IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

INDICTMENT No. 91/2006A

REGINA

v.

TREVINO TENNYSON BODDEN

Appearances:	**Ms. Cheryll Richards Q.C. and Ms. Elisabeth Lees for the Crown** **Mr. Mark Mulholland Q.C. and Mr. Jonathon Hughes of Samson Law for the Defendant**
Before:	**Justice Alexander Henderson Q.C.**
Hearing:	**20th April 2017**

Criminal Law – Sentence *– Mandatory life sentence – Minimum term – Conditional Release – Firearm – Exceptional in nature – Aggravating circumstance – Extenuating circumstance – Arbitrary and disproportionate legitimate expectation of release.*

JUDGMENT

1. The Defendant, Trevino Tennyson Bodden, was convicted on November 6, 2007 of two murders and sentenced to imprisonment for life. At the time, our law did not provide for the setting of a minimum term of imprisonment after which the offender might apply for conditional release; it does so now in the *Conditional Release Law, 2014* (the "Law") and the *Conditional Release Regulations, 2016* (the "Regulations"), legislation that applies to all prisoners regardless of when they were convicted or sentenced[1]. I have conducted this hearing to fix a minimum term for Trevino Bodden.

2. The guiding principles for setting a minimum term were discussed in some detail in my recent judgment in ***R. v. Ricketts***[2] and will be referred to here only in passing. The Legislative Assembly has determined that the minimum term "shall" be 30 years unless there are extenuating or aggravating circumstances that are exceptional in nature[3]. It is important to bear in mind that the minimum term fixes the earliest date at which an offender may apply for release but says nothing about whether he should be released on that date, at a later date, or not at all.

[1] see s.3(1) of the Law
[2] (unreported), February 7, 2017
[3] See s. 14(1) of the Law

FACTS

3. The Defendant was born on October 3, 1985 and was 21 years of age at the time of the two offences. On the evening of November 1, 2006 The Defendant was at the Pirate's Cove Bar in East End on Grand Cayman with several friends. One of the victims, Brenard Scott ("Mr. Scott") (known locally and in the evidence as "Chicken Bone"), was there also. Around 11 p.m., the Defendant, Mr. Scott, and others left the bar and walked to a nearby location in front of the residence of the second victim, Renold Pearson ("Mr. Pearson"). The Defendant and Mr. Scott became embroiled in a fight. There is no reliable evidence about how, or why, it began. What is clear is that Mr. Scott prevailed. He threw the Defendant to the ground while holding onto his shoulder-length hair and punching him repeatedly. Mr. Scott was also using his knee to inflict blows to the Defendant's face.

4. The Defendant said something like "*don't go nowhere – I coming back*" then left the area. He returned running, within five or six minutes, still angry and with a loaded handgun in his hand. He said "*who the bad man is*?" At this, Mr. Scott emerged from a nearby residence. As Mr. Pearson shouted "*don't go in my old lady's yard with the gun*", the Defendant approached Mr. Scott and fired several shots, killing him.

5. Mr. Pearson then shouted at the Defendant, "*what you do my brother*?" and ran towards him. The Defendant replied "*you too pussy hole*" and fired several more shots, killing Mr. Pearson.

6. When he returned with the gun, the Defendant made an amateurish and entirely unsuccessful attempt to disguise his identity. At trial, he testified to the circumstances of the fight but denied returning to the scene and killing the two men. He said he went home and fell asleep. The jury did not believe him.

7. Several members of the local community, including some older men and one woman, witnessed the fight and saw Trevino Bodden, the Defendant, beaten badly. He was humiliated. I am satisfied that, in light of his age, the circumstances of the fight, and, especially, the presence of the witnesses to it, Trevino Bodden was provoked. I left with the jury the possibility of a manslaughter verdict on both counts of murder.

8. The jury rejected the possibility of manslaughter verdicts. In doing so, they likely concluded that the interval between the end of the fight and the Defendant's return with a firearm was sufficiently long that he could reasonably have been expected to regain his self-control.

ISSUES

9. In its written submission, the Crown had argued that the use of a firearm is an aggravating circumstance of an exceptional nature. At the hearing, the Crown conceded that this position could not be maintained in light of my decision in ***Ricketts***[4]. The Crown also says that the fact that this was a double murder is an obvious aggravating circumstance of an exceptional nature; the Defendant concedes that to be the case.

10. The Defendant says that he was provoked and that, in all of the circumstances, the provocation was exceptional in nature and should therefore serve to reduce the minimum term. He also argues that it would be unfair to set his minimum term at 30 years or more for a variety of reasons relating to the interplay between the current and former legislation. He says that the 30-year norm is higher than the terms served by those life prisoners who were released under the former legislation; that the prohibition on considering his conduct while in prison is unfair; and that the 30-year norm is arbitrary and disproportionate. He also says that under the former legislation he could have applied for release at any time; that he had a legitimate expectation of release after serving less than 30 years; and that the Crown should have warned him, but did not, of the legislative change, so as to enable him to apply under the old licence provision. Mr. Bodden says that all of these considerations, collectively, amount to an extenuating circumstance that is exceptional in nature.

[4] *supra*

PROVOCATION

11. Section 2(3)(d) of Schedule 12 of the Regulations lists "the fact that the offender was provoked" as a possible extenuating circumstance. Since the section has application only to offenders convicted of murder, it is obvious that it refers to provocation falling short of the criteria for returning a verdict of manslaughter. The decision of the UK Court of Appeal in ***Attorney General's Reference No. 23 of 2011 (Sanchez Williams)***[5] supports this conclusion. I accept that the Defendant was provoked within the meaning of the section.

12. The Crown says that the nature and degree of the provocation that was caused was not exceptional in nature and, as a consequence, this extenuating circumstance cannot be used to reduce the minimum term that would otherwise be imposed. "Exceptional" in this context means only that the circumstances are unusual or uncommon, not that they are unprecedented or very rare. I consider the circumstances to be sufficiently uncommon to qualify as exceptional. It follows that the minimum term should be reduced to reflect this mitigating factor.

13. I am also of the view that the provocation was well beyond minimal or trivial. It caused a loss of control by the Defendant that led him, in a state of ungoverned rage, to shoot two people. The fact of provocation is a substantial extenuating circumstance.

[5] [2011] EWCA Crim. 1496; [2012] 1 Cr. App. R. (S.) 45

DOUBLE MURDER

14. The killing of Renold Pearson, a mere bystander, is obviously an aggravating circumstance of the most serious kind. Double or multiple homicides are thankfully rare in the Cayman Islands; I am satisfied that this aggravating circumstance is exceptional in nature and justifies an uplift in the minimum term.

15. How large an increase is appropriate? If the second killing fell to be considered in isolation, a very large addition to the 30-year norm would be appropriate. However, I must consider all of the circumstances and arrive at a minimum term that is not arbitrary or disproportionate when measured against the three legislative objectives of retribution, deterrence and rehabilitation. There is an upper limit to how long a minimum term can be, if anything more than lip service is to be paid to the prospect of rehabilitation. Moreover, I must weigh this aggravating circumstance against the extenuating circumstance of provocation.

OVERALL FAIRNESS OF THE LEGISLATIVE TRANSITION

16. Counsel to Mr. Bodden argues that the collective impact of several aspects of the transition from the old regime to the new is unfair to the Defendant. He does not seek a declaration of incompatibility or any other constitutional remedy but does say that the unfairness can be alleviated by treating these factors as an extenuating circumstance, and by reducing the minimum term accordingly.

17. Mr. Mulholland says, correctly, that the 30-year norm is higher than the various periods of time actually served by all six prisoners released on licence by the Governor under the old legislation that has been superceded by the Law and the Regulations. He draws a contrast with the analogous UK legislation: it contains a transitional provision that is intended to prohibit the imposition of a heavier penalty than what could have been imposed at the time the offence was committed. The UK legislation is described in depth in ***R v Sullivan & others***[6]. The decision proceeds on the assumption that a minimum term is part of the "penalty" for murder and the UK legislation appears to adopt the same viewpoint. Article 7 of the *European Convention on Human Rights* prohibits the imposition of a penalty more severe than that which could have been imposed at the time the offence was committed; section 8(1) of the *Cayman Islands Constitution Order, 2009* (the "Bill of Rights") is a similar provision.

[6] [2004] EWCA Crim 1762; [2005] 1 Cr. App. R. (S.) 3 (CA) at para. 17 ff

18. The law has moved on from that position. In ***Ricketts***[7], counsel conceded and I agreed that a change in the law that results in prisoners having to serve more time before becoming eligible for release does not amount to a retroactive increase in the penalty. The penalty is and remains imprisonment for life. The change is an alteration in the manner of execution or enforcement of the sentence. I drew my conclusion from the decisions in ***Uttley v Secretary of State for the Home Department***[8]; ***Kafkaris v Cyprus***[9]; ***Robinson v Secretary of State for Justice***[10]; ***Del Rio Prada v Spain***[11]; and ***The Queen on the application of Abedin v Secretary of State for Justice***[12]. The point must be regarded as decided at this level. It cannot amount to an extenuating circumstance.

19. The Defendant has also argued that the legislative prohibition in the Law on my considering his conduct in prison and efforts after sentencing to rehabilitate himself is unfair. Section 23(1) of the Law says I am to determine the appropriate minimum term as if I "were sentencing an accused who has been convicted". Section 23(4) reads:

> *"At the sentencing hearing referred to in this section, evidence of the prisoner's behavior in prison after [the] original sentencing is not admissible."*

No similar prohibition exists in the United Kingdom legislation.

[7] *supra*,
[8] [2004] 1 WLR 2278 (HL)
[9] (2009) 49 EHRR 35 (ECHR)
[10] [2009] EWHC 2251 (QBD)
[11] (2014) 58 EHRR 37 (ECHR)
[12] [2015] EWHC 782 (QBD)

20. The Defendant has invited me to read down to s.23(4) so as to take into consideration his evidence about his conduct in prison. The difficulty with that proposal is the utter absence of any ambiguity or lack of clarity in the provision. Reading down, in this jurisdiction, is sanctioned by s. 25 of the *Bill of Rights* in these words:

> *"In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part."*

21. The result is that this interpretive tool becomes unavailable if the primary or subordinate legislation in question is unambiguous and clear[13].

22. However, it does seem to me that the prohibition on my considering any information that was not available on the date of sentencing is a reason for caution, especially given his relatively young age. The minimum term will, of course, prevent the Conditional Release Board from considering whatever progress towards rehabilitation has been made by the Defendant until the term has elapsed. I approach the setting of a minimum term with an awareness that I am deprived of much information that, if the law conformed to its UK counterpart, I could take into account.

23. The final point made under this heading is that the 30-year norm is arbitrary and disproportionate. The approach taken here is a comparative one. The Defendant points out that in the UK, if the severity of the crime is "particularly high", the starting point for setting the minimum term is 30 years. Article 110(3) of the *Rome Statute of the International Criminal Court* directs that a life prisoner is entitled to a review of his detention after 25 years.

[13] See *In re Nairne* 2013 (1) CILR 345 at para. 22 ff. (GC).

The Defendant's written submission contains a list of 32 countries with the minimum terms applicable to life prisoners in each. Most are less than 30 years, some substantially less. Estonia and Moldava specify 30 years. France adopts 30 years for "certain" murders and Turkey does so for "aggravated" murders. The only minimum term exceeding 30 years is in Turkey, where 36 years is the minimum for "aggregate sentences of aggravated life imprisonment". My conclusion from this data is that our Legislative Assembly has chosen a period of time – 30 years – that is at the top of the range, but not outside the range, of relevant international comparators. The 30-year norm is not disproportionate when measured against the minimum terms of these other democracies.

24. In any event, there is the margin of appreciation to be considered. In ***Vinter v United Kingdom***[14], the European Court of Human Rights said (at p. 140):

> *"In addition, as the Court of Appeal observed in* R v Oakes, *issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement. Accordingly, Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes. As the Court has stated, it is not its role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court."*

25. I am unable to find that the 30-year norm is arbitrary or disproportionate. It is well within the margin of appreciation. In light of that conclusion, I do not treat it as amounting to an extenuating circumstance.

[14] (2016) 63 EHRR 1

LEGITIMATE EXPECTATION AND LACK OF NOTICE

26. Mr. Mulholland argues that the Defendant could have applied for release under the former legislation at any time and that he had a legitimate expectation of release after serving between 15 and 25 years. He was denied this opportunity because he was not warned of the forthcoming change in the law.

27. The Defendant has sworn an affidavit explaining (in paragraphs 10 to 13) his understanding of and expectations concerning the possibility of conditional release. The Crown has filed the affidavit of Debra Prendergast, Secretary of the Conditional Release Board and of its predecessor, the Parole Commissioner's Board. In addition, I have evidence concerning the release of other prisoners serving life sentences.

28. After being sentenced to life imprisonment on November 6, 2007 the Defendant believed "there was no possibility of getting released". That was realistic, as no life prisoner in the Cayman Islands had been released as at that date.

29. He says that he learned of the possibility of release "when inmates started to be released". Ms. Prendergast's evidence on the chronology is summarized in my judgment in ***Ricketts***[15]. The first prisoner serving a mandatory life sentence to be freed was released on June 21, 2013. He was released under the former legislation, which gave to the Governor a discretion to release a life prisoner at any time. This prisoner had served 27 years at the time of his release. I infer that Trevino Bodden learned of the possibility of his being released around this time. He made inquiries and decided (correctly) that it was too early for him to apply.

[15] *supra.*

30. Two more prisoners serving mandatory life sentences were released in the first half of 2014. The evidence indicates that each had served 28 years at the time of his release.

31. As I said in ***Ricketts***[16], the Law received second reading in the Legislative Assembly on October 24, 2014 and would have received substantial media attention at that time. It is reasonable to conclude, and I do, that prisoners serving life imprisonment became aware of the new regime on or shortly after that date.

32. Mr. Peter Gough of the Deputy Governor's Office delivered a PowerPoint presentation about the new Law to the Inmate Council at the Prison in January, 2015. I was told in argument that there were one or more life sentence prisoners on the Council. Mr. Gough told them that the new Law would apply to all prisoners serving life sentences, no matter when sentenced, and that a Grand Court judge would set a minimum term for each such prisoner unless the prisoner had already applied to the Governor for release. The evidence does not reveal whether Mr. Gough warned the audience of the soon-to-be-enacted 30-year norm.

33. The Law did not come into force until February 15, 2016. By that date, three more life prisoners had been released. They had served 29, 24 and 22 years respectively. The prisoner who was released after 29 years is the only other person in the Cayman Islands to have been sentenced to life imprisonment for a double murder.

[16] *supra*

34. Trevino Bodden says in his affidavit:

> *"I had no idea before the new law came in that it was coming. I was never warned about the old scheme ending or told that I might want to make an application. I only found out when this whole issue blew up and it became apparent that we were being denied the opportunity to apply to the Governor, which my friends had been given. As far as I was concerned I was eligible to apply and could be released, particularly due to my positive attitude in prison, in a few years' time. Based on those who had gone before me and what they had told me, I expected that this would be at some point after I had served between 15 and 25 years."*

35. The same argument was advanced in ***Ricketts***[17]. I will repeat here what I said there. The Defendant could have had no legitimate expectation of release on the date of his offences or on the date he was convicted and sentenced. No legitimate expectation could have arisen after the proposed legislation received its second reading, and attendant publicity, in October, 2014. By that time, just three prisoners had been released. This number is too small, and the period of time during which the releases took place is too short, to permit a reasonable conclusion that a new policy had become entrenched and would necessarily be followed by successive governors (who are replaced every three or four years). A pattern had not yet emerged. No one in authority told Trevino Bodden that he would be released at any particular point in time. The evidence is too insubstantial to justify a legitimate expectation.

[17] *supra*

36. It is correct that the Defendant could have applied for release at any time, but any such application was bound to be refused. If any inference can be drawn from the case of the other prisoner (mentioned above) who was serving life imprisonment for a double murder, Trevino Bodden could have expected release by the Governor, exercising her discretion, after approximately 29 years. Consequently, even if the authorities had a duty to warn him of the impending change in the law and did not (and both propositions are in doubt), he suffered no prejudice. I find that legitimate expectation and lack of notice are not extenuating circumstances.

OFFENDER'S BACKGROUND

37. I am permitted to take into account any information about the Defendant's antecedents that could have been presented at the time he was sentenced. His affidavit contains some information about his unfortunate childhood.

38. The Defendant did not really know his father at all until his mother died when he was 18 years of age. At that point he moved in with his father but the relationship quickly deteriorated. The Defendant was abusing alcohol and soft drugs. His girlfriend, who could have been a moderating influence, left him. He became morose and (he says) took to sleeping upon his mother's grave. The Defendant is the father of three young children. I take all of this into account.

CONCLUSION

39. I must weigh and balance the factors I have mentioned. I must bear in mind that I am not ordering Trevino Bodden's release but merely setting a date after which his release may be considered. Release is not automatic but dependent upon the Conditional Release Board's assessment of his conduct in prison, upon whether he can be viewed as rehabilitated, and upon whether he presents a danger to the public. Taking the provocation and age and background of the offender into account, and weighing them against the fact that two people were killed, I fix the minimum term at 28 years. The 367 days Mr. Bodden spent while on remand are to be taken into account.

Dated this the 12th May 2017

GRAND COURT CAYMAN ISLANDS

Henderson, J.

Justice Alexander Henderson Q.C.
Judge of the Grand Court