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

ANTIGUA AND BARBUDA
CASE NO. 62 OF 1995

BETWEEN

THE QUEEN

vs

MELLANSON HARRIS

MARVIN JOSEPH

Appearances:

Mr. Anthony Armstrong, Director of Public Prosecution and Mrs. Shannon Jones-Gittens for the Crown
Mr. Sherfield P. Bowen for the Defendants

2016: September 19, 20 October 19,
November 18, 21, 28

Criminal Law – Re-Sentencing - Murder – Conviction on Trial in 1996 – Original Sentence of Death declared unconstitutional – Order of Re-sentence – Court's approach on re-sentencing – Application of normal sentencing principles taking into account the progress made by defendants – Considerations of aggravating and mitigating features – Design and Execution of the offence justifying a whole life sentence

Unconstitutional sentence of death – Condemned prisoner of death row awaiting execution – Stay of Execution – Prisoner remaining under a sentence of death for just over 20 years – Breach of right of fair trial – Breach of guarantee against inhumane treatment – Whether constitutional breaches operates to mitigate commensurate sentence

On the 28th February 1996, the two offenders, Marvin Joseph and Mellanson Harris were found guilty by a jury of their peers of the murders of four visitors on board a yacht at Low Bay, Barbuda. The killings were committed during the course of a planned and elaborately executed robbery that bore striking similarity to an act of piracy on the high seas. The two defendants and a third man met some days before the fateful day and planned that they would board and plunder one of the several yachts in the Low Bay area. They planned and executed a separate housebreaking and stole a shotgun containing five live shells. They decided that they would 'borrow' a Boston Whaler

speedboat from Codrington Bay and use it to get to Low Bay where they had earlier hidden a small craft; this too had been earlier stolen from its owner. On the fateful night, they executed their plan, paddled up to the Yacht, the 'Challenger', which had arrived in Barbuda the day before. They climbed over the sides, Joseph with the loaded shotgun. It was their plan that they would find the occupants and tie them all up. They roused them from their sleep and tied them up, placing them to sit around a table whilst the other man and Harris pillaged the boat. When they had stolen all they could, Joseph fatally shot the young mate, one Thomas at point blank range. He then handed the gun to Samuels and told him to kill the others. Samuel declined and Harris was then handed the gun. The three remaining victims listened to the robbers discuss their impending death. The others were then shot to death. On their arrest, Harris gave three statements and these led the police to the hidden shotgun and some of the stolen goods which they had buried near the airport. Samuels eventually pleaded guilty to manslaughter and gave evidence for the prosecution.

On the 28th March 1996, both men were found guilty of murder. There and then, as a matter of course, they were then given what was then regarded as the only possible sentence for murder, the death penalty. Under this sentence of death they were imprisoned in the maximum security section of the prison awaiting their execution. In January of 2000, a warrant of death was read out to them. They were to be executed within a matter of days. They were measured for their coffins, and they saw the gallows being built. Hours before their scheduled execution, they were granted a stay by the High Court to allow for various appeals. All appeals were dismissed, but nothing more was done to carry out the death sentence. After they had spent some ten years in the maximum security wing of the prison, their risk level was effectively downgraded and they were placed in the 'general population'. In 2014, the Attorney General applied for, and in 2015 was granted an order that the sentence of death imposed on each of these men was unconstitutional. It was ordered that each man be re-sentenced by the high court. A full sentencing hearing was conducted by this Court.

Held: Each defendant is sentenced to an indeterminate term of life in prison. Each shall serve a minimum of 45 years and then shall be reviewed for early release under section 3B of the Offences against the Person Act, Cap 300, for the following reasons:

1. A court engaged in a re-sentencing of a prisoner who has been held for years under an unconstitutional sentence and whose conditions of imprisonment may have amounted to cruel and unusual punishment, may, preferably, first approach this exercise in the normal way. Such an approach would entail that the court apply those common law principles of sentencing of retribution, deterrence, prevention, rehabilitation and even restoration in arriving at a commensurate sentence. In this regard, the court must have regard to the circumstances of the case in the round, the offence and the offender having regards to the progress he has made over the years, and evaluate those aggravating and mitigating features of the case. When this is done and a notional commensurate sentence is arrived at, the court must then consider those matters, the delay and the other complaints of violations of the offender's constitutional rights. The court must consider what mitigating effect, if any, proven violations of the offender's rights, would have on the sentence.

   Considered: *Coard and others v Attorney General of Grenada (2007) 69 WIR 295; Mervin Moise v R St. Lucia Criminal Appeal No. 8 of 2003; The Republic of Walawi v Njiratenga*

Banda, Homicide Sentencing Re-hearing No. 8 of 2015;Rashid A. Pigott v The Queen - [2015] ECSCJ No. 80; Hassen Eid-En Rummun v The State of Mauritius [2013] UKPC 6

2. A court in Antigua and Barbuda is entitled to impose a term of life imprisonment for the offence of 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. Such a term of life imprisonment may mean in an appropriate case a whole life term, as there is 'no reason in principle why a crime of sufficient heinousness should not attract life-long incarceration for the purposes of punishment'.

   Considered: *R v Foy [1962] 2 All ER 246; R v Norton - [2001] All ER (D) 92 (May); Desmond Baptiste v R Criminal Appeal No. 8 of 2003; Mervyn Moise v R Saint Lucia Criminal Appeal No. 8 of 2003; R v Adebolajo and another - [2014]* All ER (D) 37 (Dec); [1] Hutchinson v United Kingdom (App. No. 57592/08) - [2015] All ER (D) 17 (Feb); *Vinter and others v United Kingdom* (Application nos 66069/09, 130/10 *and 3896/10, 9 July 2013) [2013] ECHR 645;* R v Bieber [2008] EWCA 1601; Ocalan v Turkey (No 2) *(Application Nos 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014); David Roberts v The Queen - [2009] ECSCJ No. 146; Jerry Martin v The Queen - [2011] ECSCJ No. 121 Nardis Maynard v R Criminal Appeal No. 12 of 2004 SKN; Kamal Liburd and Jamal Liburd v R Criminal Appeals Nos. 9 and 10 of 2003; Lyndon Lambert v R Criminal Case No. 57 of 2003; David Roberts v R [2009] ECSCJ No. 146; Curvin Jeremiah Isaie v R Criminal Appeal No. 6 of 2006; Rudolph Lewis v R Criminal Case No. 49 of 2011; Berthill Fox v R Criminal Appeal No. 40 of 1998; R v Avie Howell and Kaniel Martin Criminal Case Nos. 29 and 30 of 2010; R v Jay Marie Chin Criminal Case No. 31 of 2011; R v Lasana Riley and Jevorney Richards Criminal Case No. 11 of 2012,*

3. Experience has shown that when an offender commits an offence of extreme violence it may be necessary to impose a sentence which is designed not only to punish him but also be adequate enough to allow for a period within which the prisoner may be rehabilitated and also assessed for dangerousness to the public. So that even where the punitive portion may be satisfied, the prisoner may yet be incarcerated where it is determined that he is not yet rehabilitated or that he continues to be a danger to the public. These aims are properly grounded in the law and may justify a sentence greater than what is needed for mere retribution. These concepts are also ingrained in the review mechanism of section 3B of the Offences against the Persons Act, Cap 300, as such a 'minimum' ought to normally represent that portion of the sentence which is the measured and commensurate response for purposes of retribution and punishment. Therefore on this basis, a court in Antigua and Barbuda considering sentences of life imprisonment and extended sentences which local and regional courts have imposed for similar offences, must be mindful not to simply impose sentences which are consistent, but should go further and identify where possible, what portion of any sentence represents the punitive element and thereafter to allow for a review.

Considered: Section 3B of the Offences against the Person Act, Cap 300, Laws of Antigua and Barbuda; David Roberts *v The Queen - [2009] ECSCJ No. 146; Jerry Martin v The Queen - [2011] ECSCJ No. 121 Nardis Maynard v R Criminal Appeal No. 12 of 2004 SKN; Kamal Liburd and Jamal Liburd v R Criminal Appeals Nos. 9 and 10 of 2003; Lyndon Lambert v R Criminal Case No. 57 of 2003; David Roberts v R [2009] ECSCJ No. 146; Curvin Jeremiah Isaie v R Criminal Appeal No. 6 of 2006; Rudolph Lewis v R; Berthill Fox v R Criminal Appeal No. 40 of 1998; R v Avie Howell and Kaniel Martin Criminal Case Nos. 29 and 30 of 2010; R v Jay Marie Chin Criminal Case No. 31 of 2011; R v Lasana Riley and Jevorney Richards Criminal Case No. 11 of 2012,*

4. In this case, in deciding what was the factual basis of the conviction against each man the court, not being the trial court, considered the transcript of the trial as well as representations from both sides on what would have been accepted by the jury. This court was satisfied that the jury would have found that these defendants, in the course of an armed robbery, akin to an act of piracy, had killed four unarmed and defenseless persons in a savage and heinous manner. The underlying offence was elaborately planned and executed. After they had silently paddled up to and had stolen unto the yacht that night, they startled the four occupants of the yacht from their sleep and tied all of them up. They placed them around a table and then after they had searched and stolen items from the yacht, proceeded to shoot each person at point blank range. After one of them had killed the first victim, they discussed who would do the other killings as the three remaining victims listened to them in what must have been utmost fright. One of them shot the second victim, the lady on board, and then shot her husband in his chest. They then killed the captain. They had already carried out the robbery and no one posed any danger to them. They killed everyone because they wanted no witnesses. The mitigation at the date of this offence was that each man was previously of good character, and were young men, Joseph who was the mastermind was 20 years old and the Harris was 21 years old. These matters were weighed in the balance but the court considered that they could mitigate the shocking nature of this offence. Even the fact that they generally have been of good behavior in prison and are considered as rehabilitated do not mitigate a life-long sentence purely for the purposes of punishment. Had it only been for these matters, the court would have imposed a sentence of life imprisonment without the possibility of any release.

5. It is beyond doubt that an unconstitutional sentence of death was imposed on each man upon his conviction. Even though in 2015, this had been the subject of an order of court which granted a declaration of unconstitutionality, there is no doubt that the imposition of such a sentence of death amounted to cruel and inhumane treatment and a breach of the Constitutional right to a fair trial. The fact that each man had a death warrant read to him and his coffin was built for him further exacerbated these breaches. It was also a breach of each man right to a fair trial to have to wait for over 20 years to have a lawful and proper sentence imposed on them. It is recognized that constitutional breaches may operate as an extraneous mitigating feature and affect the final sentence, though in cases of extreme gravity, such breaches may have little or no weight.

Considered: *Hassen Eid-En Rummun v The State of Mauritius [2013] UKPC 6*

6. The sentence will remain a sentence of life imprisonment. In the balance, however, having regards to the serious constitutional breaches of each man's rights, and the lengthy delay, the punitive element of the sentence is to be reduced from being fixed at a whole life sentence to a period of 45 years. On the expiration of this period, the sentence of each man is to be reviewed under section 3B of the Offences against the Person Act, Cap 300 for possible early release. That reviewing court may not consider retribution but may consider other matters under section 3B. All time spent on remand and detention shall be taken into consideration in calculating the review date.

DECISION

7. RAMDHANI J. (Ag.) This is a re-sentencing exercise commenced by this Court on the 19th September 2016. At the end of the hearing, a sentence of life imprisonment with a review upon the expiration of 45 years under section 3B of the Offences against the Persons Act Cap, 300, was considered in all of the circumstances of this case to be the appropriate sentence with regards to each of the defendants for the reasons now set out.

8. In deciding what was the factual basis of the conviction against each man this Court, not being the trial court, considered the record of the trial as well as representations made by both sides as to what would have been found as facts by the jury.[1] In any event both sides agreed that the facts as set out in this decision was proven against these men.

9. The defendants, Mellanson Harris and Marvin Joseph and another man were arrested and charged in 1994 for the murders of four persons on board a yacht moored in the Low Bay area off the coast of Barbuda. The other person, one Donaldson Samuel, pleaded guilty to the offence of manslaughter and gave evidence for the prosecution and in 1996 both defendants were found guilty of murder.

[1] As Justice of Appeal Rawlins noted in Mervin Moise Criminal Appeal No. 8 of 2003: "In most murder cases, however, the trial Judge would also be the sentencing Judge. All of the facts and circumstances that surround the offence would be disclosed to the Judge in the evidence that is adduced during the trial. The Judge is at liberty to bear that evidence in mind during the sentencing phase, but only to consider the facts and circumstances in which the offence was committed. The availability of the trial record to a sentencing Judge who did not conduct the trial would have the same effect. A sentencing Judge can only draw such reasonable inferences from the facts, which he or she finds from that evidence that are relevant to the circumstances of the offence."

10. On the 26th January 1994, the yacht 'Computer Challenger' arrived from Antigua to the Low Bay Lagoon, Barbuda. There were four persons on board visiting the twin islands of Antigua and Barbuda. There was the captain Ian Cridland, his mate Thomas Williams, a young man in his 20s, and couple Norman and Kathleen Clever, the former being in her 40s and the latter his early 50s.

11. Sometime in the afternoon of the next day, the captain of a nearby yacht noticed that the dinghy of the 'Challenger' was anchored about 40 miles from the Challenger with no one nearby. He became suspicious and sent a crew member to check on the Challenger. This resulted in the gruesome discovery of four lifeless and bloodied bodies slumped and fallen around a table; 'there was blood all over'. The bodies were found bound and gagged. The subsequent police investigation led to the arrest of a number of persons. Three persons, these defendants, and one Donaldson Samuel were later charged with the murder of the four victims. Samuel pleaded guilty to manslaughter and gave evidence for the prosecution against these two defendants.

12. It was the case before the jury which the jury would have accepted that the defendants and Samuel had met several days before the attack and had planned to execute an armed robbery on any one of the yachts that frequented the Low Bay area. In preparation for this crime, the defendants Harris and Joseph planned and executed a housebreaking and stole a 12 gauge pump action shotgun from one Griffiths; the gun had five live shells at the time. It was buried until it was needed for the robbery and then was dug up.

13. It was agreed that they would use a small boat described as a 'Sunfish' which had been earlier hidden at Low Bay. (One witness testified that the 'Sunfish' had been stolen from him in October 1993.) The men agreed they would use a small speedboat, a Boston whaler which was often moored along the lagoon at Pier Codrington to get to Low Bay, Barbuda. Their plan came to fruition on the 27th January 1994 and they identified the Challenger as the target of their attack. That night they did 'borrow' and use the Boston Whaler to speed off to Low Bay where they pulled out their 'Sunfish from where they had

earlier hidden it. They then 'paddled by hand' some 15 minutes in the darkness of the night to get to the yacht.

14. When they boarded, the defendant Joseph was armed with the gun. They encountered the captain and Joseph 'stuck him up' with the gun. On their command, the captain roused the other occupants and they came out of their cabin. At gunpoint, all were immediately tied up with rope, their mouths taped. One of the victims managed to untie the rope and tried to get away. He was immediately recaptured and retied, this time the defendant Joseph did the tying. Samuel, at the direction of Joseph, went down to the cabin and searched and number of items were found, including money, a camera, and a bird gun. This lasted between 30 to 40 minutes and an hour.

15. The jury was told by the Samuel that the victims were bound, gagged and seated around a table, and that after the search was completed and items were taken and placed in a bag found on the yacht, he tried to get the defendants to leave. He said that no one listened to him. The defendant Joseph then shot the mate the young Thomas Williams. Samuel testified: "Marvin shot the young guy. He passed the gun to me. I told him I don't know how to use it. I dropped it on the step. I told him I don't know how to use… before he passed it to me he said shoot. ..then he passed it to Mel who shot the other victims.'

16. The defendant Harris gave three statements to the police and he stated in one of those that Joseph shot the first victim, Mr. Thomas and he, Harris shot the other three after Joseph passed the gun to him and told him to shoot those persons. In one of the subsequent statements, Harris also stated that he shot the first person and then Joseph who did not believe that person was dead took the gun from him and shot him in the back of his head to ensure he was dead.

17. Harris stated that he killed the others because "as one dead, I did not see no reason to keep the others alive." The medical evidence showed that Thomas was shot in his head and the pellets also hit his back suggesting he was shot from above confirming that he was seated at the table. The victim Kathleen Clever was shot next. When she was shot she

was trying to hide behind the table. There was medical evidence of the entry origin of the gunshot injury which supported that finding that she was moving. Norman Clever sitting next to her was then shot. He was shot point blank to his chest. Then the captain was shot. The medical evidence showed that he was shot point blank to his chest. The medical evidence showed there was blood in his lungs supporting a finding that he lived for about 15 minutes after he was shot.

18. Samuel told the jury that after the killings, they left the yacht on board the 'sunfish' taking the BB gun and a bag filled with the stolen items. They paddled to Low Bay and then used the speedboat, the Boston Whaler to get back to Codrington Bay. He said that the three of them hid the shotgun in a sandpit west of the airport and the bag in a sandpit southeast of the airport.

19. Harris' fingerprint was found on the tape that bound Kathleen Clever's mouth. He also gave statements accepting in large part the role he played in the murders. He also took the police to where the bag and items stolen from the yacht was found. The bag bore a label marked with the words 'Captain William Clever', 'Jethau' and his phone number.

20. These defendants were convicted on the 28th February 1996 and were on that same day sentenced to death. There was no mitigation hearing as at that time, it was considered that the sentence was a mandatory sentence in the sense that it was to be imposed as a matter of course.

21. In January 2000 a death warrant was read to each of the convicts. They were to be executed within days. They were measured for their coffins. Hours before their execution was to be carried out the high court granted a stay of execution to allow for various appeals to be filed. Those appeals have since been pursued but the convictions and sentences were affirmed. With the passage of time, the rulings by the Privy Council in R v Pratt and Morgan [1994] 2 AC 1 became relevant and it appeared that the prison authorities accordingly took no steps to carry out the execution of the convicts. No formal pronouncements or orders, however, were made at the time and for all intents and

purposes, these men remained in prison under the original sentence of death. Each spent some ten years in maximum security section of the prison and were then transferred to the 'general population' on the basis of their conduct and an assessment that their risk level was low.

22. In 2014, the Attorney General, fulfilling an obligation of the State, took matters in his hands, and on behalf of these men and five others who were similarly being held under sentences of death for unrelated offences, a claim by way of Originating Motion was filed in the high court for orders that the sentences of death which had been imposed on each man as a matter of course as a mandatory sentence was unconstitutional.[2] On the 4th June 2015, the Honourable Justice Cottle granted the declaration which was sought and ordered that each of these men be re-sentenced by the high court at the earliest opportunity.

23. When this matter came on for re-sentencing each of these men had spent just over 20 years in prison, ten of which was spent in maximum security. It also seemed that when notice was sent out in September 2016 to each of the defendants to attend to their sentencing hearing, neither man had been informed of the order made by Justice Cottle. It also became clear that even the prison authorities had not been formally notified of the order and records of the Prison continued to reflect that each man was under a sentence of death.

The Mitigation Hearing

24. The evidence considered at the mitigation hearing included the testimony of several witnesses, a pre-sentence report from the probation department which included a victim impact statement and a psychiatric report and an addendum to that report prepared by Dr. James A. King. The Court also received and considered sentencing guidelines from the Crown and written submissions from Mr. Bowen for both convicts.

[2] Claim No. ANUHCV 2014/0359

The Pre-Sentence Report – Mellanson Harris

25. At the date of sentencing the convicted man was presented to this court as a 43 years old man who has been in prison since February 1994. He was 21 years old at the date of the commission of the offence.

26. Prior to this offence, the defendant lived in Barbuda and there is a bare mention in this report that the choices made by the defendant may have been as a result of some sort of peer pressure coming from his questionable associations at that time. The report does also mention that he had lived and attended high school in New York during some period of his youth.

27. The rest of the report presented information related to the defendant's years in prison and mention was made of the hardships he suffered in prison. In this regard, apart from the trauma he would have suffered for being on death row and having a death warrant read out to him, a report of incidents of beatings at the hands of prison officials are also included.

28. Most of the report appeared to be focused on the defendant's potential to re-assimilate into society as it leaned towards suggesting that the defendant be given a sentence which would see his release in the near future.

29. The report confirms evidence from the prison officials that the defendant is regarded as a model prisoner being hardworking and respectful of authority. He is regard by officials as a rehabilitated man who can use his own experience to guide others away from crime.

30. The report informs the court that the defendant, who learnt auto body work and repairs in prison and is now skilled to the point of managing the prison's workshop. He has managed to acquire sufficient tools to run his own shop which he plans to use when he opens his own body work and repair shop in Barbuda. In fact, the report informs that the defendant

has inherited a four-bedroom property from his deceased father; it is being cared for by a family member.

31. The report goes on to state that the community members do not fear the defendant and they are ready to accept his return to society 'when' (sic) he is released.

32. The court was able to glean from the report that the State recourses, through agencies such as the Antigua Tourism Authority have a challenging task to mitigate the negative impact of such crime, and that measures include placing greater emphasis on the safety and security of visitors to these shores.

Mellanson Harris - 2013 Report from the Acting Superintendent of Prison and Oral Evidence from Current Prison Superintendent and Senior Officer

33. The 2013 report from former superintendent Percy Adams was admitted by consent. It noted that after the warrant of execution was stayed in 2000, the defendant Harris showed the ability to understand that he is in prison and that rules and regulations must be adhered to. This report noted that the defendant had shown that he has matured, that he is respectful to others and that he had taken rehabilitation seriously.

34. This theme was supported by the current head of the prison, Mr. Albert Wade who took on his role in November 2014 and from that time had the opportunity to observe the defendant Harris in prison.

35. He confirms that the defendant who manages the auto body and repair shop in prison is a highly trusted prisoner. He describes the prisoner as highly motivated with good history in prison. He is often relied on by prison officials to assist in various areas in prison. This prisoner is reformed and is ready for release into society.

36. Officer Grant Beggs, the Principal Prison Officer who received the defendant into maximum security years ago also stated that the defendant has been a model prisoner over the years and opined that he is reformed and ready for release into society.

The Psychiatric Report on Mellanson Harris

37. A psychiatric assessment of this offender was conducted by Dr. James A. King and a report was presented. This report noted that the offender was presented as a man without any previous history of aggression or violence prior to the murder itself. The doctor noted that 'no symptoms consistent with a psychotic, mood or anxiety disorder were elicited during the evaluation'. It further noted that the offender's 'insight, judgment and impulse control were adequate'. No 'serious psychological abnormality were detected. The doctor noted that 'no major psychiatric/mental health issues past or present were identified.' He was considered competent to participate in his sentencing hearing.

38. This defendant was also assessed for his risk of dangerousness. The doctor stated that this defendant's history has raised the question of him having undiagnosed ADHD which should be further assessed.' His risk of recidivism is considered low to moderate.

The Pre-Sentence Report of Marvin King Joseph

39. At the date of sentencing the defendant is presented as a 43 years-old single man with a daughter who is 23 years old. He has spent the last 22 years in prison for this offence. He was 20 years old when he committed the offence. His date of birth is recorded as the 30th November 1973.

40. This report did provide more information on this defendant's pre-incarceration life. He has five siblings, and though he lived primarily with his mother, his father was very influential in his life and from all indications the defendant had a good upbringing. He attended church and from an early age was working in the construction field. Both his father and mother have suggested that his poor decision making which led to this crime may have come from

his poor associations. His parents are prepared to assist him should he be released; his father has even prepared a house for him (the court was supplied with a photograph of this building).

41. The defendant's daughter was 10 months old when this offence was committed. The report states that she was 19 years old 'when she was told the truth' and that for many years she was bullied in school because of the crime. She states that she continues to be confused by this matter and is trying hard to put it behind her.

42. The report gives a brief overview of the defendant's conduct in prison. When he was first incarcerated, he resisted the authority of the prison but in more recent years, he has become more respectful to the point where he is regarded as quiet and soft spoken. He keeps to himself and today he has no conflict with the prison authorities.

43. The community memory of the defendant revealed that prior to this crime the defendant was generally well liked and was viewed as a jovial person. One senior member of the Barbuda community did say that the defendant had been the leader of a violent gang in Barbuda. Some members of the community expressed unease at the possible release of the defendant suggesting that he should remain in prison.

44. The report informed the court that the Barbuda Tourism Department Authority effectively felt that the State had done well to mitigate the adverse effects of these types of crimes. The authority did express some concern about the release of this defendant, and a suggestion was made that if release was being considered that some probationary monitoring scheme be implemented.

45. The report also exhibited a letter from a Reverend Nigel Henry of the Barbuda Pentecostal Church written in September 2015 to the Governor General seeking clemency for this defendant.

2013 Report from the Acting Superintendent of Prison and Oral Evidence from Current Prison Superintendent and Senior Officer on Marvin Joseph

46. The 2013 report from the former superintendent of prison was admitted by consent. There are several relevant aspects to this report. It states that after the death warrant was read to the defendant on the 19th January 2000: "A stay of execution as granted and since then inmate Marvin Joseph has not displayed any part of remorse, he is angry towards the Judicial System. However, he was given the opportunity to work in the craft shop.' It goes on to say that his 'attitude towards the prison authority is left much to be desired, and is 'one that is not geared towards rehabilitation."

47. The current superintendent of prison, Mr. Albert Wade gave oral evidence. He stated he met this defendant when he took on his current duties in November 2014. He remembers that the defendant was reading a book and learnt that the defendant was an avid reader who kept to himself. He considered that this defendant was 'sufficiently rehabilitated' that he placed him on the Prison's 'environmental programme' which allowed the defendant to do work on the outside of the prison.

48. The court learnt that an incident led to him being taken off the programme. That incident related to him posing for photographs with a member of the public on the beach where prison work was being done.

49. The Superintendent stated that the defendant could not be considered a model prisoner, but he opined that he believed that it would be safe to release him back into society.

50. Mr. Grant Beggs, the Principal Prison Officer knew this defendant from the time he was first incarcerated and kept in maximum security. He said that after 10 years, the defendant was transferred out of Maximum and placed in the 'general population'. He said that this defendant has been interested in academics and worked in the craft shop producing craft for sale to the public. He said that this defendant has never been involved in any violence or gang related activities in prison. He is willing to assist and volunteers and tries to

channel his energies to positive things. He states that he believes that this defendant is reformed and can be released back into society.

The Psychiatric Reports on Marvin Joseph

51. A psychiatric assessment of this offender was also conducted by Dr. James A. King and a report was presented. This report noted that the offender was presented as a man without any previous history of aggression or violence prior to the murder itself. The doctor noted that this offender did not 'have any symptoms consistent with any affective, psychotic or anxiety disorder'. In considering whether there was need for external control, the doctor opined that 'no treatment issues were identified'. He was deemed competent to participate in his sentencing hearing.

52. The doctor assessed his risk of dangerousness. He opined that because of his drug addiction, this defendant would require ongoing treatment. Further because of his limited education and lack of vocational skills, he would need structured guidance to assist him on release. If this is provided, his risk of recidivism should be relatively low to moderate.

The Victims – The Impact of the Murders

53. Four persons died that day. These victims, all visitors to Antigua and Barbuda, were the captain of the yacht Ian Cridland a man in his thirties, the mate of the yacht, Thomas Williams who was in his twenties, and the couple Kathleen who was in her forties and Norman Clever who was in his fifties.

54. The probation officers were unable to source any relatives of the deceased captain, Mr. Cridland and the deceased mate, Mr. Thomas.

55. Ms.Bonnie Clever Floyd, the daughter of the deceased provided a written impact statement and on the 19th October 2016, gave oral evidence in court at the hearing to express the impact of the offence on her family and herself.

56. She was 33 years old when her parents died. She states that her mother was a 'Cordon-Bleu Chef and the Co-Administrator with her father of the island Jethau in the English Channel. She said her father was a brilliant man and her parents played a great role in her life; her mother was her 'best friend' and her father a 'wise counsellor'. She stated that her mother was a warm person who 'knew no strangers' and was the 'sweetest kindest woman who never wanted anyone to be sad'.

57. Ms. Clever-Floyd has given her life to Christ and is now a 'Christian Speaker and Author' and has actually does some of her life's work in the islands. She has made several trips to Antigua and Barbuda. She stated that she has forgiven the defendants and has taken the pain of the tragedy and 'turn[ed] it into something good'. She did express her views that these defendants should remain in prison for the rest of their lives. (As a matter of law, this court was obliged to disregard this statement in these proceedings.)

58. It was obvious to the court that the tragedy of these murders has continued to affect this family to this day. There has been many dark moments for this family. Ms. Floyd today states that she is now older than her mother who was killed that day. She relates to the court that other siblings (her two step brothers and two sisters) were similarly affected. Her brothers were 'destroyed' and have never been the same. She informed the court that this incident had torn her family apart as others have lost their faith refusing to believe that God could allow such a tragedy to take place.

The Submissions for the Defendants

59. Mr. Bowen for the defendant made oral arguments and presented the court with written submissions.

60. The thrust of these submissions is that these defendants have suffered considerably by the imposition of the original unconstitutional sentence, the circumstances surrounding their near execution and the circumstances of their incarceration. He argued that they

should be given a fixed term of imprisonment which would realize in their early release from prison.

61. Counsel argued that the defendant spent some 23 and a half years in prison for this offence, and after it would have been impossible to execute them on the Pratt and Morgan principle, they continued to languish in prison without certainty as to their position. The period of delay alone should warrant a substantial discount in the sentence.

62. Learned Counsel also launched a separate argument against the imposition of any life sentence. He submitted that the facts show that the death penalty was off the table in February 2001, but no one in authority took any step until 2015 to alleviate the defendants' agony, fear, despair and hopelessness. Their legal position, known to them was that they continued to be under a sentence of death until Justice Cottle declared the sentences unconstitutional in 2015.

63. All of this he argues have constituted in cruel and inhumane treatments to them, and that should be reflected in the sentence.

The Applicable Principles of Sentencing

64. There has been considerable emphasis on the fact that this re-sentencing exercise is taking place more than 20 years after these men were convicted and sentenced to death, and more than 22 years since they had been first detained for the offence. There has even been a delay of more than a year after Justice Cottle quashed the death sentence and ordered that they be re-sentenced. Certain aspects of their treatment in prison has been identified and submission have been made that these ought to affect the final sentence for each man.

65. Whether these matters will have the effect advocated for, must be informed by a proper approach to this sentencing exercise. This court is sitting as a criminal court exercising all

of the jurisdictions of the sentencing judge at the end of any trial.[3] Any court tasked with the sentencing of an offender may, as a preferred approach first consider and apply in the usual manner, those ordinary and relevant principles of sentencing applicable to the subject offence, and having regard to the progress of the defendants as they now stand.[4] In this process, the court will take into consideration, any new statutory rules which may operate to the benefit of the offenders.[5] In keeping with this approach, it is only after the court has arrived at a notionally appropriate sentence that the court should have regard to those unique matters including complaints of constitutional breaches which have arisen out of the circumstances of the original sentence, the delay and the incarceration to determine whether they would have any mitigating effect on that sentence.[6] This is the approach that this Court will take.

66. This court is also well aware that it was not the trial court. For this reason, the court carefully examined the record to identify what were the underlying facts which would have been proven to the court and what inferences could have been clearly drawn from those facts. In this regard the court also heard representations from both sides on what were the undisputed facts in this case.[7]

67. It is accepted by both sides and this court agrees, that the prescribed and now discretionary death penalty is not relevant in this sentencing exercise. If it is necessary to state, it is this court's view that such a penalty may not have been appropriate for this case in any event, having regards to the principles set out in R v Trimmingham - [2010] 1 LRC 205. There the Privy Council made it clear such a penalty was only appropriate in rare cases; the worst of the worst murders. It was held that two principles must be followed:

> *"First, that the death sentence should be imposed only in cases which, on the facts of the offence, were the most extreme and exceptional 'the worst of the worst' or 'the rarest of the rare'. In considering whether a particular case fell into that category, the judge should compare it with other murder cases and not with*

[3] See for a similar approach the decision in The Republic of Walawi v Njiratenga Banda, Homicide Sentencing Re-hearing No. 8 of 2015

[4] See Coard and others v Attorney General of Grenada (2007) 69 WIR 295

[5] Such as Section 3B of the Offences against the Person Act, Cap 300, Laws of Antigua and Barbuda

[6] See Rashid A. Pigott v The Queen - [2015] ECSCJ No. 80; Hassen Eid-En Rummun v The State of Mauritius [2013] UKPC 6

[7] See Mervin Moise v R Criminal Appeal No. 8 of 2003

ordinary civilised behaviour. The second principle was that, for the death sentence to be imposed, there should be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances were to be taken into account insofar as they might operate in his favour by way of mitigation and were not to weigh in the scales against him."

These men would have been very young men at the time and it would have been difficult to see how a finding could have been made that there would have been no reasonable prospect of reform.

68. The death penalty not being relevant, the maximum penalty which may be considered for this offence is a term of life imprisonment. Under the common law a sentence of life imprisonment means imprisonment for the whole of the natural life of the prisoner, so much so that even if a prisoner is released on licence this sentence continues to remain on him until his death.[8]

69. In deciding whether a sentence of life imprisonment or lesser fixed term is appropriate in relation to each of these men, this Court, in the absence of any statutory scheme is guided by the common law principles or aims of punishment[9] including retribution, deterrence, prevention, rehabilitation as well as restoration. It is these principles, their individual weight in any case that will inform this Court's determination in its evaluative exercise, considering both aggravating and mitigating factors, as to what is a commensurate and appropriate sentence in this matter.

70. So, when is a term of life imprisonment appropriate in a case or murder? When is a lesser term appropriate? Guidance has surely been provided as to the matters the court must consider. As Rawlins J.A. stated "It is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the

[8] See R v Foy [1962] 2 All ER 246; R v Norton - [2001] All ER (D) 92 (May)
[9] Desmond Baptiste v R Criminal Appeal No. 8 of 2003

possibility of reform and social re-adaptation of the convicted person. ... The Judge may accord greater importance to the circumstances, which relate to the commission of the offence.[10]

71. In using these matters in finding its way to a life sentence, there is also no shortage of guidance by way of broad expressions of principles. Our court of appeal in David Roberts v R Criminal Appeal No. 8 of 2008 has stated 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."*[11]

72. Cases have made it clear that this has been one of the underlying themes of life imprisonment cases, namely that it is presumptively applicable for punishment and deterrence and for 'reserved for offences of utmost gravity'. In fact, Lord Bingham of Cornhill in his own inimical manner offered that there could be 'no reason, in principle, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment.' R v Wilkinson [2010] 1 Cr. App. R(S) 100.

73. So it is then left to the experience of the law, and the individual court's own sense as to where a particular case falls in that sliding scale of bad cases, worse cases and cases which are the worst of the worst. Judges must be mindful and must give due regards to other cases and make comparisons without being mechanistic.[12]

74. Whole life sentences have been considered proper in other jurisdictions. Even the European Court of Human Rights have clearly accepted that such sentences will withstand

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[10] Per Rawlins J.A. [Ag.] (as he then was) in Mervyn Moise v The Queen, Saint Lucia Criminal Appeal No. 8 of 2003 (delivered 15th July 2005, unreported) at paras. 18 and 19.

[11] 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."

[12] See Trimmingham [2010] 1 LRC 205

constitutional scrutiny where they are justified, commensurate and capable of being reducible.[13]

75. A vivid example of a whole life sentence withstanding scrutiny of a higher court in recent history can be found in R v Adebolajo and another - [2014] AII ER (D) 37 (Dec) 'The first defendant (D1), aged 29, and the second defendant (D2), aged 22, had been accused of the murder of a British soldier, L. D2 had converted to Islam when he was 17. The defendants, who were both British citizens, were extremists and had decided that, to advance their cause, they would murder a soldier in public. In May 2013, the defendants parked up and waited near an army barracks. L happened to walk past, wearing a 'Help for Heroes' top and carrying an army rucksack. The defendants stalked him. L crossed the road and D1 accelerated his car and ran L down from behind. L was unconscious and unable to defend himself. The defendants got out of the car, armed with knives, and killed L. That was seen, as intended, by members of the public. D1 made a political statement, the effect of which was to seek to justify the acts.' D1 was given a whole life sentence and the other man for his age and issues related to his mental health was given a 45 years sentence. There was an appeal related to several issues including sentence. The court of appeal dismissed the appeal and on the whole life sentence stated: "Paragraph 4 of Sch 21 to the 2003 Act had been the starting point for sentencing. There had been more than sufficient evidence to conclude that the murder had been solely for the purpose of a political or ideological cause. Further, it was plain that D1 had intended to commit a barbaric murder for purposes intended to have maximum effect. Having killed L, he had gloried in the murder and had sought to advance his political and ideological cause. [It was held that i]n all the circumstances, there was no conceivable basis upon which the whole life order imposed could be appealed.'

76. A much older case is Hutchinson in which a whole life sentence was imposed. In October 1983, the applicant broke into a family home, stabbed to death a man, his wife and their adult son and repeatedly raped their 18 year-old daughter, having first dragged her past

[13] *Kafkaris v Cyprus* [2008] ECHR 21906/04; See de Boucherville v Mauritius - (2008) 25 BHRC 433 where there was no proper review mechanism.

her father's body. He was arrested several weeks later and charged with the offences. At trial he pleaded not guilty, denying the killings and claiming that the sex had been consensual. On 14 September 1984, at Sheffield Crown Court, he was convicted of aggravated burglary, rape and three counts of murder. A challenge to the European Court in 2015 on the basis that the sentence in invalid as being irreducible was dismissed as the Secretary of State had a power to consider early release.[14]

77. Whilst it is clear that the courts are prepared to impose a whole life term for grave and heinous offences even where the offender have had previously good character, it has been recognized that even such 'lifers' may have their sentences reduced by proper and effective review mechanism so that a sentence which may have started out as a whole life sentence may very be 'reduced' on a review. [15]

78. Most instances of a life sentence therefore operates as an indeterminate sentence. Jurisdictions with review mechanism allow courts to set identifiable tariff or a minimum punitive period which the offender must serve before he is reviewed under a statutory scheme for early release. (In Antigua and Barbuda, such a sentences would also prevent the operation of section 211 of the Prison Act, Cap 341 insofar as it relates the 'life sentence'. It would of course not relate to any fixed minimum period.)

79. Some jurisdictions have provided guidelines which inform whether a court should impose a discretionary life sentence in any given case. In the UK, a mandatory life sentence is required in all cases of murder. The legislation in the UK sets out examples of cases of murder in which a "whole life order" may be the appropriate starting point: (i) the murder of two or more persons where each murder involves a substantial degree of premeditation, the abduction of the victim, or sexual or sadistic conduct; (ii) the murder of a child if involving the abduction of the child or sexual or sadistic motivation; (iii) a murder for the

[14] Hutchinson v United Kingdom (App. No. 57592/08) - [2015] All ER (D) 17 (Feb

[15] Section 3B of the Offences against the Persons Act, Cap 300; see the European cases treating with the irreducible nature of a life sentence e.g. Vinter and others v United Kingdom (Application nos 66069/09, 130/10 and 3896/10, 9 July 2013) [2013] ECHR 645; R v Bieber [2008] EWCA 1601; Ocalan v Turkey (No 2) (Application Nos 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014); See David Roberts v The Queen - [2009] ECSCJ No. 146; Jerry Martin v The Queen - [2011] ECSCJ No. 121

purpose of advancing a political, religious or ideological cause; or (iv) a murder by an offender previously convicted of murder.'[16] Tariff periods are required to be fixed and reviews will follow.

80. The experience of the courts have shown an approach that a starting point of life imprisonment is considered appropriate where the offence falls into a notional category of extremely serious and grave, but a real possibility exists that changing circumstances may lead a court to conclude that the prisoner having satisfied all the punitive elements of his sentence is sufficiently rehabilitated and there is no other matters of public interests which should not operate against his release.

81. The effect of this approach is that would be a rare case where the offender would have been required to serve a whole life sentence, such a sentence only being reducible on the basis of the exercise of the clemency by the Governor General. It recognises the primacy which is given to rehabilitation and restorative justice in keeping with the State's obligation to subscribe to a modern approach to punishment.

82. This jurisdiction has given legislative voice to this recognition in providing an available scheme for early release for offenders serving life or extended sentences for certain offences. In Antigua and Barbuda, the possibility of the review of life terms or long term sentences for certain offences including murder, is now addressed by the Offences Against the Person Act, Cap 300 as amended by the Offences Against the Person (Amendment) Act No. 13 of 2013. The new section 3B states:

> *"(1) Where a person is convicted of any offence under Part I and part II of this Act, and sentenced to life imprisonment or to a lesser period of imprisonment, the court may order that the sentence imposed on the convicted person be reviewed by a court of competent jurisdiction after the person has served not less than a period of –*
>
> *(a) Thirty years, where the sentence is for life imprisonment, and thereafter at intervals of five years; and*

[16] See Law of Retaliation or Revenge - (2014) 178 JPN 282 for a discussion inter alia of the imposition of f whole life terms'

(b) Twenty years, in the case of a lesser term of imprisonment and thereafter at intervals of three years,

and there consider whether it is any longer necessary for the purposes of deterrence, retribution, rehabilitation and in the public interest that the convicted person should be further detained.

(2) A review under subsection (1) shall take into account a report submitted by the Visiting Committee appointed under Rule 3 of the Prison Rules.

(3) An application for review may be made by counsel on behalf of the prisoner or by the prisoner on his own behalf or initiated by the Director of Public Prosecutions or the Superintendent of Prison."

83. It is provision which has already been called in aid by the courts. This provision is intended to apply not only to future offenders about to be sentenced, but also person who were already serving sentences at the commencement of the section. It also arises for consideration with regards to these men who are now being re-sentenced.

84. It is obvious that the section does not specify that review dates must be fixed or that they should be 30 years into a life term or 20 years into a fixed term sentence. The section gives the court a discretion as to whether a review date should be fixed. This is a statement of the intention of parliament to allow the courts to continue to impose whole life sentences where they are appropriate without the possibility of early release, or at least not at the date of the imposition of the original sentence. Further, the '30 years and 20 years periods' are the minimum periods and a court may fix a review date beyond the minimum. It is open to the court to set review dates well beyond the 20 or 30 years periods. It would seem to me that in an appropriate case, the court may fix a review date which is less than the minimum dictated by the provision.[17]

85. These review provisions provide for a useful scheme within the context of the sentencing decisions of regional courts to ensure that life sentences and extended sentences are subjected to some robust review mechanism. A few of those cases show the readiness of

[17] See R v Selassie; R v Pearman - [2014] 2 LRC 511

local and regional courts to impose lengthy extended sentences and life sentences for murder. A few of these will be examined.

86. In Berthill Fox v R Criminal Apppeal No. 40 of 1998, the appellant returning from overseas was labouring under the belief that his fiancé was unfaithful to him. He went to her mother's place of business and shot and killed his fiancé and her mother in cold blood. He was sentenced to two sentences of life imprisonment. On appeal these sentences were confirmed but ordered to run concurrently.

87. In R v Avie Howell and Kaniel Martin Criminal Case Nos. 29 and 30 of 2010, the defendants shot and killed three persons in July and August of 2008. The first two were a newlywed couple from the United Kingdom honeymooning in Antigua. The defendant had broken into their cottage and robbed and killed them. The third person was a shop keeper who they also robbed and killed at her home. They were given three consecutive life terms on conviction.

88. In the St. Kitts' case of 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 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.

89. In another St. Kitts case of 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, 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.

90. In the Grenadian case of 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.

91. In the St. Vincent and Grenadines case of David Roberts v R [2009] ECSCJ No. 146 the Court of Appeal dismissed an appeal against a sentence of life imprisonment which had been based on arguments that the sentence was effectively a whole life sentence but for the exercise of the prerogative of mercy. The defendant in this case had gone to the home of the victim a 75 year old lady. She was sitting on a chair when he got there. She heard him and enquired who was there. He did not respond. She threatened to call for help. He then proceeded to choke her with his hand. She died on strangulation and he then took her to the bedroom, undressed her and had sex with her. When he was finished he prepared a meal of macaroni and cheese, sat on a chair and proceeded to eat until he was disturbed by a neighbour who came calling for the victim. The defendant fled the scene.

92. In the St. Lucian case of Curvin Jeremiah Isaie v R Criminal Appeal No. 6 of 2006 the appellant who was part of a gang known as the 'Assou Canal Gang' was found guilty of the murder of a young man. It was the prosecution case that the appellant was sitting with gang members along the Assou Canal in Grand Riveire when the deceased and his brother attempted to pass them. The appellant got up and blocked them, and when the deceased pushed him, he pulled a gun and shot the deceased at point blank range. The deceased ran and fell into the river a short distance away. The appellant pointed the gun at the deceased's brother and cranked it. The appellant then ran away. Even though he was considered as having previous good character he was sentenced to life imprisonment.

93. In the Antigua and Barbuda case of Rudolph Lewis v R the Court of Appeal substituted a term of twenty five years for life imprisonment in a case where the appellant had stabbed his 21 years old common law wife because he suspected that she had been unfaithful to him on numerous occasions. He stabbed her 21 times with a penknife. The court of appeal found that the sentencing court had failed to have regard to the fact that the appellant was acting under circumstances of domestic emotional stress which was a significant mitigating feature. It was also found that sufficient weight had not been given to the 'strong personal circumstances' of the appellant and to a failed attempt to plead guilty.

94. In the Antigua and Barbuda case of R v Jay Marie Chin Criminal Case No. 31 of 2011 the defendant was sentenced to life imprisonment for murder. She and the deceased were divorced after a long marriage. Even so they continued to operate together a business they jointly owned. One evening she shot him multiple times in the store killing him.

95. In another local case, R v Lasana Riley and Jevorney Richards Criminal Case No. 11 of 2012, both defendant were found guilty of murder and sentenced to life imprisonment. The deceased Rondel George was a butcher who bought animals to be slaughtered. On the fateful day the defendants lured the deceased into a dirt road surrounded by bushes under the pretext they had goats to sell. When Mr. George and another man arrived in the area with a pickup, they were confronted by both defendants who were armed with firearms. They proceeded to rob Mr. George and his passenger and during this robbery Riley shot

Mr. George and that bullet exited his leg and struck the passenger in his leg. The passenger was made to lie on the ground and the men fled the scene.

96. In another local case, R v Edwin Gomez, Kavvin Benjamin and Isaiah Benjamin Criminal Case No. 66 of 2012, all of the defendants were found guilty of murder. The defendants armed themselves and attempted a robbery at a bar in Liberta. They were foiled by a customer who was a licensed firearm holder who drew his gun and shot Kayvin Benjamin. They all made good their escape in an awaiting car, Kayvin dropping his firearm in the process. As they escaped Gomez shot out of the window of their getaway car in the direction of a group of persons. The shot struck and killed one Lyndon Isaac who was simply walking on the road. Gomez was sentenced to 30 years, with a review after 23 years. Kayvin and Isaiah Benjamin were sentenced to 25 years with a review after 18 years. Gomez was 19 and Kayvin was 24 and Isaiah 22 years old at the time of the offence.

97. Most of these cases did not expressly state that these offenders were to be subjected to any review after a minimum period. But in most of those jurisdictions, there are in place, some parole mechanism which allows for review. At the very least as in St. Vincent and the Grenadines in the David Roberts context, there is the Governor General's power to release for clemency. The review provisions of Antigua and Barbuda provide that robust scheme which plays an important role in the sentencing process.

98. What these cases working together with review mechanisms do indicate is that when an offender commits an offence of extreme violence it may be necessary to impose a sentence designed not only to punish him but also adequate to allow for a period within which the prisoner may be rehabilitated and also assessed for dangerousness to the public. So that even where the punitive portion may be satisfied, the prisoner may yet be detained where it is determined that he is not yet rehabilitated or that he continues to be a danger to the public. These aims are properly grounded in the law and may justify a sentence greater than what is needed for mere retribution. These concepts are also ingrained in the review mechanism of section 3B of the Offences against the Persons Act,

Cap 300, as such 'minimum' ought to normally represent that portion of the sentence which is the measured and commensurate response for purposes of retribution and punishment. Therefore on this basis, a court in Antigua and Barbuda considering sentences of life imprisonment and extended sentences which local and regional courts have imposed for similar offences, must be mindful not to simply impose sentences which are consistent, but should go further and identify where possible, what portion of any sentence represents the punitive element.

99. In exercising this discretion judicially, a court fixing a relevant sentence ought to give consideration as to what parts of the actual sentence satisfies the punitive or retributive element – as it is quite possible that this aspect might only be a portion of the full term imposed. Therefore, on this basis, a court fixing a date of review must, where possible, decide on the date the retributive or punitive element of the sentence would be satisfied.[18] Where therefore a review date has been fixed on this basis, the later reviewing court should only delay release on matters such as deterrence, rehabilitation and other public interests. If a later reviewing court is able to consider deterrence after a fixed review date then it can only be so on the changing circumstances such as the increased prevalence of the offence many years later.

100. Where a review date has never been fixed, and an application is made for a review, that later court is seized with the jurisdiction to consider all matters including deterrence, retribution, rehabilitation and the public interest.

101. These provisions remind the court that a sentence of life imprisonment may be based on several elements and it should not inadvertently amount to a sentence for the full natural life of the prisoner. The 2013 amendments also clearly intends to provide life termers with some hope of the possibility of release before the end of their natural life. Parliament must have intended by way of restorative justice where it is appropriate to do so, to have some

[18] See R v Secretary of State for the Home Department ex parte Doody [1994] 1 A.C. 531 which discusses the review scheme in the UK. This allowed the Secretary of State review dates after consultation and having regards to the recommendations of the Chief Justice and the trial judge. The judiciary recommendations for the first review date, are referable to the period which satisfies the punitive element of the sentence.

regard to the duty to respect human dignity of the prisoner including his 'right not to live in despair and helplessness, and without any hope of release regardless of circumstances.'[19]

102. In this regard therefore, it would seem to me that notwithstanding the use of language directory in nature, a court in considering the imposition of a life sentence or any extended fixed term sentence must give consideration as to whether a review date should be fixed. Where the life sentence is made up of several components, one being that part representing the punitive aspect of punishment, a review date should be fixed marking the expiration of that period. Where the sentence is one of life imprisonment it would be humane and in keeping with the aims of sentencing to ensure that a review date is fixed when all matters may be considered.

103. In the unusual situation facing this court, the court is not tasked with a review but rather of imposing a sentence many years after the conviction. This being so, this court must at the very least consider whether the deterrent and retributive elements of these sentences have run their course, and if so, whether there is any public interest matter or issues of rehabilitation which may militate against release. In these circumstances, if it is relevant, considerations will be given to whether a review period may be suitable with regards any of these offenders.

104. With the above principles in mind, I now turn to consider this matter.

The Aggravating and Mitigating Factors of this Case

105. There are a number of aggravating matters in this case. Though charged and tried as one offence, these two men killed four persons. This is a seriously aggravating feature of this case.

[19] State v Tcoeib - [1997] 1 LRC 90

106. This was an attack by a gang of robbers and must have been one of the worst cases of public criminal violence in the twin island State.

107. A seriously aggravating feature of the offence was the planning that went into the underlying crime. The defendant Harris planned and committed a separate felony to steal a weapon, the shotgun. There was planning to use another stolen boat which had been hidden earlier for use in this crime.

108. It is a seriously aggravating feature of this offence that these men armed themselves with that shotgun and went on this robbery.

109. It is also a seriously aggravating feature of this offence that the offence was executed no different from an act of piracy on the high seas. Here were innocent, unsuspecting persons on board a yacht retiring for the night when these three robbers, paddled up and boarded the yacht to commit a felony.

110. The manner of the actual killings is a seriously aggravating feature in this case. The victims were bound and tied and totally helpless posing no danger to the killers when the murders were carried out. The killings were discussed in front of the victims as they listened to plans to kill them. One can only imagine what must have been going through their minds as they sat around that table on board the yacht bound and gagged to hear two men discussing who would be the one to kill them. No doubt they probably offered little resistance to being bound thinking that all that was going to happen was that these men were there to rob them and escape. This must have been the worst agony for those who remained alive to see others beings shot to death knowing that their turn was coming next.

111. It is also a real public aggravation that the victims were all visitors to the islands of Antigua and Barbuda. Visitors to these shores, especially those who visit with their yachts come to enjoy the tranquility of these islands, to embrace the calm and quiet beauty of the Caribbean. Nothing could cause greater shock to society when multiples murders of this kind are committed. It is significant to note that even today, the various tourist-related

bodies express continuing concern about violent crimes against visitors, so much so that these bodies are hard at work designing and running programmes to mitigate these violent onslaughts to the very fabric of society.

Mitigation

112. 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.

113. 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 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."*

114. This is an extremely grave and serious offence. The manner of its commission was equally frightening. This Court will follow the guidance given in Baptiste and hold that their previous good record will have no weight by way of mitigation.

115. They have also been presented to this court today as men who are essentially rehabilitated. Harris is regarded as a reformed man. He has had no disciplinary incidents in Prison for the last 22 years. Joseph is also considered reformed, though he has had some incidents and oral evidence from the current Superintendent does appear to suggest that

there may be some issues with this defendant. These matters been considered and weighed in the balance.[20]

116. As regards the defendant Joseph it was pointed out that he was 20 years old at the date of the commission of the offence. The defendant Harris was 21 years old at the time. 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."*

This too has been weighed in the balance.

117. There has been an expression of remorse on the part of each man. This however, has been vague and neither of them has been very clear as to his own part in this crime. This court is not convinced even on a balance of probabilities that this remorse on the part of either men is genuine.

118. The original sentence was declared as an unconstitutional sentence, and there have been clear evidence of other matters related to the incarceration which was used to ground the arguments of violations of the defendants' fundamental rights. This particular aspect of the mitigation, though raised at this stage will be considered fully after the court has fixed a notionally commensurate sentence.

The Appropriate Sentence

119. This crime involves murders which must be really high on the list of exceptionally heinous killings in Antigua and Barbuda. It was executed during a robbery which was planned and executed as effectively an act of piracy with great detail. Four innocent persons who posed no threat to these men were shot execution style. The actual killings themselves were premeditated, callous and cold-blooded. These men did not intend to leave anyone alive. It

[20] Following Coard and Others v Attorney General of Grenada (2007) 69 WIR 295

is instructive that they came to the robbery without being masked and with a loaded shotgun.

120. The discussions which took place between the two of them when the victims were bound and gagged is perhaps the most chilling and gruesome aspect of this matter. The victims were seated around a table bound and gagged but fully conscious. There were conversations with them prior to them being gagged as Harris was able to tell the police the name of the lady who was on board and there is also evidence that the deceased Thomas also spoke to Samuel. The first person was shot in his head from the back. That might have come as a sudden shock to the other victims, but thereafter, expectations changed horribly as the two defendants and the other man began to speak about who would kill the others. They were then shot one by one. Kathleen Clever was shot next. Her husband saw her trying to hide behind the table when she was shot. She did not die immediately. Mr. Clever was then shot point blank in the chest. The captain then followed last. These victims were all bound and gagged with some sort of tape across their mouths. They would have been unable to talk at that time. They were surely unable to even scream as they saw their impending murder. One cannot begin to imagine their absolute fright.

121. In passing, I note Kent Calderon & Derek Desir v R Criminal Appeal No. 9 and 10 of 2006 SLU where Barrow JA commented that the use of a firearm to kill places a homicide in the worst case instance of murder. There he was speaking about what it said about the intention of the person using the shotgun. In this case, the expressed intent of the killers was to kill all the victims.

122. This was a crime motivated purely by greed and other base instincts. It has demonstrated a complete regard to basic humanity. There has been lasting harm caused by this offence. This court is aware that it has devastated a family, leaving them with lasting scars and has shaken their faith even in God.

123. This was a robbery related crime so extreme in its vicious manner that it must have placed Antigua and Barbuda on the map of places that the world's eye would have turned to in

alarm. These types of offences threaten the very fabric of these small islands safety and economy. All are left to scramble to call in aid every good and decent cell in their beings to return humanity to their hearts.

124. Every way I look at this case convinces me that this was a really vicious and savage act. In every society in the democratic world, this is an offence which would have called for serious punishment. This is a case in which considerable emphasis ought to be given to the principles of retribution and deterrence.

125. This is one of those few instances when the design and the manner of the commission of the offence would have taken precedent over any issues of rehabilitation so much so that the fact that these men were of young men and of previous good character and that they have made considerable strides by way of rehabilitation, would not have mitigated this sentence any. I do not find that the Privy Council in Coard v AG[21] was making a statement of principle that in these types of cases where an offender would have made progress in prison, a sentence of life imprisonment is never relevant.

126. This is one of those cases, even in considering the defendants as they stand before this court, this court is compelled to give greater regard to the circumstances of the commission of this exceptionally serious offence. This is also justified as these men have never really expressed what can be regarded as genuine remorse.

127. There is jurisprudential basis in other jurisdictions for notionally separating a 20 year old man from a 21 year old man for the purposes of punishment.[22] But even in those jurisdictions it is recognized that such a person could be sentenced to 'custody for life'. In

[21] 69 WIR 295. Justice Belle in The Queen v Callistus Bernard and others - [2007] ECSCJ No. 250 engaged in a re-sentencing exercise of the 'Grenada 17' who had spent some 23 years under an unconstitutional sentence of death felt compelled to impose fix terms sentences having regards to misgivings expressed by the Privy Council that those men might never receive the benefit of any consideration for clemency as their crime was deeply politically motivated and any opportunity to considered for clemency was at the behest of the Executive of the day who the court accepted had made statements that the men would remain in prison for the rest of their lives. The misgivings which the Prvy Council expressed about the exercise of the prerogative of mercy in Grenada does not arise here as this case has no political elements as Coard did.

[22] In the UK, persons 21 and over may be given 'life imprisonment' for serious offences, whilst persons between 18 and 200 are sentenced to 'custody for life'. See Powers of the Criminal Courts (Sentencing) Act, s. 94

this case, this 20 year old defendant, Joseph must have been accepted by the jury as the mastermind and the man directing the others.

128. The notional commensurate sentence in this case is therefore a sentence of life imprisonment. This court considers that only a whole life sentence will satisfy retribution and deterrence in this case. Such a sentence would only be reducible by the exercise of the Governor General's power to order release on the basis of clemency.

129. I now turn to consider those complaints violations and the mitigating effect they would have on the sentence.

The Unconstitutional Sentence and the Delay Factor – Violations of the Constitution

130. In this case, each of these defendant was, without the benefit of any mitigation hearing, subjected automatically to death on his conviction on the 28th February 1996. This was an unconstitutional sentence by the mere manner of its application. It was so imposed as all courts locally and regionally with similar statutory provisions at the time proceeded on the basis that it was proper and lawful. This sentence led the Executive in January 2000, to read out to each of the defendants a warrant of death; each man's execution was to be carried out within a matter of days. Each man was measured for his coffin. Each saw his coffin for these few days thereafter as he was let out to use the bathroom. During this period, each man heard the gallows being tested every day. Just hours before the time fixed for their execution, they were granted a stay.

131. Both defendants have urged this court through learned counsel Mr. Bowen that the court should have regard to the fact that there was an unconstitutional sentence originally imposed on these men, and that further there had been substantial delay in finally imposing a proper sentence. In the meantime, these men had been traumatized by the reading of the death warrant in 2000, the coffins which they saw and their impending execution which was then stayed only hours before the time fixed for it.

132. The Prosecution, through the learned Director of Public Prosecution asked to address the Court on this matter, stated that these were matters to be considered but that in the circumstances of this case they should have little weight in the appropriate sentence to be fixed.

133. The learned Director in dealing with the delay of some 20 years asked this court to treat it as having little effect on any commensurate having regard to the exceptionally serious nature of this offence. He relied in Rummun v The State of Mauritius [2013] UKPC 6 in which there had been a delay of some 9 years before the defendant was tried and sentenced. It was held that a breach of the right to a fair trial within a reasonable time was a matter to be taken into consideration by the sentencing court even if it not raised. The court held however that whether the sentence would be affected would depend on the circumstances of each case. The Board stated:

> *"A breach of that right will always be a factor to be considered in deciding upon the appropriate disposal. In some instances it may not be a factor of great weight and there may even be cases in which because of the strength of the countervailing factors such as the gravity of the offence, it will be accorded no weight at all. But it will always be a factor to be considered."*

134. I agree that the manner in which the sentence of death was imposed on the defendants in 1996, was a violation of each man's constitutional right to a fair trial which includes that right to be heard on his sentencing and to be given an opportunity to present a sentencing court with mitigation relevant to the circumstances of the offence and himself. See Reyes v R [2002] UKPC 11. The fact that matters went as far as the death warrant being read out to him and him being measured for his coffin and seeing it and hearing the gallows being tested on a daily basis has only aggravated this breach.

135. The declarations that the mandatory penalty of death was unconstitutional took this region by storm and it led to many governments being required to address such sentences which had been imposed in the past. Notwithstanding this, it is a matter of alarming curiosity that nothing was done about this with regards these defendant until 2014 when the State itself sought and obtained a formal order that the sentences of death were unconstitutional sentences.

136. The delay in this exercise had had one clear effect on the fate of these defendants. They have spent more than the five years on death row, and so even if the original sentence of death had been a lawful sentence, it could no longer be carried out. (See Pratt). It must be noted that the 'five years period' is not prescriptive as Pratt itself has recognized. Depending on the circumstances of the case including the conditions under which the defendant is held, a much shorter period may have the effect of preventing the State from carrying out the death sentence.[23] Even if it has been suggested as being applicable to this case, it would have been rejected.[24]

137. This fact that these men were held under an unconstitutional sentence of death is also inhumane punishment.[25] This was exacerbated by the reading of the warrants and the events at that time related to their execution. There was no positive evidence led as to the effect that this sentence had on each man. But this is unnecessary as I agree with the conclusion that each man has been subjected to inhumane punishment 'is to be drawn from the likely effect of the death penalty on a condemned person'.[26]

138. The delay in bringing certainty to these men must have a real source of punishment to each of them over and above what would have normally flowed from a lawful sentence. Had this been mere delay in the imposition of a sentence, and not delay after an unconstitutional sentence of death had been imposed this may not have greatly impacted or mitigated the sentence on this particular offence at all.

139. The manner in which the defendant has been treated by the State is largely inexcusable. No person should have been kept for this length of time under this unconstitutional sentence of death. As the Caribbean Court of Justice stated not so long ago: *"… the Constitution affords even to persons under a sentence of death, rights that must be*

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[23] See the case of Kigula and Others v Attorney General, Constitutional Court of Uganda, Constitutional Petition No. 6 of 2003 referred to in The Republic v Njiratenga Banda, High Court of Malawi Homicide Sentencing Re-Hearing No. 8 of 2015

[24] See Tido v R - (2008) 75 WIR 26

[25] See Hunte and another v State of Trinidad and Tobago [2015] UKPC 33,

[26] The AG of Trinidad and Tobago v Angela Ramdeen Civ. App. No. 6 of 2004 - Para 32 of the judgment of the Court delivered by Sharma CJ

respected and that the true measure of the value of such rights is not just how well they serve the law-abiding section of the community, but also, how they are applied to those for whom society feels little or no sympathy."[27]

140. There was one commendable effort to regularize this when the then Attorney General in 2014, moved the court to quash the original death sentence and put right this matter. The State was carrying out its obligation albeit after considerable time.

141. This court have carefully considered the learning expressed in Rummun and a number of other authorities.[28] There can be no doubt that even the breach of a constitutional right to a fair trial may not in certain cases affect the sentence where the seriousness of the offence is exceptionally high. Further, in most of the delay cases, the delay usually occurs before the person is found guilty by a proper trial. This is a case where the issue of the defendants' guilt have long been determined and all appeals on their convictions dismissed making post-conviction delay at least minimally different from pre-conviction delay.

142. There is no doubt, however that these violations have been grave. It has been more than simply delay. It has been a staggering period of more than 20 years delay breaching the right to a fair trial within a reasonable time as guaranteed by section 15 of the Constitution of Antigua and Barbuda. It has also been inhumane treatment and punishment and amounts to a breach of section 7 of the Constitution.

143. The line of case following Pratt and Morgan show that where an offender is kept on death row for an extended period under a lawful death sentence, notionally a five year period, this would amount to cruel and inhumane treatment, the remedy for which is that the death penalty may not be carried out and the sentence is commuted. Court have also been prepared to reduce sentences where an unconstitutional death sentence has been imposed. So too, a sentence would be mitigated where there has been a substantial delay

[27] Attorney General et al v Jeffery Joseph and Lennox Boyce [2007] 4 LRC 199
[28] See also Boolel v The State [2007] 2 LRC 283

in correcting an unlawful sentence. In one regional case, a constitutional court has even been prepared to grant compensation.

144. In the exercise of its criminal jurisdiction this court is concerned with the effect of these violations on the notional sentence. In deciding of whether this sentence will be mitigated the court must take into account not only the violations but also the nature and gravity of the offence as well as the public interests. It will be these considerations which will guide whether an appropriate remedy would be, on the one end of the scale, a public acknowledgement of the violation, and on the other end of that scale a reduction of the commensurate sentence.[29] The Privy Council in Rummun v State of Mauritius [2013] 1 WLR 598 considering the effect of the delay where it amounted to a breach f the right to a fair trial, stated:

> *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."*

145. This is a case where the seriousness of this offence is exceptionally high. This offence was committed in a heinous manner. Four persons were brutally killed. In these circumstances, but for these breaches, the appropriate sentence would have been a sentence of life imprisonment to last for the whole life of each offender with the punitive aspect of the sentence lasting just as long effectively meaning that release would not be possible except for the exercise of clemency by the Governor General. These violations and the delay will have a mitigating effect in this case. It cannot be argued that the fact that they do not face the death penalty is really a meaningful remedy as having regards to the principles in Trimmingham it would not have been an appropriate punishment for either of these men. The punishment which have been suffered by these two offenders flowing directly from these violations must be taken into account. It will mitigate the sentence and will result in the reduction of the punitive aspect of this sentence which will in turn inform the fixture of review date. In all of the circumstances of this case, the sentence for each man will be as follows:

[29] See the approach of Rummun v State of Mauritius [2013] 1 WLR 598 at paragraph 13 where the court was considering a remedy for delay. The Board stated: 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."

Marvin Joseph, you are sentenced to life imprisonment. You shall serve a minimum of 45 years as representing the punitive element of this sentence. All time spent on remand or under detention shall be deducted from this period. At the expiry of that period, you are to be reviewed by a court in accordance with section 3B of the Offences against the Person Act, Cap 300, for the possibility of early release.

Mellanson Harris, you are sentenced to life imprisonment. You shall serve a minimum of 45 years as representing the punitive element of this sentence. All time spent on remand or under detention shall be deducted from this period. At the expiry of that period, you are to be reviewed by a court in accordance with section 3B of the Offences against the Person Act, Cap 300, for the possibility of early release.

146. They will have all the usual rights of appeal as exists in a criminal matter relating to sentence. The Prison Authorities are directed to ensure that they continue to receive the benefit of rehabilitative programmes.

147. I wish to thank all Counsel for their assistance in this matter.

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Darshan Ramdhani
High Court Judge (Ag.)