EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

BVIHCR 2005/0018
BETWEEN:

DEVIN MADURO

Applicant

And

REGINA

Respondent

BVIHCR 2008/0002

BETWEEN:

DESHAWN STOUTT

Applicant

And

REGINA

Respondent

Appearances:

Mr. Wayne Rajbansie, Director of Public Prosecutions with him Mr. Garcia Kelly, Senior Crown Counsel and Mr. O'Neal S. A. Simpson, Crown Counsel for the Crown
Mr. E. Leroy Jones and Mr. Patrick Thompson for the Devin Maduro
Mr. Patrick Thompson for Deshawn Stoutt

2016: March 21

JUDGMENT

[1] **Ellis J.:** Both of Applicants were convicted of murder after a trial before a judge and jury and subsequently sentenced to imprisonment for life.[1] At the date of their convictions, the legislative landscape of the Virgin Islands did not include a Parole Act.

[2] At that time, the sentence of mandatory life imprisonment for murder truly took effect as an indeterminate sentence in the Virgin Islands. The learned trial judges adopted the established practice under the relevant Criminal Code and sentenced the Applicants to mandatory life imprisonment. This was an indefinite period as neither the judge nor the Applicants would knew how long they would in fact serve or whether they will ever be released. The Applicant was entirely reliant on the possibility of executive clemency for release on an unconditional or licensed basis.

[3] The Virgin Islands Parole Act No.7 of 2009 was subsequently enacted on the 26th February 2009 andsome of its provisions came into force on the 20th May 2009. The Act was subsequently amended by the Parole Amendment Act No 15 of 2014 which came into force on 16th September 2011. The relevant provision is found at section 9 which provides that:

> " (1) Every prisoner serving a sentence of imprisonment for a period of at least four years except for a prisoner sentenced to imprisonment for life is eligible to be considered for parole for the first time if that prisoner
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> (a) Has served at least one-half of his or her sentence of imprisonment; and
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> (b) Has completed an approved counselling or rehabilitation programme where applicable.
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> (2) For the purposes of subsection (1) (a), where the prisoner was under the age of eighteen on the date when the sentence which he or she is serving was passed, the sentence of imprisonment shall be computed by substituting six months for twelve months.
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> (3) **A judge upon sentencing a person for imprisonment for life shall state whether such person may be eligible to be considered for parole and, if a person is found to be so eligible, state a minimum period of imprisonment that such person shall serve before being considered for parole for the first time.**

[1]Devin Maduro was convicted of murder and sentenced on 22nd June 2005. In addition to the count of murder he was also convicted of two counts of wounding with intent and one count of aggravated burglary. Deshawn Stoutt was convicted of murder and sentenced on 16th March 2009.

(4) A prisoner who is not released on licence after a parole hearing is eligible for reconsideration for parole twelve months after the date of the last hearing if the remaining part of his or her sentence is more than twelve months.

(5) For the purposes of determining the length of that part of the sentence which a prisoner has serve, any period spent in custody

(a) before conviction

(b) between conviction and sentence ; and

(c) pending the determination of an appeal against conviction or sentence

shall be taken into account as if he or she had served that period as part of the sentence, unless the court otherwise directs." Emphasis mine

[4] The Applicants are now before the Court on applications made pursuant to the Act as amended (the Act). Section 30 of the Act provides that persons who are serving a sentence of life imprisonment before the passage into force of the Act may apply to the High Court for a review of the sentence imposed and the Court shall indicate in its revised judgment when the person would be eligible for consideration for parole.The Applicants having been sentenced to imprisonment for life, this Court is now required to determine whether they are eligible to be considered for parole and if so the Court must state a minimum period of imprisonment which they must serve before being considered for parole for the first time.[2]

[5] Unfortunately, in the case of person sentenced to life imprisonment, there are no domestic rules prescribing the standard and criteria to be adopted in determining whether a whole life order is necessitated or in setting a minimum period of imprisonment. As a consequence, courts in this region have looked to the relevant guidance emanating from the United Kingdom. This position appears to have been acknowledged even at the appellate level in the case of **Jerry Martin and R.**[3]

[2]s. 9 of the Parole Act and s. 3 Parole (Amendment) Act No. 15 of 2014

[3]Jerry Martin v RHCRAP2007/003, Court of Appeal Judgment 2011 at paragraphs 49, 50- 53

[6] In arriving at a just determination, it is however appropriate that this Court look to the most recent and authoritative guidance of the Judicial Committee of the Privy Council in its judgment in **R v. Milton and Campbell.**[4] In that case, Andrew Milton and Dennis Campbell were convicted of the murder of Dorcas Elizabeth Rhule (known as Louise) and of conspiracy to murder Kerrian Ebanks, after a trial in the High Court of the British Virgin Islands before Hariprashad-Charles J. They were each sentenced to life imprisonment for murder, with eligibility for parole after 35 years, and to concurrent sentences of ten years' imprisonment for conspiracy to murder. They appealed against conviction and sentence to the Court of Appeal. Their appeals were dismissed. Campbell then appealed to the Judicial Committee against his conviction, and Milton and Campbell both appeal against their sentence.

[7] For the first time, the Privy Council had an opportunity to pronounce on the legal principles to be applied by an Eastern Caribbean court when considering Section 9 of the Act. The Committee noted that in the absence of any statutory guidelines, the courts in the region have developed a practice of using the provisions of Schedule 21 of the UK Criminal Justice Act 2003 for guidance.[5]

[8] In that regard, the Judicial Committee made the following sage observation:

> "The courts are entitled to look for guidance to sentencing practices in other countries, but the Board would not recommend that they bind themselves too closely to the regime of a particular country, including the UK. Local judges are in the best position to assess the appropriate tariff in their jurisdiction, subject to their own statutory provisions."

[9] This Court is guided by this dictum and has determined that while the English statutory framework found in Section 269 and Schedule 21 of the Criminal Justice Act 2003 is the usual point of reference it does not and should not in any way bind this Court in assessing the appropriate tariffs

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[4] [2015] UKPC 42

[5] Schedule 21 of that Act sets out "minimum terms" (a term further defined in Section 269 (2)) for those convicted of murder. The terms are in the form of standard "starting points" based on age and other factors, from which any increase or decrease is then made by the sentencing judge according to the circumstances of the crime and the offender.

in the Virgin islands. However, having carefully considered several other regimes within the Commonwealth and having considered the domestic statutory and legal framework within the BVI which informed these Applications, the Court is satisfied that that arriving at an appropriate determination in the Applications at bar, requires that this Court first allocate an appropriate starting point. In doing so, the Court must take into account the seriousness of the offence (or the combination of the offence and any one or more offences associated with it). The Court must then go on to consider the aggravating and mitigating factor, the effects of the Applicant's previous convictions, whether the offence was committed whilst on bail or licence. Finally, the Court must take into account any time served in custody or remand.

[10] In arriving at a just determination, this Court is also satisfied that it is impermissible to do so in a vacuum. The Court is therefore also entitled to have regard to any representations from the Office of the Director of Public Prosecutions, any social inquiry or prison reports, any other representations made on behalf of the Applicants, written representations made on behalf of the victim's family as to the impact upon them, the antecedents of the Applicant and the trial judge's summary (if any).

[11] Applying this methodology, the Court will first consider the appropriate starting point.

Appropriate Starting Point

[12] If for no other reason, the Privy Council's dictum in **Milton and Campbell** is helpful in that it confirms what has become the standard practice and procedure adopted by the courts in the region. Indeed, it is common ground between the Parties that there has been a slavish adherence to the English statutory guidelines and authorities. It is also contended that in applying the English guidelines, the courts in this region appear to have adopted a starting point of 30 years in respect of all murders.

[13] In commending this course to the Court, the learned Director of Public Prosecutions referred to a number of judicial authorities staring with **Milton and Campbell** where the Judicial Committee of the Privy Council upheld a 35 year sentence.

[14] The Director also referred the Court to the most recent and relevant authorityof **R v Lance Wilson aka "Goats"**[6] in which the accused was convicted for non-capital murder in March, 2015. In that case Ramdhani J. concluded that the killing was senseless but not within the category of the worst of the worst cases. The learned Judge went on to observe:

> "[26] Whether it is to be a 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 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.
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> [27] 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 number 18 of 2007.
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> [28] 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.
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> [29] 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 a sentence of 30 years imprisonment. R v Sullivan, R v Gibbs, R v Elener, R v Elener [2004] Crim 1762.
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> [30] The guidelines also suggested that this court consider a number of cases in which sentences of life imprisonment were considered appropriate for murder. These are Nardis Maynard v R No. 12 of 2004 St. Kitts and Nevis, Kamal Liburd and Jamal Liburd v R Criminal Appeal No. 9 and 10 of 2003, R v Lyndon Lambert Criminal Case No. 57 of 2003 and Java Lawrence v The DPP Criminal Appeal No, 1 of 2008. The guidelines also specifically also referred to R v Lance Blades Criminal Case No. 41 of 2011."

[6]SLUCHRD 2013/0911

[15] After considering these cases and the English guidelines, Ramdhani J. was fortified in the view that the appropriate starting point should be 30 years and at paragraph 51 of the judgement, the learned trial Judge concluded as follows:

> "[51] It is this degree of culpability that has led me to decide on a determinate sentence. I have used the starting point of 30 years and I have factored in the aggravating factors and the single mitigating factor of this case. I have given due weight to the rehabilitative aim of sentencing. To my mind the proper sentence is a sentence of 25 years imprisonment. All time spent on remand will be taken into account."

[16] The learned Director of Public Prosecutionsalso referred the Court to the November, 2015 judgment in **R v Jean Fontinelle aka Zong.**[7] The Court in that case noted that:"*This analysis comforts me that it would be proper to continue to usethe traditional starting point 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. The Court will therefore use the 30 year mark as the starting point in this offence and then factor in the aggravating and mitigating factors to arrive at the final sentence and then to make deductions for the plea*."

[17] Closer to home, the Court noted the judgment of Hariprashad Charles J in **R v David Swain.**[8] This judgement was rendered just 6 months after the Parole Act came into force. The learned trial Judge in that case referred extensively to section 269 and Schedule 21 of the Criminal Justice Act, 2003 and the Consolidated Criminal Practice Direction (Amendment No.8) (Mandatory Life Sentences).[9] The learned Judge also considered a number of English decisions where this statutory regime was applied, including **R v Sullivan; R v Gibbs; R v Elener; R v Elener**[10] where the Court of Appeal heard

[7] SLUCHRD 2001/1679 at paragraph 49
[8] CASE NO. 17 OF 2009

[9] [2005] 1 Cr, App, R. 8
[10] [2004] EWCA 1762

four conjoined appeals which raised questions as to the correct approach to be adopted by sentencing courts when applying the provisions of the Criminal Justice Act in order to set a minimum tariff period.[11]

[18] In applying the English guidelines, the Hariprashad-Charles J observed that:

> "Sch. 21 of the CJA, 2003 provides for appropriate starting points depending on the seriousness of the murder. The instant case is not so serious as to require a "whole life order" but the seriousness of the murder is particularly high as it was a murder done for gain. In my considered opinion, the appropriate starting point is 30 years: see para. 5 (2) of Sch. 21 of the CJA 2003."

[19] After applying the aggravating and mitigating factors, David Swain was eventually sentenced to life imprisonment with parole eligibility of 25 years.

[20] In **R v Lorne Parsons and Others**[12] Olivetti J. noted that the Parole Act gives no guidance as to the factors to be considered in determining whether a convicted person sentenced to life imprisonment may be eligible for parole, neither does it lay down any criteria for assisting in determining the minimum or tariff term if such a person is found to be so eligible. The learned Judge went on toconclude that the "*sanctioned approach, is to apply English practice and procedure where there is a hiatus … and thus I can properly be guided by Schedule 21 of the CJA.*"[13] The Judge went on to observe that this approach was approved by the Prosecution, and embraced by all counsel and adopted in several other local decisions. At paragraph 26 of the judgment, the court went on to accept the starting point of the tariff term for all three prisoners should be 30 years.[14]

[21] Given the apparent historical position adopted by the prosecutors in this Territory, it is therefore significant that in the cases at bar, the learned Director concurred with Counsel for the Applicants who submitted that as Schedule 21 and section 269 of the English Criminal Justice Act are substantive law

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[11] The recommended tariff for very serious murders was 30 years and 14 years for average murders

[12] Criminal Case No.9 of 2006

[13] S.48 of the Virgin islands Criminal Procedure Code

[14] The following local decisions also reflect the wholesale application of the English methodology: R v Aaron George, R v Allen Baptiste and Yan Edwards, R v Alcedo Tyson and R v Jessroy McKelly.

and not mere practice and procedure, this English statutory regime could not properly be applied in light of the lacuna.

[22] Indeed, Counsel for the Applicants went further and argued that it is entirely debatable whether there is in fact a 30 year starting point for murders in the Virgin Islands. Counsel noted that sentences for murder vary greatly in the region and he noted that in most of the cases, the courts were considering fixed or determinate sentences rather than minimum terms in the context of a parole regime. In drawing the Court's attention to this critical point of distinction, Counsel pointed to paragraph 7 of **R v Sullivan; R v Gibbs; R v Elener; R v Elener**[15] where the Court observed;

> "We now turn to consider the relevant provisions of the 2003 Act. Before considering these in detail, it is desirable to make two general points. The first is that, while all murders are grave crimes, because murder can be committed without the offender having an intention to kill, an intention to inflict grievous bodily harm being sufficient, the offence covers a particularly broad spectrum of gravity. For example, besides the sadistic killer, it covers mercy killing by a caring member of the deceased's family responding to a plea to bring terminal suffering to a more rapid conclusion. Minimum terms can range from whole life to even less than 8 years. **The second is that in order to compare a minimum term with a determinate sentence it is necessary approximately to double the determinate sentence. This is because in the case of a sentence of a fixed duration the offender is either released or eligible for parole at the half way stage. This is the position of a life prisoner only after the whole of the minimum term has been served." Emphasis mine**

[23] According to Counsel for the Applicants, this demonstrates that there is a clear and material difference between cases where a court is imposing a determinate sentence and where a Court is called upon to fix a minimum term. He urged the Court not to transpose these sentences to the Virgin Islands which has an operative Parole Act.

[24] Counsel for the Applicants then went on topoint out a trilogy of Grenadian precedents[16] in which the Court of Appeal confirmed determinate 18 year sentences for murders involving the use of

[15] [2004] EWCA Crim. 1762

[16] Elvon Barry, Zoyd Clement and Kenton Phillip v R; Michael Swayne David and Stephen Sandy v R and Nigel Sookram v R

firearms in the course of a robbery. Counsel submitted that these precedents further raise doubt as whether the purported 30 year starting point exists. Unfortunately, the Court was not provided with the relevant sentencing remarks or reasoning in these cases.

[25] According to Counsel for the Applicants, there is further cause for doubt when the Court considers that the local and regional cases which apply the 30 year starting point, all place substantial reliance on the English guidance derived from the Criminal Justice Act 2003.

[26] Counsel for the Applicantsinvited the Court to consider the genesis of the minimum regime and to determine whether it accords with the needs of this Territory. In commencing this historical perspective, Counsel forthe Applicants noted that in 1969, the death penalty was abolished in the United Kingdom. A similar abolition closely followed in the Virgin Islands so that the statutory regime imposed a sentence of life imprisonment for murder. Lawton LJ in **Turner (1975) 61 Cr. App.R. 67** confirmed that the abolition of the death penaltyhad an effect upon the length of sentences. He observed:

> "Since there is now no death penalty, the only sentence which can be imposed for the most serious crime known to the English law, treason apart, is that of life imprisonment. With very rare exceptions, those who are sentenced to life imprisonment are discharged from prison at some time. The date when they are discharged depends upon the circumstances of the offence; and it is wrongly assumed by the public that nearly all persons convicted of murder are released after about 10 years, but some are. Very few, however, are kept in custody after about 15 years.
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> This has created a difficult sentencing problem for the courts. If a man is convicted of murder, and has a reasonable chance of being let out before the expiration of 15 years, what is the appropriate sentence for someone who has been convicted of a lesser offence than murder? Ought it to be any more than the sentence which is likely to be served by someone convicted of murder? It is that aspect of this problem which has concerned this Court very much when dealing with these 17 appeals, because it seems to us that it is not in the public interest that even for grave crimes, sentences should be passed which do not correlate sensibly and fairly with the time in prison which is likely to be served by somebody who has committed murder in circumstances in which there were no mitigating circumstances."

[27] On the basis of this, Counsel for the Applicants submitted that**Turner** is authority for the proposition that life imprisonment for murder usually amounted to a 15 year term of imprisonment. He therefore submitted that it is arguable that the first minimum term amounted to a 15 year term of imprisonment.

[28] Counsel found support for this contention in the **Practice Statement of Lord Bingham dated 10th February 1997**. Under this regime, the practice was to take 15 years as the period actually to be served for the "average", "normal" or "unexceptional" murder. Lord Bingham went on to say that given the intent necessary for proof of murder, the consequences of taking life and the understandable reaction of relatives of the deceased, a substantial term will almost always be called for, save in the case of mercy killing.

[29] **Lord Bingham's Practice Statement** was later followed by **Lord Woolf's Practice Statement of 31st May 2002**. That Statement replaced the previous single normal tariff of 14 years by substituting a higher and a normal starting point of 16 (comparable to 32 years) and 12 years (comparable to 24 years)respectively. It is emphasized that they are no more than starting points. These starting points are then increased or reduced depending on the aggravating or mitigating factors.

[30] In 2003, the Criminal Justice Act was passed and there followed a further **Practice Statement on 29th July 2004** which consistent with Schedule 21 of the Criminal Justice Act set out the following starting points:

i. Whole life order

ii. 30 year starting point

iii. 25 year starting point

iv. 15 year or 12 year starting point.

[31] Schedule 21 sets out the basic starting points:

a) For adults aged 21 years old and over there are 4 starting points:

- a whole life order;
- 30 years;
- 25 years (effective from 2 March 2010); and
- 15 years.

b) For 18 - 20 year olds there are three starting points:

- 30 years;
- 25 years (effective from 2 March 2010); and
- 15 years.

c) For youths there is one 12-year starting point.

[32] The determination of the relevant starting point follows an assessment of the criteria prescribed by Schedule 21 of the Criminal Justice Act. Having set a starting point, the court must then take into account any aggravating or mitigating factors. Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point) or in the making of a whole life order.

[33] Counsel for the Applicants invited the Court to adopt the simplified approach espoused by Lord Bingham's Practice Statement 2002 and confirmed by Lord Woolf. According to Counsel, this earlier regime reflects the development of the common law and offers a sentencer an opportunity to sentence without being unduly fettered by rigid categories. In Counsel's view, the focus should

be on the particular offender and the particular offence rather than on any categories into which the murder must first be placed.

[34] During the course of the hearing, Counsel for the Applicants undertook a comprehensive review of the sentencing regimes in several Commonwealth countries in order to determine the most appropriate regime. He examinedthe statutory regimes in New Zealand[17], Australia[18], Northern Ireland[19], Canada[20] and Jamaica[21]. In almost all of these jurisdictions, the legislatures have provided comprehensive statutory frameworks which unequivocally prescribe appropriate minimum terms. Indeed, it is this fundamental difference in the BVI Act which gives rise to the uncertainty manifested in the contrasting submissions advanced before this Court.

[35] Disputing a 30 year starting point, Counsel for the Applicantsencouraged the Court to adopta 15 year starting point in the case of Devin Maduro and a 12 year starting point in the case of Deshawn Stoutt. He submitted that these starting points could then be varied upwards or downwards having regard to the relevant aggravating and mitigating factors, thus preserving a judge's discretion on sentencing.

Court's Analysis and Conclusion

[36] Parole is the conditional release of a prisoner serving a sentence of imprisonment. It allows offenders to serve a portion of their sentence in the community for the period during which they are still under sentence. In construing any parole regime it becomes readily apparent that parole seeks to uphold the ideals of humanity, tolerance, repentance and reform. It is critical as an incentive to reform and for rehabilitation. It reflects the Legislature's acknowledgment that there

[17] New Zealand Sentencing Act 2002 – prescribes a minimum terms of 10 years
[18] Crimes (Sentencing Procedure) Act 1999 – prescribes three standard non-parole periods depending on the victim age.
[19] Lord Bingham's Practice Statement 2002 – normal starting point of 12 years
[20] Criminal Code – makes a distinction between 1st (20 – 25 years) and 2nd degree murder (12 years)
[21] Parole Act - prescribes 7 – 10 years

must be a balance between the needs of the community recognizing that the community benefits from the rehabilitation of offenders and the reality of the threat to society of recidivists at large.[22]

[37] The Court is cognizant of the fact that parole is a product of both judicial and administrative decision-making. The power to grant parole is and has always been a function of the executive through a parole board. However the parole regime mandates that it is the court which is to determine whether an offender may be eligible to be considered for parole and if he is found to be so eligible, to pronounce on the minimum period of imprisonment that he shall serve before the Parole Board can consider him eligible for parole for the first time.

[38] The case at bar requires that the Court seta term after which the Applicants may become eligible for release on parole. In doing so it is critical that the Court first determine the proper approach for the fixing of a non-parole periodwhich represents the minimum term that the Applicants must serve before becoming eligible for release on parole. The Parties in this case have completely divergent views on this and despite repeated solicitations during the course of the hearing, the Court was not provided with the relevant Hansard reports or indeed any other background which would have informed these reforms.

[39] The Court has carefully considered the submissions of Counsel in the matter. The Court has also considered the relevant legal and judicial authorities. Having reviewed the regional authorities advanced by the Counsel, the Court is satisfied that there must be some caution applied before one could conclude that there is a traditional or accepted 30 year starting point in the region. It is clear to the Court that in many of the authorities referenced; the learned judges were not obliged to adjudicate upon sentence within a parole framework. Thejudgment in **R v Jean Fontinelle aka Zong** perhaps best illustrates this**.**[23] At paragraph 30 and 34 and 40 of the judgment, Ramdhani J. clarifies the remit, noting that:

[22] Power v The Queen (1974) 131 CLR 623

[23] Also see: R v Lance Wilson aka Goats; R v Clinton Gilbert and Curlan Joseph SLUCHRD 2006/20 and 2006/26

[30] "*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 that the prescribed maximum*.

[34] The defendant through his attorney has 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.

*[40] Whether it is to be a 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 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***." Emphasis mine

[40] While some guidance can be extrapolated, the Court is not satisfied that such decisions could properly serve as precedent in the context of parole.

[41] Further, the Court is guided by the appellate decision in **Andre Penn v R**[24] where Baptiste CJ (Ag.) drew the following conclusions:

> "I note however that the Full Court has pronounced upon the question as to which laws are intended to be imported by section 11 of the Supreme Court Act of the Virgin Islands. Thus in PanacomInt v Sunset Investments, Sir Vincent Floissac C J stated that section 11 relates solely to the exercise of the jurisdiction of the High Court and is therefore an intrinsically procedural

[24] Criminal Appeal No.7 of 2013 and see paragraphs 6 -14 of the judgment Persad J in R v Andre Penn Criminal Case 32 of 2009

> provision and the words "provisions", "law" and "law and practice" appearing in the section are clearly intended to be references to procedural as distinct from substantive law. **The Court held that the English Law intended to be imported by section 11 is the procedural law administered in the High Court of Justice in England and not English substantive law nor English procedural law which is adjectival and purely ancillary to English substantive law. It appears to me that in construing section 48 of the Criminal Procedure Act of the Virgin Islands, by parity of reasoning, a court is likely to come to the same conclusion.** It is instructive to note that Panacom was followed recently by the Court of Appeal in Veda Doyle v Agnes Deane." Emphasis mine

The learned Justice of Appeal went on to observe:

> "In so far as reliance is placed on the reception provision in the Criminal Procedure Act Cap 18 of the Virgin Islands, in view of the pronouncements of the Court of Appeal in the cases of Panacom; and Veda Doyle v Agnes Deane, the prospect of success on this point appears to be bleak."

[42] The Court fully adopts this conclusion. It follows from this decision and that of the Privy Council in **Milton and Campbell** that in the absence of a statutory guidelines laying down an appropriate starting point, it is no longer the "*sanctioned approach*"[25] to incorporate and indiscriminately apply thesubstantive provisions of the Criminal Justice Act 2003.

[43] The Court therefore finds that while the English statutory framework found in the Schedule 21 of Criminal Justice Act 2003 may provide useful guidance, it does not and should not bind this Court in assessing the appropriate tariffs in the British Virgin Islands. Having considered the Privy Council's caution in **Milton and Campbell**, the Court is fortified in this opinion. The application of this caution also demands a wary view of the **United Kingdom Bingham's Practice Statement 2002** which Counsel for the Applicants advocated notwithstanding his trenchant objections to the later UK Regime.

[25] R v Parsons, Hamm and Varlack Criminal Case No 9 of 2006 (BVI) at paragraph [18]

[44] What is clear is that an offender's eligibility for a non-parole period is determined by the discretion of the sentencing court. It is also clear to this Court that in formulating a sentence that a sentence cannot have regard to parole board policies and cannot speculate about future possible decisions of a parole board to grant or cancel parole.

[45] While the Virgin Islands Parole Act provides a formula for determining the minimum term for a defendantwho is sentenced to a period of at least four years,[26] the Act provides no guidance regarding the length of the non-parole periodwhere a defendant has been sentenced to imprisonment for life. It is however clear that in determining an appropriate non-parole period, a sentencing judge must impose a total effective sentence that is not only appropriate to the particular offence in the case, but must then decide whether to set a non-parole period and if so the minimum period required to "*serve the objectives of the sentence*".[27]

[46] Having reviewed the parole regimes in several countries including the United Kingdom, what is readily apparent is that a court should not to employ a mathematical approach in determining the appropriate non-parole period. Each particular case depends on the circumstances of that case and the exercise of judicial discretion.And so therefore:

> "…the length of the period on parole is a matter of discretion that will depend upon all of the circumstances of the case including the offender's prospects for rehabilitation, age (both young and old), criminal record and past parole history, and protection of the community."[28]

[47] The length of the period on parole is therefore a matter of discretion that will depend upon all of the circumstances of the case. Indeed, relevant case law has also prescribed that in fixing a non-parole period, the considerations which a sentencing judge will take into account will be the same as those applicable to the setting of a head sentence. Factors that influence the total

[26] Section 9 of the Parole Act as amended by section 3 of the Parole (Amendment) Act 2014
[27] R v Douglas [1959] VR 182
[28] Arie Freiberg, Fox and Freiberg's Sentencing: State and Federal Law in Victoria (3rd ed., 2014) 852.

effective sentence must therefore also influence the non-parole period.In the Court's judgment however, the weight to be attached to those factors and the way in which they are relevant will differ due to the different purposes underpinning each function.[29]

[48] A key factor in the length of the total effective sentence is the gravity or seriousness of the offending. This no doubt explains why the lawmakers in this Territory have sought to draw a distinction between sentences of at least 4 years as opposed to a life sentence. It would appear in the case of the former that this stems from the assessment of offenders committing offences with a lower maximum sentence as having relatively good prospects of rehabilitation.It follows that "*a more serious offence will warrant a greater non-parole period due to its deterrent effect upon others and the need to give close attention to the danger which the offender presents to the community*."[30]

[49] In order to determine seriousness, a court must have regard to two important factors. The primary indicator isthe culpability of the offender in committing the offence. According to the learned authors of the **Sentencing Handbook – Sentencing Guidelines in the Criminal Courts,** [31] there are four levels of criminal culpability where the offender:

1- "Has the intention to cause harm, with the highest culpability when an offence is planned. The worse the harm intended the greater the seriousness;

2- Is reckless as to whether harm is cause. That is where the offender appreciates that at least some harm would be caused but proceeds giving no thought to the consequences even though the extent of the risk would be obvious to most people;

[29] Bugmy v The Queen [1990] HCA 18
[30] R v Hillsley (1992) 105 ALR 560, 572
[31] Published by the English Law Society 2009

3- Has knowledge of the specific risks entailed by their actions even though they do not intend to cause the harm that results;

4- Is guilty of negligence."

[50] Culpability will generally be greater where an offender deliberately causes more harm that is necessary for the commission of the offence or where he/she targets a vulnerable victim (due to age, disability or by virtue of their job)

[51] The second factor to be considered in assessing seriousness is the harm caused, intended to be caused or which might foreseeably be caused to the individual victim or the community. Harm must always be judged in the light of the level of culpability of the offender in an individual case having regard to the motive of the offender and whether the offence was premeditated or spontaneous.

[52] Another key factor in determining an appropriate starting point is likely to be the personal circumstances of the offender. Some jurisdictions have considered the offender's prospects for rehabilitation, age, previous criminal convictions and past parole history. By way of example Schedule 21 of the English Criminal Justice Act 2003 pays significant regard to this. There are clear categories of appropriate staring points drawn on the basis of age (youth).

[53] Having reviewed the parole regimes in several Commonwealth jurisdictions, it has become clear to this Court that distinctions in non-parole periods have generallyproceeded on the basis of the gravity of the offence and by offender characteristics. In the Court's judgment a sentencer should be reluctant to apply a 30 year starting point without careful regard to such criteria.

[54] Turning now to the cases at bar, the Court has first considered whether the Applicants offending and culpability falls within the category of the "worst of the worst" which would warrant a denial of eligibility for parole or a whole life order. The Court notes that it is common ground between the

Parties that a whole life order is not warranted in the case of either Applicant. This Court concurs with that position.

[55] Having determined the Applicant's offending falls below the threshold of a whole life order, the Court must thenconsider appropriate starting points in each case. In so doing the Court accepts that the relevant facts and the seriousness of the individual offending, the personal characteristics of the offenders are to be considered. In applying the principles identified above, there can be no doubt that the Applicants have been convicted of very serious crimes. Both Applicants have been sentenced to life imprisonment for murder and it is apparent that their individual offending was quite serious.

[56] In the case of Mr. Maduro it is apparent that at the time of his offending he was a 26 year old adult male. The Crown's case was that he was married to Urlene Paul Maduro. This tempestuous and abusive marriage lasted 3 months during which Mr. Maduro threatened to kill his wife.She eventually sought refuge at her mother, Ursaline Paul Joseph's house. She made several reports to the Police and had obtained a final protection order on 22nd July 2004.

[57] The following day, Mr. Maduro unlawfully entered the house of Sunday Joseph and Ursuline Paul Joseph where his wife was staying. He was masked and armed with a machete, a shotgun containing one round of ammunition, a flashlight, a piece of cord and a Leatherman (implement containing a pliers and a knife). Mr. Maduro was convicted of the murder of Anderson Paul, a child of 13 years and the brother of Urlene Paul Maduro. The deceased child was found with a stab wound to his neck and chest inflicted with a knife or sharp object and or a machete.

[58] The Accused then went upstairs to his wife's bedroom and attacked her with the machete inflicting injuries to her side and to her head. Awakened by her sister's screams, Adele Paul ran to her parent's room to alert them. The parents, Sunday Joseph and Ursuline Paul Joseph went to Urlene's room and rushed the attacker with a pipe wrench. Mr. Maduro was armed with the

machete. Sunday Joseph received a cut to his shoulder. The machete fell and was taken up by Ursuline who used it to inflict several blows to the attacker. Once his mask was removed, Mr. Maduro's identity was revealed.

[59] In considering an appropriate starting point, the Court has noted that Mr. Maduro's culpability involved grave multiple offending culminating in the deliberate murder of Anderson Paul who was at the time of his death 13 years old. The gravity of his conduct captures that this Applicant was completely callous and coldblooded in slaying thischild. His determined and premeditated efforts indicate that he was intent on inflicting maximum harm and trauma. The gravity of his crimes includes the lingering emotional suffering and harm caused to his wife and her family. The nature of his crimes includes the harm which the Applicant intended to and did cause his wife and her family. It also includes the risk of grave harm to which others were exposed to his violence. Mr. Maduro's culpability in this case is thus very high.

[60] Mr. Maduro was an adult offender who had previously served a custodial sentence in 2003. Having applied the relevant principles indicated and having considered the Applicant's culpability, the gravity of his conduct and the consequences of his offending, the Court is satisfied that a starting point of 30 years is appropriate.

[61] In the case of Mr. Stoutt, it is common ground that his offending is of a slightly less serious category than Mr. Maduro. Nevertheless. Mr. Stoutt was convicted of a murder involving the use of a firearm. The Crown's case was that this was the culmination of a dispute between the Applicant and the deceased, Godwin Cato which had its origins in October 2006. On two successive days in October 2006, the deceased made complaints to the Police that he had been threatened on the second occasion with a gun. The first complaint occurred on 9th October 2006. The deceased complained that after he had been involved in a minor traffic accident with another

car in East End, he was threatened. The following day, the deceased made a further complaint to the Police that whilst in East End the same man threatened him with a gun.

[62] On the night of 25th January 2007, the deceased made an emergency (999) call in which he informed the police operator that the same man he had complained about before had accosted him with a gun again. With the line still open an argument with the deceased and the Applicant was recorded following which three shots could be heard. While the deceased lay dying on the road, a police officer happened to pass by. He tried to comfort the deceased who told him that he had been shot by someone of whom he had previously complained and who lived in an adjacent house. The deceased died on the street in East End as a result of 3 gunshot wounds. The Crown's case was that the assailant was the same man who had threatened the deceased.

[63] In considering an appropriate starting point in the case of Mr. Stoutt, the Court has noted that culpability is also quite high. At the time of the offence the Applicant was a 27 year old adult male. The facts disclose that a series of prior threatening behavior culminating in the deceased's coldblooded murder on a public road. In the Court's view provocation was not at issue here. Mr. Stoutt had previously threatened to kill the deceased – on one occasion, he employed the use of a firearm and it is therefore not surprising that the murder involved the use of a firearm. The gravity of his crimes includes the lingering emotional suffering and harm caused to the deceased's family. The nature of his crime also captures the broader harm that is inevitably caused to the community when crimes such as these are committed in a public setting.

[64] Having applied the relevant principles and having considered these factors, the Court is satisfied that the appropriate starting point is 25 years.

Aggravating and Mitigating Factors

[65] Having set appropriate starting points, the Court must now go on to consider any aggravating or mitigating factors, to the extent that theywere not taken into account in the choice of starting point. This may result in a minimum term that is higher or lower than the declared starting point. In the case of Mr. Maduro, the Court is satisfied that there are no relevant mitigating factors. The Court does not accept Counsel's submission that Mr. Maduro's "relative youth" is a mitigating factor. At the time of the offence, Mr. Maduro was an adult who committed the most serious of crimes. He could not in the Court's view be described as a youthful offender. Further, even if the Court was prepared to make that assumption, the Court is satisfied that in light of the seriousness of his crimes, his age would not in any event be mitigating.[32]

[66] During the course of the hearing, Counsel for the Applicant suggested that the Applicant had expressed remorse for his actions. Mr. Maduro's Social Inquiry Report reflects that he had written letters of apology to the family for his actions asking for their forgiveness. He stated that he still has possession of those letters which he would like to give to the family. It is clear to the Court that even the Applicant had demonstrated no remorse for his actions this is not an aggravating factor. However, if a person has remorse that is genuine and is attempting to rehabilitate themselves, that would be relevant in setting an appropriate term.

[67] Having reviewed the totality of the Reports submitted in regard to this Applicant the Courthas significant reservations about Mr. Maduro'sabstruse expression of remorse. The Court has reviewed the Social Inquiry and the Prison Reports. The latter report discloses that the Applicant shows remorse for his actions and wants to participate in victim awareness programmes. The former report discloses that Mr. Maduro has maintained that "his primary intention the night of July 23rd 2004 was to "*hurt my wife and no one else…I ain't kill anyone and even though I told the officers that I was with someone that night they did not investigate it*." It is therefore apparent that Mr. Maduro has consistently maintained that he did not kill "Andy". The Court has some difficulty

[32] Desmond Baptiste v R Criminal Appeal No. 8 of 2003

in discerning how this Applicant could possible feel remorse for a crime which he does not accept he committed.

[68] It is an aggravating feature that this Applicant's offending involveda significant degree of planning and premeditation. Anderson Paul was clearly a vulnerable victim whose murder was aggravated by the fact that the masked Applicant armed himself with knife and other weapons and unlawfully entered the home at night. The crime was the culmination of the Applicant's cruel and previously violent behavior and committed while in flagrant breach of a court order secured to ensure his restraint. Moreover, the Court has noted that Mr. Maduro had previous convictions and served a custodial sentence in 2003.

[69] It follows that the aggravating features far outweigh the mitigating factors in this case.

[70] In the case of Mr. Stoutt, the Court is also satisfied that there are no relevant mitigating factors. For the same reasons as are set out above, the Court does not accept that Mr. Stoutt can be described as "relatively youthful" at the time of his offence and even if such a description were apt, the Court is satisfied that the seriousness of his crimes would militate against applying this as a mitigating factor.Counsel for the Applicant also urged the Court to consider that this offence lacked premeditation and was spontaneous. The Court is not persuaded that such case could be made out given the history between the parties and the previous threats.

[71] As in the case of Mr. Maduro, the aggravating factors far outweigh the mitigating factors. This Applicant's offending is aggravated by the fact that it took place in public and involved the use of a firearm. In the Court's judgment, this was a coldblooded murder and there can be no doubt that prior to his death, the victim would have suffered*three* gunshot wounds prior to his death. This was a senseless and reckless killing which was further aggravated by the fact that the firearm in question was not recovered.

[72] The Court has also noted that Mr. Stoutt has previous convictions which do not involved violence but which involve possession of firearms and explosives. Given the serious nature of this offence and the fact that Mr. Stoutt utilized a firearm in its commission, the Court is satisfied that this has significant implications for his recidivism.

Personal Circumstances of the Applicants

[73] In determining the appropriate non-parole period, the Court has also considered the relevant reports and representations made on behalf of the Applicants. In regard to Mr. Maduro, it is apparent that he lost his parents at an early age and that he received no grief counselling to help him deal with his loss. Mr. Maduro therefore had less than typical upbringing. It is therefore not surprising that his marriage to Urlene Maduro was characterized by conflict and violence. He was clearly unable to properly process his emotions or deal with the demise of his marriage and his actions following the issuance of the protection order bear this out. The Social Development Department has recommended continued counselling in order to address his emotional issues.

[74] It is apparent that Mr. Maduro has expressed remorse for his actions as it relates to his wife. He has participated in the House of Healing and Anger Management courses while in custody and he has expressed interest in participating in the victim awareness programme. This is confirmed by the Prison Chaplain who noted that Mr. Maduro is self-aware and has expressed remorse. He also reports that he participates in religious services at the prison as well as the rehabilitation programme and is adjusting his thinking and responses to life. The Prison reports also intimate that Mr. Maduro is adjusting and responding well to custody.

[75] However, from all accounts, this development only followed his escape from lawful custody on 9th May 2009. He remained at large for five weeks until he was arrested and returned to prison. He therefore served additional sentences for escaping lawful custody and other firearm offences committed while absconding. All of his other sentences are now concluded save for the life

sentence. While the Court agrees that the offences which postdated his life sentence cannot be taken into account as an aggravating feature of his offending, the Court is satisfied given their nature that they speak to his prospects for rehabilitation which is an important factor when setting a non-parole period.

[76] Within that same context, it is also a matter of concern that this Applicant acceptsno responsibility for the murder of Anderson Paul saying only that "…*I feel bad that Andy lost his life and the hurt and pain that it cause the family."*

[77] In contrast to Mr. Maduro, Mr. Stoutt's upbringing on the other hand was characterized as disciplined but stable. Form all accounts he still has the benefit of a supportive family and is regularly visited while in custody. The reports indicate that Mr. Stoutt has participated in the House of Healing Programme in 2010/2011. Like Mr. Maduro, he is said to be responding well to custody. The Court notes that except for one offence against the prison code of discipline (smoking tobacco), his behavior is described as good, respectful polite and compliant.

[78] Although he appears to fully appreciate that impact which his actions have had on his own family and to some degree on the family of the victim, Mr. Stoutt has however expressed no genuine remorse for his actions. Instead he lays considerable blame for his predicament on the justice system stating that "the court did not handle him fair." Again, this has serious implications for his prospects for rehabilitation and the Court must properly take this into account.

[79] The Applicants' prospect for rehabilitation is a critical factor to be considered by this Court. It may very well be the case that a person who commits a murder in circumstances which are very grave but whose antecedents and personal circumstances are such as to indicate that his or her prospects of rehabilitation are high will have a shorter minimum period set than one who commits

the offence in circumstances where his or her moral culpability is somewhat reduced but whose prospects of rehabilitation are judged to be low.

[80] In the case of both Applicants, the Court is satisfied that their culpability is very high. Further notwithstanding the respective Prison and Chaplain Reports, the Court has considerable concerns about their prospects for rehabilitation.

Victim Impact Statements

[81] It is now widely accepted that the Court must pass sentence having regard to the circumstances of the offence and the circumstances of the offender taking into account as far as the Court thinks appropriate the consequences of the offence. In that vein, the Court has also considered the personal statements from both victims' families, describing the impact of the loss of their family members.

[82] Counsel for the Prosecution provided the Court with victim impact statements from Ursaline Joseph and Urlene Paul Maduro. Mrs. Joseph recounted the history of violent abuse suffered by her daughter at the hands of the Applicant Devin Maduro. It is clear from her statement that the deceased's family members have had to deal with an extraordinarily traumatic experience and have been greatly affected by this tragedy and that they are still struggling to come to terms with it. The family lives in fear of Mr. Maduro's release from custody and she describes their terror during the period when he escaped from custody. They remain fearful that he will kill all of them if he is released.

[83] The Court also had the benefit of victim impact statements from Rhona Rebecca Cato-Charles the mother of the deceased Godwin Cato. Her statement discloses that there was a strong family bond prior to her son's death and there remains a deep sense of loss, depression and grief. She indicates that her health began to deteriorate soon after her son's death. She also attributes the

misfortunes which have befallen his siblings to their grief over his death. Also left to mourn were the deceased's wife and his young daughter who can only recall her father from pictures. Mrs. Cato Charles concluded that her son's murder has disrupted her family's way of life and they have not been able to return to normalcy in the 8 years which have elapsed.

[84] While victim impact statements provide valuable information to any sentencer, the Court accepts that they should not be viewed as a vehicle by means of which the victim is permitted to play a direct role in determining the nature or quantum of the sentence that is to be meted out. In the Canadian case of **R. v. Labbe**[33], Bouck J., of the British Columbia Supreme Court, expressed the view that victim impact statements are essential for two purposes:

> "First, so the court is more aware of the harm done by the offender to the victim so that the sentencing judge has a better understanding of the offence's gravity. Second, to assure victims that the sentencing process includes them by ensuring they are not irrelevant and forgotten."

[85] And later at paragraph 52 he stated that:

> "… To my mind, it matters not if the deceased is young, promising and much–loved, or old, deranged and despised by all who knew him. The law ought not to measure the value of a life taken, for to do so would diminish every person's right to live out his or her appointed span."

[86] The use to which a Court is to put a victim impact statement is appropriately stated by the English Court of Appeal in **R v Perkins and Ors.**[34] Extrapolating the relevant dicta and applying it to the cases at bar, this Court is satisfied that the appropriate non-parole period to be imposed should not be the product of the family's subjective characterization of the degree of their suffering.The

[33] (2001)159 CCC (3d) 529 (BCCA
[34] [2013] EWCA Crim. 323

opinions of the victim's family as to what would be an appropriate minimum term would be just as irrelevant is the Court were setting the head sentence.

[87] However, a Court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and the offender, taking into account so far as it considers appropriate the consequences to the victim and the victim's family. The impact on a victim's families has assistedthe Court assessing the seriousness of the offence and it has also assisted the Court in evaluating the relevant aggravating factors.

Conclusions

[88] Ultimately, the fixing of a minimum term is an exercise of discretion undertaken with reference to established sentencing principles and requiring consideration of the individual facts of the particular case. In the context of the Virgin Islands regime, the Court's discretion is unfettered. The Court therefore has a wide discretion in weighing and balancing the relevant considerations and arriving at an appropriate outcome.

[89] The Applications at bar demand that this Court consider the objectives and principles of sentencing which are set out in the seminal case of **Desmond Baptiste v R:**

(1) Retribution - in recognition that punishment is intended to reflect society's and the legislature's abhorrence of the offence and the offender;
(2) Deterrence - to deter potential offenders and the offender himself from recidivism;
(3) Prevention - aimed at preventing the offender through incarceration from offending against the law and thus protection of the community; and
(4) Rehabilitation - aimed at assisting the offender to reform his ways so as to become a contributing member of society.

[90] In **Deakin v The Queen (1984) 58 ALJR 367** the Australian Court applied this rationale in the following way:

> "The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence: see **Power v The Queen (1974) 131 CLR 623 at 629**."[35]

[91] This Court therefore acknowledges that although the purpose of release on parole is to promote the offender's rehabilitation, rehabilitation is not the only consideration when a court fixes a non-parole period. This Court is guided by the following dictum from the High Court of Australia in **Power v the Queen:**

> **"**The judge, in fixing a non-parole period, must, we believe, have regard not to the time within which the paroling authority must consider the prisoner's case but to the time for which the prisoner must remain in confinement."

And later

> "To our minds no assistance towards the construction of the Act is to be had by considering the various objects of criminal punishment and by treating the non-parole period as retributive and the remainder of the time served in confinement as a period of rehabilitation. Confinement in a prison serves the same purposes whether before or after the expiration of a non-parole period and, throughout, it is punishment, but punishment directed towards reformation. The only difference between the two periods is that during the former the prisoner cannot be released on the ground that the punishment has served its purpose sufficiently to warrant release from confinement, whereas in the latter he can. In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention.

[35] This has been consistently approved in Bugmy v The Queen (1990) 169 CLR 525 at 531 and 536； The Queen v Shrestha (1991) 173 CLR 48 at 62 and 69

> Nor do we understand how it is said that the fixing of a non-parole period is not concerned with deterring either the prisoner himself or others from crime. Surely the requirement that a prisoner must stay in confinement for some period seen by a judge to be appropriate in all circumstances, would operate more as a deterrent than to allow the prison gates to be opened almost as soon as they have closed, that is, when the paroling authority has had time to consider whether the sentence should be served in confinement. To the extent to which deterrence is an object of imprisonment, then imprisonment without a chance or release for a longer time, rather than for a shorter time, is within that objective."

[92] Ultimately, a key principle regarding the non-parole period and its relationship to the total effective sentence is proportionality. A non-parole period must be proportionate to the total effective sentence and the gravity of the crime. Redlich JA in **Romero v The Queen**[36], giving the unanimous decision noted that:

> "The ratio between the [total effective] sentence and non-parole period more commonly found for lesser offences and lower sentences are generally unlikely to be appropriate for murder and other serious crimes attracting similarly long [total effective] sentences, as they would create inordinately long parole periods and the non-parole period would not then, as it must, also reflect the gravity of the offending. The non-parole sentence would be shortened beyond the lower limit of what might be reasonably regarded as condign punishment. Other purposes of sentencing that are relevant to fixing the non-parole period as well as to fixing the [total effective] sentence, such as deterrence and protection of the community, would not then have been given their necessary weight."

[93] To the extent that the needs of denunciation, deterrence, condign punishment and community protection demand a head sentence of a higher order, so too are they likely to dictate a higher minimum term or non-parole period. It is this consideration which makes it impossible for the court to accept the starting points (15 and 12 years respectively) proposed by Counsel for the Applicants. While a whole life order may not be warranted in these cases, the Court has assessed

[36] Romero v The Queen (2011) 32 VR 486, 493 [25]

the seriousness of the offending in both cases as very high. In the Court's judgment, this concept of proportionality and condign punishment is critical.

[94] The mandatory head sentence in the case of both Applicants is life imprisonment and the Court has also considered the need for proportionality and condign punishment. The Court has applied the relevant principles indicated and has determined that aggravating features outweigh the mitigating factors in each case and in the Court's view this warrants a variation of the starting points.

[95] Having considered all of the relevant factors including circumstances of the offending, the Applicants' personal circumstances and their prospects of rehabilitation, the Court is satisfied that minimum terms or non-parole periods should be as follows:

i. In the case of Devin Maduro – 35 years
ii. In the case of Deshawn Stoutt – 30 years.

These minimum terms will serve as the minimum amount of time which the Applicant's must spend in prison from the date of sentence before the Parole Board can order early release.

Credit for time spent on remand before sentence

[96] Finally, the Court is satisfied that it should take into account any period the Applicant's have spent on remand in connection with the offence. In setting the minimum terms therefore, the Court has determined that the Applicants are to be given full credit for any time served on remand.

Vicki Ann Ellis
High Court Judge