

**IEASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

**ANTIGUA AND BARBUDA
CASE NO. 2 OF 1996**

BETWEEN

THE QUEEN

vs

MICHAEL MASON

Appearances:

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

Mr. Sherfield P. Bowen for the Defendant

2016: September 19, 20 October 19,
November 22

Criminal Law – Re-Sentencing - Murder – Conviction on Trial – Original sentence of death declared unconstitutional – Order of re-sentence – Court’s approach on re-sentencing – Application of normal sentencing principles – Considerations of aggravating and mitigating features – Notional range of sentence for murder – Fixing a commensurate Sentence – Relevance of delay on sentence – Relevance of time spent on death row – Relevance of declaration of Unconstitutionality of original death sentence on commensurate sentence.

On the 25th June 1996, the defendant, Michael Mason was found guilty of the murder of one Wendy Newbiggin, a Canadian citizen on vacation in Antigua with her parents and siblings. It was the prosecution case to the jury that at about 1.30 p.m. on the 24th February 1995, the accused shot and killed Ms. Newbiggin during the course of robbing her and her father while they were relaxing on the Valley Church Beach in Antigua. The defendant was arrested the next day and was positively identified by the father in an identification parade. The prosecution case not only comprised of witnesses who put him in the general area that day driving his blue Suzuki but also forensic evidence which revealed that ‘fibre’ which had been recovered from his clothing matched the fibre of one the stolen bags which had been recovered. There was strong inference on the evidence that when he shot her he intended to do her grievous bodily harm and not kill her.

Upon his conviction, the defendant was immediately sentenced to death as this was believed at that time to be the only available sentence for the offence of murder. There was no mitigation hearing, and the defendant was not allowed to make any representations to mitigate his sentence. He was placed in the maximum security wing of the prisons awaiting the execution of his sentence. In 2000 a death warrant was read to him and even the gallows were built for his execution, but this was stayed shortly thereafter and since then he remained under the original sentence. Some years later he was removed from maximum security and placed in the general population. In 2014, the State filed proceedings to regularize his status in prison and the His Lordship Justice Cottle declared that the original sentence of death was unconstitutional and was accordingly quashed. It was also ordered that he be re-sentenced for the crime. At this re-sentencing hearing it was argued that this was a case in which a life imprisonment was not appropriate having regards to not only the offence and the offender, but also having regard to the breaches of the Constitution and especially the length of time which had elapsed.

Held: The defendant is sentenced to a fixed term of imprisonment of 30 years for the following reasons:

1. The death penalty not being relevant, the maximum penalty which may be imposed for murder is a discretionary life sentence which is a whole life sentence. Notwithstanding the delay and complaints of constitutional breach, on this sentencing exercise the court's approach may as a preferred approach first apply in the usual way ordinary common law principles of sentencing and in this regard consider the matter in the round having regards to the offence and the offender taking into consideration the progress he has made. On arriving at what would have been a commensurate sentence, the court must then go on to consider those matters extraneous to the offence and the offender, and their mitigating effect on that sentence in arriving at the appropriate sentence in this case.
2. An examination of this offence and the offender, aggravating and mitigating features puts this offence extremely high on the scale of seriousness. A firearm was used to kill the deceased in the course of an armed robbery in a public place in broad daylight. The fact that the offender was a young man at the time of previous good character, and is today to be regarded as being rehabilitated does little to mitigate the sentence. A notional commensurate sentence is therefore a sentence of life imprisonment with the punitive element being fixed at 35 years with the review for early release after that period.
3. There were several constitutional violations in this case. First, there was a violation of his right to a fair trial when upon his conviction, he was automatically sentenced to death without the benefit of a mitigation hearing. This breach was further aggravated when a death warrant was read to him and he was measured for his coffin. His right to a fair trial was also breached by the delay of over 20 years in the imposition of a sentence in accordance with law. These matters also amounted to inhumane treatment in breach of section 7 of the Constitution. The unconstitutional sentence of death was imposed on the 26th June 1996 and since then he remained in Prison under that sentence. Even after the death sentence was declared unconstitutional in 2015, neither the offender nor the Prison Authorities was informed of his change of status, and that a re-sentencing exercise was to be held. He was only notified when notice was sent out by this court.

4. These breaches were significant in this case and will operate to mitigate the sentence. Considering these breaches as against the actual circumstances of the offence a fixed term of 30 years is therefore an appropriate sentence. All of the time that he has spent on remand or on detention for this offence shall be taken into consideration in calculating this sentence.

DECISION

- [1] **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 30 years imprisonment was considered in all of the circumstances of this case to be the appropriate sentence for the reasons now set out.
- [2] On the 25th June 1996, the defendant, Michael Mason was found guilty of the murder of one Wendy Newbiggin, a Canadian citizen who was a visitor to the island when she was robbed, shot and killed on the beach on the 24th February 1995. He was sentenced to death on that same day.
- [3] In January 2000 a death warrant was read to the defendant Mason; he was to be executed on the 27th January 2000. Hours before his execution 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 and the rulings by the Privy Council in **R v Pratt and Morgan** [1994] 2 AC 1, as with a number of other matters, it appeared that the prison authorities accordingly took no steps to carry out the execution of the convicts. This man, like other murderers who had their execution also stayed at the same time, was treated as not being liable to execution and was moved from maximum security and allowed to be in the 'general population section' of the prison. No formal pronouncements or orders, however, were made at the time and for all intents and purposes Mason remained in prison under the original sentence of death.

[4] In 2014, the Honourable Attorney General took matters into his hands, and on behalf of this defendant and six others who were similarly being held under their original sentences of death, filed a claim in the high court for orders that the sentences of death which had been imposed as a matter of course as a mandatory sentence was unconstitutional. On the 4th June of 2015, Justice Cottle granted the declaration which was sought and ordered that this defendant and the others were to be re-sentenced by the high court at the earliest opportunity.

[5] When this matter came on for re-sentencing this defendant had spent just over 17 years in prison, ten of which was spent in maximum security.

THE FACTS

[6] This court was not the trial court. For this reason, this court examined the trial record and heard submissions from both sides on what were the facts in this case as the jury would have found them from the evidence led. The court was satisfied that the following represented the facts in this case.

[7] In broad daylight, on the 24th February 1995, Wendy Newbiggin was robbed, shot and killed on the Valley Church Beach, Antigua. The murder was committed in full view of her father who was there with her and was also robbed at the same time by this defendant.

[8] The deceased, Ms. Newbiggin, was a 26 year-old lady at the time of her death and she had come from Canada to Antigua with her family on the 19th February 1995 for a week's vacation. On vacation with her was her mother, father, her brother and sister.

[9] Her father, Dr. Peter Newbiggin was the crucial witness in the case. He stated that at about 10 a.m. on the 24th February 1995, he and his wife, his son and his daughter Susan had gone to the Valley Church Beach. His other daughter, the deceased Wendy joined them about 11.30 am. She laid down on the beach next to him. They were on an incline and their handbags were on the sand above their heads. He said that his wife and Susan

had walked down to the beach, and his son was about 30 feet away. He told the jury that 'a man strolled quickly past my head. He had a small handgun pointed to the sky. I did not see him until he was past me. He moved very quickly. He said 'surprise' and reached for the bags. I didn't do anything. I just watched the bags. He picked them up and started taking them away. Wendy reached for hers and wouldn't let go.

- [10] He continued: 'I heard a shot. I didn't see the gun go off, Wendy released her grip on her bag. I sort of rolled back and looked at the man. He looked at me and pointed the gun at me. I dropped my eyes. It is about this time. Wendy said: 'Daddy, I'm shot. He left at that point. I did not look at him any further. I turned my attention to my daughter.'
- [11] The deceased, Wendy had been shot. As her father attended to her, she gasped, and became unresponsive. She died on that beach. Forensic evidence revealed that the gunshot had severed her aorta causing her to die from a loss of blood.
- [12] Dr. Newbiggin told the jury that he had looked at the man's face for about 4 to 5 seconds. He said that: 'I was looking at his face and his eyes when we stared at each other.' He described that the man as wearing a 'tank top of dark blue tones and a cut off faded jeans and said that he was barefooted.
- [13] Items stolen that day including the bags were recovered by the police that same day further along the beach by the Lady of the Valley Church building.
- [14] At about noon the following day, the defendant seen driving a blue Suzuki van was stopped and detained by the police. The van was searched and the police found a wet pair of cut-off jeans which the defendant said were his and explained that he had been swimming the day before. Witnesses testified that on the 24th February 1995, they had seen the defendant in the blue Suzuki coming from the general direction of Valley Church.

- [15] The very next day, Dr. Peter Newbiggin attended an identification parade at the St. John's Police Station and positively identified the defendant as the man who had robbed and shot his daughter.
- [16] One Cheryl Corbin who was deemed a Forensic Scientist gave evidence that she had tested certain items given to her by the police and stated that her examination revealed that some fibre which was found on the pants of the defendant matched those found on one of the stolen bags which was recovered.
- [17] The defendant denied the crime. At the trial he gave sworn evidence and maintained his innocence and provided evidence of an alibi. The alibi witness, the girlfriend of the defendant corroborated this evidence.
- [18] This evidence was rejected and he was found guilty.

THE MITIGATION HEARING

- [19] 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 prepared by Dr. James A. King. The Court also received and considered sentencing guidelines from the Crown and written submissions from Mr. Bowen.

The Pre-Sentence Report – Michael Mason

- [20] At the date of sentencing the convicted man was presented to this court as a 45 years old man who has been in prison since 1995. He was 24 years old at the date of the commission of the offence.
- [21] The report reveals a somewhat normal upbringing and, if anything, it speaks very favourably of the defendant's childhood and his interaction with his community. The

memory of the community is that he was generally regarded as someone who was raised with good Christian values. Someone who was 'playful' and 'jovial'.

[22] He is the father of two children of different mothers, one whom he has never seen and the other whom he has seen a handful of times.

[23] Prior to the crime, the defendant worked within the tourist industry and during that time met the mother of his second son, a national of Switzerland. From his own account, the defendant was in Switzerland for an extended period and was about to secure employment when he was called by a local pastor advising that he should attend to Antigua for his first son's christening. This offence was committed on his return.

[24] Today the report informs that the defendant is not seen as having any behavioural issues in prison. He is described as cheerful, helpful and friendly. Through this report which has been confirmed by the prison authorities, it recorded that he is a suitable candidate for rehabilitation.

[25] Community members who has only had good things to say about the defendant's life prior to his incarceration, are also ready to welcome this man back into their community. His own family members including his first born son, seem ready to assist him with his new life outside if and whenever he is released.

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

[26] A 2013 report from former superintendent Percy Adams, a report from Reverend Canon Emerson Richardson, the Chaplain at the Prisons in 2013, and a report from the Prisons' Medical Officer were admitted by consent.

- [27] The 2013 Report from Mr. Adams describing the defendant as being 'also angry, claiming that he did not commit the crime', the report went on to state that 'for the past two years [presumably 2011 to 2013] he has come to realize that he is in prison and his behaviour has improved.
- [28] The Reverend also spoke of the defendant's assertions that he had been falsely convicted and that he was also despondent.
- [29] The current superintendent of Prisons Mr. Albert Wade gave oral evidence. He stated that he took on his role in November 2014 and from that time had the opportunity to observe the defendant Mason in prison. He stated that he interacts with him for about 15 minutes every day.
- [30] He states that Mason is a hardworking man who does all the work 'around him' and even volunteers. He cleans the chapel, and assists others who are handicapped acting as their crutches. He also assists prison officials to quell disturbances in prison.
- [31] Mr. Wade opined that the defendant Mason is rehabilitated and that he is safe to be released back into society.
- [32] 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, very disciplined, and acting more like a prison officer than a prisoner. He opined that based on 20 years of interaction, the defendant Mason, is reformed and ready for release into society.

The Psychiatric Report

- [33] A psychiatric assessment was ordered and an examination was done by Dr. James A. King on the 9th October 2016 and a report was presented unchallenged to the court.

- [34] The doctor said that he had examined the defendant and stated that he did not find any serious psychological abnormality. He stated that the defendant did not meet any 'criteria at the time of evaluation for any psychotic, affective or anxiety disorder'. He was deemed competent to participate in this sentencing hearing.
- [35] The doctor did identify that the defendant admitted use of cannabis even to date, and recommended that some treatment be given to him for this dependency. The doctor opined that that 'his limited education and lack of vocational skills would have to be addressed with the involvement of an assigned social worker to help give him guidance and structure. If this could be arranged and maintained his relative risk of reoffending should be relatively low to moderate'.
- [36] This court was unable to make any finding that as he presently stands before the court the defendant presented a danger to the public.

The Victim – The Impact on Relatives

- [37] Several statements from family members of the deceased Ms. Wendy Newbiggin, were received by the court and were considered as part of these proceedings.¹
- [38] The first statement came from the deceased parents, Dr. Peter Newbiggin and his wife Lois Newbiggin who inform the court that the death of their daughter changed their lives forever. These two grieving parents stated that with their three children including Wendy, the deceased, they were a close family. The father states: "Wendy was the outgoing one. Friendly, generous, outspoken, questioning. She was the life and sparkle at the dinner table, or at a gathering. Her loss abruptly changed everything. Louis became reclusive; she dropped almost all her social and community contacts. I had to return to my work, but

¹ The Probation Department is to be commended for their efforts in making contact with these family members through the assistance of the Canadian High Commission in Barbados

no longer with confidence and belief in my abilities, and it faltered and did not recover, and I progressively withdrew to the sidelines in my practice at the hospital.

[39] Wendy's brother, David Newbiggin also spoke of his grief and the continued impact of this offence. He states that 'the pain that my family has had to endure and relive has been unabated. The world we could have faced, the world with optimism and goodwill has been replaced with constant assault of fear and a sense of lurking danger.

[40] Wendy's sister, Susan Newbiggin also expressed her grief and continued pain. She states: "the shock of losing such a gentle person in such a violent, senseless way, is one we relive again and again. We mourned her loss at the time, and each of us in our own way has struggled to find a path to overcome the grief and trauma of witnessing her death. Persistent fear, anxiety, and nightmares have plagued us for over twenty years, yet it is not simply the loss of what she was that haunts us, but what might have been. As we have gotten older, and had families of our own, we see her reflected in the faces of our own children. She is the phantom aunt that they will never know, who they resemble so much. Now when we gather together, it is not just Wendy that is missing from the table, but her future, and what she had to offer the world, which was stolen from us all."

THE COURT'S APPROACH TO THE SENTENCE

Fixing a Commensurate Sentence

[41] Arguments were made in this matter by Mr. Bowen on behalf of the offender that, having regards not only the circumstances related to the offence and offender but also the delay and the unconstitutional sentence of death imposed on the offender, a proper sentence should be a fixed term of imprisonment which would realize in his early release from prison. These arguments in this case, have merit.

- [42] The unconstitutional sentence of death, the circumstances of the incarceration and the delay were unique features which made this sentencing exercise a very unusual one. It is therefore important that this court state the approach adopted.
- [43] This Court is complying with the Order of the Honourable Justice Cottle sitting as a Constitutional Court in Originating Motion Proceedings No. 359 of 2014. That order declared the sentence of death which had been imposed on each of these men as unconstitutional. It was directed that each of these men be sentenced by the High Court. This re-sentencing is therefore an exercise of the court sitting in its criminal jurisdiction as if it were the court passing sentence at the end of the criminal trial.²
- [44] In the usual way, a court in Antigua and Barbuda tasked with the sentencing of a criminal offender, must approach the matter having regards to the common law principles of sentencing, considering both the offence and the offender as he presently stands before the court. The court must have regard to all of the aggravating and mitigating features that would ordinarily fall to be considered. This would in the normal way lead the fixture of a commensurate sentence. In this case, having arrived at this sentence, the court will go on to consider whether the 'extraneous matters'³ would also have a mitigating effect on the sentence.
- [45] Turning then to this case, it is accepted that the prescribed and discretionary death penalty is not relevant in this sentencing exercise, and that 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.⁴

² See for a similar approach the decision in *The Republic of Malawi v Njiratenga Banda*, Homicide Sentencing Re-Hearing No. 8 of 2015

³ So termed as they arise outside of the usual matters relating to the culpability of the offender or the harm which the offence caused. See 'Re-evaluating the justifications for aggravation and mitigation at sentencing.' – 'Mitigation and Aggravation at Sentencing' Cambridge University Press

⁴ See *R v Foy* (1962) 48 Cr App R 290; *R v Norton* [2001] All ER (D) 92 (May)

- [46] In deciding whether sentences of life imprisonment or lesser fixed terms are appropriate in this case in relation to this offender, this Court, in the absence of any statutory scheme is guided by the common law principles or aims of punishment⁵ 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 those 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.
- [47] A life imprisonment would be appropriate where '*considering the matter in the round including the individual circumstances of the offender and the offence, punishment and deterrent*' dictates that such a sentence is a commensurate sentence.⁶
- [48] Some jurisdictions have categorized the offence of murder, so that certain types of murder, on the basis of their level of seriousness would presumptively attract a life sentence, whilst murders falling into a second level of seriousness would require that the court use a starting point sentence of a fixed period of years (30 years in the UK) and then be increased or decreased for aggravating and mitigating features. Even further, some jurisdictions have placed murders which fall low in the scale of seriousness or in relation to the age of the offender, into a third category which will have a lower starting point (in the UK, this is a starting point of 25 years).
- [49] The common law or the sentencing provisions of Antigua and Barbuda do not place the offence of murder into clear categories with expressed starting points. Notwithstanding, the common law has provided some guidance in cases which would require a starting point of life imprisonment. It would also seem that the experience of the common law taken together with the provisions of Offences against the Persons Act, Cap 300 would support

⁵ Desmond Baptiste v R Criminal Appeal No. 8 of 2003

⁶ David Roberts v R Criminal Appeal No. 8 of 2008

placing the offence of murder in Antigua and Barbuda into three broad categories in terms of punishment.

- [50] A notional category one relates to cases attracting the death penalty. For those murders considered the worst of the worst where the common law guidelines of **Dick Trimmingham** are met, a commensurate sentence would be a sentence of death.
- [51] A notional category two relates to those murders which are so serious that sentences of life imprisonment are appropriate. A life sentence may be either for the whole life of the offender or it may be a term subject to a review for possibility of early release. Where a life sentence is imposed a court may, on the basis of section 3B, fix a review date for the possibility of early release. The legislation states that that court shall require that life terms in this category must be required to serve at least 30 years before they are eligible for early release. In my view, a court must fix the date of this review period by reference to that period which is required to be served to fulfil the punitive element of the sentence, so that if it is shown that the person is rehabilitated and there is no other public interests reasons or that deterrence does not require the person to remain in prison, the person shall be released. Parliament has clearly stipulated that certain cases of murders will require a punitive period of at least 30 years – cases which will carry a range of life imprisonment to 30 years imprisonment. (I am of the view that these minimums established by section 3B of Cap 300 may be ignored in appropriate cases where even a life term is imposed.)
- [52] This approach is seen in the sentencing scheme of the United Kingdom. There, Schedule 21 of the Criminal Justice Act 2003 indicates that a starting point of life imprisonment is appropriate where the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and the offender was aged 21 or over when he committed the offence. This provision provides examples of such cases to include (a) the murder of two or more persons, where each murder involves any of the following (i) a substantial degree of premeditation or planning, (ii) the abduction of the victim, or (iii) sexual or sadistic conduct, (b) the murder of

a child if involving the abduction of the child or sexual or sadistic motivation, or (b) the murder of a police officer or prison officer in the course of his or her duty, (c) a murder done for the purpose of advancing a political, religious[, racial] or ideological cause, or (d) a murder by an offender previously convicted of murder. All of these sentences will then carry a tariff component which will represent the punitive period, after which the person is reviewed for possible release.

[53] Notionally category three must then comprise those other cases of murder that are presumptively not so serious that an assessment of the offence and the offender will lead to an indeterminate life sentence. These cases are appropriately dealt with by fixed terms sentences. Such sentences may also include extended sentence, that is, a sentences which comprise of a minimum period which must be served before a fixed review of the sentence takes place.

[54] In any event, these stated minimum 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 in deciding on a commensurate punishment for the offence of murder. The 20 to 30 years minimums generally indicate a range which is also 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.

[55] A number of cases were also examined by this court to gauge the local and regional courts' response to the offence of murder committed through serious acts of violence.

[56] In **R v Sylvester Lindsay** Criminal Case No. 49 of 2011 the defendant was given an effective 25 years sentence for murder of tourist during the course of a robbery. The deceased in the matter was one Mr. Drew Golan who was an Australian citizen and boat captain visiting Antigua and Barbuda. On the evening of the 22nd January 2009, Mr. Gollan and his female companion and a young child were walking along a main road in English Harbour area. The defendant who was in a van asked the driver to stop and confronted Mr.

Gollan with a firearm in an attempt to rob him. Mr. Gollan swung the bag he was carrying at the defendant and the defendant shot him twice in his chest. He subsequently died of the injuries. At the trial after several witnesses were called the defendant asked to be re-arraigned and pleaded guilty to murder. A partial discount for his late plea led to a sentence of 22 years to be added to his 3 years already spent on remand.

[57] In **Nardis Maynard v R** Criminal Appeal No. 12 of 2004 SKN, the appellant was convicted of the murder of one Henry and sentenced to imprisonment for life. At the time of sentencing he was 22 years old and had an impeccable record. He grew up without his father and lacked parental guidance. On appeal the conviction and sentence was upheld. The facts show that Maynard's attack upon the victim was 'particularly vicious and cold-blooded'. The attack took place in the town of Basseterre just after midnight. The appellant had approached the victim and asked for money that the victim gave to him. Then unprovoked, the appellant moved closer to the victim in an aggressive manner. A bystander held his hand and told him to chill out. He pulled his hand away and launched an attack 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 Rastafari'. Henry, who was sitting tried to get up but fell into the street bleeding.

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

- [59] The statutory review provisions of Antigua and Barbuda in the context of the regional sentences for the offence of murder, addresses a useful sentencing aim. It recognizes that in particular instances, the level of violence involved indicates that rehabilitation and other public interests may require that the offender be imprisoned for an indeterminate life sentence or fixed extended sentence to cater for these imponderables which are (a) primarily dependent on the defendant and (b) matters outside of the punitive element of the sentence. The section provides the court with the statutory mechanism to assess many years after the original sentence, violent offenders and their suitability to be returned to society. In these types of cases, the court is quite capable of fixing a tariff or minimum period which would represent the punitive period which then triggers the review phase of the sentence. None of the regional cases make it obvious that in the usual case 'life terms' may never be released. Those life terms were all imposed soon after the offence. Many of these territories have reducible schemes in place which provides an opportunity for release. It would seem that where legislation provides for the court to be engaged in the review it assures that the sentencing process would not be afflicted by executive transgressions.
- [60] This court conducted this analysis of the legislation and the cases in identifying a sentence range for the purposes of this sentencing exercise, and is quite aware that such categorization should not cause the court to approach this exercise in a mechanistic manner, but must consider all of the circumstances of this case. As it is, this exercise has assisted this court in assessing the seriousness of this crime in deciding on a range of sentences for this offence. This is an important matter in this case, as this sentencing exercise is coming just over 20 years after the defendant was found guilty for this offence and he was already being punished on an unconstitutional sentence. This court will consider that where the punitive portion of a sentence or a fixed term sentence is being considered, a broad notional range between 18 years to 35 years is appropriate.

[61] This court now turns to consider the aggravating and mitigating features of this case.

The Aggravating Factors of this Case

[62] There are a number of aggravating matters in this case. This was a killing which took place during the course of a robbery.

[63] A firearm was used in this attack, and it has to date never been recovered.

[64] This murder took place in broad daylight in a place of public recreation, on one of the island many beaches. This is a place used and frequented by both tourists and nationals.

[65] This victim was killed in full view of her father and not far from her other family members.

[66] Finally, she never posed any threat or danger to this defendant and there was no need for him to shoot her. I am unable to find however, that he did intent to kill her when I look at the evidence in this case. It is equally open on the evidence that he shot her on the spur of the moment and probably only with the intention to get her to release the bag. This is not mitigating but it does not further aggravate the matter.

The Mitigating Factors of the offence and the Offender

[67] I turn to consider the mitigation in this case. First, the defendant was a young man in his 20s at the time of the offence.

[68] Second, he had no previous convictions and was a man of previous good character. Even today as he stands in this court, after spending just over 20 years in prison, he is considered to have been 'rehabilitated'. The cases have accepted that the importance of good character will vary from case to case depending *inter alia* on the nature and

seriousness of the commission of the offence⁷. This is especially true when a court is considering an appropriate sentence in the normal way, that is where the matter was tried within a reasonable time and the offender stands before the court facing sentence thereafter. This court is fully cognizant of the fact that this man has spent over 20 years being punished for this offence. The prison authorities consider that he is rehabilitated. So that there is really no need for any prison term to be designed to ensure that he is rehabilitated.

[69] He does not get the mitigation of remorse as he has never accepted that he has committed that crime. The court will not hold that against him.

[70] The violations which have been pointed out will operate as extraneous matters in mitigation but these will be considered after a notional commensurate sentence is fixed.

The Appropriate Sentence

[71] This offence does not fall among the worst. It is quite open on the evidence to find that this defendant intended either to kill the deceased or to cause her grievous bodily harm. These two inferences being available, this court must proceed on the basis that when he shot and killed the deceased that day as he was trying to rob her, he intended to cause her grievous bodily harm and not kill her. I am unable to find that this was not a robbery 'gone bad'.

[72] I have considered the experiences of the region, shown through the cases. I have noted that this was a murder of a single person. Notwithstanding, the seriousness of this offence was exceptionally high as it involves the use of a firearm used in the course of a robbery.⁸ It was committed on a public beach, against a person enjoying the warmth and beauty of these islands. She was killed in the presence of her father who could do nothing to stop it.

⁷ Desmond Baptiste v R Criminal Appeal No. 8 of 2003

⁸ Note that some jurisdictions have categorized murders into 'capital' and non-capital' murders. In St. Lucia the legislation stipulates that the use of a firearm to kill someone places a murder in the category of capital murder. Commenting on the St. Lucia legislation, Barrow JA stated in *Kent Calderon & Derek Desir v R* Criminal Appeal No. 9 and 10 of 2006 SLU that "...the use of a firearm to commit murder may reasonably be viewed in our Caribbean common law jurisprudence as a worst-case instance of murder."

This offence has not only taken a life, but has left lasting harm on the family and relatives. It has affected even the peace and security of these islands. These are high on the scale of the worst of robberies – the murder flowing from it must be viewed in a serious way. The aggravation in this case indicates that in the usual way, an indeterminate life sentence would have been the appropriate in this case to cater for retribution, deterrence, prevention and rehabilitation. Within this sentence, it would be important to identify what period of such a sentence would represent the punitive period to allow for the review for release mechanism.

- [73] In this regard, I have considered the minimum established by the legislation. I am of the view that it is permissible for this court to fix a lower minimum period in a fitting case,⁹ but having regards the authorities, viewing the use of a firearm as being a very serious matter, I do believe that in fixing this date for review I should start with that minimum of 30 years. In all of the circumstances of this case surrounding the actual offence and the offender as he now stands before me, a period of 35 years represents the punitive period. A commensurate sentence in this case would therefore be a sentence of life imprisonment with the first review of the sentence to be at 35 years for a reviewing court to consider matters such as rehabilitation, deterrence and others matters of public interests. I now turn to consider those other matters which provide further mitigation to this notional sentence.

The Unconstitutional Sentence and the Delay Factor – Extraneous Mitigating Features

- [74] Mr. Bowen, in both his written and oral submission have urged that this court should have regard to the fact that there was an unconstitutional sentence originally imposed on this offender. He argues that further there had been substantial delay in finally imposing a proper sentence. In the meantime, this man had been traumatized by the reading of the death warrant in 2000, the coffins which he saw and his impending execution which was then stayed only hours before the time fixed for it.

⁹ R v Selassie; R v Pearman - [2014] 2 LRC 511

[75] 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.

[76] As in the Harris and Joseph matter, 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 sentence 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.”

[77] In this case, this offender was, without the benefit of any mitigation hearing, subjected automatically to death on his conviction on the 26th June 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 this offender a warrant of death; his execution was to be carried out within a matter of days. He was measured for his coffin. He 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.

[78] When a man is imprisoned for an offence, what is taken away is his freedom and he is thereby deprived of other basis incidents of freedom. Notwithstanding, the humanity and

dignity of society requires that the conditions of the incarceration are reflective of the dignity of free society. A prisoner must only be deprived of his liberty in accordance with law and after his conviction by a lawful sentence. He should thereafter be imprisoned and kept under humane conditions.¹⁰

- [79] 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.
- [80] 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.
- [81] 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 to this defendant until 2015 when the State itself sought and obtained a formal order that the sentence of death was an unconstitutional sentence in breach of section 15 of the Antigua and Barbuda Constitution.
- [82] The delay in this exercise had had one clear effect on the fate of this defendant. He has 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.¹¹ In any event the death penalty was never an appropriate sentence in this matter.

¹⁰ As the United Kingdom Prison services states in part of their mission statement, "Our duty is to look after them with humanity and help them lead law-abiding and useful lives in custody and after release."

¹¹ 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

- [83] The fact that this offender was held under an unconstitutional sentence of death for such an extended period is inhumane treatment and contravenes Section 7 of the Antigua and Barbuda Constitution. This was exacerbated by the reading of the warrant and the events at that time related to his impending execution. There was no positive evidence led as to the effect that this sentence had on this offender. This is unnecessary as I noted in one of the other matters dealt with during these re-sentencing exercises, I agree that the conclusion that this man has been subjected to inhumane treatment and punishment 'is to be drawn from the likely effect of the death penalty on a condemned person'.¹²
- [84] The delay in bringing certainty to this offender must have a real source of punishment to this defendant. At the very least this man believed that he was going to be hanged for at least 5 years and for years after he remained on death row in maximum security. He remained a man under a sentence of death on the prison records. It is appropriate that I refer to the words of Chief Justice Conteh of the Belize Court of Appeal in **Harris v The AG of Belize** Claim No. 339 of 2006 speaking of a man being prisoner being under an unlawful sentence of death. He said at paragraph 11, "*It is no leap of the imagination or creative thinking to conclude that to have the prospect of the hangman's noose over a person head for so long a period (over eleven years) is especially tortuous and inhuman punishment and treatment.*"
- [85] 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 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.*"¹³

¹² 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

¹³ Attorney General et al v Jeffery Joseph and Lennox Boyce [2007] 4 LRC 199

- [86] 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. That however, was not followed through as vigorously as it could have been. Even after the order was made by the court in 2015, though efforts were being made to provide a special court to carry out this exercise, no-one informed the defendant or the prison authorities that the defendant was no longer under a sentence of death.
- [87] These violations will have a mitigating effect in this case. The line of case following Pratt and Morgan have established 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. Courts 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 in correcting an unlawful sentence. In one case, a regional court has even been prepared to grant compensation.
- [88] It cannot be contended that the fact that the death penalty is off the table is already a benefit to the defendant. This is a fallacy. Having regard to the approach of the cases, showing the experience of the common law, a death sentence would not have been an appropriate sentence in this case. A remedy in these cases 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.¹⁴ Even apart from the nomenclature of a 'remedy', the period and circumstances of the defendant's

¹⁴ 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.*"

incarceration are really in effect mitigating features, though distinct from the usual mitigating features that ought to be weighed in the balance in fixing the final sentence.¹⁵

[89] In this case, but for these breaches the appropriate sentence, would have been a sentence of life imprisonment with a review after 35 years. These violations and the delay have been substantial. This court is not aware of any other defendant, except a few who have also been ordered to be sentenced during this period, who have spent as long as this man under an unconstitutional sentence of death.

[90] These constitutional violations including the period of delay in the imposition of the lawful and proper sentence, will have a mitigating effect in this case. It will have some meaningful impact on the sentence and will result in the exclusion of a life term with a review date and the substitution of a fixed term. In all of the circumstances of this case, the sentence for this man will be as follows:

Michael Mason, being found guilty of a jury of your peers for the offence of murder, you are sentenced to a fixed term of imprisonment. That period shall be a period of 30 years. All the time spent on remand or in detention under your first sentence shall be taken into consideration in computing this sentence.

[91] This is the sentence of this court. It is recommended that the Probation Department work with this man on his release to assist him in re-integrating into society.

[92] I will to thank all counsel for their assistance in this matter.

.....
Darshan Ramdhani
High Court Judge (Ag.)

¹⁵ See Pratt v Morgan [1994] 2 AC 1

