

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

ANTIGUA AND BARBUDA  
CRIMINAL CASE NO. 41 of 2015

BETWEEN

THE QUEEN

VS

UMBERTO SHENATO

Appearances:

*Mr. Anthony Armstrong, Director of Public Prosecution and Mrs. Shannon Jones-Gittens  
for the Crown*

*Mr. Lawrence Daniel and Mr. Sherfield Bowen for the Defendant*

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2016: September 19, October 19, 28  
November 25, 28  
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*Criminal Law – Sentence - Murder – Conviction on Trial – **Court’s approach on** sentencing –  
Application of common law sentencing principles – Considerations of aggravating and mitigating  
features – Vicious Attack on deceased with a knife – Intention to Kill - Killing in a public place –  
Defendant 73 years old at the date of offence – Previous positive good character – circumstances  
of extreme emotional stress - Starting point a sentence of 30 years – Appropriate sentence of 20  
years – Minimum term of 14 years – Review under section 3B of the Offences against the Persons  
Act, Cap 300*

DECISION ON SENTENCING

[1] RAMDHANI J. (Ag.) On the 20<sup>th</sup> September 2016, the defendant, Umberto Schenato was found guilty of the murder of his ex-wife Edda Schenato. The court ordered a pre-sentence report and a psychiatric report and the matter was adjourned to the 18<sup>th</sup> November 2016 for sentencing. In considering this matter in the round, taking into consideration both the offence and the offender, an appropriate term is a fixed term of imprisonment of 20 years with a minimum period of 14 years. The reasons for this sentence are now set out.

- [2] Minutes after 2 p.m. on the 3<sup>rd</sup> June 2013, police were called to the Epicurean Supermarket at Friar's Hill Road, St. John on a report that an elderly gentleman had viciously stabbed and killed an elderly Caucasian woman in the parking lot. When the police got the scene, they found elderly man standing on the western end of the parking lot with a knife to his throat warding off civilians and even another officer in plain clothes. He was quite agitated and was pacing near his rented vehicle which had been boxed in by truck driven there by the owner to prevent him from leaving.
- [3] The officers quickly disarmed that gentleman, this defendant, and took him into custody. **He was taken to the St. John's police station where he gave a written statement and two** days later voluntarily participated in the question and answer interview. He was later charged with the offence of murder of the deceased lady, his ex-wife.
- [4] The prosecution led some 23 witnesses at the trial, several of whom were eyewitnesses to the actual killing that day at the parking lot of the Epicurean Supermarket. They also led evidence of video footage taken from two video surveillance cameras at the supermarket; one of these caught the actual killing with considerable clarity and substantially confirmed the crucial eyewitness evidence.
- [5] Witnesses stated that at about 2 p.m. on the 3<sup>rd</sup> June 2013, they noticed what appeared to be an argument between **an elderly 'white' man and** an elderly **'white'** lady between two parked cars in the parking lot. Suddenly, the man **started to 'punch at'** the lady with his right hand and she almost immediately fell the ground. Witnesses stated that he went on top of her and continued trying to hit her with his hand. Several witnesses stated they ran up to the fallen couple and tried to pull the man off the lady. He continued attacking her on the ground. Several more persons came up and tried to get him off her. At one point he turned around and lashed out with his right hand, and then those witnesses realized that he had a knife **in the hand he was 'punching' with**. One of these persons got cut. The crowd retreated and the man turned back to the lady and struck at her several times. A few

persons returned to her aid and eventually they managed to get him to pull away from the lady. At that time she was lying motionless on the ground. She would die moments later on that asphalt surface of that parking lot.

[6] As the man got up, the crowd backed away. He wiped the knife and he walked to the western end of the parking lot. A police officer in plain clothes who happened to be at the supermarket, realizing that the man had just attacked someone, attempted to stop him. This officer said that the man then placed his own knife to his throat and threatened to kill himself if anyone tried to stop him. With these threats holding everyone at bay, he managed to get into his car which had been parked at the western end of the parking lot. But he could not leave, as an unidentified man, reversed his truck and stopped it just behind the car boxing in the attacker's **car**. When he realized that he could not get away with the car, he came out the car, and again placed the knife to his throat, threatening to kill himself. There was a standoff for about 10 to 15 minutes until other police officers came to the scene. Together, they managed to distract the man and disarmed him. They arrested him and took him to the station. It was this defendant, Umberto Schenato that was so seen and arrested.

[7] Much of these crucial matters were captured by the video footage. Whilst the features of the man and the lady could not be clearly seen, the defendant has never denied that he is **the man in the footage and that it showed the 'confrontation' between himself and his ex-wife**. He was clearly seen to be the aggressive one in the video.

[8] The prosecution also led evidence that earlier that same day, the defendant was seen at one **'Tony's Watersports and Bar'** where he spoke to **'Tony'** within the hearing of an employee. Both these persons gave evidence to the effect that when the defendant was **asked about 'his wife' he responded to the effect that he wished she was dead**. Tony testified that he referred to his **'wife'** as a **'bitch'** and stated twice that he wished she were dead.

[9] The prosecution also led evidence that the defendant and the deceased had been married and divorced, and were involved in a protracted property dispute which had been in the civil courts for over 8 years. That matter was scheduled to be heard on the 4<sup>th</sup> of June 2013, and the defendant who had been living in the Dominican Republic had just come into the country for that hearing.

[10] When he was arrested the defendant agreed to give an explanation for what had happened. This statement was reduced into writing and he signed it. No objection was taken to its admission at the trial. He stated:

***“Today I find her by accident I knew that she don’t want to come to court tomorrow and is eight years am waiting for that. I then said to her come to Court tomorrow I repeated it three or four times, she then told me she is not coming in an angry manner she then started calling people. I then took my knife from my right pants pocket and stabbed her, she fell to the ground. Somebody then came on my back and I was trying to escape to go to Fort James at High Point to put myself down. After I wasn’t successful the police came at the Epicurean Parking Lot and met me with the knife and they took the knife from me. I had the knife at my throat because I was hoping to go in the car at High Point at Fort James to kill myself. I was afraid to kill myself I just wanted to go to Fort James where it is nice and rocky and high enough. The police did a very good job of taking away my knife, while one was talking to me the other came from my side and took away my knife. Five police then came on top of me.”***

[11] Two days after he was arrested he also participated in a question and answer interview which the police held to clear up a few things. There was also no objection to the admission of this interview record. In this interview he told the police that it had been an accident. He also said that she attacked him. One of the more significant answers he gave in this interview explaining what he meant when he said it was an accident was as follows:

***“I mean by this, that I was approaching Edda asking her to come to court the day after for the foreseen trial and she answered evasively. That was followed by a further request and it was the same evasive answer. In this I was telling her the reason for my request that was the fact that for eight years her and her attorney was doing mockery of the justice, postponing and postponing indefinitely the trials. In this case the ...Edda lawyers are coming up with hundreds of reasons just to postpone the trial. After that I showed her that if they do that again they have to face the knife I had in my hand and I showed her because it was eight long years that I was waiting for that. When I showed her she attacked me and it came out of that physical collision. The particulars of that I can’t recollect them, like a mess.***

*When I saw that there was some blood around, I was running away. The further things are not important.”*

He claimed that he carried the knife for his own protection as he had been attacked in the past.

- [12] At his trial, he gave an unsworn statement and maintained that he never intended to kill her and that all he intended to do was to threaten her to come to court. He said that she also told him she had a knife and that she was trying to get into her car and he was trying to stop her when they fell.
- [13] The jury would have rejected accident, self-defense and provocation in this case when they returned a verdict of guilty of murder.
- [14] It was revealed at the trial that the defendant and the deceased were going through a contentious property dispute following a bitter divorce several years ago. The defendant is an Italian who came to Antigua and Barbuda in 1988, on a contract to perform services on the electrical grid on the islands. He had met the deceased almost immediately and six years later they got married.
- [15] This marriage lasted for until 2005 and then the deceased filed for divorce.
- [16] Following this divorce, there arose a dispute related to how much money of his own the defendant had invested into the property owned by the deceased. He claimed that he had invested much of his life savings and all of his efforts to develop the property. The defendant initiated civil proceedings in the High Court and obtained a default judgment in his favour. This judgment, however was later set aside. The contentious court proceedings included an excursion to the Court of Appeal, and as things stood on or about 2014, the matters was to be retried to resolve the disputed property rights.

[17] During this time, the defendant left Antigua. He stated at this trial in an unsworn statement from the dock that he could not remain here having regard to the bitter battle that was ongoing between the he and the deceased. He said that he moved to the Dominican Republic and would come whenever the matter was set for trial. He stated that early after the divorce, he had spoken to the deceased about collecting his personal belongings from the home. He said that she agreed and when he got there, she initially refused to acknowledge that she was home and when she eventually did, she came out to talk to him. This talk became heated and she stopped a passing car and lied that he had threatened her and she was afraid of him. He left and shortly thereafter police officer sought him out and arrested him, they told him that there was a protection order in place against him and he was not to make contact with the deceased. In his narrative, he also said that at some point in time, she had threatened to get him into trouble with the immigration authorities and somewhere along the way he was coerced into signing an agreement related to the property giving up most of his rights.

[18] He said that the matter was adjourned some 23 times all at the behest of either the deceased or her attorney at law. This was confirmed by prosecution witnesses during the trial.

[19] He continued to live in the Dominican Republic coming to Antigua for the case. He said that on two separate occasions, he was nearly run off the road whilst driving. He believed that this was connected to the deceased. As a separate matter he was attacked in the Dominican Republic and he became a licensed firearm holder there. He began to carry a knife for his own protection.

[20] On the day in question, he arrived in Antigua early that morning for the court case. It was slated for the next day. **Early that morning he visited his lawyer's office but was given an appointment to return at 3 p.m.** He then decided to spend the day driving around.

[21] He **does not speak to visiting Tony's Watersports. But prosecution evidence places him** there at Tony Watersports, Bar and Restaurant at Dickenson Bay. He and the owner, Tony

had a conversation and Tony asked him about 'his wife'. His response was: another witness, one of Tony's employee was there at the Bar and he said he heard the defendant speak about wishing that the deceased was dead.

[22] At the trial, the defendant raised issues of accident, self-defence and provocation. He said that it was a coincidence that he saw the deceased at the supermarket and decided to speak with her to ensure that she would attend the court the next day. In his unsworn statement he said that she threatened him about a knife she had in the car and he showed her his knife. They got into a struggle and she got stabbed. He said that he never intended to hurt her.

[23] The jury rejected all these defences and found him guilty as charged.

#### The Mitigation Hearing

[24] The evidence considered at the mitigation hearing included a pre-sentence report from the probation department filed on the 17<sup>th</sup> November 2016. The court also considered a Psychiatric Report from Dr. James A. King filed on the same date. A family impact statement was also placed before the court and considered. The Crown submitted sentencing guidelines and the defendant presented the court with written submissions and made oral arguments.

[25] The defendant also spoke on his own behalf during the hearing. At first he made an unsworn statement from the dock and then on being given the option he chose to make this statement from the witness box. He was given this option in this hearing having regards to what he was now saying about the offence. He now stated that for a few days before the crime, he had been using a drug for depression and that he had been using only half of a tablet at a time. He stated that on 3<sup>rd</sup> June 2013, after he had been sent away by his lawyer to return later that afternoon, he took a whole tablet. He said that he drove around and saw Edda by accident. He said that after he got into a confrontation with her and after he had taken out the knife, the next thing he knew was that she was on the

ground and he had a dripping knife in his hand. He said he had no memory of how that all happened and that he must have made statements after putting one and two together and saying that it was **he** who stabbed her.

[26] This court listened to arguments on both sides on this unusual state of affairs. Mr. Daniels who was at the trial represented him together with Mr. Bowen at the sentencing hearing. They were proper to accept that the court must proceed on **the basis of the jury's verdict**.<sup>1</sup>

[27] That for this court is the appropriate course to take. The jury has already found the defendant guilty of murder. On that basis this sentencing exercise proceeded.

#### The Pre-Sentence Report

[28] At the date of sentencing the convicted man was presented to this court as a 76 years old Italian who prior to this offence had lived an exemplary life.

[29] During his working years, he was a trained electrical engineer and worked as an expert in his field in many parts of the world. He lived and did significant work in the Congo, Pakistan, Iraq, Syria, Lebanon, Egypt Morocco, South Africa, Brazil, El Salvador, Nigeria, Ecuador and finally in Antigua. In many of these countries he worked on the countries electrical grids. Working in these many countries enabled him to learn and be able to speak three other languages besides his native Italian – French Spanish and English.

[30] Anecdotal information in the report painted different versions of this man. Some considered him a good man, others considered him rude and arrogant. Some even suggested that he had a violent streak. What can be safely gleaned from the report was

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<sup>1</sup>In passing, the psychiatric report from Dr. James A King who evaluated the defendant contains an admission from the defendant when he showed his ex-wife the knife she shouted out and that he impulsively struck at the left side of her neck – when such admissions are contained in a pre-sentence report it is important that the court raises it with the defence. See the case of *R v Cunnah* 1996 1 Cr App R (S) 393. This was raised with the defendant. He denied saying this to the doctor. It will be ignored.



that he was clearly very troubled in the later years of his marriage. After the parties separated the deceased also obtained a protection order against him.

- [31] The report indicates that this once professional and good man of exemplary conduct may have, in his later years, become erratic and deeply troubled.

#### The Psychiatric Report

- [32] The theme that he was so troubled over his break up and his property dispute was maintained in the narrative history he provided the doctor.

- [33] A psychiatric examination of the defendant was conducted by Dr. James A. King. A report dated the 13<sup>th</sup> October 2016 was presented to the court and was by consent admitted into evidence. It was the opinion of the doctor that at the evaluation of the defendant, no present or past history was elicited for symptoms consistent with any anxiety, effective or psychotic disorder. He was competent and had no relevant medical issues.

- [34] **This report stated that from the defendant's account, the 'slow process of the court/legal system irritated him and he was constantly frustrated and angry that it was taking years for him to recoup most of the over US\$1000,000.00 from Ms. Jensen. He was perplexed that she refused to do the right thing and settle fairly with him. He remembered writing an email to her stating, 'the judge should punish you'.**

- [35] The doctor stated that his insight, judgment and impulse control were adequate during the evaluation. **Further along the doctor noted that the defendant 'displayed a short lived but intense anger when discussing matters related to his deceased ex-wife'.**

#### The Impact of the Offence on Surviving Relatives

- [36] At the request of the court, a family impact statement was presented to the court. This came from one Jacquie who states that she is the only child the deceased.

- [37] She states that when she found about the attack on her mother, there came a darkness over her life that she cannot describe. She states that nothing compares to the pain she **feels for her mother's death**. Her daughter was pregnant at the time and just about to give birth that same day and they had to conceal this tragedy from her when the report was made. She says that by the grace of God the baby was born safe and well on the 13<sup>th</sup> June 2013.
- [38] She lost her job because of the effect this tragedy had on her life as she was unable to cope with its impact. Her son, his wife and their child have all gone through trauma over the murder of her mother.
- [39] **There is a lot of pain and anger in the daughter's expression of her hurt. She knew that her** mother was going through a terrible ordeal related to the divorce and the property dispute and she had feared that this man would have harmed her mother. She seeks that justice be done in this matter and has asked that the defendant spend the rest of his life in prison.<sup>2</sup>

#### The **Court' Approach and the Appropriate Sentence**

- [40] There has been no request for the death penalty in this case. It is accepted that the prescribed and discretionary death penalty is not relevant in this sentencing exercise, the maximum penalty which may be considered for this offence is a discretionary 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.<sup>3</sup>

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<sup>2</sup> The court is barred by law from considering the views of the family as to what should be an appropriate punishment. This court has considered the harm this offence has caused, and noted the sentiments of the family. See Victims and sentencing – 148 NLJ 1263 - Alisdair Gillespie

<sup>3</sup> See R v Foy

- [41] In deciding whether sentences of life imprisonment or lesser fixed terms are appropriate in this case in relation to this defendant, this Court, in the absence of any statutory scheme is guided by the common law principles or aims of punishment<sup>4</sup> including retribution, deterrence, prevention, rehabilitation and restoration. It is these principles that will inform this **Court's determination as to what is a commensurate** and appropriate sentence in this matter. It will further inform the court whether in any given case which of the sentencing principles will take precedence so that for instance in a given case, a commensurate sentence may well be a sentence which rests more firmly on retribution than on rehabilitation.
- [42] Under the common law, a discretionary life sentence may be imposed where it is commensurate sentence necessary for retribution and deterrence; namely applicable for offences of exceptional gravity. Even recent English courts, construing present day statutory prescriptions, have accepted that these discretionary life sentences are reserved for these types of violent offences.<sup>5</sup> Indeterminate life terms have been the norm in the United Kingdom and some other jurisdictions for certain offences involving violence including the offence of murder. The rationale for such indeterminate terms or an extended sentence is that such violent crimes are an indication that there is an issue of rehabilitation, as well as a presumption that such persons may pose a danger to the public, and the court is unable to determine at the date of sentencing with any degree of certainty when that risk would be abated.<sup>6</sup>
- [43] Where such life discretionary life terms or extended sentence are appropriate a court must, in Antigua and Barbuda, on the basis of section 3B of the Offences against the Person Act, Cap 300, consider a date for the review of the sentence. A review would ordinarily be fixed on the basis of that period which would satisfy the punitive element of the sentence. When such a matter comes on for review a court must consider whether the prisoner is suitable for release having regards to matters of rehabilitation, dangerousness and other matters of public interests.

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<sup>4</sup> Desmond Baptiste v R Criminal Appeal No. 8 of 2003

<sup>5</sup> *R v Wilkinson* [2010] 1 Cr. App. R(S) 100; David Roberts v R Criminal Appeal No. 8 of 2008

<sup>6</sup> Some territories have codified this principle. See for example section 1097(2)(b) of the Criminal Code St. Lucia.

- [44] The legislation has actually fixed minimum periods which may be set for the review date. In the case of a life sentence, a review may not take place before the expiration of 30 years. Where a sentence other than life is imposed, no review shall take place before the expiration of 20 years. I am of the view that such minimums as fixed by section 3B impose an inflexible fetter on the discretion of a sentencing court and may in some cases result in an arbitrary sentence. In an appropriate case, the punitive period may on consideration of judicial sentencing principles, fall well below those minimums. A court has to have the discretion to impose a commensurate sentence and accordingly this provision is to be read as directory only.<sup>7</sup>
- [45] In any event, these stated minimums provide a useful reference point as to what parliament has intended to minimum punitive periods for this offence. Parliament's **expressed intent** must therefore guide the court when it considers within what range commensurate punishment should fall for the offence of murder. The range of 20 to 30 years set by the minimum also is supported somewhat with the experience as shown by the local and regional courts for this offence where sentences have been handed down that range generally between 18 years and 35 years.
- [46] There is no guidance in the legislation or the case law from this jurisdiction which guides the court in fixing a starting point, but it must be that a court would have to have regard to the aggravating features of the particular offence in deciding whether a whole life term should be imposed as a starting point with considerations, usually, of a punitive element for the purposes of fixing a review date. Where it is considered that a whole life order is not appropriate, then the two minimum periods established by the legislation for what should be the punitive element of the sentence, and the **range** of sentences imposed by the courts for this offence, provide a useful indicator as to what should be a range within which sentences should normally be considered having regard to the seriousness of the offence of murder. This court will therefore consider a range between 18 years and 35 years is

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<sup>7</sup> R v Selassie; R v Pearman - [2014] 2 LRC 511

generally indicated unless there are exceptional features which may push the sentence upwards or downwards outside of this range.

- [47] This analysis comforts me that where a sentence of life imprisonment is not appropriate, it would be proper to use the aggravating features to fashion a starting point sentence between the 18 and 35 years range for cases of murder in this jurisdiction and then to consider the offender and any other extraneous mitigating features to arrive at a final sentence.
- [48] Factors which have been known to take a sentence outside of the normal ranges include the age of the offender. In this case, it has been raised that his age should operate as mitigating the sentence.
- [49] It is well known that the youth of an offender may mitigate a sentence. In the UK, sentencing guidelines indicate that when a juvenile offender is being sentenced, one year should be taken off for every years he falls below 18 years of age.
- [50] This offender is an old man. His old age is also relevant. He was 73 when he committed this offence. As he stands before this court is 76 years old. The learning from other jurisdictions show that the sentencing of elderly offenders require due considerations for sentencing regimes.<sup>8</sup>
- [51] The cases do show that age of an old offender will mitigate a sentence. These cases show that as a person gets over 55 it will begin to be a factor in the sentence.<sup>9</sup> The impact of age on a sentence may be greater or lesser depending on the circumstances of the case.

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<sup>8</sup> 'One of the more intractable problems now facing the courts is how to sentence very old offender. More often than not the defendant would have been convicted of serious sex offences committed, in many, cases, in the distant past. The principle appears to be that old age will not in the absence of exceptional circumstances save a person from imprisonment, but it will, as a rule, provide grounds for mitigation.' - *The People (DPP) v WN - 12/2003*, (Transcript) Citing Mr O'Malley's book on Sentencing Law and Practice, at p 185, para 6-11

<sup>9</sup> Criminal Justice Act 2003 Sch 21 para 11 which provides that mitigating factors that may be relevant include the age of the offender; See also *R v McDonald* 2007 EWCA Crim 1081 D

[52] In R v Archer 2007 EWCA Crim. 536, 2 Cr App R (S) 71 (p 453) D was convicted of **murder. He was aged 55. It was held that** 'one of the factors which will be taken into account in relation to a sentence as long as 30 years is the possibility of light at the end of the tunnel. This defendant was not given a whole life order, but it may be that the sentence he was given would amount to one in practice. The understood actuarial position is that males will not last much over 80, if at all, in terms of normal life expectancy. If he were considered for parole at the age of 83½ he may well not be immediately released. If released then, or even at a lesser age, he will be nothing like the danger to the public that he might otherwise have been. The Judge should have made allowance for age as a mitigating factor. Reduced to 25.'<sup>10</sup>

[53] In R v Troughton 2013 1 Cr App R (S) 75 (p 417) D was convicted of murder. He had two cousins, C and V. V suffered from a mental illness. This another case in which age made a **significant difference to the sentence. In this case 'V** broke into C's home under a mistaken impression and started to rearrange the property. C was away but on his return D and a number of others spent six hours cleaning the property up. About two weeks later, C locked V out and ignored him. At about 10.15 am, some family friends summoned D to help and he arrived with a farm vehicle which had a spade in it. D went to confront V with the spade. An argument broke out during which D stuck V with the spade to the left side of the head. V was knocked to the ground, and D struck him again on the top and back of his head as V lay on the ground. D left to carry on working on the farm. D returned about an hour later to recover a broken-down van but did not check on V. At about 1 pm, C called V's mental health team and said V was lying in the garden. An ambulance was called at about 2.40 pm. V was found unconscious with severe head injuries. He died three weeks later. D, aged 75 at his appeal, was of impeccable character. He was in robust health. The Judge found D had lost his temper and started at 15 years. He reduced that to 12 years because of D's character. It was contended that the minimum term did not properly reflect D's age. Held. If the minimum term imposed by the Judge is to stand, D will not be released until he is, at the earliest, 86. D's age justifies a further reduction to 9 years"<sup>11</sup>

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<sup>10</sup> See Commentary - Banks on Sentence; Murder, Matters related to the Defendant at 288

<sup>11</sup> See Commentary - Banks on Sentence; Murder, Matters related to the Defendant at 288

- [54] In *R v Horseman* 2007 EWCA 2589, is a case where a very low minimum was imposed. In this case the appellant was 65 years old when he killed his wife. He was found guilty of murder and was given a life sentence with a tariff of 8 years having regards to his exceptional character and good conduct. This was further reduced on appeal to 7 ½ years. The court made the point that the impact of a life sentence on an old person is greater and must be taken into account.<sup>12</sup>
- [55] In *R v Walker* [2005] 2 Cr App Rep (S) 328, where, at p 332, Silber J, giving the judgment of the court, indicated by reference to a minimum term that they noted that a mitigating factor was the age of an offender if there was the likelihood of him dying in prison. Although there may be other reasons for including age as a mitigating factor in para 11 of Sch 21, it must be apparent that the risk of dying in prison, either by reference to specific evidence brought forward of the health of a particular offender, which is the not case here, or simply based on the understood actuarial position of an expectation that males will not last much over 80, if at all, in terms of normal life expectancy, age must be a factor in relation to any offender who comes before the court at the kind of age of this Appellant.<sup>13</sup> See also *Doyle* [DPP -v- Doyle Unreported, Court of Criminal Appeal, Ireland, and *K* [DPP -v- K Unreported, Court of Criminal Appeal, Judgment delivered (O'Flaherty J) March 20th 1991; *R v Sullivan* [2004] EWCA Crim 1762 all cited in *The People (DPP) v WN - 12/2003*, (Transcript).
- [56] While some of these case make the point that the court should have regard to the possibility of the defendant dying in prison, it is also relevant to the defendant's **physical** capacity on release.<sup>14</sup> The point has been equally made that that where any sentence might result in the defendant remaining in prison for the rest of his life, age should not be overemphasized; it should remain a factor in the mix.

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<sup>12</sup> See Commentary - Banks on Sentence; Murder, Matters related to the Defendant at 288

<sup>13</sup> See Commentary - Banks on Sentence; Murder, Matters related to the Defendant at 288

<sup>14</sup> *R v McDonald* 2007 EWCA Crim 1081 D

[57] This latter point was made in R v Symmons 2009 EWCA Crim 1304 the appellant was found guilty of the murder of his wife and sentenced to a minimum term of 16 years. The appellant and his wife lived together for 37 years. By 2005 their marriage had been on the rocks for some time. Mrs Symmons described the appellant as controlling and frightening. He bugged her telephone calls. She was scared he might kill her. He claimed she was the one who was over assertive and in control of their relationship. He accused her of taunting him about his impotence and being rude about his mother. She discovered he was having an affair and began divorce proceedings. They went to see a marriage guidance counsellor. Mrs Symmons began distributing her money and property in case anything happened to her and to prevent the appellant finding them. On the evening of 5<sup>th</sup> September 2005 they went together to see the counsellor, they had dinner and returned home. That night the appellant killed his wife. He battered and strangled her to death. He claimed he was acting in self-defence and because he was provoked. He wrapped his wife's body in polythene, put her in the boot of his car and drove to France. He was in touch with his mistress on the way. The court stated:

*“On the question of the appellant's age, we accept that it may well be a material consideration that the effect of the minimum term could be to sentence an offender to die in prison. The judge may not have referred expressly to that possibility in his sentencing observations, but he did refer expressly to the appellant's age. It was obvious to all that the appellant is a man of mature years and previous good character upon whom any prison sentence, let alone a life sentence, will weigh heavily. The inevitable consequence of a 62 year old man's committing a murder, for which the agreed starting point is a minimum term of 15 years imprisonment (to serve), is that he is going to grow old if not die in prison. His age, therefore, cannot be determinative of the finishing point; it is but one factor to be borne in mind as part of the sentencing process.”*

[58] **These cases will guide this court on the issue of the defendant's age** and its mitigating effect in this case.

[59] I now turn to this circumstances of this case.

The Aggravating Features of this Case



- [60] There are a number of aggravating matters in this case. This was a brutal killing in which the defendant must have intended to kill the victim.
- [61] It is an aggravating feature of this offence that he inflicted so many injuries on her – there were seven wounds.
- [62] It was also aggravating that the attack continued after she fell to the ground and after persons were trying to pull him off. At the time she was helpless and posed no threat to him
- [63] It is also aggravating that he committed this crime in broad daylight in a public place. This kind of offence shatters feeling of security and safety in our islands. One of the persons who attempted to pull him off was herself cut by the knife.
- [64] It is also an aggravating feature that this offence was committed over a protracted court case. Even now, during this sentencing hearing he continues to focus considerably on the money, time and effort that he put into the property which his ex-wife had **'dispossessed'** him of. He actually states that this is his most significant achievement notwithstanding all he has done in his life.

#### The Mitigating Features

- [65] I turn to consider the mitigation in the case.
- [66] This is a man who is of previous positive good character and has lived an exemplary life contributing in a significant way to the basic infrastructure of several counties including Antigua and Barbuda. He is a trained electrical engineer and has lived and worked in several countries where he has been responsible for improved electrical grids and systems. In Antigua he worked on the national grid when he first arrived here in 1988, supervising a team of about 35 persons. Together, under his guidance, they put in place

the islands electrical grid which continues to work to date supplying electricity to all on the island.

[67] It is a mitigating feature in this case that at 73 years of age the defendant was a man who had not come into conflict with the law. Having regards to what he has done with his life, and his present age it is commendable that he has never been at odds with the law. Were it not for this crime, he would have led an exemplary life well to the end of his twilight years.

[68] His age is also a mitigating feature. With reference to the cases above, I am of the view that age will mitigate the sentence and where it is not appropriate to impose a whole life sentence, the court must consider whether any notional sentence would amount to a whole life sentence and that the defendant may die in prison. Where, for his age, this becomes a real consideration, then a lengthy sentence may well amount to a whole life sentence and me be excessive. These matters are relevant in this case.

[69] It is also a mitigating feature in this case that the defendant was laboring under strong emotional feelings at the time. This was a relationship which had gone wrong leading to a property dispute and court proceedings, and he was convinced that efforts had been taken to frustrate its resolution. He was the one who had commenced proceedings to resolve his dispute with the deceased, but these proceedings endured the court system for over eight years, being constantly adjourned at the behest of the other side. He was clearly angry at the time of the crime, and this court is convinced that he must have snapped at that moment when he confronted her that day. His extreme emotional state cannot operate to reduce this crime, but it would be considered as a mitigating feature of this offence.

[70] He said that he is sorry for the death of the deceased. This court however, is not convinced that he is remorseful about his conduct. He gets no mitigation from this. It is of course not aggravating.

The Appropriate Sentence

- [71] In this case, the crime was especially serious. This man took a knife which he carried on his person and which he used to savagely stab an aged and frail lady, his ex-wife to death. He did this in broad daylight as the most public of places – **the island's main supermarket**. Onlookers were unable to pull him off and he even turned and attacked them as well. There were seven wounds, six of them stab wounds.
- [72] However, there is much going for this defendant. He has lived his life in the most positive of ways. He is a highly educated man and has contributed significantly to many countries around the world as well as Antigua and Barbuda. This court is told that many years ago, he led a team of engineers and others to **install this island's electrical grid which still stands up to today**.
- [73] There is nothing known against him in the law and he has managed to remain on the right side for all these years of his life. It is clear to this court that he was laboring under extreme emotional stress at the time, and that he lost his control. It did not amount to any defence to the charge of murder but it may be considered at the sentencing stage as a mitigating feature.<sup>15</sup> As was noted by the Court of Appeal of Jamaica in R v Clement (2016) 88 WIR **449 the court must consider as a mitigating feature** 'the pressures under which the offence was committed (such as provocation or emotional stress)'.
- [74] I have chosen to consider the age of this offender at the very end of this evaluative exercise as it relay is a unique feature of this case. This man is today 76 years old. This coupled with this his positive good character and the fact that he was laboring under extreme emotions on that day, has caused this court to exclude an indeterminate life sentence. There is no need in this case to assess him for rehabilitation or dangerousness as the court **does** not think that there is a real likelihood of him being a danger to the public on his eventual release. The sentence nonetheless must be a lengthy sentence and be close to what may be a life sentence for him; I consider that any sentence I impose will

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<sup>15</sup> This has been recognized in other jurisdictions - See Soering v United Kingdom (App. no. 14038/88) - [1989] ECHR 14038/88

likely see him ending his days in prison. It must therefore be fashioned in such a way that it allows him to see the light at the end of the tunnel and give him the possibility of release at the end of it all.

[75] I have considered the authority commended to me by the learned Director. In that case, *The State v Edward Green* Criminal Case no. 24 of 2012 (Dominica), the defendant was a 72 years old man convicted of murder (he was 67 when he committed the offence). At the relevant time, the deceased was his tenant, and he was in arrears of rent. There had been an argument about the outstanding rent. The defendant told persons prior to the fateful day that he would shoot the deceased in the head, cut off his head and throw his body one way and his head another. On the night in question, the defendant armed himself with a rifle and shot the deceased in his head as he exited his apartment. He loaded the body into a vehicle and removed it from that location. The decapitated body was found at a rubbish dump and his head found somewhere else. On his conviction for murder he was sentenced to 25 years.

[76] It is clear that the facts of that case is far different from the present matter. That case involved a great degree of premeditation. Though this is a violent crime, it does not rise to that threshold. In all the circumstances I consider that having regards to the aggravating features of the case, a starting point of 30 years is appropriate. Considering therefore the strong mitigation including his age, that an appropriate sentence would be a sentence of 20 years with a minimum period of 14 years. At the end of that period he shall be reviewed under section 3B of the Offences against the Person Act, Cap 300. Any time spent on remand shall be taken into consideration in calculating the minimum term. This period has been set so that he has the possibility of light of the end of the tunnel.

[77] He will use the years in prison to reflect on the senseless of this crime and the anger in his heart for the deceased which appears to continue to today.

[78] He has complained of being ill-treated in prison whilst he was on remand, and points out that he is foreigner surrounded by other inmates unlike him. This, he says has made him a

target and he has already been attacked. The authorities must investigate these matters. Considerations may be given as to whether he could be returned to Italy or his home country wherever that is to serve the sentence of this court.

[79] The Court wishes to thank all Counsel for their assistance in this matter.

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Darshan Ramdhani  
High Court Judge (Ag.)