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

SAINT LUCIA
CASE NO. SLUCHRD2006/0020
CASE NO. SLUCHRD2006/0026

BETWEEN

THE QUEEN

vs.

CLINTON GILBERT aka 'SCRATCHES'

CURLAN JOSEPH aka 'TAKER'

Appearances:

Mr. Wayne Harrow for the Defendant Clinton Gilbert
Mr. David Moyston for the Defendant Curlan Joseph
Mr. Stephen Brette Crown Counsel for the Crown

2015: April 22, May 4, July 24;
Written reasons delivered 15th October 2015

Sentencing – Non-Capital Murder – Conviction on Trial – Starting point of 30 years imprisonment – Consideration of aggravating and mitigating circumstances - Extremely serious case of murder – Murder an execution style killing in full view of the public – Little or no mitigation – A commensurate sentence is life imprisonment – Consideration of statutory dangerousness – Whether statutory dangerousness may provide separate basis for imposition of life imprisonment – Delay substantial and breaching reasonable time guarantee – Not affecting fair trial - Offence and the circumstances of its commission sufficiently grave and serious – Appropriate to acknowledge the delay – Delay having no effect on sentence.

The two defendants, Clinton Gilbert aka 'Scratches' and Curlan Joseph aka 'Taker' were tried by a jury of their peers for non-capital murder, and on the 30th October 2014, they were found guilty by unanimous verdicts. The sentencing was adjourned several times to facilitate the defendants' submissions. The evidence in the case, which must have been accepted by the jury, was that minutes before midnight on the 31st December 2005, the defendants, each being armed with firearms - Gilbert with a pistol and Joseph with a shotgun - walked up a public square in Vieux Fort and in the presence on several onlookers shot and killed one Richard Augustin aka 'Scarla'. The deceased victim was seated with two other men waiting the arrival of the 'new year' when the two

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men came up at him. Gilbert stood over him and emptied the pistol on him aiming for his head. It may have been by some curious twist of fate that the victim was not killed instantly, but somehow managed to shield his head by raising his hands. He managed to get up and tried running away. It was then, with a promise that he was going to 'finish him off' that the other defendant Joseph chased after him and shot him in the back with the shotgun. When the victim fell to the ground, Joseph was seen banging away at his head. The victim died on the spot. The two men having committed this murder in execution style in full public view, walked away from the scene guns in hand, taking time to threaten one of the shocked eyewitnesses.

Held: Each defendant is sentenced to a term of life in prison for the following reasons:

1. A person convicted of non-capital murder in St. Lucia is liable to sentenced to a maximum term of life in prison. In the absence of an expressed statutory benchmark, the legislative framework in St. Lucia ensures that a sentencing court is guided by a number of statutory guidelines and the general common law principles of sentencing. In the usual case a sentence imposed by a court must be commensurate with the seriousness of the offence, though the court has the power and discretion to impose an extended term on the basis that the defendant is considered statutorily dangerous when he poses a real risk of serious harm to the public.

2. The United Kingdom's case law and general sentencing guidance provides a useful basis for this court's approach to sentencing for non-capital murder. Following this guidance it seems, it has been the practice of the regional courts to adopt a 30 years starting point for these offences and thereafter to consider both the aggravating and mitigating factors in the case to fashion the appropriate sentence.

3. A court in St. Lucia is entitled to impose a term of life imprisonment for non capital murder where the aggravating and mitigating factors considered in context of the relevant principles demonstrate that this particular act of murder is so serious it warrants as a commensurate term a sentence of life imprisonment. In this case, these two defendants had committed an execution style killing in a savage and brutal manner. It was clear that they were determined not only to kill this man and ensure that he was dead, but also that they would do so in full view of the public clearly determined that others would be around to see who committed the act. Their clear intention and level of determination was expressed in the facts that they wore no masks and walked up the scene with guns on hand and walking calmly away when they were done, taking time to threaten an eye-witness both coming and going, to and from the killing.

4. Having regard to all the circumstances of this case, it was proper for the court to give considerations as to whether either or both of these defendants could be considered statutorily dangerous under section 1097(2)(b) of the Criminal Code. Such considerations would require that notice be given to the defendant that the court was considering an extended sentence this section. It would also require that an opportunity to address the court on the matter be given to the defendant. In considering the question of statutory dangerousness the court is entitled to have regarded the evidence presented at trial, which must have been accepted by the jury, the aggravating and mitigating features of the case and the defendant as well as the pre sentence and psychiatric reports. In this case,

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however, notwithstanding that the evidence demonstrated a serious degree of dangerousness on the part of each of these defendants, there was a significant delay before this matter came on for trial. In such a case, the court should be slow to use only the circumstances of the actual incident to ground this finding of dangerousness. The court should look to more recent material such as the pre-sentence and or the psychiatric reports. There was only one psychiatric report in this case for one of the defendants and it actually stated that he could not be considered dangerous today. The pre-sentence reports did not add much to this exercise. In these circumstances, the court is unable to make any finding that either of the defendants could be considered statutorily dangerous.

5. The delay was significant in this case and was accepted by the Crown, the administrative and judicial arms of the State was substantially responsible for the delay. It was an unreasonable delay having regard *inter alia* to the nature of this case, the number of witnesses and the period it took for this matter to come to trial. When this type of delay occurs but it does not affect the fair trial of the defendants, the acknowledgement of the breach without more may be considered proper and fitting when the offence is sufficiently grave and serious and the public interests demands that the delay should not have any effect on the sentence. In this case this offence is sufficiently grave and serious so much that this delays even though in breach of the Constitutional reasonable-time-guarantee will not have any effect on the sentence.

DECISION

[1] **RAMDHANI J. (Ag.)** The defendants, Clinton Gilbert aka 'Scratches' and Curlan Joseph aka "Taker' were jointly indicted by the Learned Director of Public Prosecutions for the offence of murder, contrary to section 85(a) of the Criminal Code, Cap. 3.01 Of the Revised Laws of St. Lucia. They were tried on this charge by judge and jury, and on the 30th October 2014, a unanimous verdict of guilty of murder was returned by the jury against both defendants.

[2] A number of events prevented the sentencing exercise from taking place until July 2015. First, it was not until June 2015 that counsel for the defendant Gilbert who had been given time to file written submissions, indicated that he would not be relying on any written submissions in the matter. Second, the court had originally agreed with Mr. Moyston that a psychiatric report was unnecessary, but during preliminary considerations of the appropriate sentence, it became obvious that such a report for each defendant was crucial. Late in June 2015, psychiatric reports were so ordered.

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The Prosecution's Case

[3] The prosecution case presented to the jury is that these two defendants, minutes before midnight on the old year's night in 2005, acting together shot and killed one Richard Augustin aka 'Scarla'.

[4] The killing took place St. Paul's Lane, Vieux Fort. According to two eyewitnesses, at about 11.30 pm on the 31st day of December 2005, Curlan Joseph and Clinton Gilbert walked out from the direction of the nearby graveyard towards the public square where the deceased victim and several other persons were sitting waiting on the incoming New Year. Each man had a gun; Joseph had a pistol and Gilbert had a shotgun. Together, each with firearm in hand, walked past one of the witnesses who was standing at his gate. One of the defendants waved the gun at this man. When they got closer to the group of men seated in the square, one of the men got up and ran away. The deceased was still seated when, the Joseph standing over him, started shooting at his head and face.

[5] The deceased victim, in a desperate effort to shield himself, raised both his arms blocking his head and face. Shot several times, he still managed to get up and started to run away. The defendant Gilbert, shouted out a promise that he would 'finish off' the deceased and ran after him and shot the fleeing deceased in his back. The deceased fell to the ground and Gilbert was seen banging down at him repeatedly with the butt of the shotgun. The two men each with the firearms in hand walked away from the scene taking time out to threaten a shocked and frozen eyewitness at the gate of a nearby yard to keep quiet about it all.

[6] The pathologist observed five gunshot entry wounds. One to the right upper neck that entered at the back of the ear through the soft tissue and exited through the right cheek. Another one was to the left back through the sixth rib, 3 cm from the midline. The third was to the upper right arm fracturing the right humerus. The fourth was to the front of the right leg outside of the knee and fifth to the outer aspect of the left upper arm. There were also five lacerations to the head. The pathologist found no blackening around any of the

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gunshot wounds supporting evidence of the distances from which shots were fired off consistent with the eyewitness accounts. The cause of death was stated as haemorraghic shock as a result of gunshot wound to the left back.

[7] At the trial, the defence's approach was essentially a challenge to the eyewitness accounts that they were in fact the person who committed the act.

The Pre Sentence Report - Curlan Joseph

[8] The defendant Curlan Joseph is, at the date of sentencing, presented to this court as a 30 year old unemployed Rastafarian.[1] He was 20 years old at the date of the commission of the offence.

[9] He has had a hard family life. He was born to a family which faced many social and economic deprivations and he faced many challenges in his youth. His relatives and his ex girlfriend variously describe him as a 'helpful', 'not a bad person' to someone who easily is influenced by bad company.

[10] Community members opine that his family structure led to him going astray early in life. He is said to be one of those troublesome young men who would gravitate to others like himself near Larry's Scrap Metal Business in Vieux Fort. He was regarded as being part of gang because of his general reputation and his association with known gang members who had ongoing issues with the deceased and his friends.

[11] In the interview with the probation officer, he has accepted playing a part in this murder. He states that he was young and unwise and made a terrible mistake which he now has to live with for the rest of his life. He says that he had no father figure in his life which resulted in him following bad company. He has expressed remorse and hopes the family will forgive him.

[1] His date of birth is the 13th August 1985.

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The Pre Sentence Report - Clinton Gilbert

[12] Clinton Gilbert also known as 'Scratches' is presented to this court as a 33 year old[2] Rastafarian. He was 24 years old at the date of the commission of the offence.

[13] He too grew up in impoverished conditions coming from a large and poor family. He is one of six siblings and he and brothers grew up with his paternal grandparents.

[14] When he was 19 years old he moved out of his grandparents' home and started living by himself. He spent about four years in Barbados living with his father and also visited his mother in St. Vincent over the years.

[15] His siblings have good things to say about him. It is community members again who state that he spent much time associating with gang members and being in the Ghetto.

[16] He too has a number of risk factors which includes low academic achievements, lack of employment skills, poor decision, gang associations and a low socio-economic situation.

The Victim – The Impact on Relatives

[17] The deceased victim was one Richard Augustin known as 'Scarla'. He was one of four children and at the time of his passing he lived at Vieux Fort with his mother and siblings. At the time of his death he was 29 years old.

[18] The death of this man was a traumatic one for the family who still mourns his passing. They still recall that it happened on New Year's Eve while his mother and sister were actually in church service.

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[2] His date of birth is the 21st December 1981

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[19] The deceased had been in a relationship and at the date of his death his girlfriend had been pregnant with his child. He has left three children. The first lives with his mother and siblings. The second lives with her mother in Canada and the third lives with her maternal grandmother.

[20] The family is hoping for closure in this matter.

The Maximum Sentence and Principle of Sentencing

[21] The prescribed penalty for non-capital murder is life imprisonment. It has been accepted that this is a whole natural life sentence. The court has a wide discretion to give any less term of imprisonment than the prescribed maximum.[3]

[22] In deciding what the appropriate sentence is in any given case, the court in St. Lucia is to have regard to the legislative scheme found in the Criminal Code Cap. 3.01 that guides punishment and restorative justice. This scheme establishes a number of statutory guidelines and effectively incorporates the common law principles or aims of punishment[4] including retribution, deterrence, prevention, rehabilitation and restoration. It is these principles that will inform a court's determination as to what is a commensurate sentence in any given case.

[23] The need to turn to these common law and statutory principles become even more apparent in the recognition that there are no statutory benchmarks in place for the offence of murder.

[24] Section 1102(2) of the Criminal Code Cap 3.01 of the Revised Laws of St. Lucia, requires the court to have due regard to the considerations relating to the rehabilitation of the offender as an aim of sentencing. Section 1102(2)(b) also requires that the court observe

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[3] Section 1123(1) of the Code states: *"Subject to the provisions of this Code or of any other enactment relating to any offence, the High Court before which any person is convicted of any offence may, in its discretion, sentence the person to any less term of imprisonment than that prescribed by this Code, or such other enactment, for such offence."*
[4] Desmond Baptiste v R Criminal Appeal No. 8 of 2003

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as a guideline in any sentence, that 'the gravity of any punishment must be commensurate with the gravity of the offence."[5] Here is where the common law principles go to work, weight being given to one or the other of these principles as the case requires. For instance, in finding the final and appropriate sentence a commensurate sentence may well be a sentence which rests more firmly on retribution than on rehabilitation.

[25] Additionally, a court in St. Lucia may well be entitled to impose a sentence of life imprisonment even when it is a sentence other than a commensurate sentence. This is one of the effects of section 1097(2)(b) which allows a longer than commensurate sentence to be imposed where the 'offence is of a violent or sexual nature' and in the opinion of the court such a term ' is necessary to protect the public from serious harm from the offender.'

[26] The defendants through their respective attorneys have effectively argued that a fixed determinate sentence should be set as a benchmark in this case and that further this was not an appropriate case for a life imprisonment and that a determinate sentence was the only commensurate sentence.

[27] No doubt as Parliament has recognized and accepted, a commensurate sentence for the offence of non-capital murder may well be a sentence of life imprisonment. Our court of appeal in **David Roberts v R** Criminal Appeal No. 8 of 2008 has accepted that:

> *"It may well be that considering the matter in the round, including the individual circumstances of the offender and the offence, punishment and deterrent may well be served by the prisoner remaining in prison for life."*[6]

[28] The current UK statutory position is that court should only impose a life imprisonment on an offender in certain circumstances for certain serious offences under the CJA 2003. Whilst such a sentence may often depend on whether the offender is considered

[5] See also section 1097(2) (a) of the Criminal Code Cap 3.01

[6] There was a constitutional challenge to a sentence of life imprisonment imposed in St. Vincent and the Grenadines in this case. The Court of Appeal held *inter alia* that: "Under section 65(1) of the Constitution, the Governor General may grant a free or conditional pardon to a person sentenced to life imprisonment, grant a respite of the imprisonment imposed; substitute a lesser punishment or remit the punishment imposed. This indicates that there is a possibility of a future release by executive clemency of a prisoner serving a life sentence. A life sentence therefore would not be incompatible with section 5 of the Constitution."

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dangerous, a sentence of life imprisonment does not always depend on a finding of dangerousness and may well be imposed on the basis of the seriousness of the offence. In **Attorney General's Reference (No 27 of 2013); R v Burinskas; R v Phillips and other appeals** [2015] 1 All ER 93 the court held:

> *"If the offender is not dangerous and s 224A of the* ***CJA 2003*** *does not apply, a determinate sentence should be passed. If the offender is not dangerous and the conditions in s 224A are satisfied then (subject to subsection (2)(a) and (b)), a life sentence must be imposed. If the offender is dangerous, the judge must consider whether the seriousness of the offence and offences associated with it justify a life sentence. Seriousness is to be construed by the consideration of: (i) the seriousness of the offence itself, on its own or with other offences associated with it in accordance with the provisions of s 143(1)[7]; this is always a matter for the judgment of the court; (ii) the offender's previous convictions, in accordance with s 143(2); (iii) the level of danger to the public posed by the offender and whether there is a reliable estimate of the length of time he will remain a danger; (iv) the available alternative sentences. If a life sentence is justified then the judge must pass a life sentence in accordance with s 225."*

[29] A finding of dangerousness may be made where the court is satisfied that there is a significant risk that the offender may commit further offences which involves serious harm to members of the public.

[30] I am of the view that even in the absence of a finding that the offender is dangerous, this court would be entitled to impose as a commensurate sentence, a sentence of life imprisonment for non-capital murder where the aggravating and general mitigating features taken together personal features of the defendant justify such a sentence. In the absence of a finding that the offender is dangerous, there must really be serious aggravating features in a case of this nature to meet this threshold.

[31] Whether it is to be sentence of life imprisonment or a fixed determinate sentence, the Crown's guidelines has also properly suggested that the court is required to bear in mind

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[7] Section 143, so far as material, provides: '(1) In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused. (2) In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to—(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and (b) the time that has elapsed since the conviction …'

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the statutory guidelines and the other classic principles of sentencing in arriving at the appropriate sentence. In the context of such an approach, it is useful to draw upon the experience of the courts both in and out of this region in considering whether the seriousness of the offence taken in the round with all the other features of the offence and the offender requires a sentence of life imprisonment or whether a determinate sentence is appropriate and then to set an appropriate benchmark for the offence and ultimately to fix the final sentence.

[32] When these guidelines were filed in 2012, the Crown's guidelines had commended the UK's minimum starting point for this offence that had been adopted by the British Virgin Islands for these types of cases. See **R v Andrew Milton and Others** Criminal Case No. 18 of 2007

[33] For the UK, the procedure that should be followed to arrive at a starting point is set out in a 'Practice Direction'. This Practice Direction requires that the court to consider the seriousness of the offence and explain Schedule 21 of the UK Criminal Justice Act 2003. In very serious cases where there are a number of aggravating factors a minimum term of 30 years is appropriate.

[34] This Practice Direction and the CJA 200 engaged the England and Wales Court of Appeal in four conjoined appeals and affirmed that the recommended tariff for very serious murders was 30 years imprisonment. **R v Sullivan, R v Gibbs, R v Elener, R v Elener** [2004] Crim 1762.

[35] The guidelines asked the court to consider **R v Neal Jones and Others** [2006] 2 Cr. App. Rep (s) 19. In that case the English court was tasked with finding a minimum sentence. The court held that where a firearm was carried for the purpose of being used as an offensive weapon, it is hard to envisage a reason for not following the guidance in Sch. 21 of the UK CJA 2003 and adopting 30 years of a starting point.

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[36] In this case, the guidelines has suggested that the court should employ a '40 years benchmark' and then make the appropriate deductions to find the appropriate sentence in cases of murder.

[37] When the learned judge in Lance Blades set a 'benchmark' of 40 years, he appeared to have already had in mind a lower 'starting sentence' and had then factored in the serious aggravating features of the offence; in other words he had already gone past the starting point and was working his way towards a final sentence. When he arrived at 40 years in those cases, it must have been because of the circumstances of those cases. I do not consider that the learned judge was setting a new 'benchmark' as in a new 'starting point sentence' in this jurisdiction.

[38] This analysis comforts me that it would be proper to continue to use the traditional starting point of 30 years for cases of murder in this jurisdiction and then to factor in the aggravating and mitigating features of the offence to arrive at a final sentence. Notionally, this court will therefore use the 30 years mark as the starting point in cases of murder and then factor in the aggravating and mitigating factors to arrive at the final sentence in this case. As will be shown in this case, starting points may become irrelevant when the offence is so serious in the context of its aggravation that no other punishment is appropriate other than a term of life imprisonment.

The Aggravating and Mitigating Factors of this Case

[39] There are a number of aggravating matters in this case. This was a gang related killing. This is one of the worst forms of public violence in the region. More and more our societies are being infiltrated by movie type violence and young persons are especially vulnerable to the dangers of this violence. Ordinary folk shudder whenever they get a brush with this scourge on our small societies.

[40] A seriously aggravating feature of the offence is the fact that both these men used illegal firearms to carry out this killing – a pistol and a shotgun. These were never recovered.

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[41] What is even more aggravating in this offence is the fact that the killing was carried out in a public place where other persons were present, and it was executed without any regards of collateral consequences.

[42] The manner of the commission of this offence is an extremely aggravating factor. Here these two men walked deliberately up to the deceased and the other persons, with guns in hand exposed for the world to see. When, they saw one man look at them, they showed neither hesitation nor uncertainty; they simply threatened him without breaking a stride and continued to where their target was. On getting there, one of them in a matter of fact manner, literally emptied his gun on the seated man whilst the other stood and watched. This must have been a surreal scene for the frozen onlookers. It was not yet done. When the wounded man desperately tried to flee for his life, the other promised that he would finish him off, and chased after him firing off a shotgun. It must have been this shot that resulted in the fatal injury – gun shot entry wound to the 'left back through the sixth rib, 3 cm from the midline'. The deliberate intention to kill manifested itself in a further cold-blooded demonstration when Joseph 'banged' away at the fallen victim after the shotgun blast. The two men calmly sauntered away.

[43] It is also an aggravating one that this killing took place minutes before a new year. Just when everyone was preparing to usher in a new year, these two men were carrying out their act to end the life of another person.

Mitigation

[44] I turn to consider the mitigation in this case and search as I might; there is not a single mitigating factor in the actual offence itself.

[45] As regards to personal mitigation, both of these men are first time offenders. It is accepted that the importance of this factor will vary from case to case depending *inter alia* on the

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nature and seriousness of the commission of the offence. As Sir Dennis Byron CJ noted in **Desmond Baptiste v R** Criminal Appeal No. 8 of 2003:

> *"As to the fact that the offender was committing crime for the first time, it seems to us that the importance of this circumstance should be left to the discretion of the sentencer as a matter that is to be taken into account with all other mitigating circumstances of the offence. It must be stressed though that the more serious the offence, the less relevant will be this circumstance. In Turner v The Queen[8], a case of armed robbery, Lord Lane, CJ stated that "the fact that a man has not much of a criminal record, if any at all, is not a powerful factor to be taken into consideration when the Court is dealing with cases of this gravity". Conversely, the lack of a criminal record would be a powerful mitigating factor where the offence is of an insubstantial nature."*

[46] This is an extremely grave and serious offence. The manner of its commission was equally frightening. The fact that they have no previous conviction will have no weight by way of mitigation.

[47] As regards Clinton Gilbert it was pointed out that he was 20 years old at the date of the commission of the offence. The court did have regard to the learning in **Desmond Baptiste** where Sir Byron stated:

> *"On the issue of the age of the offender, a sentencer should be mindful of the general undesirability of imprisoning young first offenders. For such offenders, the Court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects. Where imprisonment is required, the duration of incarceration should also take such factors into account."*

[48] Mr. Moyston also pointed me to the Consolidated Criminal Practice Direction (mandatory life sentences) UK, which, at IV 49,6 speaks to a benchmark sentence of 30 years for offenders between 18 and 20 years of age, for murders which is so serious it would require a whole life sentence.

[49] Neither the distinguished jurist nor the legislation from the UK, however, was making a statement of binding principle that the youth and giving due weight to any prospects or rehabilitation would in all cases mitigate the sentence. In the circumstances of the commission of this case, the fact that Joseph was 20 years of age when he committed this offence will not mitigate this sentence at all.

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[50] I noted that in the case of Curlan Joseph, he actually spoke of this matter with the probation officer and admitted that he had played a role in the killing. Enquiries were made of Counsel as to whether he was standing by these statement made to the probation officer and after a brief consultation with his client, counsel advised that the defendant Joseph had accepted that he played a role in the killing. There was an attempt of sorts here to use this as some show of remorse. To my mind however, it hardly does that, as it is not expressed as any real regret for the killing.

Yardstick Case Law

[51] The guidelines pointed me to a number of cases in which it recommends as being relevant to my task in this matter.

[52] In **Nardis Maynard v R** Criminal Appeal No. 12 of 2004 SKN, the appellant was convicted of the murder of one Henry and sentenced to imprisonment for life. At the time of sentencing he was 22 years old and had an impeccable record. He grew up without his father and lacked parental guidance. On appeal the conviction and sentence was upheld. The facts show that Maynard's attack upon the victim was 'particularly vicious and cold-blooded'. The attack took place in the town of Basseterre just after midnight. The appellant had approached the victim and asked for money that the victim gave to him. Then unprovoked, the appellant moved closer to the victim in an aggressive manner. A bystander held his hand and told him to chill out. He pulled his hand away and launched an attack at the victim striking him three times on his chest and thigh area with a sharp object. The appellant then turned and walked away putting his hand with the instrument under his shirt. As he walked away, Henry asked him what he had done to him and all the appellant said was 'Jah Rastafarai'. Henry, who was sitting tried to get up but fell into the street bleeding.

[53] In **Kamal Liburd and Jamal Liburd v R** Criminal Appeals Nos. 9 and 10 of 2003, two brothers aged 24 and 20 years respectively, were convicted of murder and manslaughter. Kamal was convicted for the offence of murder and was sentenced to life imprisonment,

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and Jamal was sentenced to thirty years for the offences of manslaughter. On appeal their convictions and sentences were upheld. The facts as would have been found by the jury in that case were that on a day in August 2002, the defendant Jamal was seated on a wall in Basseterre when one Bart approached him and threatened to slap him. An argument followed. Bart assaulted Jamal by striking him about his head. They then began throwing bottles and stones at each other. Bart then ran away. Kamal and Jamal then went in hot pursuit of him. Kamal caught up with Bart, grabbed him and swung a club at his head. Bart avoided the blow and wrested free. Again they chased after him and caught up with him. Kamal then inflicted a blow to Bart's head with a club when the latter was in a squatting position. Bart fell to the ground. Jamal then struck Bart on his head with a bottle.

[54] In the **Lyndon Lambert v R** Criminal Case No. 57 of 2003 the appellant who was 20 years old at the time of the offence was convicted of murder and was sentenced to life imprisonment.

[55] None of these cases have risen to the level of seriousness as the present matter.

The Appropriate Sentence

[56] This is really one of the worst of the worst killings in St. Lucia. It was callous and cold-blooded and without a doubt these men intended to kill this deceased victim. They effectively tried to obliterate him from the face of the earth having regard to the manner of the commission of the murder. One of them emptied the gun on him. When that did not kill him and he rose to flee, the other would not let him go, but promising to finish him off, chased after him and did just that. I can hardly see how this offence could rise in the range of seriousness.

[57] I consider it appropriate to make reference to **Kent Calderon & Derek Desir v R** Criminal Appeal No. 9 and 10 of 2006 SLU where Barrow JA stated:

> *"In some jurisdictions that have established different categories or murder, the use of a firearm to kill, places a homicide in the category of capital murder. While that is not the law in St. Lucia such a law demonstrates that the use of a firearm to*

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commit murder may reasonably be viewed in our Caribbean common law jurisprudence as a worst-case instance of murder. The judge mentioned the senselessness of this murder and the seeming lack of motive for it. He could, as well, have mentioned that shooting seven or eight times at a completely exposed victim displayed an intention that established murder not because the act was criminally reckless or inferentially intentional but because it manifested an intention to murder, and a desire for that result."

[58] Every way I look at this case convinces me that this was a really vicious and savage act. This is a case in which considerable emphasis ought to be given to the principles of retribution and deterrence. This is one of the worst of the non-capital murders. These men demonstrated a single-minded determination to kill the deceased that night. Not only did they set out to kill him, but they also chose to do in a manner designed to make a public statement of this killing. They chose to deliberately kill this man in a public square in Vieux Fort. They clearly wanted others to see it, and they did not care who saw it. Sadly and tragically, this was like a slow motion depiction of some men's throwback to primordial basic cruelty. They walked with guns exposed for the world to see, and when the world did see, they threatened and waved the guns around. One might hardly imagine this outside of the celluloid world. Common people must tremble when they hear of this. This type of behaviour must be a call for the strongest statement of public outrage.

[59] I have had regard to the mitigation in this case. I am convinced nonetheless that the sentence in this case should be anything but a reflection of this level of seriousness of this offence. The fitting sentence can only be a sentence of life imprisonment.

A Question of Dangerousness

[60] I have considered that there is a separate basis in this case to keep both of these men away from the public for life.

[61] Section 1097(2)(b) of the Criminal Code is relevant to this discussion. The section reads that the custodial sentence shall be:

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> *"Where the offence is of a violent or sexual nature, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender."*

[62] I have examined this provision in Kazia Chandler and I came to the view that 'under section 1097(2)(b) of the Criminal Code,' a court may give a longer than commensurate sentence or an extended sentence but not greater than the statutory maximum 'as in the opinion of the court is necessary to protect the public from serious harm from the offender.' Such a sentence may well have the effect of reducing the discount on a guilty plea or nullifying its effect altogether. This task for the court is to assess the dangerousness of the defendant. The test is that there must be a real and significant risk that the defendant may cause harm to the public (a single member of the public will suffice[8]) in the future. The question of dangerousness must be assessed on the facts and circumstances of each case. The court is entitled to have regard to all of the personal circumstances of the offender together with *"his history of offending including not just the kind of offence but its circumstances and the sentence passed, whether the offending demonstrated any pattern and the offender's thinking and attitude towards offending.*' A first time offender could be properly regarded as dangerous. A court is entitled to have regard to the pre sentence and any psychiatric reports before the court. [9] Where the latter report has been requested, it should provide an assessment on the issue of dangerousness. The defendant should be informed that the court is considering an extended sentence on the basis of dangerousness and given an opportunity to make representations on the issue. This is especially so where the court may be inclined to depart from the risk assessment in the reports.'

[63] The court in this case gave the parties notice that it also intended to consider whether these men were statutory dangerousness under section 1097(2)(b) of the Criminal Code. Psychiatric reports were ordered for each man.

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[8] See R. v Fazli (Hamayoun) [2009] EWCA Crim 939
[9] See R. v Fazli (Hamayoun) [2009] EWCA Crim 939

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[64] At the date of sentencing only one report was available; this was a report for Clinton Gilbert dated the 23 July 2015. The court was given no reason why the second report was unavailable. Having regard to the delays in this matter, the court could not wait any longer to conclude this matter.

[65] The report for Clinton Gilbert stated that the doctor did not consider that he could be considered dangerous. In the absence of a report for Curlan Joseph, I have considered that there is no psychiatric evidence that he is today dangerous.

[66] I have earlier noted that notwithstanding such a finding by the psychiatrist, it is still open to the court to make a finding of dangerousness. However there must be some basis upon which the court can act. I am of the view that where the offence is recently committed, the court may be entitled after hearing the defendants on the issue, to use the circumstances and the manner of its commission to ground such a finding. Where, as in this case however, many years has passed since the commission of the offence, a court should be hesitant to use the circumstances and in particular the manner of the commission of the offence, where that is all that is available for consideration on this issue, to ground such a finding. Further, the pre sentence reports did not take the matter much further. In this case, therefore, my hesitation has led me to a conclusion that I am unable to make any finding that the defendants are statutorily dangerous.

The Delay Factor

[67] Both defendants have urged this court through their attorneys that the court should have regard to the substantial delay in this matter. This offence was committed on the last day of December 2005. They were found guilty in October 2014. It is now July 2015. It has been nearly eight years since the commission of the offence.

[68] There has been a well-traversed debate as to whether the right to be tried within a reasonable time is separate guarantee or whether it is to be seen simply as a part of the

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right to a fair trial.[10] Perhaps it has come to rest at least for some courts in the Caribbean as in **Frank Gibson v the Attorney General** [2010] CCH. 3 an appeal from the Court of Appeal of Barbados to the Caribbean Court of Justice, the Judges have all been prepared to consider that the reasonable time entitlement is a separate guarantee contained within the constitutional right to a fair trial.

[69] In any event, in my view the opposing opinions have really been one of remedy.

[70] The Crown has accepted in this matter that the delay has been substantial and that it rests primarily on the shoulders of the Crown. These men could not have been tried earlier simply because the State had not allocated sufficient resources to try criminal cases in St. Lucia. For years there has been a single criminal court in this jurisdiction.[11] It has been nearly eight years since this offence was committed. This was a serious matter but there were no real complexities at trial. The trial itself was over in a matter of days.

[71] This gruesome murder was not given the priority it deserved. I have looked at some of the disposed cases over the years. I am aware that the Crown insists of placing those clearly less serious matters before the court that they say are ready for trial. How does a matter like this not become ready for trial after all this time? I cannot fathom how matters such as this will take a backseat to housebreaking charges involving adult offenders who are on bail where the damage to households have been minimal. This must have been one of the most terrible murders at that time. If it occurred today, it would probably still rank high up on the list among the worst.

[72] I have to say that the reasonable time guarantee provision has been breached. The question then becomes one of remedy. The delay has not affected the fair trial of this matter. In these cases, the courts have made clear that the remedy may start from one

[10] Darmalingum v The State 2000 1 WLR 2303; MILLS v HM ADVOCATE - 2003 SC(PC) 1

[11] A second criminal court, this court was only installed in September 2014. The point was made in Dyer v Watson [2004] 1 AC 379 para. 55:*"The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable* delays *on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the* reasonable time *requirement is honoured."*

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end by a simple acknowledgement of the breach, or to the other end by a dismissal of the proceedings. Along this continuum the delay may affect the sentence by a reduction that is considered appropriate to mark the breach.

[73] The acknowledgement of the breach without more is considered proper and fitting when the offence is sufficiently grave and serious and the public interests demands that the delay should not have any effect on the sentence. As the Privy Council put it in **Rummun v State of Mauritius** [2013] 1 WLR 598 at paragraph 13.[12]

> *'In some instances it may not be a factor of great weight and there may even be some cases in which, because of the strength of countervailing factors such as the gravity of the offence, it will be accorded no weight at all."*

[74] This is such an offence. It is among the worst of the worst as far as non-capital murder is concerned serious offence. It is hardly relevant that I consider that there was very strong evidence in this case, and the verdict was unanimous. The fact remains that these men have been found guilty.

[75] The public interest requires that this offence be viewed as grave and serious. The balance is not affected by any question of their anxiety of having this charge over their head for such a long period changing. Further, they were both on remand. There is no question that their life has changed in the meantime. They should not receive the benefit of this delay. Had they been tried at that time this would have been the sentence. The passing years have not diluted the seriousness or gravity of this despicable crime. The public voice cries out that they get the most severe penalty.

[76] All of this analysis really leads right back to the conclusion that the commensurate sentence is a sentence of life imprisonment.

[77] The delay will have no effect on this sentence. These men are sentenced to a term of life imprisonment.

[12] Eckle v Germany (Just Satisfaction) (1983) 13 EHRR 556, 560, para 24 cited with approval in Mills v HM Advocate 2003 SC(PC); Attorney General's Reference (No. 2 of 2001)

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[78] I wish to thank all counsel for the assistance in this matter.

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Darshan Ramdhani
High Judge (Ag.)

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