalty as being the "worst of the worst." So too will a brutal and disgusting murder involving the cold blooded killing of an elderly man in the course of a robbery, or a very bad case of murder committed for gain, or a murder committed in a revolting fashion which is not comparable with the worst cases of sadistic killings" not qualify. However, a killing

involving torture of the deceased, or involving humiliation or prolonged trauma to the victim prior to his death, and also a case involving a sadistic killing may qualify as being in the category of the "worst of the worst". No other practical guidelines were established by the Privy Council in that case to assist a sentencing judge in making the required comparison.

[227] Subsequently, in the Belize case Earlin White v The Queen[111] where the deceased was killed with two swift shots, the Privy Council per Lord Dyson stated that though that murder was callous and serious, it came nowhere near meeting the criteria specified in Trimmingham, as the deceased was killed with two swift shots and there was no element of sadism, torture or humiliation. Lord Dyson stated[112] that: "The appellant had behaved in a 'revolting fashion', but the case was not comparable with the worst cases involving sadistic killings. The facts of the present case were considerably less appalling than those in Trimmingham's case."

[228] More recently, the Privy Council stated in Maxo Tido v The Queen[113] (Bahamas) at paragraph 36:

> "Epithets such as "the worst of the worst" and "the rarest of the rare" can give rise to conceptual difficulties as to which cases will qualify. Murder is always a heinous crime. But it is clear that a death sentence – the ultimate and final sentence – must be reserved for the wholly exceptional category of cases within this most serious class of offence. Whatever "the worst of the worst" and "the rarest of the rare" may mean, the Board is satisfied that this case does not come within that wholly exceptional category. This was a dreadful crime. A young life was extinguished in brutal circumstances but it is not a case that can be placed alongside the most horrific of murders of which, sadly, human beings are capable. There is no warrant for believing that it was planned, nor is there unmistakable evidence that it was accompanied by unusual violence beyond that required to effect Miss Conover's killing." (My emphasis).

[111] [2010] UKPC 22.
[112] At para. 16.
[113] [2011] UKPC 16.

[229] The Privy Council further clarified the Trimmingham guidelines in the Bahamas case Ernest Lockhart v The Queen[114] where it is stated at paragraphs 15 and 16 that:

> "15. The circumstances in which a person has been done to death and the impact that his killing has had on his family, friends and community are, at least potentially, highly relevant to the question whether the murder comes within the wholly exceptional category of the worst of the worst crimes. But the quest for that elusive concept is not necessarily assisted by pitting the circumstances of the killing against the personal circumstances of the killer. … The question whether a particular murder can be described as the "worst of the worst" must be addressed first. Of course, the personal circumstances of the killer may affect the judgment of whether the murder is to be characterised as "the worst of the worst" but, if they have any part to play in that, it must be secondary to an assessment of the nature of the crime and the surrounding circumstances, rather than any personal mitigating attributes that the offender may have.
>
> "16. If the murder cannot be characterised as the worst of the worst, the first aspect of the second principle, whether there is a reasonable prospect of reform, does not arise. It is only where the killing is to be regarded as occupying a place in the worst category of murder that the question of reform need be addressed." (My emphasis)

[230] Mr. Fitzgerald, QC in his contention which was accepted by the Privy Council, seems to have treated the absence of planning and premeditation from the murder in Trimmingham as a separate reason for non-classification as being the rarest of the rare in my view. To that extent, the decision in Trimmingham can be distinguished. In White, it appears that the presence of a planned and premeditated killing also did not arise. If I am right, then the question arises in my view as to whether the planned and premeditated killing committed by Cannonier in order to rob the off duty police officer, or the planned and premeditated killing of the witness Gavin Gilbert to prevent him from testifying, though not comparable to a sadistic killing, may be in the category of the worst of the worst.

[114] [2011] UKPC 33.

[231] In Patrick Reyes v The Queen[115] Lord Bingham of Cornhill[116] considered the range of offences of widely varying degrees of criminal culpability embodying the crime of murder. He stated that: "It has however been recognised for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat." Lord Bingham referred to the Royal Commission on Capital Punishment Report 1949-1953 which stated among other things at page 6 paragraph 3 that: "The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. The crime may be committed in order to carry out another crime or in the course of committing it or to secure escape after its commission. Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident." The observations of Lord Bingham apparently led the Bahamas Court of Appeal in Maxo Tido to conclude thus:[117]

> "125. In our view, the worst cases of murder which may call for the imposition of the most condign punishment which the law allows, would be those in which the murder is carefully planned and carried out in furtherance of another crime, such as armed robbery, rape, drug smuggling, human smuggling, drug wars, gang enforcement policies, kidnapping, preventing witnesses from testifying, serial killers, as well as the killing of innocents for the gratification of base desires mentioned by Lord Bingham."(My emphasis)

[232] It was not surprising therefore that in Ernest Lockhart, where the deceased drug dealer was shot and killed by the appellant who was also a drug dealer, in order to protect his "turf" that the trial judge imposed the death sentence.

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[115] [2002] UKPC 11.
[116] At para. 11.
[117] See para. 34 of Maxo Tido v The Queen [2011] UKPC 16.

This killing had the hallmark of a planned and premeditated killing. Relying on the judgment of Lord Bingham of Cornhill in Reyes, counsel for the appellant sought to locate this killing in the exceptional category of the worst of the worst. Counsel suggested before the Privy Council that the killing was akin to a contract killing, and according to Lord Bingham's classification, it was therefore to be regarded as falling in the "worst of the worst" category. The Board rejected that argument.[118]. The Board explained that: "… Lord Bingham was not addressing directly the question of how the worst of the worst murders should be defined; he was demonstrating the broad spectrum of culpability that should be recognised in various types of killing. More importantly, however, Lord Bingham was not suggesting that, simply by inclusion in a particular type of murder category, a killing was to be regarded as being the worst of the worst." The Board's explanation has answered the question I raised.

[233] Consequently, I would conclude from the authorities reviewed that neither the fact that the police officer was, after obvious premeditation and planning, shot several times and killed to "settle a score" and robbed, nor the fact that the witness was killed in a planned and premeditated murder to prevent the witness from testifying in a case, would by itself justify the sentencing judge categorising each murder as the worst of the worst or the rarest of the rare. The sentencing judges would also have to consider and assess the circumstances in which the deceased persons were killed and the impact that the killings has had on the deceased persons' family, friends and community as this is, at least potentially, and highly relevant to the question whether their killing comes within the wholly exceptional category of the worst of the worst cases of murder. It is only after the judges have assessed the nature and surrounding circumstances of the respective murder that the personal circumstances of the killer or killers may affect the judgment of whether each murder is to be characterised as "the worst of the worst".

[118] At para. 17.

[234] There is no information or evidence on the records which discloses the impact that the killing of the police officer and Gavin Gilbert has had on their family, friends and community. That has to be specifically adduced as evidence in my view, it cannot be inferred. The binding authorities of the Privy Council accordingly compel me to conclude that the first murder carried out by Cannonier only and the second murder carried out by Cannonier and the other appellants are not murders which can be placed in the category of the worst of the worst or the rarest of rare. The learned sentencing judge erred in the first case and second case on appeal, by concluding that the murder of the off duty police officer, and the murder of the witness Gavin Gilbert were each a murder in the category of the worst of the worst.

[235] In that regard, on the authority of Ernest Lockhart, there would be no need to address the question of reform. However, having regard to the specific request made by the Privy Council Board, on this issue, I should state that I found the opinions and evidence of Dr. Green, Professor Eastman and Dr. Othello on Cannonier's prospects of reform to be conjectured and highly speculative. Notwithstanding my views, I cannot state definitively that the sentencing judges would share my view where that evidence was before them. I am obliged to resolve this issue in Cannonier's favour and agree with my brother Mitchell J.A. [Ag.] on the outcome of the appeal and the order he has proposed.

Ola Mae Edwards
Justice of Appeal

[236] RAWLINS, C.J.: It has been my privilege to have read the erudite judgments of my sister and brother, Edwards J.A. and Mitchell J.A. [Ag.]. I agree with the background and facts as stated by my brother Mitchell J.A. [Ag.]. I agree with his decision to give leave to the 4 appellants to appeal against their

convictions and sentences, and, accordingly, to have their appeals considered on their merits.[119] However, I prefer the reasoning of Edwards J.A. on this issue.[120] I also accept her reasoning on ground 2 of Cannonier's first appeal concerning the exclusion of the alibi evidence which Cannonier sought to have adduced.[121]

[237] I accept and agree with the decision of Mitchell J.A. [Ag.], at paragraph 67 of his judgment, to dismiss ground 3 of Cannonier's first appeal, which is concerned with the admission of the statement of Garvin Gilbert, deceased.

[238] I also agree with the decision of Mitchell J.A. [Ag.] to dismiss ground 4 of Cannonier's first appeal. It will be recalled that in that ground, Cannonier insisted that his conviction for the murder of PC Nisbett is unsafe because the judge failed to prevent prejudicial references to witnesses and insinuations concerning witness safety by prosecuting counsel in the presence of the jury, and, additionally, that the judge erred in making prejudicial comments to the jury while summing up. I agree with my learned brother Mitchell J.A. [Ag.]'s conclusions that there is no merit in that ground of appeal because there was nothing improper or unfair in what was said by the trial judge or by the prosecuting counsel during the trial.[122] I accordingly agree that the appeal should be dismissed on this ground.

[239] I further agree with my brother Mitchell J.A. [Ag.]'s decision to dismiss ground 5 of Cannonier's first appeal, for the reasons which my learned brother has given. It will be recalled that this ground alleged that the trial judge failed to properly direct the jury to exercise caution when considering Gavin Gilbert's statement because the defence was deprived of the opportunity to cross-examine Gilbert on the contents of the statement. I also agree with my brother Mitchell J.A. [Ag.]'s decision that no neglect was established on the part of

[119] See paragraph 39 of this judgment.
[120] See paragraphs 196-218 of this judgment.
[121] See paragraphs 219-220 of the judgment.
[122] See paragraph 82 of this judgment.

defence counsel in requesting that the jury remain during the discussion on the admissibility of Gilbert's statement.[123]

[240] I agree with my brother Mitchell J.A. [Ag.]'s decision to dismiss ground 6 of Cannonier's first appeal, which alleged that his conviction was unsafe because the trial judge improperly disrupted defence counsel's closing address thereby depriving Cannonier of a fair trial. In this regard, I agree with Mitchell J.A. [Ag.]'s statement at paragraph 97 of this judgment, as well as with his conclusions contained in paragraph 101 of this judgment for dismissing this ground of Cannonier's first appeal.

[241] In summary, I agree that Cannonier's first appeal against conviction for the murder of PC Nisbett should be dismissed and the conviction affirmed. I also agree with the decisions by my learned sister and brother that Cannonier's appeal against the death sentence for the murder of PC Nisbett should be allowed; the sentence quashed, but only on the ground that the murder of PC Nisbett does not fall within the category of the worst of the worst or rarest of the rare. I accordingly agree, on this basis only, that the death sentence imposed on Cannonier for that murder should be set aside and that a sentence of life imprisonment should be imposed on him instead for PC Nisbett's murder.

[242] I also agree, for the reasons that my brother Mitchell J.A. [Ag.] gave,[124] that the appeal by Sheldon Isaac against his conviction should be allowed; the conviction quashed and that he should be accordingly acquitted.

[243] I further agree for the reasons that Mitchell J.A. [Ag.] gave, that the appeals against conviction by Ruedeney Williams and Louis Gardiner for the murder of Gavin Gilbert should be dismissed and their convictions affirmed. I also agree that their appeals against their death sentence for the said murder should be allowed but only on the ground that their part in the murder of PC Gilbert does

[123] See paragraph 86 of this judgment.
[124] See particularly paragraphs 134-149 of this judgment.

not fall within the category of the worst of the worst or rarest of the rare. Accordingly, their death sentences should be quashed and sentences of life imprisonment should be imposed upon each of them instead.

[244] With very great respect, however, I am afraid that I depart from the decision by my learned sister and brother to the extent that they would allow Cannonier's appeal against the death sentence for the murder of Gavin Gilbert.

[245] It is my view that there may be a dichotomy of roles in a particular murder, which may constitute the role of one actor the worst of the worst, while that of another may not be. A particular murder may not in its actual revolting and sadistic execution be rendered the worst of the worst or the rarest of the rare so that those who actually executed it may not be liable for the death penalty. This does not prevent the role of another participant in that murder, say a mastermind who plans and orders the murder, from causing that person's role to fall within the category that constitutes the worst of the worst. The final result would depend upon all of the surrounding circumstances. Thus, in the present appeals, for example, where the actual killing of Gilbert was not sadistic, the role of those who carried it out does not render their acts to the worst of the worst attracting the death sentence. It does not however preclude the role of Cannonier, the mastermind, from falling into the worst of the worst category. It would be necessary to look at all of the circumstances.

[246] In any event, I do not think that the worst of the worst categorisation is only referable to the heinous and sadistic method of execution of a murder. This seems clear from the fact that, in Ernest Lockhart's case, the Judicial Committee of the Privy Council recommended, by way of analogical reference, the legislative provision which in England and Wales specify types of murder, which call for the imposition of a whole life tariff, as a possible guide to specific types of murder which may be considered for the death penalty in our countries which retain that penalty.

[247] The provision is section 4 of Schedule 21 of the Criminal Justice Act 2003, which states as follows:

> "(1) If —
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> (a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and
>
> (b) the offender was aged 21 or over when he committed the offence, the appropriate starting point is a whole life order.
>
> (2) Cases that would normally fall within sub-paragraph (1)(a) include —
>
> (a) the murder of two or more persons, where each murder involves any of the following—
>
> (i) a substantial degree of premeditation or planning,
>
> (ii) the abduction of the victim, or
>
> (iii) sexual or sadistic conduct,
>
> (b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,
>
> (c) a murder done for the purpose of advancing a political, religious or ideological cause, or
>
> (d) a murder by an offender previously convicted of murder."

[248] This provision shows that egregious categories of murder, which may qualify as the worst of the worst or rarest of the rare, may be within type categories that are not necessarily sadistic in execution. Of course we are guided by the wisdom of their Lordships of the Privy Council when they cautioned that the foregoing provision should not be used as a template, and that other factors, apart from those adumbrated in the provision, such as aggravating features of the defendant's previous offending, will also have to be taken into account.[125] This also bears out the guiding principle that the determination whether a case falls within the exceptional category of the worst of the worst would still be a function of its own peculiar facts and circumstances.

[249] At first blush, the murder of Gilbert may not appear to fall within paragraph 1(2)(d) of the Criminal Justice Act 2003. This, in my view, is only because paragraph 1(2)(d) seems to suggest that its application may be to a second

[125] See para. 8 of the judgment in Ernest Lockhart's case (supra note 114).

murder which was committed by an offender who was convicted of the first murder prior to committing the second. I think, however, that it does actually fall into the category of paragraph 1(2)(d). It must be so, in my view, if this provision is not to be subjected to an artificial distinction or requirement the absurdity of which would be reflected in the following example.

[250] Suppose Mr. AB commits say 4 murders. He commits the first himself and is arrested and charged for it. He then instigates the commission of the other 3 in order to eliminate 3 witnesses to the first murder to prevent them from testifying against him. These 3 murders are committed prior to his trial and conviction for the first murder. What in my view is an absurd interpretation of paragraph 1(2)(d) of the Criminal Justice Act 2003 would mean that the 3 murders which AB instigates would never fall within the exceptional category merely because the State failed to bring him to trial and thereby obtain a conviction for the first murder prior to the commission of the other 3 murders. If, however, out of revenge AB instigates the murder of a person who testified in the trial for the first murder after trial and conviction that murder may fall within the exceptional category. State action or inaction rather than type and circumstances could then determine whether a murder falls within the exceptional category.

[251] In any event, Cannonier's instigation of the murder of Gavin Gilbert, for which he was convicted, falls, in my view, under paragraphs 1(a) and 2(a)(i) of the Criminal Justice Act 2003. That murder was carried out after he murdered PC Nisbett. The evidence shows that Cannonier premeditated and planned the murder of PC Nisbett, among other reasons, because he thought that the officer had treated him unkindly ("roughed him up") on a prior occasion. He lay in wait for him on a dark and lonely country road and killed him. He (Cannonier) then took money off PC Nisbett. He was convicted for the murder of PC Nisbett prior to his trial and conviction for the murder of Gavin Gilbert.

[252] He (Cannonier) was in prison awaiting trial for the murder PC Nisbett when he ordered the murder of Gilbert. The evidence shows that his reason for ordering the murder of Gilbert was for his own benefit. He (Cannonier) premeditated and planned the murder of Gilbert to prevent him from testifying against him (Cannonier) in his trial for the murder of PC Nisbett. He solicited the assistance of Isaac, Williams and Gardiner, through the instrumentality of one Lionel Warner who was in prison for other offences. At base the murder of Gilbert was born of an egregious plan to subvert the criminal justice system in a manner that would have the effect of engendering a fear which would so compromise the system as to render it totally ineffective. It could show the way for others to follow. It is my view that the seriousness of this offence must be exceptionally high in all of the surrounding circumstances. In the result, I would hold that Cannonier's role in the murder of Gavin Gilbert fits into the category of the worst of the worst or rarest of the rare.

The possibility of reform

[253] The trial judge did not have the benefit of all of the reports, which the Privy Council mandated for the consideration of this issue. Accordingly, we permitted further reports to be filed and facilitated further cross-examination. The trial judge had a social inquiry report prepared by a probation officer for each of the appellants, including Cannonier. He also had a psychiatric report prepared by Dr. Sharon Halliday, a general consultant psychiatrist to the Government of St. Kitts and Nevis. Dr. Halliday had recommended a psychological testing for each appellant, including Cannonier. We gave leave to adduce new evidence relative to the mental health of the four appellants, including Cannonier. Accordingly, the evidence of psychologist, Dr. Tim Green, and forensic psychiatrist, Professor Nigel Eastman, was adduced for the appellants, while the evidence of forensic psychiatrist, Dr. Hazel Othello, was adduced on behalf of the Crown.

[254] My brother Mitchell J.A. [Ag.] very helpfully reproduced important aspects of the expert opinion evidence provided by Dr. Green, Professor Eastman and Dr. Othello.[126] He concluded that this is evidence of substantial mitigation that justifies the imposition of a lesser sentence than death. I do fear that I must depart from that conclusion when all of the evidence is considered. While I have great respect for the opinions stated by these outstandingly respected experts, I have agonized greatly, for example, with the conclusion that Cannonier behaved in prison and had responded to the stability and structure of prison life. It is difficult for me to reconcile this with the fact that he ordered the murder of Gilbert from prison while he awaited trial for the murder of PC Nisbett. It is further troubling that I find no statement of real remorse by Cannonier himself for either the murder of PC Nisbett or Gavin Gilbert.

[255] Having considered all of the reports and evidence given, I am inclined to agree with the statement by Edwards J.A. that the clinical opinions and evidence of Cannonier's prospects of reform appear conjectured and speculative.[127] It is therefore my view that even if the sentencing judge had the further evidence that this court permitted to be adduced, he would not have arrived at a different conclusion and imposed a lesser sentence than the death sentence upon Cannonier for his part in the murder of Gavin Gilbert.

[256] In the foregoing premises, I would dismiss Cannonier's appeal against the death sentence for the murder of Gavin Gilbert and affirm the sentence.

Hugh A. Rawlins
Chief Justice

[126] At paragraphs 163-165 of this judgment.
[127] In paragraph 235 of this judgment.