

The Death Penalty Project Limited

simons muirhead & burton

A Guide to Sentencing in Capital Cases

Edward Fitzgerald QC and Keir Starmer QC

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2007

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PREFACE

Founded by the law firm Simons Muirhead & Burton, the Death Penalty Project (“the project”) is now established in its own right as an independent NGO with a connected charity, the Death Penalty Project Charitable Trust. The principal objective of the project is to provide free legal representation to the many individuals still facing the death penalty in the Caribbean and Africa and to ensure that the domestic application of the law complies with regional and international human rights standards.

The project has succeeded in establishing violations of domestic and international human rights law on behalf of prisoners facing the death penalty in cases such as Pratt & Morgan [1994] 2 AC 1, Neville Lewis [2001] 2 AC 50, Hughes [2002] 2 AC 259, Reyes [2002] 2 AC 235, Fox [2002] 2 AC 284 and Bowe & Davis 1 W.L.R. 1623.

These decisions have limited the circumstances in which the death penalty can be imposed or carried out on those charged with and convicted of murder. The mandatory death penalty has now been abolished in nine Caribbean countries and a discretion to impose a lesser sentence has been given to the judges of the Eastern Caribbean, Belize, Jamaica and more recently the Bahamas. In exercising that discretion, the judges of Belize and the Eastern Caribbean have developed a number of important sentencing principles. These are set out clearly in the remarks of Byron CJ in Hughes and Spence (unreported), Eastern Caribbean Court of Appeal, 2nd April 2001, and the subsequent sentencing remarks of Conteh CJ in Reyes (unreported) Supreme Court of Belize, 25th October 2002. In brief they establish that (a) the imposition of the death penalty requires special justification, (b) it should be reserved for the worst of the worst cases and (c) only where there is no possibility of reform and social re-adaptation of the offender.

This, briefly put, is the background to the abolition of the mandatory death penalty in the Commonwealth Caribbean. Since 2003, the project has been providing expert support on international and comparative law to lawyers and NGOs in Africa (including Uganda and Malawi) on behalf of prisoners facing the death penalty.

In June 2005, in a landmark judgment (Kigula & Others v AG, Constitutional Petition No. 6 of 2003, unreported), the Constitutional Court of Uganda declared that the mandatory death penalty was unconstitutional. This decision had an immediate impact on all 417 prisoners on death row in Uganda.

Following on from this, in April 2007, the High Court of Malawi in the case of Francis Kafantayeni et al v Attorney General of Malawi (High Court of Malawi, unreported), unanimously held that the mandatory requirement of the death sentence for the offence of murder as provided by the Penal Code, violated the constitutional guarantee protecting every person against inhuman treatment or punishment.

As a result of the decisions in Uganda and Malawi, prisoners presently on death row in those countries now fall to be re-sentenced with the death penalty being no more than an option, rather than the inevitable sentence, for the offences they have committed. The implications for future murder trials will have to be the introduction of a completely new set of procedures for dealing with the new sentencing phase.

The purpose of this manual is to provide judges, prosecutors and defence lawyers with a practical guide to the sentencing phase in capital cases as it has developed around the world and in particular jurisdictions of the Commonwealth. We hope that it is both practical and informative. The guide attempts to set out the test to be applied when sentencing those who would otherwise have faced a mandatory death sentence, to consider the relevant factors to the sentencing exercise and the procedural issues that arise as a result of the discretion now vested in the courts.

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Finally, we would like to acknowledge the work of Edward Fitzgerald QC and Keir Starmer QC in preparing the text of much of the manual and to Joseph Middleton for his

helpful comments and editing of the text. There are of course many others who have been intimately involved in the litigation and development of the law who are too many to mention individually. Their work and our relationship with them has been crucial in developing this area of the law.

Saul Lehrfreund MBE
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Executive Directors
Death Penalty Project
July 2007

Chapter One

INTRODUCTION

1. Recent years have seen a number of ground-breaking judicial decisions on the mandatory death penalty in various Caribbean and African jurisdictions. These cases have led to a fundamental reappraisal of sentencing for offences that would previously have attracted an automatic capital sentence. In Africa, the mandatory death penalty was ruled unconstitutional in Uganda in 2005 and in Malawi in 2007. Similar constitutional challenges are pending before the courts in Kenya and Nigeria and are under consideration in Tanzania and Zambia.
2. In analysing these developments, this manual addresses the key issues that arise in the sentencing and resentencing of offenders following the abolition of the mandatory death penalty for particular crimes. It deals with the general test to be applied when deciding whether an offender should be sentenced to a discretionary death penalty. It also addresses the aggravating and, in particular, mitigating considerations relevant to the sentencing exercise and procedural issues that arise as a result of the discretion now vested in the courts to impose an appropriate sentence in each case. First, however, it is important to understand and appreciate the context within which the sentencing exercise now takes place.

Recent developments.

3. In *Reyes v the Queen* [2002] 2 AC 235, the Judicial Committee of the Privy Council held that the imposition of a mandatory death sentence on all those convicted of murder in Belize was “disproportionate” and “inappropriate” and thus inhuman. As Lord Bingham observed in that case,

“ ... to deny the offender the opportunity, before sentence has been passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated

and thus to deny his basic humanity, the core right of which section 7 exists to protect” (para. 43).¹

4. *Reyes* was an appeal from the Court of Appeal of Belize. The Privy Council has reached the same conclusion as to the incompatibility of a mandatory death penalty with fundamental human rights in appeals from several other jurisdictions, including: St Lucia (*R v Hughes* [2002] 2 AC 259); St Christopher and Nevis (*Fox v R* [2002] 2 AC 284); Barbados (*Boyce and Joseph v the Queen* [2005] 1 AC 400); Trinidad and Tobago (*Matthew v The State* [2005] 1 AC 433); Jamaica (*Watson v The Queen* [2005] 1 AC 472); and the Bahamas (*Bowe and Davis v The Queen* [2006] 1 W.L.R. 1623).

Africa: Uganda

5. In *Kigula and others v AG* (Constitutional Court Petition No.6 of 2003) all of those then on death row in Uganda (417 in total, including 23 women) brought proceedings challenging the mandatory death sentences imposed on them. The petitioners relied on three key submissions. First, they argued that the death penalty is inhuman and thus contravenes the Constitution of Uganda. Their second submission was that even if the death penalty itself is not unconstitutional, the automatic or mandatory nature of the sentence of death is arbitrary and disproportionate (death is the only punishment that can be imposed for murder and other serious offences whatever the circumstances). Third, the petitioners argued that those who had been on death row for long periods should be reprieved and have their sentences commuted to life imprisonment.
6. In a landmark judgment, the first of its kind in Africa, the majority of the Constitutional Court declared that the death sentences passed on all 417 were unconstitutional. Although the Court did not strike the death penalty down altogether, it found that the mandatory nature of its imposition was unconstitutional because it did not provide the individuals concerned with an opportunity to mitigate their sentences. The Constitutional Court provided the Government of Uganda with a two year period to give effect to the judgement after which all death sentences would be set aside. The Constitutional Court

¹ Section 7 of the Constitution of Belize provides: “No person shall be subjected to torture or to inhuman or degrading treatment or punishment”.

also ruled that any of the prisoners who have been on death row more than three years were entitled to have their death sentences commuted to life imprisonment.

Africa: Malawi

7. The first challenge to the constitutionality of the mandatory death penalty in Malawi was launched in the subsequent case of *Francis Kafantayeni et al v the Attorney General of Malawi* (High Court of Malawi, 27 April 2007).² Murder and treason have carried an automatic death penalty in Malawi since the Penal Code was introduced in 1930. Death is also the maximum penalty for rape, robbery and burglary. The High Court (Hon. Justice E.M. Singini, SC, Hon. Justice F.E. Kapanda and Hon. Justice M.L. Kamwambe) accepted that the international instruments ratified by Malawi, such as the International Covenant on Civil and Political Rights (ICCPR), have direct effect under the Malawi Constitution and that their provisions provide an authoritative guide to constitutional interpretation. Having reviewed contemporary norms of public international law and comparative jurisprudence from other domestic courts, the Court unanimously held that the mandatory requirement of the death sentence for the offence of murder, as provided by Section 210 of the Penal Code, violated the constitutional guarantees protecting every person against inhuman treatment or punishment and the right of an accused person to a fair trial including the right of access to justice. As a result, the Court ruled that the plaintiffs should be brought back before the High Court for a judge to pass sentence on each individual offender, having heard evidence and submissions in regard to the offender and the circumstances of the offence.

Other jurisdictions

8. In its recent ruling in *Bowe and Davis v The Queen* [2006] UKPC 10, the Judicial Committee of the Privy Council provided a comparative review of evolving restrictions on the mandatory death penalty for murder. The Board observed that mitigating circumstances could be taken into account in South Africa and Southern Rhodesia from

² To be published in vol. 46, *International Legal Materials*.

1935, in Swaziland from 1938, in Lesotho from 1959 and in Botswana from 1964. The Board was unaware of any jurisdiction in which, by as early as 1973,

“... the mandatory death sentence was retained and it was considered just to execute all who were convicted: by one means or another, the harshness of the old common law rule was mitigated” (see para. 35).

9. In South Africa (*S v Makwanyane* (1995) (3) SA 391) and in Hungary (*Constitutional Court Decision No. 23/1990* (X.31) AB), the death penalty itself has now been declared incompatible with fundamental human rights.
10. These important cases follow a world-wide trend towards the abolition of mandatory death penalties that started with cases in the United States of America and India and progressed through the various international bodies to the Caribbean, Africa and across Europe. That trend will briefly be examined.

The United States of America

11. In 1937 the US Supreme Court recognised that the Eighth Amendment to the US Constitution, which prohibits cruel and unusual punishments, required that all criminal sentences should be individualised (see *Pennsylvania ex rel. Sullivan v Ashe* (1937) 302 US 51). In all those states where the death penalty has been preserved, the disproportionality of mandatory death sentences has been mitigated by the introduction of various measures. In particular, by 1963, in all those States where murder had carried a mandatory capital sentence, the law had been amended to give juries a discretion as to whether to impose the death sentence. In *Woodson v North Carolina* (1976) 428 US 280 the Supreme Court observed:

“The history of the mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offence has been rejected as unduly harsh and unworkably rigid” (p.292) .

The Court went on to note that by 1972, when the Court had ruled in the case of *Furman v Georgia* (1972) 408 US 237, it was beyond dispute that “mandatory death sentences had

been renounced by American juries and legislatures” (p.297). In *Furman* Chief Justice Burger had referred to the American abhorrence of imposing mandatory death sentences.

India

12. In India the mandatory death penalty has not been in existence since at least 1860, save for a very limited class of offender. In 1983 the Supreme Court of India struck down a mandatory death sentence on the basis that no judicial discretion existed for the offence concerned (murder committed whilst under a life sentence): see *Mithu v Punjab* (1983) 2 SCR 690.

The African Charter on Human and People’s Rights

13. The African Commission on Human and People’s Rights has not yet had to rule on whether the mandatory death penalty is a violation of the African Charter on Human and People’s Rights. There is no communication that specifically deals with the matter. However, there are at least three compelling reasons why it cannot reasonably be assumed that the international obligations of a State Party under the African Charter with respect to the mandatory death penalty would be any different from those of a State Party to the International Covenant on Civil and Political Rights, the European Convention on Human Rights or the American Convention on Human Rights:

- (1) The text of the African Charter itself places a high premium on the requirement of due process where the right to life is threatened. It reads:

“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. *No one may be arbitrarily deprived of this right.*” [Article 4, emphasis added]

As expounded in the jurisprudence of the Human Rights Committee and the Inter-American Commission (see below), it is precisely the *arbitrariness* of the mandatory sentence that makes it repugnant. It is therefore reasonably clear that under the African Charter, where the guarantee of the right to life places emphasis on the requirement that any infringement of this right *not be arbitrary*, the mandatory sentence would not survive scrutiny.

(2) The African Commission has established that the imposition of a sentence of death after an unfair trial is necessarily a violation of Article 4 of the Charter. Thus in *Forum of Conscience v Sierra Leone* 223/98 the Commission ruled:

“The right to life is the fulcrum of all other rights. It is the fountain through which all other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of law. Having found above that the trial of the 24 soldiers constituted a breach of due process of law as guaranteed under Article 7(1)(a) of the Charter, the Commission consequently finds their execution an arbitrary deprivation of the right to life provided for in Article 4 of the Charter” (para. 20).

The same reasoning was applied in the communication concerning the human rights violations suffered by Ken Saro-Wiwa and others:

“Given that the trial which ordered the executions itself violates Article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of article 4.” (*Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* 137/94, 139/94, 154/96 and 161/970, para. 103)

(See also the series of communications heard with *Malawi African Association v Mauritania* 54/91 at para. 120.)

(3) The African Commission has consistently been hostile to the interference with, or the usurpation of, the role of the judiciary. The series of cases where the Commission found decrees enacted by Nigeria that purported to oust the hearing of appeals from the jurisdiction of the courts provides a clear example of this: see *Civil Liberties Organisation v Nigeria* 129/94, *Constitutional Rights Project v Nigeria* 60/91 and *Constitutional Rights Project v Nigeria* 87/93, where the Commission found such decrees and other interferences with the judicial process to violate Article 7 of the African Charter. There is no reason why the mandatory sentence of death, where the

legislature usurps what is essentially the prerogative of the judiciary – i.e. the individualisation of the sentence – should not receive the same treatment.

The American Declaration of the Rights and Duties of Man and the American Convention on Human Rights

14. The right to life as a regional human rights standard was recognised by the Organisation of American States in the American Declaration on the Rights and Duties of Man, adopted in 1948. This was elaborated upon by the American Convention on Human Rights, adopted in 1969. Articles I and XXVI of the Declaration recognise the right to life and the right not to receive cruel, infamous or unusual punishment respectively. Article 4(2) of the Convention provides that the death penalty may only be imposed for the most serious crimes.
15. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have consistently interpreted these provisions as requiring that death be a maximum, but not the only sentence for those convicted of murder: see the reports of the Inter-American Commission in *Downer and Tracey*, Report No. 41/00, 13 April 2000, *Baptiste v Grenada*, Report No. 38/00, 13 April 2000, *Knights v Grenada*, Report No. 47/01, 4 April 2001 and *Edwards v The Bahamas*, Report No. 48/01, 4 April 2001. In *Downer and Tracey*, the Commission stated:

“The experience of other international law rights authorities, as well as the high courts of various common law jurisdictions that have, at least until recently, retained the death penalty, substantiates and reinforces an interpretation of Article 4, 5 and 8 of the Convention that prohibits mandatory sentences. Based upon a study of these various international and domestic jurisdictions, it is the commission’s view that a common precept has developed whereby the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of individual offenders and offences is considered to be a condition *sine qua non* to the rationale, humane and fair imposition of capital punishment. Mitigating circumstances requiring consideration have been determined to include the character and the record of the

offender, the subjective factors that might have influenced the offender's conduct, the design and manner of execution of the particular offence, and the possibility of reform and social readaptation of the offender" (para. 212).

16. In similar vein, the Commission stated in *Edwards v The Bahamas*:

"[B]y sentencing the condemned men to mandatory death penalties absent consideration of their individual circumstances, [the State] has failed to respect their rights to humane treatment pursuant to Article XXIV and XXVI of the Declaration, and has subjected them to cruel, inhuman, or degrading punishment or treatment in violation of those Articles. The state sentenced the condemned men to death solely because they were convicted of a premeditated category of crime. Accordingly, the process to which they have been subjected, would deprive them of their most fundamental rights, their rights to life, without consideration of their personal circumstances and their offenses. Treating [the petitioners] in this manner abrogates the fundamental respect for humanity that underlies the rights protected under the Declaration, and Articles XXV and XXVI in particular" (para. 148).

The International Covenant on Civil and Political Rights

17. A similar approach has evolved in the practice of the UN Human Rights Committee in the interpretation of the International Covenant on Civil and Political Rights ("ICCPR"). Article 6(1) of the ICCPR enshrines the right to life. Article 6(2) recognises that the death penalty may be imposed as a criminal sanction but only for "the most serious crimes":

"In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime".

18. The Human Rights Committee first addressed the compatibility of a mandatory death penalty with the provisions of the ICCPR in 1995. In *Lubuto v Zambia* (Communication No. 390/1990; 17 November 1995) the challenge was framed not in terms of cruel, inhuman or degrading treatment (Article 7 of the ICCPR) but in terms of the right to life

itself (Article 6). In that case the applicant had been sentenced to death for robbery aggravated by the use of a firearm. The Human Rights Committee found the automatic imposition of the death penalty gave rise to a breach of Article 6:

“Considering that in this case the use of firearms did not produce death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence in these circumstances violates Article 6, paragraph 2, of the Covenant” (para. 7.2).

The Committee has more recently affirmed this conclusion in *Chisanga v Zambia* (Communication No. 1132/2002; 18 November 2005). It should also be noted that in its General Comment on Article 6, the Committee emphasised that the expression “most serious crimes” must be read restrictively to mean that the death penalty should be “an exceptional measure” (para. 7.4).

19. In 2000 the Human Rights Committee considered whether the mandatory death penalty for murder in St Vincent and the Grenadines was compatible with the ICCPR. In *Eversley Thompson v Saint Vincent and the Grenadines* (Communication No. 806/1998, 5 December 2000) the respondent State had argued that the mandatory death penalty was *only* imposed for murder and was thus reserved for “the most serious crimes”. The Committee rejected that submission and held that Article 6 required that the death penalty should not be imposed unless it was appropriate in the particular circumstances of an offender’s case. It held:

“Counsel has claimed that the mandatory nature of the death sentence and its application in the author’s case, constitutes a violation of Article 6(1), 7 and 26 of the Covenant. The State party has replied that the death sentence is only mandatory for murder, which is the most serious crime under law, and that this in itself means that it is a proportionate sentence. The Committee notes that the mandatory imposition of the death penalty under the laws of the State party is based solely on the category of crime for which the offender is found guilty, without regard to the defendant’s personal

circumstances or the circumstances of the particular offence. The death penalty is mandatory in all cases of ‘murder’ (intentional acts of violence resulting in the death of a person). The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author’s case would constitute an arbitrary deprivation of his life in violation of article 6, paragraph 1, of the Covenant” (para. 8.2).

Again, this conclusion was reached by reference to Article 6 of the Covenant, although the Committee indicated that no separate issues arose (and implicitly that the same conclusion should be reached) in respect of Article 7. The decision in *Thompson* has since been followed in the cases of *Kennedy v Trinidad & Tobago* (Communication No. 845/1998, 28 March 2002) and more recently in *Carpo v The Philippines* (Communication No.1077/2002, 15 May 2003).

The position under the European Convention on Human Rights

20. In 1989 the European Court of Human Rights made clear that the imposition of capital sentences could give rise to a breach of Article 3 of the European Convention on Human Rights, which prohibits cruel, inhuman and degrading treatment and punishment (see *Soering v UK* (1989) 11 EHRR 439). Amongst the circumstances in which such a breach would arise, the Court expressly included a failure to take into account the personal circumstances of the offender and disproportionality between the gravity of the crime and the punishment inflicted (see *Soering* at para. 104).

The sentencing issue

21. As a result of all these developments, and in particular the recent developments in the Caribbean and in Africa, the principle has been established that nobody should be sentenced to death without an opportunity to put forward mitigation. The remainder of this manual deals with the test to be applied when sentencing those who would otherwise have had a mandatory death sentence imposed on them. It then addresses the considerations relevant to the sentencing exercise and procedural issues that arise as a result of the discretion now vested in the Courts to impose an appropriate sentence in each case.

Chapter Two

THE RELEVANT TEST ON THE DISCRETIONARY APPLICATION OF THE DEATH PENALTY

22. The principle that nobody should be sentenced to death without an opportunity to put forward mitigation – about the nature and circumstances of their offence, and about their own individual history, their mental and social problems and their capacity for reform - reflects an evolving international norm that it is wrong to sentence to death all those convicted of murder and leave it to the mercy stage to decide who should live and who should die. Rather the death penalty should be imposed by a Court only for the worst cases of murder, where the crime is particularly heinous and for the worst type of murderer where there are no significant mitigating circumstances.

The approach of the Indian courts

- 23 In *Bachan Singh* (1980) 2 SCC 478 the Indian Supreme Court upheld the constitutionality of Section 302 of the Indian Penal Code which provides for the death penalty as an alternative sentence to life imprisonment for certain kinds of murder. But it did so on the express basis that the “death sentence is constitutional if it is prescribed as an alternative sentence for the offence of murder and if the normal sentence prescribed by law for murder is imprisonment for life”. (That explanation of the ratio of *Bachan Singh* is given by Chandrachud CJ in *Mithu v State of Punjab* (1983) 2 SCR 690 at p. 700). In other words, life imprisonment is, as a normal rule, the appropriate sentence for murder and the death penalty can only be justified in the “rarest of rare” cases where, for special reasons in the individual case, the court is compelled to take the exceptional course of imposing the death penalty rather than the life sentence. Again, Chandrachud CJ in *Mithu* summarises the ratio of the *Bachan Singh* case helpfully as follows:

“The majority concluded that Section 302 of the Penal Code is valid for three reasons: Firstly, that the death sentence provided for by section 302 is an alternative to life imprisonment; secondly, that special reasons have to be stated if the normal rule is

departed from and the death sentence has to be imposed; and thirdly, because the accused is entitled to be heard on the question of sentence. The last of these three reasons becomes relevant only because of the first of these reasons. In other words, it is because the court has an option to impose either of the two sentences, subject to the rule that the normal punishment for murder is life imprisonment, that it is important to hear the accused on the question of sentence.”

24. The application of this principle has led to a very restrictive approach to the imposition of the death penalty in India, such that it is only upheld in the “rarest of rare” cases when the alternative of life imprisonment is demonstrably inadequate: see the cases of *Machin Singh & Others v State of Punjab* (1983) 3 SCC 470; *Ronny v State of Maharashtra* (1996) 4 SCC 148; *Manohar Lal alias Mannu & Another v State* {2000} 2 SCC 92; and *Mohd. Chaman v State* (2000) 2 SCC 28. It is significant that in *Manohar Lal*, where the defendants had dragged out four sons and burned them in front of their mother, the death penalty was set aside because the young defendants “were on a rampage” triggered by their reaction to the “murder of Indira Ghandi” and “they ran berserk unguided by sense or reason and triggered only by a demented psyche”. In other words, the presence of any significant mitigating factor justifies exemption from the death penalty even in the most gruesome cases.

The approach of the South African courts before abolition

25. The position of the South African courts before abolition was helpfully summarised by Chaskalson P in *State v Makwanyane* 1995 (3) SA 391, para. 46 (Constitutional Court of South Africa):

“Mitigating and aggravating circumstances must be identified by the Court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person’s conduct, and these factors must then be weighted with the main objectives of

punishment, which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence".

The principle that there should be "no reasonable prospect of reformation" and that "the objects of punishment" should not be achievable "by any other sentence" is derived from the cases of *S v Senonohi* (1990) 4 SA 727 at 734F-G; and *S v Nakwanyana* (1990) 4 SA 735 at 743-745A.

The United States approach

26. In the United States, the trend is also towards a restriction of the death penalty to the most extreme cases of murder. The Supreme Court jurisprudence rejects any approach that restricts the range of mitigating circumstances that can be taken into account. Thus in *Lockett v Ohio* 57 C Ed 2a 973 the Supreme Court held that an Ohio death penalty statute which specified a limited number of relevant mitigating factors, but excluded others, violated the Eighth and Fourteenth amendment prohibitions against cruel and unusual punishment because it did not permit the sentencer to consider a necessary range of mitigating circumstances, including the defendant's age, character, record, or the circumstances of the offence. In other cases, the US Supreme Court has even struck down as unconstitutional statutes that mandated the death penalty for certain very extreme sub-categories of murder - such as those who commit murder whilst serving a life sentence (*Sumner v Shuman* 438 US 66). It would therefore also be inconsistent with the US approach to adopt any rule that there is a presumption in favour of the death penalty and that only some "special" (in the sense of exceptional) extenuating circumstances could justify the court in refraining from its imposition.

Approach of the Inter-American Commission & Court

27. All the States of the Caribbean are members of the Organisation of American States; some have also signed and ratified the American Convention of Human Rights (ACHR). As such, they are committed by the OAS Charter to respect the human rights enshrined in the American Declaration of Human Rights which are, in turn, elaborated in the American Convention of Human Rights. Article 4(1) of the Convention, which guarantees the right to life, has been interpreted by the Inter-American Court and Commission of Human Rights to require a restrictive approach to the imposition of the death penalty. This is of relevance in determining how the court should approach its sentencing function when there is a discretion as to whether or not to impose the death penalty.

28. In its Advisory Opinion on Capital Punishment (O/C3/83), the Inter-American Court stated:

“The text of Article 4 as a whole reveals a clear tendency to restrict the scope of the death penalty both as far as its imposition and its applicability are concerned.”

29. The Inter-American Commission’s decision in *Downer & Tracy v Jamaica* further advances the case for restricting the death penalty to the exceptionally grave cases of murder with no significant mitigating circumstances. Moreover, it was decided in the context of the Jamaican system of capital punishment which, as in Belize, distinguishes between capital and non-capital cases. Nonetheless the Inter-American Commission found a violation of Article 4 in the absence of room for any individualized discretion in sentencing in respect of the capital categories of murder. And it linked the need for individual consideration to an overall dynamic development in the region towards the restriction and eventual abolition of the death penalty:

“Mitigating factors may relate to the gravity of the particular offence or the degree of culpability of the particular offender, and may include such factors as the offender’s character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offence, and the possibility of

reform and social re-adaptation of the offender. Consistent with the foregoing discussion, the Commission considers that the high standards of due process and human treatment under Articles 4, 5 and 8 of the Convention governing the lawful imposition of the death penalty should also be interpreted to require individualised sentencing in death penalty cases. In the Commission's view, this is consistent with the restrictive interpretation to be afforded to Article 4 of the Convention, and in particular the Inter-American Court's view that Article 4 of the Convention should be interpreted as imposing restrictions designed to delimit strictly the scope and application of the death penalty, in order to reduce the application of the penalty to bring about its gradual disappearance" (para. 209).

30. In finding that the mandatory imposition of the death penalty was inhuman punishment and violated Article 4 of the American Convention, the Inter-American Court stated that the death penalty must only be imposed for the most serious crimes and the rules allowing for the imposition of the death penalty must be restrictively interpreted. In *Hilaire, Constantine and Benjamin et al.* (Judgment of June 21, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 94 (2002)), the Court said:

"In spite of the fact the Convention does not expressly prohibit the application of the death penalty, the Court has affirmed that the conventional rules concerning the death penalty should be interpreted as "imposing restrictions designed to delimit strictly its application and scope, in order to reduce the application of the death penalty to bring about its gradual disappearance.

In light of the general spirit evident in Article 4 of the American Convention, considered in its entirety, the Court has found that:

'[t]hree types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain

considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account” (paras 99-100).

The approach in the Caribbean

31. There has been growing confirmation by the judicial decisions in Belize and the Eastern Caribbean that the proper test to apply is one that reserves the death penalty for the exceptional or worst cases, and applies the life sentence as the norm (sometimes varied to a lesser period).
32. The judgment of Byron CJ in *R v Spence & Hughes* (2 April 2001) and the decision in *R v Reyes* in the Privy Council were followed by a series of decisions in the Caribbean on this issue. In those cases where reasons were given, there was support for the restrictive approach of Byron CJ in the *Hughes* decision that the death sentence should be imposed “only in the most exceptional and appropriate circumstances”. Thus:
 - (1) In *R v Fox* (27 September 2002) Baptiste J adopted Byron CJ’s test and held: “The law requires that the death penalty should be imposed in only the most exceptional and most appropriate circumstances”. Because of the element of diminished responsibility, he declined to impose the death penalty on Berthill Fox, despite his conviction for deliberately shooting and killing both his girlfriend and her mother.
 - (2) In *R v Reyes*, Conteh CJ held that:

“... it is the imposition of the death penalty, rather than its non-imposition for murder, that requires special justification.”
 - (3) In *R v Winston Exhale* Saunders J declined to impose the death penalty, saying: “I do not believe this is a murder which falls within the category I would regard as one of the ‘worst cases’”. He illustrated what he meant as follows:

“For example, this was not a murder that was carefully and deliberately pre-planned. This was not a murder where the victim was a judicial officer or a

member of the security services or correctional force in execution of a duty or a judicial office. This was not a contract killing. This victim was not murdered because of his status as a juror or as a witness or party in litigation”.

He referred to the legislative proposal to introduce two categories of murder in St Lucia and noted that the crime did not fall into any of the proposed capital categories. But he made it clear that there would still have to be a discretion even in the cases of aggravated murder classified as “capital”.

- (4) In *R v Hughes* (14 November 2002) when the case was remitted for sentence, Saunders J adopted the approach of the DPP that the case was not of the gravest kind - although “a senseless act of unbridled rage” - and also stressed the strong individual mitigation. For these reasons he imposed a sentence of twenty years.
- (5) In the St Lucian case of *R v Charles & Gilbert* (25/2002; 28 April 2003) Hariprashad-Charles J accepted that the murder itself did not fall into the worst category and adopted the test of Saunders J in *Winston Exhale’s* case. She imposed a life sentence on the worst offender and a sentence of fifteen years on the other three.
- (6) In the St Lucian case of *Titus Albert & Vincent Norber* (47/2001) sentences of life imprisonment were imposed instead of the death penalty - although in Vincent Norbert’s case, the judge referred to the offence as a “truly monstrous act”, stressed the defendant’s lack of remorse and even expressed the hope that the defendant would “never ever get out”.
- (7) In *R v Francis Philip & Kim John (St. Lucia)* 930 April 2003 sentences of death were imposed on the two defendants for the murder of a priest and a nun in the course of the notorious attack on the Catholic cathedral in St Lucia. The judgement in this case includes a review of all the relevant case law. There was a dispute as to whether the defendants were mentally disordered or “retarded”. The judge found they were not (para. 21). She imposed the death penalty because of

the appalling nature of the offence, the existence of a premeditated plan to burn down the cathedral, the defendants' lack of remorse, and the cruelty of the actual killings. The Court of Appeal upheld the sentence but the Privy Council recently allowed the appellants' appeal against conviction on the basis that the judge's directions to the jury had been inadequate (*Philip & John v The Queen*, Appeal 110 of 2005).

33. This review of recent authorities on sentencing shows that the death penalty is being reserved for the worst cases and sparingly imposed under the new discretionary system in the Caribbean. This is demonstrated by Chief Justice Conteh's judgment in *Reyes* in Belize, Justice Baptiste's judgment in *Berthill Fox* in St Kitts, and the two judgments of Saunders J in *R v Hughes* and *R v Wilson Exhale*.

34. One of the most recent decisions from the Caribbean is the ruling of Rawlings JA in *Harry Wilson v The Queen* (28 November 2005) cited by Barrow J:

"The foregoing cases establish that the first principle by which a sentencing judge is to be guided in the case is that there is a presumption in favour of an unqualified right to life. The second consideration is that the death penalty should be imposed only in the most exceptional and extreme cases of murder."

"The death sentence should only be imposed in those exceptional cases where there is no reasonable prospect of reform and the object of punishment would not be achieved by other means".

35. The new approach, which is derived from but further develops the very restrictive approach adopted in India today and in South Africa before abolition, has two aspects:

(1) Firstly, that the crime itself should be an exceptionally grave one – as was found to be the case with the Cathedral killers in St Lucia, and the defendant in the case of *Trimmingham* in St Vincent.

- (2) Secondly and in addition, that there should be no special mitigating factors and “no real prospect of reform”, a test applied in South Africa before abolition and adopted in *Wilson, Trimmingham and Moise* by the Eastern Caribbean Court of Appeal.

Life imprisonment not the only alternative option

36. In some jurisdictions, life imprisonment is the only possible sentence for murder other than death. However, where that is not the case, life imprisonment is not the only alternative option.

Chapter Three

RELEVANT CONSIDERATIONS

No exhaustive list

37. It is neither possible nor desirable to compile an exhaustive list of relevant aggravating and mitigating factors, the categories of which are never closed. Indeed it would be unlawful for the courts to create an exhaustive list that did not allow for consideration of other factors if the occasion so required (*Lockett v Ohio* 438 US 586 (1978)). This was recognised by Conteh CJ in *R v Reyes* (25 October 2002) where he said:

“The need to have regard in the exercise of discretion whether to sentence an offender to death or life imprisonment would therefore, I think, preclude a list of predetermined special extenuating circumstances.”

38. Whilst by no means exhaustive, it is plain from the caselaw that the following are relevant aggravating and mitigating factors in the sentencing of murderers:

- (1) Type and gravity of the murder
- (2) Mental state – including a degree of diminished responsibility
- (3) Other partial excuses including an element of provocation or undue influence
- (4) Lack of premeditation
- (5) Character
- (6) Remorse
- (7) Capacity for reform and continuing dangerousness
- (8) Views of the victim’s family
- (9) Delay up until time of sentence and prison conditions
- (10) Guilty pleas
- (11) Prison conditions.

Type and gravity of the murder

39. It is a necessary precondition for the imposition of the death penalty that the particular offence should be exceptionally grave or heinous. But the fact that the crime is exceptionally grave or heinous should not of itself create a presumption in favour of the death penalty that can be rebutted only by exceptional mitigating circumstances. There should be both an exceptionally grave offence and the absence of significant individual mitigation before the death penalty can be permissible.

Mental state – including diminished responsibility and other related defences

40. Failure to establish the defence of diminished responsibility at trial does not exclude the relevance of mental factors at the sentencing stage. Equally defendants on the borderline of other recognised defences such as provocation, coercion or duress, or with an element of any of these factors in their case can also deploy this consideration even if they did not advance them as a specific defence, or did so unsuccessfully at trial.
41. Otherwise mental state is always an important consideration at the sentencing stage. For example, the appellants in both *Reyes* and *Fox* were double killers, but their mental state was relevant to sentence, despite the judge's contrary conclusion at trial in *Reyes* and the non-availability of a diminished responsibility defence at trial in the case of *Fox*.
42. The underlying principle is that nobody should be convicted of a capital offence, sentenced to death or executed if they suffer from significant mental disorder at the time of the offence and that nobody should be sentenced to death, or executed, if mental illness develops later and is present at the time of either sentence or execution.
43. This principle can be dated back as far as 1756, when Blackstone wrote:
- “In criminal cases idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it because he is not able to plead to it

with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution” (*Commentaries on the Law of England*, book 4, chapter 2, p.24).

44. In recent years, the principle has been reinforced and restated in the US Supreme Court:

(1) In *Ford v Wainwright* (477) US 399, it was recognised that it was wrong in principle and unconstitutional to execute the mentally ill. If an individual cannot be executed because of mental illness, he should not be sentenced to death in the first place if there is evidence of mental illness either at the time of the offence or at the time of sentence.

(2) In *Atkins v Virginia* (536) US 2002 the US Supreme Court recognised that it is unconstitutional to sentence to death or execute the mentally handicapped – with a suggestion that this covers all those with IQs of 70-75 or less. The judgments of the Supreme Court referred to the existence of an international consensus that the execution of the mentally ill was inhuman or cruel. What is important too is that there are international norms as to the level of handicap that merits the diagnosis of “mental retardation” and therefore the prisoner’s exemption from the death penalty.

45. The presence of significant mental disorder is not a mitigating factor that the judge is free simply to weigh in the balance and then impose the death penalty nevertheless. If it is proved to a significant degree, the presence of mental disorder makes it unlawful and unconstitutional to impose the death penalty. That must mean first that the prosecution must refute the presence of mental disorder beyond reasonable doubt and second that the state has a duty to fund a psychiatric examination in every case (c.f. the Trinidad case of

Winston Solomon v The State and the US Supreme Court case of *Ake v Oklahoma* (470 US 68 (1985)). The state also has a duty to disclose any relevant records or information in its possession that may bear on the issue of mental disorder.

46. It is not necessary to establish a formal mental illness for the mental state of the accused to be relevant. For example, in *Reyes v R*, Conteh CJ took into account as a mitigating factor the accused's depression:

“The second consideration is the questionable state of the prisoner's mental state at the time of the commission of the offence. I am satisfied with the testimony of Dr. Cayetano that the prisoner was suffering at that time from a major depressive disorder, probably brought on by the stress from the running boundary dispute with the deceased, Wayne Garbutt, over their adjoining land. This must have caused him to be unhinged, at least temporarily, to the extent that after shooting the deceased he turned the gun on himself in an attempted suicide, but only succeeded in inflicting serious wounds on himself, from which he still suffers today”.

Other partial excuses

47. Defendants on the borderline of other recognised defences such as provocation, coercion or duress, or with an element of any of these factors in their case, can also deploy these considerations in mitigation even if they did not advance a specific defence, or did so unsuccessfully in the trial itself.
48. In *R v Duncan* (4 February 2004) the High Court in Grenada proceeded on the basis that although the jury had rejected the accused's defence “in a general way”, it could not speculate on whether any specific aspects of the defence were accepted. Similarly in *R v Olgivie* (14 July 2004), the High Court of Grenada said:

“Although the jury has rejected provocation in the legal sense, the Court for the purpose of sentence is not precluded from taking into account and acting on the behaviour of the deceased towards the accused from the time the sexual abuse began to the date of the incident”.

See also *R v Sayed* (10 April 2006) where the same approach was again taken.

Lack of premeditation

49. It is well recognised that many convicted of murder are not guilty of lengthy premeditation or pre-planning. However “malice aforethought” does not necessarily imply significant premeditation. Given that there are degrees of premeditation, it is suggested that the lack of any long pre-meditation, or pre-planning, should always count as a strong mitigating factor. Equally it is clear that judicial findings of a deliberate and premeditated killing can play a key part in the decision to impose the death penalty: see for example the case of *Max Tido* (April 2006) in the Bahamas and in cases of the Eastern Caribbean such as the *Cathedral Killings* and *Trimmingham v R* (13 October 2005).

Character and social inquiry reports

50. Past good character is obviously a mitigating factor. But even bad character may have its roots in a troubled and disadvantaged start in life, and conceal grounds for mitigation.
51. In *Reyes v R*, Conteh CJ, took character into account in the following way:
- “Thirdly, from the testimony of the various witnesses I have summarized earlier, there would appear to be present in the prisoner’s favour, additional extenuating circumstances to justify this Court not to impose the death penalty. There is evidence of the prisoner’s good character; his good standing in his community and reputation for help and kindness and an exemplary family man; his profound remorse and absence of future dangerousness. All these impel me to believe that the shooting by the prisoner was quite out of character.”
52. In a number of jurisdictions, it is a mandatory requirement that social enquiry reports be obtained before sentencing: for example Jamaica and Bahamas.
53. A social inquiry report that is adverse need not be disclosed if the defence have commissioned it themselves, as opposed to the Court ordering it. The potential benefits of a social inquiry report are obvious. In a case such as the notorious “Mr Shit” case in

St Kitts some years ago one suspects the defendant would not have hanged if a proper social inquiry report had been commissioned and deployed before the Mercy Committee. “Mr Shit” was so called at the orphanage where he was brought up in St Kitts because he had been found as a baby abandoned in a latrine by his mother. Clearly this was the kind of cruel start in life that should have acted as serious mitigation. But he was still hanged.

Remorse

54. The presence of remorse is obviously an important mitigating factor - which played a significant role in a case such as *Reyes*. But its absence has been stressed as an aggravating factor in some cases: for example the *Cathedral Killings* case, where the absence of all remorse played an important part in the decision to impose the death penalty. In *R v Bowen* (December 2005) the High Court in Grenada highlighted the lack of remorse as an aggravating feature, but made clear that “if demonstrated, [remorse] would have gone a long way towards impacting on sentence”.
55. It is suggested that - while the death penalty is retained - the test should be that nobody is sentenced to death unless they are beyond all hope of reformation and redemption. If adopted, this would be a high and exacting test.

Capacity for reform and dangerousness

56. Where there is a clear capacity for reform – because of youth, or some curable contributory factor (such as alcohol or drug addiction), or clear evidence of remorse – this should, at least, count heavily against the death penalty. Equally positive evidence that the defendant “will not do it again”, or is very unlikely ever to resort to violence again, is a significant mitigating factor.
57. By contrast, adverse evidence of continuing dangerousness should not count as an aggravating factor. When imposed, the death penalty must be justified on grounds of retribution and general deterrence on the basis of past acts, and not future propensity. Future propensity is, of course, highly relevant to the length of any detention under the life sentence imposed in lieu of the death penalty. But, in principle, it should not be

regarded as an aggravating factor in determining the appropriate punishment. This was accepted by Barrow J in his important judgment on this issue in the case of *Trimingham*. As he said there: “Imposing a sentence of life imprisonment can attain the objectives of keeping the appellant out of society entirely. Therefore, the objective of protecting the society from the appellant cannot justify the imposition of the death sentence. It was therefore wrong to impose the death penalty on that basis ... removing a presence from the society does not require executing the person.”

Impact on victim’s family

- 58 The English courts have now grappled for some time with the issue of how far the views or wishes of the victim’s family are relevant to sentence. The Court of Appeal has held that the views of the victim’s family as to the appropriate sentence are irrelevant and should be disregarded by the sentencing judge (see Practice Direction (2002) 1 WLR 2870 para 28; and see *Archbold* 2007 at 5.77a). Clearly, the views of the victim’s family that the death sentence should be imposed are not an acceptable aggravating factor because of the subjective nature of such views. But the extent of the impact of the death on the victim’s family may be relevant to a limited degree. But what of those rare, but not unknown, cases where they actually ask that the death penalty should not be imposed? In those cases, it is at least arguable that a judge should not disregard altogether those views. Though regard for such views introduces an element of arbitrariness into the decision, it is arguable that it is wrong to exclude any mitigating factor, however subjective.

Delay up until time of sentence

- 59 Judges have accepted delay as a very significant mitigating factor in cases such as *Reyes* and *Hughes*. In *Hughes*, Saunders J said:

“I think a more significant mitigating factor is the fact that in this case there is the factor of the length of time that Peter Hughes has been in custody. He was remanded in 1993 and convicted in 1998. He sat on death row from 1998 until 2001 not knowing whether he would or would not be executed. Having to sit through the various appeals on the issue of the constitutionality of the automatic death penalty for murder must

have been a harrowing experience, described by counsel as oscillating between hope and despair.”

But these were the test cases when the inevitable delays caused by the constitutional challenge were very great.

60. There is a growing body of authority that any significant delay in the trial or appellate process should lead to a reduction of sentence. Since this point is a subject on which there is considerable authority, it may merit a slightly more detailed analysis.

61. In principle, once the court has a discretion as to sentence, delay will always be a relevant mitigating factor. In most cases, this will be pre-trial delay; but for the ‘reference back’ cases the question of post-trial delay in sentencing will also arise.

62. The link between delay and sentence has long been recognised because a reduction in sentence is sometimes the only appropriate remedy for delay. In the judgment of the Privy Council in *Procurator Fiscal and Watson v Her Majesty’s Advocate and JK* [2004] 1 AC 379, Lord Millett observed that:

“The European Court has repeatedly held that unreasonable delay does not automatically render the trial or sentence liable to be set aside because of the delay (assuming that there is no other breach of the accused’s Convention rights), provided that the breach is acknowledged and the accused is provided with an adequate remedy for the delay in bringing him to trial (though not for the fact that he was brought to trial), for example by a reduction in sentence”(para.129).

63. In capital cases, the link between delay and sentence is particularly significant where an individual has spent a prolonged period enduring the anguish of death row: see *Pratt and Morgan v AG Jamaica* [1994] 2 AC 1, *Mejia and Guevara v AG Belize* (Action no.296/2000) and the series of Indian authorities referred to therein.

64. So far as pre-trial delay is concerned, there is no fixed period of delay beyond which a death sentence could not lawfully be imposed, but in *Hillaire, Constantine and others*

(see para. 30 above), it was argued that unexplained and/or unjustified pre-trial delay of over two years, spent in appalling prison conditions, gave rise to a prima facie case for commutation. The Court held that such delay was one of the grounds justifying their direction that the death penalty should not be carried out.

65. So far as post-conviction delay is concerned, there is no reason why the *Pratt and Morgan* five year minimum threshold should be applied where a defendant's case is referred back to the courts on the basis that the sentence imposed on him was unlawful because it was mandatory. That is because the effect of the delay has to be placed alongside the other factors, which must then be weighed cumulatively. Moreover, weight must be attached to the fact that the period on death row was unlawful because it was based on an unlawful sentence.
66. In recent cases in the Eastern Caribbean, and in the Caribbean Court of Justice, it has now been accepted that delay of more than two years in determining national appeals renders execution inhuman and degrading (see *Pratt & Morgan* (1993) 43 WIR 340, *Moise*, judgement of the court of Appeal of St Lucia, 15 July 2005 and *Boyce & Joseph* judgement of the Caribbean Court of Justice, 8 Nov 2006).
67. In addition, in 'reference back' cases where a significant period has already been spent on death row, there is a powerful argument that it would be wrong in principle to pass a sentence of death where there is no reasonable prospect that the defendant will complete any international application (assuming it is not on the mandatory point) and the mercy process without spending five years (cumulatively - see *Lewis*) on death row.

Guilty pleas

68. Another major mitigating factor, long recognised as requiring a substantial reduction of sentence in all non-capital cases is a plea of guilty. If the principle that a guilty plea should attract a substantial discount is applied to capital cases, then clearly this should be a ground for not imposing the death penalty, even where it would otherwise be regarded as merited by the sentencing judge. Obviously this whole issue raises difficult questions

(e.g. – as to plea bargaining), but it must be faced. In a genuinely hopeless case, where there are serious aggravating and few mitigating factors, it may be necessary to discuss the desirability of a guilty plea with one's client. But this must depend on the judiciary giving a clear indication that guilty pleas will be accepted as a ground for not imposing what would otherwise be regarded by the judge as the appropriate sentence of death.

Prison conditions

69. The conditions in which an individual has been detained both before and after trial may be relevant to sentence. Lord Millet's comments in *Thomas v Baptiste* [1999] 3 WLR 249, limiting the circumstances in which prison conditions would lead to commutation, would not bind a court at the sentencing stage as to the exercise of its discretion whether to impose the death sentence instead of life imprisonment. That is because, in *Thomas*, Lord Millet was considering whether a sentence of death should be set aside as a remedy for post-conviction constitutional breaches (including the attempted execution while international applications were pending, delay and prison conditions) - and underpinning his judgment was the fact that the sentence of death was lawful when passed.
70. The question for a court sentencing at first instance is wholly different. It is not asking itself whether the prison conditions endured are so appalling as to justify setting aside an otherwise justified and lawful sentence of death; it is asking itself whether the case before it falls into the category of the "rarest of the rare" such that the penalty of death may be imposed. That the defendant has endured appalling prison conditions is a mitigating factor and a reason not to impose the penalty of death even if other aggravating factors might place the case into the "rarest of the rare" category.

Chapter Four

PROCEDURAL ISSUES

Burden and standard of proof

71. There is clear authority that, at the sentencing stage of a capital case, the burden is on the prosecution to prove, beyond reasonable doubt, the existence of any aggravating factors and to negative, beyond reasonable doubt, the presence of mitigating factors relied on by the defendant (see *Makwanyane* at para. 46).
72. In *S v Nkwanyana* [1990] (4) SA 735 (A), the South African Supreme Court of Appeal distinguished a series of cases which had suggested that there is no burden of proof at the sentencing stage. The Court rejected that proposition on the basis that, once it is established that findings on the presence of mitigating or aggravating factors have to be made, this cannot be done unless there is a burden of proof (onus) on one party or the other:

“It has been held that the use of the term *onus* in relation to factors relevant to sentencing is inappropriate; and that no rigid rules governing the degree of proof can be satisfactorily laid down... But the position created by the new s.277(2) [of the Criminal Procedure Act, which requires the judge to have due regard to the presence or absence of any mitigating or aggravating factors] calls for a different approach. A finding or findings on the presence or absence of mitigating or aggravating factors has to be made. There may be a dispute about this. In these circumstances it would be difficult if not impossible to make the necessary findings unless the incidence of *onus* operates.” (p.743G-H, quoting the principle from Hoffman and Zeffert, *The South African Law of Evidence*, - “Any rule of law which annexes legal consequences to a fact,... must, as a necessary corollary, provide for which party is supposed to prove that fact”).

73. Thus, whatever the test for other criminal penalties, putting the burden on the prosecution at the sentencing stage in capital cases, and requiring proof beyond reasonable doubt, can be justified on the basis that the penalty of death is reserved for the “rarest of the rare” cases - which must be proved - and can only be imposed where the presumption in favour of life is

rebutted. Suggestions in some of the case law that in some circumstances there may be a ‘civil’ burden of proof on the defence to prove certain matters do not apply in capital cases.

74. The procedure for proving aggravating and mitigating factors will not be precisely the same. For aggravating factors, the prosecution will have to lead evidence sufficient to discharge the burden of proof to the required standard. In relation to mitigating factors, it will usually be for the defendant to raise the issue and, if possible, adduce what evidence he can. But, once raised, the onus is then on the prosecution to disprove the mitigating factor to the required standard:

“It follows that, if there remains a reasonable possibility that mitigating factors exist, the onus is not discharged.” (*Nkwanyana* at p. 744C)

75. In *Nkwanyana*, the Court of Appeal approved such an approach, even where the factor depended on matters “peculiarly within the knowledge of the accused” so long as they were genuinely raised - “What is required is a factual basis for the mitigating circumstance. A speculative one will not suffice” (p.744J-745A).

76. In cases where there is more than one defendant, there may be varying degrees of culpability. This may well be important if the offence itself is of such heinousness as to cross the “rarest of the rare” threshold because it will only be those most culpable who would be eligible for the death sentence. If the degree of culpability cannot be proven to the required standard, none can properly be said to fall within the “rarest of the rare” category:

“From the facts and the circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where in a case like this, it is not possible to say as to whose case falls within the “rarest of the rare” cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment” (*Ronny v State of Maharashtra* [1998] 3 SCC 625 at p. 654C-D).

77. Placing the burden on the prosecution to make out its case for the death penalty as the only appropriate punishment and to give notice of its intention to seek the death penalty and the reasons for seeking it is a procedural principle already in operation in the Caribbean (under

the *Mitcham* guidelines). As Byron CJ set out in procedural guidelines in the *Mitcham* case: “The burden of proof at the sentencing hearing lies on the prosecution and the standard of proof shall be beyond reasonable doubt”.

78. This principle was reinforced and expanded upon in the case of *Trimmingham* (13 October 2005), where the Eastern Caribbean Court of Appeal emphasised that:

“The unqualified right to life that the cases affirm means that there is no mandatory death penalty. It means as well that there must be no implicit approach that a bad case of murder will attract the death penalty unless there are mitigating circumstances. The death penalty can only be imposed if the judge is satisfied beyond reasonable doubt that the offence calls for no other sentence but the ultimate sentence of death.”

“The object of sentencing, it must be remembered, is not to reflect the court’s subjective reaction to a crime but to impose a sentence that reflects the abhorrence of the society. Judged by that standard it was an exceptional case of murder that required a consideration of the death penalty that our society has retained even against the tide of abolition. But it is important to emphasise, again, that this conclusion as to the extremity of murder does not lead to the further conclusion that the appellant deserves the death penalty. The appellant continues to be entitled, even at this stage of the sentencing process, to the benefit of the right to life and there must be no presumption or inclination to the contrary. The appellant’s right to life can only be forfeited if the case for doing so has been established beyond all reasonable doubt. On that approach, as against the aggravating features of the murder, the appellant is entitled to the benefit of all mitigating features, even those not raised by him. It is then the duty of the crown to show beyond a reasonable doubt that, notwithstanding these mitigating factors, the court should nonetheless impose the death penalty. It is not merely that there is a presumption against the imposition of the death penalty; it is that such a penalty must not be imposed unless it is shown that there is no other penalty that may suffice to do justice to the case.”

79. In some cases where there are clear mitigating circumstances, it may well be appropriate for the prosecution to accept at the outset that it cannot discharge the burden and standard of proof required for the death penalty to be imposed. That is what happened in *R v Duncan* (4 February 2004).

The resolution of factual disputes at the sentencing stage

80. In general, where there are factual disputes at the sentencing stage, the judge can proceed in one of two ways. He can hear evidence and make findings, or he can deal with the matter on the submissions of counsel. However, if the judge adopts the second course and there is a substantial conflict between the prosecution and defence accounts, the version of the defendant must be accepted: *R v Newton* 77 Cr.App.R. 13 - see also *P. v Hall* 6 Cr.App.R. (S) 321 and *R v Bent* 8 Cr.App.R. (S) 19. This is obviously all the more the case when dealing with capital cases.
81. Where a *Newton* hearing takes place, evidence is called in the ordinary way (see *R v McGrath and Casey* 5 Cr.App.R. (S) 460). Each side will call the witnesses it seeks to rely on and the judge should not put questions until counsel have completed their examination (*R v Myers* [1996] 1 Cr.App.R. (S) 187).

Resources for proper preparation, representation and expert evidence

82. It is well-established in domestic law and in international human rights law that the right to a fair trial includes all stages of the criminal process, including sentence and appeal. In many capital cases, the sentencing stage will be as important, if not more important, than the trial itself. In addition, to deprive an individual of his life without 'due process' would be unconstitutional.
83. Therefore legal aid must be available for the sentencing stage where the defendant does not have the means to pay for effective representation and, where necessary, it should extend to the preparation and presentation of expert evidence.

State funding for reports

84. A corollary of the importance of psychiatric and social inquiry reports is that there should be mandatory reporting by a psychiatrist and social worker at the expense of the state. Such a system now applies in the Eastern Caribbean. *Mitcham* is an example of a case where the absence of a psychiatric report led to the quashing of the death sentence and remittal of the case for resentencing.

Conclusion

85. Thus it can be seen there are now generally accepted substantive and procedural norms governing the discretionary imposition of the death penalty. The courts of the Commonwealth Caribbean, India, South Africa and the United States have all contributed to the development. So too have regional and international bodies and courts. The effect is a worldwide movement of the restriction of the death penalty to the worst possible case and the imposition of ever higher procedural safeguards before the death penalty can lawfully be imposed.
86. It is hoped the analysis of the development in other jurisdictions will help to guide practitioners and judges in those African jurisdictions which have only recently introduced a system of discretionary capital sentencing. It is our earnest hope that we will soon be able to produce a revised guide that is drawn more heavily on the experience and jurisprudence of the courts of Africa themselves.

APPENDIX 1

IN THE SUPREME COURT OF BELIZE, A.D. 2002

THE QUEEN

v.

PATRICK REYES

—
BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Edward Fitzgerald Q.C., Mr. Keir Stramer S.C. with Ms. Kadian Lewis
for the Defence.

Mr. Rohan Phillip for the Crown.

—

JUDGMENT on SENTENCING

1. The case of the prisoner in the dock, Patrick Reyes, has come before this Court as a result of the decision of the Privy Council delivered on 11th March 2002. The prisoner had been tried and convicted by a jury on 14th April 1999 for the double murders of Wayne Garbutt and Evelyn Garbutt on 16th April 1997. He was sentenced to death in respect of each murder. He unsuccessfully appealed his conviction and sentence to the Court of Appeal, and his petition for special leave to appeal against his conviction to the Board of the Privy Council was also refused by the Board. He was however, granted special leave by the Board to raise two constitutional issues not advanced before the Courts in Belize regarding his sentence. The first related to the constitutionality of the mandatory death penalty passed on him on his conviction; and the second challenged the constitutionality of hanging as the means of carrying out the death sentence passed on him. The Board however stated that it did not need to rule on the constitutionality of hanging as a means of implementing a sentence of death as it was most reluctant to do so in the absence of any ruling or finding on this issue by the Courts in Belize.

2. On the first issue, the Board found and held that the mandatory death penalty imposed on the prisoner as provided for and authorized by **section 102(3)(b)** of the Criminal Code was, in virtue of the constitutional supremacy of the Constitution of Belize (section 2) impermissible as being inconsistent with **section 7** of the **Constitution**, which guarantees that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. Therefore, the Board held that any murder by shooting (the murders for which the prisoner stands convicted) is to be regarded as falling within Class B as defined in **section 102 (3)** of the Criminal Code.
3. In the result, the Board remitted the prisoner's case to this Court in order "that a judge . . . may pass appropriate sentence on (him) having heard or received such evidence and submissions as may be presented and made." The remit of my function therefore is to pass appropriate sentence on the prisoner in the light of the evidence and submissions made before me. In this connection, let me at the outset acknowledge the industry and commendable way Mr. Edward Fitzgerald Q.C., the lead counsel for the prisoner, presented his case. I also acknowledge the candour and integrity of Mr. Rohan Phillip, who represented the Crown at the hearing before me, he did not argue, I must state, for the imposition of the death penalty. I found however, the arguments and submissions of both Messrs. Fitzgerald and Phillip of considerable assistance in arriving at the sentence I have to pass in this case; especially in the face of the difficulties presented by the classification as Class B murders for which the prisoner was found by the Board, to have been convicted, and the range of sentences available for this type of murder. But more on this later.
4. However, I do not have the advantage of the judge who tried and sentenced the prisoner. I therefore rely for the facts of this case from the judgment of the Privy Council; and I respectfully excerpt these from the judgment of the Board at paragraphs 2 and 3:

"The facts

2. The main facts leading to the convictions were not in dispute. The appellant and the deceased occupied houses which were close to each other but divided by a strip of public land that had been reserved as part of a roadway. The deceased Wayne Garbutt obtained a lease of the public land from the government and decided to enclose it as part of his property. The

appellant evidently heard of this intention, and understood that a fence was to be built some 2 feet away from the back of his house. On 16 April 1997 the appellant left for work in the morning, but before doing so told his son to inform him if work on building the new fence began. His place of work was some two miles away. Wayne Garbutt did begin building the fence and the appellant's son reported this to him. The appellant left work and returned home by bicycle. The building of the fence was under way. The appellant arrived on the scene and asked Wayne Garbutt to show him "the papers that he got for the lands". Garbutt said that he had "a paper" but refused to show it to the appellant. The appellant went into his own house and soon afterwards emerged with a gun which he pointed at those who were erecting the fence. There was a gunshot which injured one of the workmen and a further shot which killed Wayne Garbutt. He was shot in the back. Evelyn Garbutt then came on to the porch of their house, and the appellant shot her also. The appellant walked over to where Wayne Garbutt's inert body lay, looked at it, and then turned the gun on himself and pulled the trigger. His injuries were serious and he was kept in hospital for three months before being discharged and charged with the two murders.

3. *It is understood that the appellant is a man of good character, with no previous record of violence. At the trial he called a priest who spoke highly of him. He was examined by two psychiatrists, one in hospital, the other in prison. The first found him to be hallucinating, and subject to a psychotic episode for which she treated him, but she was unable to express an opinion on his state of mind at the time of the killings. The second concluded that the appellant may on 16 April 1997 have been suffering from a brief psychotic disorder which could have impaired his mental responsibility, but he was unable to make a definitive diagnosis of the appellant's state of mind on the day of the incidents."*
5. The remission of the prisoner's case for sentencing as falling within Class B as held by the Board, of **section 102** of the Criminal Code (which is now **section 106** of Chapter 101 of the Laws of Belize, Revised Edition 2000) is not, as I have mentioned, without difficulties nor is it as plain sailing as would appear at first blush. The difficulties, I think, stem from the rather Delphic, if not somewhat elliptical, provisions of the Criminal Code of what is a **Class B** murder and how its commission is to be punished. Somewhat enigmatically, the Criminal

Code in **subsection (3) of section 106**, defines Class B murder as “. . . any murder which is not a Class A murder.” This is preceded by enumeration from **paragraphs (a) to (f)**, of what **Class A** murders are. **Paragraph (b) of subsection (3)** is what was material in the prisoner’s case, that is murder shooting.

6. The punishment for the generic, if one might use that word, offence of murder was stated up until 1994 in **section 102** of the Criminal Code as follows:

“102. Every person who commits murder shall suffer death.”

This, it may be noticed, is the same as the common law punishment for murder. But in 1994, by **Criminal Justice Act** (Act No. 6 of 1994) a new Part III was inserted in the Criminal Code providing for sentence for murder, and among other things, amended the original section 102 by adding a **proviso** to **subsection (1)**, which is what is in issue here at this sentencing phase of the prisoner. Importantly also, Act No. 6 of 1994 introduced for the first time in Belize, the classification of murders into **Class A** and **Class B**.

7. Thus **section 102(1)** (now section 106(1)) states:

“Every person who commits murder shall suffer death:

Provided that in the case of a Class B murder (but not in the case of Class A murder), the court may, where there are special extenuating circumstances which shall be recorded in writing, and after taking into consideration any recommendation or plea for mercy which the jury hearing the case may wish to make in that behalf, refrain from imposing a death sentence and in lieu thereof shall sentence the convicted person to imprisonment for life.”

(emphasis in the original)

8. Therefore, I think, as a matter of interpretation, the statutory punishment for the offence of murder **is**, like the punishment at common law, death. But in the case of a **Class B** murder, the sentencing court is given a **discretion** and may refrain from imposing the death sentence, and in its stead, impose a sentence of imprisonment for life. However, I think that in order to properly exercise this discretion, there must be present **special extenuating circumstances** which should be recorded in writing as the **proviso** to **subsection(1) of section 102** requires. I however, do not think that the existence of special extenuating circumstances which shall be

recorded in writing is necessarily tied to, conjoined with or predicated on any recommendations or plea for mercy which a jury might make for the non-imposition of the death penalty as a literal reading of the proviso might suggest. It is, I think, still open to the judge after conviction, to record in writing, if he finds there are special extenuating circumstances, and not to impose the death penalty and instead sentence the prisoner to imprisonment for life. This, I believe, the judge is entitled to do even in the absence of or without any recommendation or plea for mercy from the jury.

9. I am fortified in this conclusion by the very circumstances of the present proceedings, directed as they are to determining the appropriate sentence to be passed on the prisoner. As I said earlier, I was not the trial judge and the jury that tried the prisoner is now functus and has, of course, been since 1999 when they returned verdicts of his guilt. There is no evidence that they made any recommendation or plea for mercy in his case. They probably could not have done, as the sentence then before the Board's decision on the constitutional challenge of the prisoner, was regarded as a mandatory death penalty and this was passed on the prisoner. But this, that is, the mandatory death penalty passed on him, has now changed, with the Board's decision and its remission to this Court for the passing of the appropriate sentence on him.
10. The jury, of course, could of its own, make a recommendation or plea for mercy, in order that the death penalty might not be imposed on the prisoner.
11. However, the difficulties with the proviso to section 102(1) (now section 106(1)) of the Criminal Code, are that it does not specify or state what special extenuating circumstances are, nor does it say how they are to be determined. It only requires the sentencing judge to record them in writing if he refrains from imposing the death sentence.
12. How then is the discretion given to the Court to refrain from imposing the death sentence to be exercised in the face of the requirements of special extenuating circumstances? Mr. Phillip for the Crown contended that "special extenuating circumstances" must be beyond the ordinary. However, with his characteristic candour, he conceded that on the evidence in this case, the mental state of the prisoner was such, that the death penalty should not have been imposed, as it constituted special extenuating circumstances.

13. Mr. Fitzgerald Q.C. for the prisoner deployed a number of arguments, reasons and submissions why the death penalty should not be imposed on him. He also called witnesses to testify in support of the prisoner. Mr. Fitzgerald Q.C. however, questioned the constitutionality of the **proviso** to **section 102(1)** (section 106(1) of the 2000 Ed. of the Laws of Belize) in so far as it appears to require something **“special”** to justify the choice of a life sentence rather than the death penalty. This, he argued, is a presumption in favour of the death penalty, contrary to general principles applied in other jurisdictions and in international human rights law, to the effect that the death penalty should only be applied in exceptional or rare cases of murder; therefore, he submitted, it is the imposition rather than the non-imposition of the death penalty that should require special justification. Mr. Fitzgerald Q.C. however, stopped short of asking this Court to rule on the constitutionality of the **proviso** on this point.
14. In my view, in order to exercise the discretion whether to sentence the prisoner to death or to life imprisonment, the Court must have regard to all the circumstances attendant on the commission of the crime and to the personal circumstances and factors that might have influenced the prisoner’s conduct. The rationale for this consideration stems from the nature of the offence of murder itself and what has been called “the problem of differential culpability”, that is always involved in its commission. The issue was eloquently but pithily put in a report of an inquiry into the mandatory life sentence for murder sponsored by the Prison Reform Trust in England and chaired by Lord Lane, a former Chief Justice of England. This is stated at paragraph 12 of the judgment of the Privy Council in the prisoner’s constitutional challenge earlier this year as follows:
- “There is probably no offence in the criminal calendar that varies so widely both in character and degree of moral guilt as that which falls within the legal definition of murder.”*
15. It is this necessity to consider the circumstances of the commission of the offence and the circumstances of the offender, and the need to afford the offender the opportunity to seek to dissuade the Court from imposing the death penalty, that led the Privy Council to hold, in the case of the prisoner, that the mandatory death penalty was incompatible with the guarantee of the Constitution against inhuman and degrading punishment. There are extensive judicial

authorities in support of this position, and I am grateful to Mr. Fitzgerald for so helpfully summarizing them in both his written and oral arguments on behalf of the prisoner. These authorities range from India – **Bachan Singh v The State of Punjab (1980) 2 SCC 478; Mithu v The State of Punjab (1983) 2 SCR**; the United States of America – **Woodson v North Carolina (1976) 428 US 280; Lockett v Ohio (1978) 438 US 586**; South Africa – **The State v Makwanyane (1995), Case No. CCT/3/94** of the Constitutional Court of South Africa and to the sub region in the decision of the Eastern Caribbean Court of Appeal in **Hughes v The Queen, Criminal Appeal No. 14 of 1997**, judgment delivered on 2nd April 2001 (unreported); and the decision of the Inter-American Commission on Human Rights in **Downer & Tracey v Jamaica (2000) Report No. 41/00** of 14th April 2000.

16. In the South African case of **Makwanyane** supra, for example Chaskalson, the president of that country's Constitutional Court, stated as follows at paragraph 46:

“Mitigating and aggravating circumstances must be identified by the Court, bearing in mind that the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person's conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence.”

In almost a similar vein, Sir Dennis Byron, Chief Justice in the Eastern Caribbean Court of Appeal stated at paragraphs 43 and 44 of his judgment in **Hughes v The Queen supra**:

“43. The experience in other domestic jurisdictions, and the international obligations of our states therefore suggest that a court must have the discretion to take into account the individual circumstances of an individual offender and offence in determining whether the

death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process.

44. In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicial principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.”

This was a restatement of the conclusion of the Inter-American Commission in *Downer and Tracey v Jamaica supra* where that body stated at paragraph 212 of its report:

“Based upon a study of various international and domestic jurisdictions, it is the Commission’s view that a common precept has developed whereby the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of individual offenders and offenses is considered a sine qua non to the rational, humane and fair imposition of capital punishment. Mitigating circumstances requiring consideration have been determined to include the character and record of the offender, the subjective factors that might have influenced the offender’s conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.”

17. In the light of all this, I am of the considered view that the discretion granted to the Court under the proviso to section 102(1) (now section 106(1)) of the Criminal Code, in sentencing a person convicted for murder, does not and cannot be reasonably or rationally be taken to import a discretion in favour of the death penalty. I hold that, in order to be rationally and judicially exercised, the discretion should be informed and guided by, for example, the gravity of the offence, the character and record of the offender, the subjective factors that might have influenced the offender’s conduct, the design and manner of execution of the offence and the possibility of reform of the offender.
18. Moreover, any presumption in favour of the death sentence is displaced, in my view, by considerations flowing from subsection (2) of section 102. This expressly provides that the

jury may make a recommendation or plea of mercy, notwithstanding any rule of practice which might prohibit the jury from making recommendations as to sentence to be awarded to a convicted person. This surely must mean that the death penalty, though available, as well for a Class B murder, is not necessarily an exclusive, or mandatory penalty, much less any presumption in favour of its imposition. The subsection is, in my view, a clear grant of discretion to the sentencer, which discretion may be influenced by recommendation or plea of mercy from the jury. Ordinarily, the jury has no direct role to play in sentencing. Their task is to return a verdict of guilty or not guilty, or where appropriate, guilty of a lesser offence. The traditional view was that the jury should be discouraged, in cases where they have convicted, from trying to influence the judge's decision on sentence. See **Sahota (1980) Crim. L.R. 678**. However, **subsection (2)** of section 102 of the Criminal Code represents an explicit statutory departure from this traditional position in Belize. Indeed, in **Attorney General's Reference (No. 8 of 1992), (1993) 14 Cr. App. R. (S) 130**, the Court of Appeal in England confirmed the departure from the traditional view, when it held that where the jury after conviction, had asked that the trial judge be made aware that they had "great sympathy" for the offender; held that "the judge was right to give effect to the recommendation of mercy, or at least of sympathy, expressed by the jury." Lord Taylor C.J. said that the sentencer had been "absolutely correct" in his view that he "had to have regard to the jury's recommendation." Therefore, in my view, the **proviso** far from importing any discretion in favour of the imposition of the death penalty, expressly on the contrary, grants the discretion, **in favorem vitae**, for not imposing the death penalty.

19. The need to have regard in the exercise of the discretion whether to sentence an offender to death or life imprisonment would therefore, I think, preclude a list of a predetermined special extenuating circumstances. And the **proviso** has, rightly in my view, stopped short of spelling out any such list. Each case should be considered and determined within the over-arching constitutional requirement of humanity stipulated in section 7 of the Constitution of Belize, which would include the consideration of the culpability of the offender and of any potentially mitigating circumstances of the offence and the individual offender.
20. This interpretative approach to the **proviso** would therefore, mean that it is the imposition of the death penalty rather than its non-imposition for murder, that requires special justification.

This approach also, I think, underscores the **presumption in favour of life** posited in **sections 3(a) and 4(1)** of the Constitution. I am further fortified in this conclusion by the consideration of the principle against doubtful penalization. It is a principle of legal policy that a person should not be penalized except under clear law, or in other words, should not be put in peril upon an ambiguity. It is therefore an aspect of this principle that the life of a person should not be ended except under clear authority of law. Therefore when considering which of the opposing constructions of an enactment would give effect to the legislative intention, courts should presume that the legislator intended to observe this principle against doubtful penalization. I would therefore hold that it is the imposition of the death penalty instead of a sentence of life imprisonment that ought, in line with the legal policy against doubtful penalization to be justified by the facts of the case – see **Vol. 44(1) Halsburys Laws of England 4th Ed. Revised**, paras. 1456 and 1457. The enormity of the murder itself and or the absence of any redeeming feature in its commission and of the murderer may be such as to nullify or outweigh any possible mitigating or extenuating circumstances.

21. In the case before me, the prisoner's constitutional challenge to the mandatory death sentence passed on him for the murders by shooting of Mr. & Mrs. Garbutt, was as already mentioned, upheld by the Privy Council as it found that that sentence constituted inhuman or degrading punishment or other treatment and as such infringed section 7 of the Constitution of Belize. This finding has resulted in the remission to this Court to pass appropriate sentence. The reasoning advanced by the Board for its conclusion is stated in its judgment at paragraph 45 as follows:

“The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the Court that in all the

circumstances to condemn him to death would be disproportionate and inappropriate is to treat them as no human being should be treated and thus to deny his basic humanity, the core of right of right which section 7 exists to protect. Section 102(3)(b) of the Criminal Code is, accordingly, to the extent that it refers to ‘any murder by shooting’ inconsistent with section 7 of the Constitution. The category is indiscriminate. By virtue of section 2 of the Constitution subsection 3(b) is to the extent void. It follows that any murder by shooting is to be treated as falling within Class B as defined in section 102(3) of the Criminal Code.”

22. Although their Lordships were at pains to point out that they were only concerned with the prisoner’s case, which was murder by shooting and that they did not need to consider the constitutionality of any mandatory penalty other than death, nor the constitutionality of a mandatory death penalty imposed for any murder other than by shooting, I venture, respectfully, to think, however, that if the logic of the **ratio** of their Lordships’ decision were to be pressed home, the result would be this: The imposition of a **mandatory death penalty** for **any** class of murder, **whether Class A or Class B**, without regard for the circumstances of the commission of the offence of murder or the circumstances of the offender, and not to allow or afford him the opportunity, before the sentence is passed, to seek to persuade the Court that in all the circumstances he should not be condemned to death; the end result may be regarded as disproportionate and inappropriate as falling foul of the Constitution. Therefore, absent the opportunity to mitigate and persuade the sentencer not to impose the ultimate penalty, having regard to the particular circumstances of the offence and offender, and simply to impose the sentence because it is ‘mandatory’, would be irreconcilable with the Constitution.

23. The ineluctable conclusion from this is that the automatic, inflexible and undifferentiating imposition of the mandatory death penalty, without regard to the factors and circumstances of the commission of the offence of murder and the offender, and without the opportunity of the offender to seek to dissuade the sentencer from imposing such a sentence, would be unsustainable, in the light of the provisions of the Constitution against inhuman or degrading punishment or other treatment.

24. In fact, on the same day as the prisoner's constitutional challenge was decided, the Privy Council handed down two other decisions, from the Eastern Caribbean States in **The Queen v Hughes** (2020) 2 WLR 1058; and **Fox v The Queen** (2002) 2 WLR 1077, which now together form a trilogy of judicial authority, the highest for our jurisdictions, that seriously renders flawed the mandatory imposition of the death penalty.
25. Although the word "mandatory" is not used in any of the legislation pursuant to which the death penalty has been meted out, in the case of the prisoner it was section 102 (3) (b) of the Criminal Code, it has come to signify and mean the absence or lack of judicial discretion in imposing sentence.

The crime of murder is, without question, a grave one and its effects and consequences should not be underestimated. But as an offence, its commission nearly always presents a dilemma; as the Royal Commission on Capital Punishment 1949 – 1953 in England, after an examination of some 50 sample of cases, stated in its report (Cmd. 8932) at p. 6, paragraph 21, (mentioned in the Board's decision in its judgment in the prisoner's case at paragraph 11):

"The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. The crime may be committed in order to carry out another crime or in the course of committing it or to secure escape after its commission. Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as often from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there may be no intelligible motive at all."

26. It is, of course, the province of the Legislature to say what constitutes a crime and to prescribe the penalty for its commission; the proper function of the courts is to interpret and apply the law so declared by the Legislature consistently with the primary and highest law of the land, namely, the national Constitution. Therefore, in order to introduce some measure of consistency and rationality and in keeping with the provisions of the Constitution of Belize, it

is proposed that the following **guidelines** be followed in the prosecution, trial and sentencing of accused persons charged with the offence of murder:

- “(i) As from the time of committal, the prosecution should give notice as to whether they propose to submit that the death penalty is appropriate.*
 - (ii) The prosecution’s notice should contain the grounds on which they submit the death penalty is appropriate.*
 - (iii) In the event of the prosecution so indicating, and the trial judge considering that the death penalty may be appropriate, the judge should, at the time of the allocutus, specify the date of the sentence hearing which provides reasonable time for the defence to prepare.*
 - (iv) Trial judge should give directions in relation to the conduct of the sentence hearing, as well as indicating the materials that should be made available, so that the accused may have reasonable materials for the preparation and presentation of his case on sentence.*
 - (v) At the same time the judge should specify a time for the defence to provide notice of any points or evidence it proposes to rely on in relation to the sentence.*
 - (vi) The judge should give reasons for his decision including the statement as to the grounds on which he finds that the death penalty must be imposed in the event that he so conclude. He should also specify the reasons for rejecting any mitigating circumstances.”*
27. Turning to the exercise I am called upon to perform in this case, Mr. Fitzgerald Q.C. forcefully urged that on the totality of the evidence before this Court, the case of the prisoner was one of unmitigated tragedy for everyone, for the prisoner and his family and for the deceased husband and wife, Mr. and Mrs. Garbutt, the victims of the prisoner’s homicide. He submitted that this was a case more deserving of mercy rather than retribution. The sentiments regarding the prisoner’s victims meet with the unqualified approbation of this Court: it is a deep tragedy that both husband and wife were shot dead in the same incident on the same day by the prisoner. The Court accordingly, even with the passage of time, expresses its condolences to the Garbutt family.

28. I cannot however be unmindful of the earnest pleas by Mr. Fitzgerald on behalf of the prisoner, especially in the light of the evidence he adduced before this Court. This, I find, demonstrably show that there are special extenuating circumstances in the case of the prisoner that should stay the hand of this Court from imposing the death sentence within the meaning and provision of the **proviso** to section 102(1) (section 106(1)) of the Criminal Code.

29. There is, in my view, an appreciable body of evidence in this case attesting to special extenuating circumstances why the prisoner should not be sentenced to death. I am assisted greatly also by the Crown who did not argue for the death penalty.

30. In his presentation on behalf of the prisoner, Mr. Fitzgerald Q.C. his learned counsel, as I have stated, deployed several arguments, reasons and submissions why the death penalty should not be imposed by this Court on the prisoner. He also called a number of witnesses in support:

Mr. Bernard Adolphus, a former superintendent of the prison where the prisoner is incarcerated, gave evidence of his quiet disposition as a model prisoner and testified also of his expression of remorse. Mr. Adolphus further testified that given the opportunity, the prisoner has the capacity for reform and he does not, in his opinion, represent further threat nor likely to commit further offence and that he could even be considered for parole.

Mr. Charles Shaw the pastor of the church the prisoner attended testified to his good character and that as a family man he was an example to others. Mr. Shaw also testified that the prisoner has repented and expressed remorse about the crime, and was of the view that he was not likely to commit a similar offence.

Mr. John Lopez, himself a victim of the shooting by the prisoner on that fateful 16 April 1997, also testified for him. Mr. Lopez in fact had testified for the prosecution at the prisoner's trial. In this Court, Mr. Lopez testified that though he was injured in the incident, he was grateful to be able to give evidence for the prisoner.

Mr. Henry Neal a former co-worker of the prisoner at the Ministry of Works also testified for him. He said that the prisoner is a hard-working family man who was always smiling and was not a violent person.

Ms. Zoe Robinson, a niece of the prisoner also testified on his behalf and told the court that they called him “Uncle Naddy”. She described him as having a very helpful and caring nature. She said that the prisoner was so kind as to take into his own home an invalid, one John Requena, whose own family did not want him. This invalid was removed from the prisoner’s home soon after his arrest and he died shortly thereafter. The prisoner, she testified, was a member of Teakettle Village Council and people always went to him for help. She further said that the prisoner was not a violent person and the incident was a shock to her. She has visited him in prison and he was remorseful and expressed sorrow for the family of his victims.

Mr. Andre Rivero, a probation officer also testified for the prisoner in addition to putting in evidence a Social Inquiry Report dated 7th June 2002. This was marked as **Exhibit AR 1**. A remarkable picture of a hard-working, religious and family-centered and non-violent person without any previous brush with the law emerges of the prisoner from this report, by all account what he did that fateful day was quite out of character.

A crucial witness for the prisoner was **Dr. Claudine Cayetano** a practicing psychiatrist who put in a psychiatric report she had prepared on the prisoner. This was put in evidence as **Exhibit CC 1**. She also testified before me that at the time of the commission of the offence, the prisoner’s mental state was consistent with mood disorder with psychotic features, stemming from the boundary dispute he had with the deceased.

31. From the totality of the evidence in this case, I find that the following considerations lead me to conclude that there are special extenuating circumstances in this case that would not warrant the imposition of the death sentence on the prisoner. Let me say this: this conclusion does not in anyway diminish the fact that two lives, a husband and wife, were cut short within minutes of each other, by the hand of the prisoner on that fateful day of 16 April 1997. The fact that in view of my findings the prisoner will not be sentenced to death would however have the consequence that he would have to live with this horrible fact for the rest of his own life.
32. The first consideration is the fact that since his conviction and sentence to death in April 1999, he had been on death row for more than three years. This in itself, on the principle of **Pratt v Morgan** (1993) 43 WIR 340; and as elaborated in **Guerra v Baptiste and others** (1995) 47

WIR 439 and **Henfield v A.G. (1996) 49 WIR**, should attenuate any possible death sentence.

This passage of time would itself, now be an extenuating consideration not to pass the death sentence.

33. The second consideration is the questionable state of the prisoner's mental state at the time of the commission of the offence. I am satisfied with the testimony of Dr. Cayetano that the prisoner was suffering at that time from a major depressive disorder, probably brought on by the stress from the running boundary dispute with the deceased, Wayne Garbutt, over their adjoining land. This must have cause him to be unhinged, at least temporarily, to the extent that after shooting the deceased he turned the gun on himself in an attempted suicide, but only succeeded in inflicting serious wounds on himself, from which he still suffers today.
34. Thirdly, from the testimony of the various witnesses I have summarized earlier, there would appear to be present in the prisoner's favour, additional extenuating circumstances to justify this Court not to impose the death penalty. There is evidence of the prisoner's good character; his good standing in his community and reputation for help and kindness and an exemplary family man; his profound remorse and absence of future dangerousness. All these impel me to believe that the shooting by the prisoner was quite out of character.
35. Therefore, having heard the evidence and the arguments and submissions by both Mr. Fitzgerald Q.C. for the prisoner and Mr. Phillip for the Crown, the sentence of the Court is:

"Patrick Reyes, you are sentenced to life imprisonment for the murder of Wayne Garbutt

And you Patrick Reyes are sentenced to life imprisonment for the murder of Evelyn Garbutt

Both sentences to run concurrently."

A. O. CONTEH

Chief Justice

DATED: 25th October, 2002.

APPENDIX II

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS. 10, 11 AND 12 OF 2002

BETWEEN:

[1] EVANSON MITCHAM
[2] VINCENT FAHIE
[3] PATRICE MATTHEW

Appellants

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Sir Dennis Byron
The Hon. Mr. Albert Redhead
The Hon. Mr. Adrian D. Saunders

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Dr. H. Browne with Mr. H. Benjamin for the Appellants
The D. P. P., Mr. D. Merchant, with Mr. V. Warner for the Respondent

2003: July 21; 22;
November 3.

JUDGMENT

- [1] **BYRON, C.J.:** I have read the Judgment of Saunders, J.A. and concur with the conclusion and reasoning. The procedure employed by the trial Judge in imposing sentence after the pleas for mitigation were advanced does not seem an appropriate manner of giving effect to the new procedure that should be adopted upon a conviction for murder. It does not accord with the tenor of what was outlined in the consolidated cases of **Hughes and Spence**. I think there is a need for detailed procedural guidelines to be provided by this Court, and the time has come for us to do so. Already, the OECS Bar Association has discussed the

matter and has helpfully submitted views to me on the matter. We have discussed the issue and have agreed on procedural guidelines.

- [2] Accordingly, I put forward the following as a procedural guide:

If the prosecution intend to submit that the death penalty is appropriate in the event that the accused is convicted of murder, then notice to that effect should be given no later than the day upon which the offender is convicted. The notice may be given immediately upon conviction in which case it may be given orally. In any event the notice should contain the grounds on which the death penalty is considered appropriate.

Upon conviction by the jury, and the Prosecution having given notice that the death penalty is being sought, the trial Judge should, at the time of the allocutus, specify the date of a sentencing hearing which provides reasonable time for preparation. Where the Prosecution and the trial Judge consider that the death penalty is not appropriate, a separate sentencing hearing may be dispensed with if the accused so consents and the offender may be sentenced right away in the normal fashion.

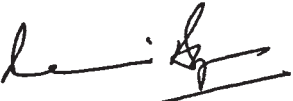
When fixing the date of a sentencing hearing, the trial Judge should direct that social welfare and psychiatric reports be prepared in relation to the prisoner.

The burden of proof at the sentencing hearing lies on the prosecution and the standard of proof shall be proof beyond reasonable doubt.

The trial Judge should give written reasons for his/her decision at the sentencing hearing.

- [3] The procedures followed in this case did not include providing Mitcham with notice that the death penalty would be sought against him, nor were the other Appellants given notice of the sentencing hearing or other information. In the circumstances I would order that the matter of sentencing must be remitted to the trial Judge so that the procedural guides I have set out may be followed as far as is practicable. I would suggest that in this case, the prosecution, as soon as possible, give notice in relation to Mitcham. Having not earlier imposed the death sentence upon either Fahie or Matthew, it would be inappropriate for the trial Judge to revisit the sentences passed on them so as to increase the penalty originally imposed to death sentences. It would be for Counsel and the trial Judge to determine whether there is any need to revisit those sentences at all.

- [4] In light of the foregoing the convictions of all three Appellants should be affirmed and the matter remitted to the trial Judge for sentencing.



Sir Dennis Byron
Chief Justice

- [5] **SAUNDERS, J.A.:** Arlene Fleming used to sell barbecue chicken at the top of Marshall Alley in Basseterre. She was there shortly after midnight on 3rd February, 2001 when three masked men approached her. One of the men demanded money. He held on to her apron. Although he was armed with a gun she resisted. Vernal Nisbett was seated close by on a wall. Nisbett came to her assistance. The gunman stepped back and fired a shot. Nisbett was mortally wounded. The three masked men then ran off.
- [6] Evanson Mitcham, Vincent Fahie and Patrice Matthew were jointly tried for the murder. The prosecution's case was that they were engaged in a joint enterprise. When arrested, Fahie and Matthew gave caution statements. They made certain admissions. Mitcham made no statement save to tell the police that at the material time he was at home. None of the men testified before the jury. Nor was any witness called by any of them. They were all convicted. Mitcham was sentenced to death. Fahie and Matthew were given life sentences. The men have appealed their convictions and sentences.
- [7] Before this Court, Counsel argued that there was insufficient legally admissible evidence against Mitcham. Counsel submitted that the trial Judge was wrong to have disallowed a no case submission made at the trial. As regards Fahie and Matthew, Counsel submitted that their respective caution statements did not disclose evidence of a joint enterprise. Counsel also took issue with the trial Judge's directions to the jury on the issue of manslaughter.

APPENDIX III

PRACTICE NOTE NO. 1 of 2006

Sentencing Procedures for Persons Convicted of Murder

Consequent upon the decision of the Judicial Committee of Her Majesty's Privy Council ("the Privy Council") in *Forrester Bowe and Trono Davis v The Queen*, Privy Council Appeal No. 44 of 2005, ("*Davis*"), that, in conformity with the Constitution, section 291 of the Penal Code, Chapter 84, must be construed as not mandating a sentence of death upon a conviction of murder, the Justices of the Supreme Court have considered how the Court should deal with persons who appear to be affected by that decision and wish to so inform the public generally.

2. There are three legal principles which, while well known to those trained in the law, may not be as familiar to persons generally and, by way of explanation, those principles are stated:

(1) The first of these principles is that, unless and until a competent court determines otherwise, all Acts of Parliament are presumed to conform to the Constitution.

(2) The second legal principle to be noted is that, in the hierarchy of courts within the legal system, each court is absolutely bound to follow the law (including decisions on the interpretation of Acts of Parliament) as it is declared by the courts which sit above it.

The codification of the criminal law in 1927 provided, as it appears in the said section of the Penal Code, that:

whoever commits murder shall be liable to suffer death

and no categories of "murder", providing for different penalties, were created (save for certain modifications added in 1953 which do not touch on the present issue).

The question of whether this penalty was mandatory or discretionary was dealt with by the Court of Appeal of The Bahamas in *Black v R* (1989) 42 W I R 1, the Court having ruled that it was a mandatory penalty. This decision was confirmed by the Privy Council in *Jones and others v Attorney General of The Bahamas* [1995] 4 All E R 1.

Accordingly, until the receipt of the Order in Council consequent upon the determination of the Privy Council in *Davis*, every judge presiding over a trial was, following a conviction of murder, duty bound to impose the sentence that the person convicted:

shall suffer death in the manner authorised by law

as provided by section 2 of the Capital Punishment Procedure Act.
(Ch. 94).

(3) The third principle is that judgments of the courts on the common law or on the interpretation of the Constitution or statutes, generally, have retrospective effect (*vide* the decision of the House of Lords in *R v Governor of Brockhill Prisons ex parte Evans* (2000) 4 All E R 15). Therefore, when the Courts declare the law, that pronouncement is of what law ever was, at least from a determinable historical point. In *Davis*, that point appears to have been the coming into force of the 1963 Constitution, in January of 1964. Accordingly, the effect of the Privy Council's decision is not limited to persons who have yet to be sentenced.

3. Justices have identified three categories of persons in respect of whom it now publishes the procedures that the Supreme Court will adopt:

(a) persons whose trials have not been completed;

(b) persons whose trials have been completed and who have appeals pending before the Court of Appeal or the Privy Council;

(c) persons whose appeals have been dismissed and whose sentences have not been commuted, whether by the Governor-General in exercise of the Prerogative of Mercy or by the application of the Privy Council's decision in *Pratt and Morgan v Attorney General of Jamaica*, Appeal No. 10 of 1993, which imposes time limits on the period within which a lawful sentence of death may be effected.

4. With respect to persons in category 3(a), the Court requires that counsel appearing for the Crown inform the Court, no later than the date of conviction of the person affected, that the Crown will seek the imposition of the death penalty. Where the Crown so indicates, the trial judge will, at a date to be fixed, convene a sentencing hearing in accordance with the provisions of section 185 of the Criminal Procedure Code, Ch 91, which provides that:

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed and may hear counsel on any mitigating or other circumstances which may be relevant.

5. The trial judge will conduct the sentencing hearing as the circumstances of the particular case require, and is at liberty to be guided by principles evolved by courts in other jurisdictions.
6. Examples of relevant principles, drawn from the experience of courts within the Commonwealth Caribbean (*vide* the decisions of the Supreme Court of Belize in *R v Patrick Reyes* (2002) and the Court of Appeal in St Christopher and Nevis in *Evanson Mitcham, et al v Director of Public Prosecutions* (2003)), include:
- (1) Upon receipt of notice from counsel appearing for the Crown that the Crown will seek the imposition of the death penalty, along with the grounds on which they will so submit, the trial judge will give directions to counsel appearing for the Crown and for the convict as to what materials should be made available by each side to the Court.
 - (2) The Court shall, in every case, direct that it be provided with a social welfare report
 - (3) When fixing a date for the sentencing hearing, the judge shall give directions to counsel appearing for the Crown and for the convict as the time limits in advance of that date by which each should have served on the other a statement of the evidence and points of law on which it intends to rely.
 - (4) The judge shall give written reasons for the decision to impose, or not impose, as the case may be, the death penalty
7. As for persons in category 3(b), the Court will not presume the determination of any pending appeal and will abide the consequential directions of the Court of Appeal or Privy Council, as the case may be.
8. As regards persons in category 3(c), the Registrar (in the person of the Deputy Registrar who manages the Criminal Division) has been directed to, in consultation with the Director of Public Prosecutions, secure a list of such persons from the Superintendent of Prisons. The Court, of its own motion, will convene a series of sentencing hearings which will proceed in the manner stated at paragraphs 4, 5 and 6.
9. The Court does not now attempt to articulate any general policy with respect to persons who do not fall within any of the categories identified at paragraph 3 as it considers it impossible to anticipate what reliefs might be sought from the Court from persons who believe they have a right to make a claim. Any applications made, including epistolary applications, will be determined on their own merits as and when they arise.

10. The provisions of section 194 of the Criminal Procedure Code as to assignment of counsel will apply to the conduct of these proceedings.

Note: All statutory references are to the chapters and sections as they appear in the current (2000) revision of the statute law.

Burton P C Hall
Chief Justice
24 May 2006

APPENDIX IV

ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 32 OF 2004

BETWEEN:

DANIEL DICK TRIMMINGHAM

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Denys Barrow, SC

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Ms. Kay Bacchus Browne for the Appellant
Mr. Colin Williams, DPP [Ag.] and Mr. Richard Williams for the Respondent

2005: October 12; 13.

JUDGMENT

- [1] **BARROW, J.A.:** The appellant, Daniel "Dick" Trimmingham, also known as "Compay", was convicted of the murder of Albert "Bertie" Brown in furtherance of a robbery and was sentenced to death. We upheld the conviction and sentence and now deliver our reasons for decision.

- [18] Counsel for the appellant relied in a general way on a number of other grounds including the complaint that the judge failed to put the defence case to the jury and counsel mentioned in this regard the evidence of the forensic analyst and of Sergeant Bailey. We saw neither substance nor significance in the complaint because the judge drew the attention of the jury to the pith of the evidence of both these witnesses. We saw even less substance to the complaint that the Judge failed to address the jury on the probability of collusion between Ava Charles and Ding Browne who both gave new evidence that the accused knocked on the door. Counsel pointed to no evidence (as distinct from argument) to found this complaint, and to which the judge could have directed the jury, or to which she should have adverted to consider that the witnesses had colluded, and which could have rendered impossible a fair trial.
- [19] Although counsel did not argue the ground that appeared in her skeleton argument that the verdict is unsafe having regard to the evidence it was a matter to which we gave appropriate consideration. We satisfied ourselves that there was no substance to the complaint. Counsel apparently recognized that the treatment that the judge gave in the summing up to the accomplice aspect of the case was unimpeachable and did not pursue the reference to it that appeared in the skeleton argument.
- [20] None of the grounds of appeal against conviction succeeded and we accordingly proceeded to consider the appeal against sentence.

Appeal against sentence

The approach to sentencing for murder

- [21] When an appellate court is performing its task of determining whether the sentence imposed by a trial judge should stand or be altered it must apply afresh the principles of sentencing, as the Privy Council confirmed in **Kumar Ali v The State and Leslie Tiwari v**

The State.¹¹ The principles that a court must consider in sentencing in murder cases were helpfully summarized by Rawlins JA in *Wilson v The Queen*¹²:

"The applicable principles

"[15]. In the jurisdiction of this Court, the legal principles that relate to sentencing in murder cases are fairly well settled. They flow from the fountainhead, which is the decision of this Court in *Spence and Hughes*, and subsequent kindred cases. Alleyne J.A., as he then was, rationalized the principles in *Francis Phillip and Kim John v The Queen*, St. Lucia Criminal Appeal No. 4 of 2003. He considered the initial statements that Sir Dennis Byron, CJ, made in *Spence and Hughes*. He also considered the subsequent statements, which Lord Bingham of Cornhill made in *Patrick Reyes v The Queen*, Privy Council Appeal No. 64 of 2001. He considered as well a statement that Saunders J.A. (Ag.), as he then was, made in a dissenting Judgment in *Christopher Remy v The Queen*, St. Lucia Criminal Appeal No. 6 of 2002, and statements that Byron J.A., as he then was, made in *Abraham v The Queen*, St. Vincent Criminal Appeal No. 12 of 1995.

"[16]. The foregoing cases establish that the first principle by which a sentencing Judge is to be guided in these cases is that there is a presumption in favour of an unqualified right to life. The second consideration is that the death penalty should be imposed only in the most exceptional and extreme cases of murder. At the hearing, the convicted person must raise mitigating factors by adducing evidence, unless the mitigating factors are obvious from the evidence given at the trial. The burden to rebut the presumption then shifts to the Crown. The Crown must negative the presence of mitigating circumstances beyond a reasonable doubt. The duty of the sentencing Judge is to weigh the mitigating and aggravating circumstances that might be present, in order to determine whether to impose a sentence of death or some lesser sentence.

"[17]. It is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person. The death sentence should only be imposed in those exceptional cases where there is no reasonable prospect of reform and the object of punishment would not be achieved by any other means. The sentencing Judge is fixed with a very onerous duty to pay due regard to all of these factors.

"[18]. In summary, the sentencing Judge is required to consider, fully, two fundamental factors. On the one hand, the Judge must consider the facts and

¹¹ Privy Council Appeals Nos. 56 of 2004 and 63 of 2004, from Trinidad and Tobago, judgment delivered 2nd November 2005.

¹² Criminal Appeal No. 15 of 2002, St. Vincent and the Grenadines, written judgment delivered 28th November 2005.

circumstances that surround the commission of the offence. On the other hand, the Judge must consider the character and record of the convicted person. The Judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case."

[22] The unqualified right to life that the cases affirm means that there is no mandatory death penalty.¹³ It means as well that there must be no implicit approach that a bad case of murder will attract the death penalty unless there are mitigating circumstances. The death penalty can only be imposed if the judge is satisfied beyond reasonable doubt that the offence calls for no other sentence but the ultimate sentence of death.

[23] It follows from the emphasis on the primacy of the right to life and the approach that this emphasis requires that, in the language of Saunders JA in **Christopher Remy v The Queen**, it will be only in the worst and most extreme case of murder that the death penalty should be imposed.¹⁴

Categories of murder

[24] The trial judge described this as a most "exceptional and extreme case of murder." She stated:

"It also falls within the category, in my view, of the rarest of rare. ... And for the reasons that I have discussed earlier, I am satisfied beyond a reasonable doubt that the Prosecution have proven to me that this case warrants my imposition of the ultimate sanction. I have no doubt that no useful purpose would be served by the continued presence of the prisoner in the community in Saint Vincent and the Grenadines. And I am fortified in my view, having examined the nature of the offence, his antecedents, his character, the circumstances, and also I have to look at the interest of the community and the safety of the community [and] the sanctity of life also. It is my view that a case like this justifies a retention of the death penalty as the ultimate sanction. There is nothing before me to persuade me that Mr. Trimmingham is deserving of my leniency. I am not convinced that any lesser penalty would do justice to this matter despite the able submission of his lawyer. I am convinced that the prisoner dehumanised Mr. Albert Browne in the manner in which he executed his murder"

¹³ This is settled law as a result of the decisions in *Spence v The Queen* and *Hughes v The Queen*, Criminal Appeal No. 20 of 1998, St. Vincent, and Criminal Appeal No. 14 of 1997, St. Lucia, from the Eastern Caribbean Court of Appeal, and *Patrick Reyes v The Queen*, Privy Council Appeal No. 64 of 2001

¹⁴ St. Lucia Criminal Appeal No. 6 of 2002, at paragraph [8].

[25] In England, before the abolition of the death penalty by the **Murder (Abolition of Death Penalty) Act 1965**, the **Homicide Act 1957** identified murders, which attracted the death penalty as including those that were committed in the course or furtherance of theft. The principle on which that approach rested was discussed by the Privy Council in **Evon Smith v The Queen**.¹⁵ In that case Lord Hope of Craighead explained:

"The vice in these cases, which was thought by the United Kingdom Parliament in 1957 to justify the death penalty, was that the defendant resorted to killing his victim in the course or furtherance of committing the theft. It was the wanton and cynical nature of the killing, the debasing in the context of a comparatively minor criminal act of the value that is to be attached to human life, that was regarded as particularly reprehensible."

But even where a murder is committed in the furtherance of a theft it seems to me that there must still be a careful examination of the particular circumstances of the crime since there will be variations in the degree of culpability even in such cases. A court may well view differently a burglar who is surprised in the course of his crime by an armed householder and responded to the householder's challenge with fatal violence to the householder from how it views a burglar who kills a startled child who presented no physical threat. Each case must be examined for the degree of culpability that it presents and a determination made as to the appropriate sentence rather than simply be examined to see if there are present or absent certain features that place it into a category that attracts the sentence of death.

The worst of the worst.

[26] In the instant case there was clear evidence that the appellant killed Mr. Browne to prevent him from reporting to the police that the appellant had attempted to rob him. The decision to steal the 6 goats that belonged to the deceased was formed after the killing had occurred and so that intent cannot be relied upon as the motive for the murder. The intent to rob the deceased of his money, however, preceded the murder and the concealment of that crime was the motive for the killing. That is sufficient to bring the murder committed by the appellant within the compass of the 'particularly reprehensible', as Lord Hope

¹⁵ Privy Council Appeal No. 44 of 2004, from Jamaica, judgment delivered on 14th November 2005.

described it. What made that reprehensible murder heinous was the manner of the killing. The old man's throat was cut¹⁶ while he was alive¹⁶ and then his head was cut off and he was eviscerated. It was not just cold blooded; it was as inhuman as one can imagine. There can be no doubt that it was a killing that the society would condemn as the worst of the worst.

The object of sentencing

- [27] The object of sentencing, it must be remembered, is not to reflect the court's subjective reaction to a crime but to impose a sentence that reflects the abhorrence¹⁷ of the society. Judged by that standard it was an exceptional case of murder that required a consideration of the death penalty that our society has retained even against the tide of abolition. But it is important to emphasize, again, that this conclusion as to the extremity of the murder does not lead to the further conclusion that the appellant deserves the death penalty. The appellant continues to be entitled, even at this stage of the sentencing process, to the benefit of the right to life and there must be no presumption or inclination to the contrary. The appellant's right to life can only be forfeited if the case for doing so has been established beyond all reasonable doubt. On that approach, as against the aggravating features of the murder, the appellant is entitled to the benefit of all mitigating features, even those not raised by him. It is then the duty of the crown to show beyond a reasonable doubt that, notwithstanding these mitigating factors, the court should nonetheless impose the death penalty. It is not merely that there is a presumption against the imposition of the death penalty; it is that such a penalty must not be imposed unless it is shown that there is no other penalty that may suffice to do justice to the case.

The factors that the judge considered

- [28] In considering the appropriate penalty to impose in this case the trial judge identified the factors that she needed to consider as including the gravity of the offence, the character

¹⁶ This was the evidence of Dr. Ronald Child; p. 22 l. 4 of the record of appeal.

¹⁷ *Desmond Baptiste v The Queen* ; High Court Criminal Appeal No. 8 of 2003 St. Vincent and the Grenadines , Paragraph 22 of the judgment.

and record of the offender, the subjective factors which may have influenced the offender, the character and design and manner of execution of the offence, and the possibility of reform and rehabilitation. Omitted from the judge's list of factors when compared to those listed by Rawlins J.A. were the personal and individual circumstances of the appellant and matters that may have influenced the conduct that caused the murder. The omission may have been because there was nothing in the evidence before the judge that spoke to such circumstances or influences. Thus, the psychiatrist who testified at the sentencing hearing said the appellant reported that he had a happy childhood¹⁸ and there was nothing in the report of either the psychiatrist or the probation officer that was significant in these respects.

- [29] The character and record of the appellant, as conveyed in the report of the probation officer, attracted vigorous cross-examination by defence counsel. Counsel denounced the report as biased and emotionally charged against the appellant. The picture of the appellant that the report painted was that of a frightening and dangerous person, suspected of taking a number of lives before. The Judge said the report indicated that the prisoner "has a very despicable character and is regarded as a menace to society." She said:¹⁹

"Mr. Trimmingham has an awful record. In a word, most of his life has been one of crime. He has had numerous previous convictions involving the use of a cutlass. His antecedents are deplorable and quite disconcerting. Many of his convictions are for offences against the person. While he does not appear to have had any brushes with the law for the last ten years; this is but only one of the factors I must take into consideration in my determination of the appropriate sentence. I am not impelled to believe that the violence Mr. Trimmingham meted out against [the deceased] was out of character. I note with concern that several of the offences for which he had been convicted previously even though they were over ten years ago involved using cutlass.

I am convinced that Mr. Trimmingham is a dangerous man who is not adverse to using offensive weapons against his victims based on his antecedents and the fact of this particular matter, and in this case he did use a weapon; in this matter a cutlass with which he murdered the deceased who from reports was an innocent, easygoing elderly gentleman. There are many aggravating factors in this matter, and very little mitigating factors in support of Mr. Trimmingham's case.

¹⁸ P. 557, i. 4 of the record of appeal.

¹⁹ P. 632, l. 21 of the record of appeal.

I have listened to the psychiatric report ... and there is no evidence before me of the prisoner having any mental illness or personality disorder. I have no evidence before me that the prisoner is amenable to rehabilitation and reform as submitted by learned counsel for the prisoner. In fact, the evidence presented by the Prosecution impose (sic) me to the view that the prisoner is a man who should be kept out of society entirely by the imposition of the ultimate sanction."

[30] That passage shows that the sentencing judge placed strong reliance on the appellant's character and reputation in imposing the death penalty. I consider such reliance was wrong. It has to be fundamental that a person cannot be sentenced to death for anything other than the offence for which he has been convicted and for which he is before the court for sentencing. Therefore, the 'awful' character of the appellant should not have operated against the appellant to assist the case for the death penalty. In considering the imposition of the death penalty²⁰ the character and record of the appellant can only work, in his favour, if good, and cannot work against him if bad. Character should have operated as a factor in the sentencing of the appellant only to the extent that he did not have a good character to mitigate the sentence that would otherwise be appropriate.

[31] The judge found there was no evidence of the prospect of reform and social re-adaptation of the appellant. The vigour with which counsel for the appellant attacked the probation officer's report showed a full awareness of the impact that such a report could have on the sentencing of the appellant and therefore assures me that there was no likelihood that counsel omitted through inadvertence to put before the court such material as could have benefited the appellant in this regard. The material in favour of the appellant that was relied on by counsel for the appellant on the sentencing hearing was the testimony of the appellant's sister, the fact that the appellant had applied for and obtained custody of four of his children from his former wife, that the appellant had not resorted to violence against the former wife and the man that had replaced the appellant in the wife's affection, and the probation officer's report of the positive statement of one of the appellant's sons.

²⁰ It is otherwise when a term of life imprisonment is being considered in the case of a repeat offender who is determined to be a future danger from whom the society must be protected.

[32] The sister testified that the appellant loved his children, took good care of them and was raising them well and as regular church-goers. She testified that the people of his community were not afraid of the appellant. She was cross-examined by counsel for the prosecution and the judge rejected her testimony. It is apparent that the sister's testimony was not persuasive that there was the possibility of reform and re-adaptation of the appellant. It was, therefore, open to the judge to conclude, as she did, that there was no evidence before the court that the appellant was amenable to rehabilitation and reform.

[33] What was not open to the Judge, in my respectful view, was the conclusion that the appellant was a man

"who should be kept out of society entirely *by the imposition of the ultimate sanction*". (Emphasis added):

Imposing a sentence of life imprisonment can attain the objective of keeping the appellant out of society entirely. Therefore, the objective of protecting the society from the appellant cannot justify the imposition of the death sentence. It was therefore wrong to impose the death penalty on that basis. It was also wrong to impose the death penalty on the kindred basis, or perhaps it was an alternative formulation, expressed by the judge that:

"no useful purpose would be served by the continued presence of the prisoner in the community of St. Vincent and the Grenadines."

Removing a presence from the society does not require executing the person.

A fresh exercise of discretion


[34] Because the sentencing judge erred in principle in the exercise of her discretion it became the duty of this court to consider afresh, and to exercise our own deliberate judgment on, the sentence that this murder required.²¹ After considering afresh the factors that must be taken into account a number of clear conclusions emerged.

²¹ For a statement of the principle that the Court of Appeal will interfere with a sentence when it is wrong in principle see **Francis Phillip and Kim John v The Queen**, Criminal Appeal No. 4 of 2003, St. Lucia, per Alleyne J.A., at [46].

[35] Beyond falling into the category of particularly reprehensible killings, because it was committed in furtherance of a robbery, the murder that the appellant committed was heinous because it was cold blooded and inhuman. It is the criminal culpability, the degree of moral guilt, present in this specific murder that made it appropriate to consider it as one of the 'rarest of the rare' cases in which the death penalty may be appropriate. The character and record of the appellant were not capable of significantly mitigating the punishment that this murder deserved. The most that his counsel was able to urge by way of mitigation was that the appellant had had no convictions for ten years and this showed that he was capable of reform. It was a valid argument and we weighed it in the balance. There were no mitigating factors in the motive and circumstances that led to the murder. Apart from the fact that the last decade of his life has been conviction-free there was no evidence that showed any possibility of reform and social re-adaptation of the appellant. The appellant neither expressed nor showed remorse; he continued to insist on his innocence. The individual circumstances of the appellant provided no assistance in determining whether the death penalty can and should be imposed.


[36] When the aggravating and the mitigating factors were weighed afresh in the balance we were satisfied, beyond reasonable doubt, that this particular murder required consideration of the imposition of the death penalty. After due consideration we were further satisfied, beyond reasonable doubt, that there was no basis upon which we could say that the object of punishment could be achieved by a sentence other than death. It is on that basis that we dismissed the appeal against the death penalty.

I concur.


Denys Barrow, SC
Justice of Appeal


Brian Alleyne, SC
Justice Appeal

I concur.


Michael Gordon, QC
Justice of Appeal

APPENDIX V

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.30 OF 2004

BETWEEN:

HARRY WILSON

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Denys Barrow, SC
The Hon. Mr. Hugh A. Rawlins

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Ms. Nicole Sylvester for the Appellant
Mr. Colin Williams, Director of Public Prosecutions, with him Ms. Sandra Robertson, Crown Counsel for the Respondent

2005: October 10; 13; 14;
November 28.

JUDGMENT

- [1] **RAWLINS, J.A.:** The Appellant, Harry Wilson, was convicted for the murder of his daughter, Ariel, who was 2 years old at the time of the murder. He was sentenced to death. He was also convicted on 2 counts of attempted murder of his elder daughter, Shantel, and the girls' mother, Grace Williams. He was sentenced to life imprisonment on each of these counts. He appealed only against the conviction for murder and the death sentence which was imposed on him for the conviction.
- [2] Wilson appealed on 12 grounds and reserved the right to add further grounds against his sentence. However, no further grounds were added. When the appeal was heard, Ms. Sylvester pursued grounds 2 and 7. The gravamen of these

grounds is that material irregularity occurred during the course of the trial and the trial Judge failed to deal with the irregularity properly. She also pursued grounds 8 to 12, by which Wilson appealed against the death sentence.

- [3] On 14th October 2005, this Court dismissed the appeal against the conviction but allowed the appeal against the death sentence. The Order substituted instead a sentence of life imprisonment. The reasons for that decision are now given. I shall first consider the appeal on the ground of material irregularity.

Material Irregularity

- [4] Ground 2 of the appeal, in its entirety, reads as follows:

“Material irregularity occurred in the course of the Appellant’s trial, namely:

- (a) The Appellant was prejudiced by the fact that while his defence was being put, a member of the jury shouted out among other things ‘Yes Jesus’ after the said witness [Shantel Williams] responded to a question in cross-examination.
- (b) The Appellant immediately expressed his concern requesting that a new jury be empanelled or the matter be investigated to determine what the jury meant by the said words but this request was denied.
- (c) As a consequence, the Appellant was not able in the circumstances to conduct his defence fairly or at all.
- (d) The Learned Trial Judge without an investigation into why the words were said and by whom determined that the words were not prejudicial to the Appellant when it is well known that in local parlance the words ‘Yes Jesus’ may connote a meaning prejudicial to the Appellant.
- (e) Failure by the Learned Trial Judge to conduct an investigation as to what was said by the jury deprived the

- [13] The transcript of the summation shows that the Judge did not specifically speak to the matter. However, she did what was important, when she admonished the jury to decide the case only on the evidence which they heard in court. She warned them against being influenced by sympathy for or prejudice against the appellant. She reminded them to be true to their oaths. She directed them how to consider the evidence. She informed them that it was the duty of the Prosecution to satisfy them so that they felt sure of the guilt of the appellant on each count before convicting him. She explained the elements of each count. In short, the Judge did what was required to ensure that the Appellant obtained a fair trial and that the jury understood the nature of their duty and the importance of returning a fair verdict. At the end of the summation, the learned Judge inquired of both Counsel whether there was anything that she omitted, which they wished her to speak to the jury about. There is no indication that there was request to address the matter, which is the subject of these grounds of appeal, specifically. In the foregoing premises, the appeal fails on grounds 2 and 7.

The appeal against the death sentence

- [14] First, I shall restate the principles that are applicable to sentencing in a case in which a person is convicted of murder in the terms in which I distilled them in **Mervyn Malse v The Queen**, St. Lucia Criminal Appeal No. 8 of 2003 (15th July 2005). I shall then apply those principles to the present case.

The applicable principles

- [15] In the jurisdiction of this Court, the legal principles that relate to sentencing in murder cases are fairly well settled. They flow from the fountainhead, which is the decision of this Court in **Spence and Hughes**, and subsequent kindred cases. Alleyne J.A., as he then was, rationalized the principles in **Francis Phillip and Kim John v The Queen**, St. Lucia Criminal Appeal No. 4 of 2003. He considered

the initial statements that Sir Dennis Byron, CJ, made in *Spence and Hughes*. He also considered the subsequent statements, which Lord Bingham of Cornwall made in *Patrick Reyes v The Queen*, Privy Council Appeal No. 64 of 2001. He considered as well a statement that Saunders J.A. (Ag.), as he then was, made in a dissenting Judgment in *Christopher Remy v The Queen*, St. Lucia Criminal Appeal No. 6 of 2002, and statements that Byron J.A., as he then was, made in *Abraham v The Queen*, St. Vincent Criminal Appeal No. 12 of 1995.

- [16] The foregoing cases establish that the first principle by which a sentencing Judge is to be guided in these cases is that there is a presumption in favour of an unqualified right to life. The second consideration is that the death penalty should be imposed only in the most exceptional and extreme cases of murder. At the hearing, the convicted person must raise mitigating factors by adducing evidence, unless the mitigating factors are obvious from the evidence given at the trial. The burden to rebut the presumption then shifts to the Crown. The Crown must negative the presence of mitigating circumstances beyond a reasonable doubt. The duty of the sentencing Judge is to weigh the mitigating and aggravating circumstances that might be present, in order to determine whether to impose a sentence of death or some lesser sentence.
- [17] It is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person. The death sentence should only be imposed in those exceptional cases where there is no reasonable prospect of reform and the object of punishment would not be achieved by any other means. The sentencing Judge is fixed with a very onerous duty to pay due regard to all of these factors.

- [18] In summary, the sentencing Judge is required to consider, fully, two fundamental factors. On the one hand, the Judge must consider the facts and circumstances that surround the commission of the offence. On the other hand, the Judge must consider the character and record of the convicted person. The Judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case.

The present case

- [19] In her sentencing judgment, the trial Judge correctly stated the applicable principles, although she did not refer to the burden and standard of proof until she stated her decision as follows:

"This is a very brutal and heinous crime for which I am convinced beyond a reasonable doubt that Mr. Harry Wilson should receive the death penalty for having murdered his daughter ... any lesser sentence would not be appropriate."

- [20] I agree with the learned Judge that this was a heinous crime. She also described it as a very brutal and senseless murder that was carried out in circumstances which indicated an intention to kill or to cause grievous bodily harm. The Judge looked at the circumstances of the offence.

- [21] The facts reveal that the appellant and Grace Williams became involved in a relationship when they were both quite young. She gave birth to Shantel when she was 16 years old. The appellant and Ms. Williams subsequently cohabitated eventually at Campden Park, and Ariel was born while they lived there. In 2000 the appellant migrated to Barbados in search of work. He spent almost one year there. During that time the relationship broke down. Ms. Williams told him the relationship was at an end. He nevertheless returned to the house at Campden Park. The relationship was tempestuous. Ms. Williams sent Shantel and eventually, Ariel, to reside with her mother. She sent Ariel on 15th February 2001. On 17th February 2001, the appellant collected the children from their

grandmother's house, on the pretext that he wanted to have them for the weekend. He took them to Campden Park.

[22] When the appellant arrived with the children at the home in Campden Park, Ms. Williams was about to go to a function. They quarreled. She stayed at home. They continued to quarrel and fight after he locked himself, Ms Williams and the children into a bedroom.

[23] The evidence of Ava Warner, a neighbour, paints a picture of events, which indicates strange behaviour by the appellant on the evening before Ariel was murdered and after. On the evening before the murder, the appellant told her that he was not going to leave the children with Ms. Williams to suffer. However, he did not answer her questions whether he would take them to his mother. According to Ms. Warner, he asked her for coins to call his mother, but she saw him pacing forward and backward in the yard after. She had left him after they spoke for a while because of the way his face looked.

[24] According to Ms. Warner, on the morning of the murder, the appellant kept telling her that Ms. Williams had killed herself and the children, even when Ms. Warner told him and it should have been clear to him that Ms. Williams and Shantel were alive. The appellant said the same thing to Verene Edwards, Ms. Williams' mother, when he called her by telephone just after the incident.

[25] The evidence of Ms. Williams indicates the tempestuous and abusive nature of the relationship, particularly as the gruesome events unfolded during the night of 17th February, 2001, and up to and immediately after the incident on which the appellant killed Ariel and inflicted cuts across the throats of Ms. Williams and Shantel. After these events, the appellant continually denied that he committed the crimes. Even as he spoke with Ms. Williams after the incident, he kept asking her why she killed herself and the two children.

- [26] Ms. Sylvester relied on **Cardinal Williams v The Queen**, St. Vincent & the Grenadines Criminal Appeal No. 10 of 1995. The evidence in that case shows that the appellant, Williams, murdered his common law wife in circumstances which show parallels to those in which Ariel was murdered in the present case. Cardinal Williams had killed both of their children also. He admitted that he had killed the children in a statement to the police. He subsequently denied killing them. At his trial, he insisted that his common law wife killed them and it so enraged him that he killed her. He maintained this story long after his conviction.
- [27] In his psychiatric report, Dr. Debnath formed the opinion that Cardinal Williams was mildly depressive and that he was faking amnesia. Dr. Mahy, a Psychiatrist of long experience, formed the opinion that Cardinal Williams was suffering from mild depression at the time of the killing. He stated that Williams clearly recalled all the events of the day of the killing. He therefore ruled out the possibility that Williams had suffered a major depressive disorder. According to Dr. Mahy, on the day of the killing, Williams, was very embarrassed and desperate and could no longer tolerate his wife's infidelity and he took a deliberate decision to kill her and the children.
- [28] On the other hand, Dr. Eastman, an English Psychiatrist, formed the view that Cardinal Williams was mentally ill at the time when he committed the murders. He came to this conclusion by way of diagnosis. He said that the conclusion was strengthened by two other observations. The first was that a person deliberately killing both of his or her children in the absence of mental illness is rare unless there is a history of child abuse. Dr. Eastman's second observation was the enormous number of wounds which Williams had inflicted upon the deceased persons when he had no previous history of violence.
- [29] Based primarily upon Dr. Eastman's Report, this Court found that there was sufficient evidence upon which the defence of diminished responsibility could have been available to Cardinal Williams. This Court quashed the conviction for murder

and substituted a conviction for manslaughter instead of remitting the case to the High Court for retrial, on the ground that a retrial would have served no practical purpose. By that time, the Pratt and Morgan principles would have precluded the imposition of the death sentence anyhow. Williams was sentenced to serve 10 years in prison.


[30] In the present case, the appellant, Wilson, had the benefit of two Reports from Dr. Debnath. In these reports, Dr. Debnath stated that the appellant had no signs of any formal thought disorder. He also found that the appellant is an intelligent person, who was "... in his full and normal sense" during or immediately prior to the time that he killed his daughter. The Judge did not have the benefit of any other psychiatric reports.

[31] There is a matter, however, from the Cardinal Williams case, which has some resonance in relation to the present case. It is that observation, which Dr. Eastman made that the killing of ones own children is rare in the absence of mental illness or child abuse. There is no evidence that the appellant, Wilson suffered abuse as a child. Although he cut the throat of his daughter, Ariel, and inflicted cuts across the throats of his daughter, Shantel, and Ms/ Williams, his common law wife on the morning of 18th February 2001, Wilson is in denial just as Cardinal Williams became. However, in the absence of any psychiatric or other relevant evidence, which specifically speaks to diminished responsibility in relation to Wilson, these observations could not confer the benefit of this defence upon him. I am of the view, however, that coupled with a matter, which comes out of the sentencing Judgment, they assist in vitiating Wilson's death sentence.

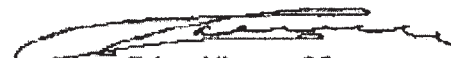
[32] In the sentencing judgment, the Judge noted Wilson's good antecedents. He had no previous criminal convictions. She also noted the evidence that he is a model prisoner, a good father and son. Notwithstanding this, she stated:

"I do not have any evidence before me (from) which I can properly conclude that the prospect of rehabilitation exists in relation to Mr. Wilson."


- [33] In the light of this statement, a consideration of the sentencing judgment reveals that although the Judge noted the mitigating factors, they were not detailed or weighed against the other factors as the principle in relation to death sentences require
- [34] It was obvious from the Probation Report by Mr. Matthews, the Deputy Director of the Family Services Division, and the evidence of Mr. Charles, the Chief Prison Officer in particular, and evidence that was given by others during the trial and at the sentencing hearing, that there was a plethora of material that spoke to Wilson's good chances of rehabilitation. These should have been detailed and dispassionately weighed and considered for the purpose of objectively analyzing Wilson's prospects for reform and social re-adaptation. The learned trial Judge erred by not doing this. The Probation Report and the other evidence which spoke to this, coupled with his clean record clearly show that his chances of rehabilitation are good. It is my view, that in the circumstances, no good purpose would be served by remitting this case to the High Court for a re-sentencing hearing.
- [35] It was in the foregoing premises that the appellant's death sentence was quashed and a sentence of life imprisonment was substituted instead.


Hugh A. Rawlins
Justice of Appeal

I concur.


Brian Alleyne, SC
Justice of Appeal

I concur.


Denys Barrow, SC
Justice of Appeal

APPENDIX VI

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.8 OF 2003

BETWEEN:

MERVYN MOISE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Adrian Saunders
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Hugh A. Rawlins

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Shawn Innocent for the Appellant
Mrs. Victoria Charles-Clarke, Acting Director of Public Prosecutions, with her Ms.
Charon Gardner for the Respondent

2005: February 15;
July 15.

JUDGMENT

- [1] **RAWLINS, J.A. [AG.]:** The Appellant was convicted of murder on 16th February 2001. He was sentenced to death pursuant to the mandatory provisions of **section 178 of the Criminal Code of St. Lucia**. He appealed against the conviction. On 2nd April 2001, in **Spence and Hughes v The Queen**, Criminal Appeal Nos. 14 of 1997, St. Lucia, and 20 of 1998, St. Vincent and the Grenadines, this Court ruled that the mandatory death sentence under **section 178 of the Criminal Code** was unconstitutional. That decision, which was subsequently confirmed by the Privy Council, requires a trial court to conduct a pre-sentencing hearing in order to determine whether there are mitigating factors,

which should result in passing a lesser sentence than death upon a person who is convicted of murder.

- [2] The High Court did not conduct the sentencing phase until 9th November 2003. On 12th November 2003 the Judge who conducted the sentencing hearing found that the aggravating circumstances in the case far outweighed the mitigating factors. She sentenced the Appellant to death by hanging. He appealed the sentence on 1st December 2003. That appeal came for hearing on 15th February 2005 and is the subject of this Judgment.
- [3] I shall first state, briefly, the facts concerning the murder, and then outline the grounds of appeal. The issues that arise from the grounds of appeal will be considered under appropriate sub-headings.

The Brief Facts

- [4] On the night of 4th December 1998, the Appellant and another person were involved in an armed robbery at a gas station in Castries. The robbery resulted in the death of Mr. Peter St. Hill, the 62-year-old owner of the station. Mr. St. Hill was sitting outside the station with one Carlisle Daniel when the Appellant and the other man, who were wearing masks and dressed in camouflage S.S.U. uniforms, approached them. The Appellant was carrying a gun. The other man carried a chopping knife. The Appellant beat the deceased on his head with the gun and shot him in his hip while the deceased was on the ground crying for help. The men then entered the office of the gas station where they robbed Ms. Gene St. Hill, the daughter of the deceased, at gunpoint. She handed over to them the cash tin, which contained about \$2,000.00. They fled.
- [5] The medical evidence revealed that when the bullet entered Mr. St. Hill's hip, it passed through his liver, the large ischial spine, and the rectum and lodged in his buttock. As a result of these injuries, Mr. St. Hill died of respiratory failure

secondary to ARDS, hypodermic shock, blood poisoning, secondary meningitis and residual pituitary oedema.

Grounds of Appeal

- [6] This appeal raises 3 discernible grounds of challenge to the sentencing Judgment. One ground challenges the actual sentencing aspect of the Judgment and the Judge's assessment and analysis of the aggravating and mitigating factors. A second ground is subsumed under the delay issue, which has its legal genesis in **Earl Pratt and Ivan Morgan v The Attorney General of Jamaica et al**, Privy Council Appeal No. 10 of 1993. The third challenge is primarily procedural and I shall consider it first.

The Procedural Ground

- [7] The gravamen of the procedural ground of appeal is that this court should have formally quashed the mandatory death sentence, which the trial court imposed, before remitting the case to the High Court for the sentencing hearing. The Appellant contended that the failure of this Court to formally quash the mandatory death sentence resulted in the imposition of a second death penalty, which was unlawful, null, void and of no effect.

Submissions

- [8] The submissions, which Mr. Innocent, Learned Counsel for the Appellant made under this ground were ingenuous. He said that **Spence and Hughes**, and kindred cases that were tried thereafter, differ significantly from cases such as the present one in which convicted persons received the mandatory death sentence prior to **Spence and Hughes**. According to Counsel, the procedure by which convicted persons in post **Spence and Hughes** cases are allowed to mitigate prior to sentencing is distinct from the pre **Spence and Hughes** cases. In the latter

cases, convicted persons had to suffer the injustice and anxiety of having an unlawful death sentence hanging over them. In the former cases, on the other hand, convicted persons were not sentenced until the sentencing hearing, and therefore did not have to labour under an unlawful death sentence.

- [9] Mr. Innocent contended that a person who was convicted of murder post **Spence and Hughes** did not and do not have to appeal a mandatory death sentence. He said that in fact, in the present case, the Appellant appealed his conviction but not the mandatory death sentence, and this court did not quash that death sentence or order a sentencing hearing pursuant to the principles in **Spence and Hughes**. Mr. Innocent insisted that there is no procedure by which pre **Spence and Hughes** cases could be dealt with because there are only opinions that Sir Dennis Byron C.J. expressed in **Spence and Hughes**. He said that, in any event, since **Spence and Hughes** held that the mandatory death sentence was unconstitutional, morality, good conscience and good jurisprudence dictate that provisions should have been made for the automatic commutation of mandatory death sentences to life imprisonment.

Findings on the procedural grounds

- [10] Parliament made no provisions that accord with Counsel's conjecture that pre **Spence and Hughes** mandatory death sentences are to be commuted to life imprisonment. In **Spence and Hughes**, at paragraph 60, Sir Dennis Byron, C.J. suggested that a judge who sets aside a mandatory sentence of death should conduct a hearing on whether the offence was of a capital or non-capital nature and impose a sentence after a hearing. He suggested that the hearing should follow the same procedure, which he outlined in paragraph 59 for post **Spence and Hughes** cases. These comments are the bases of the mitigation procedure that are presently used, except that the Privy Council has since decided that a judge, rather than a jury, must determine whether the offence was capital or non-capital in nature, and impose sentence accordingly.

- [11] The Chief Justice was mindful that impracticalities could attend the sentencing exercise in pre **Spence and Hughes** cases. His opinion suggested that such cases do not necessarily have to be brought before the trial Judge before whom the person was convicted. It might not always be convenient for the trial Judge to hear the sentencing phase even in post **Spence and Hughes** cases, on account of illness, death or some other reason.
- [12] In the absence of statutory provisions, the procedure that the Chief Justice suggested, as modified by the subsequent decision of the Privy Council, provides reasonable guidelines for the sentencing process in these cases. However, no guidelines were given as to the exact procedure by which the pre **Spence and Hughes** cases were to be brought before the High Court for death sentences to be reconsidered. In the circumstances I think that the Director of Public Prosecutions could have initiated steps to bring the matter to the attention of Parliament or seek directions from the High Court with some urgency.
- [13] It appeared from the submissions of Learned Acting Director of Public Prosecutions, Mrs. Charles-Clarke, that this Court remitted the matter to the High Court for a sentencing hearing when it upheld the Appellant's conviction. That would have provided sufficient authority for the sentencing hearing. Mr. Innocent's submissions seem to suggest, however, that this Court did not formally remit the case for sentencing. I have adverted to the certificate of the Judgment in the absence of a written Judgment or other record. The certificate states that the appeal was dismissed and the conviction and sentence of the trial Judge affirmed.
- [14] There is some reason in the submission that Mr. Innocent made that the mandatory death sentence should have been formally quashed. However, the imposition of the death penalty after the sentencing hearing was not unlawful, null, void and of no effect simply because the mandatory death sentence was not formally quashed. Additionally, contrary to Mr. Innocent's submission, there was

no authority upon which the Judge could have quashed the mandatory death sentence and commute it to life imprisonment without a sentencing hearing. The appeal therefore fails on the procedural ground.

The Sentencing Aspect

- [15] I shall first outline the principles of sentencing for persons who are convicted of murder, and, against this background, a synopsis of the objections that Mr. Innocent has taken to the sentencing aspects of the Judgment. The essential aspects of the sentencing Judgment will then be considered against the particular complaints that Mr. Innocent raised.

The principles applicable to sentencing

- [16] In the jurisdiction of this Court, the legal principles that relate to sentencing in murder cases are fairly settled. They flow from the fountainhead, which is the decision of this Court in **Spence and Hughes**, and subsequent kindred cases. Alleyne J.A., as he then was, rationalized the principles in **Francis Phillip and Kevin John v The Queen**, St. Lucia Criminal Appeal No. 4 of 2003. He considered the initial statements that Sir Dennis Byron, CJ, made in **Spence and Hughes**. He also considered the subsequent statements, which Lord Bingham of Cornwall made in **Patrick Reyes v The Queen**, Privy Council Appeal No. 64 of 2001. He considered as well a statement that Saunders J.A. (Ag.), as he then was, made in a dissenting Judgment in **Christopher Remy v The Queen**, St. Lucia Criminal Appeal No. 6 of 2002, and statements that Byron J.A., as he then was, made in **Abraham v The Queen**, St. Vincent Criminal Appeal No. 12 of 1995.
- [17] The cases mentioned in the foregoing paragraph establish that the first principle by which a sentencing Judge is to be guided in these cases is that there is a presumption in favour of an unqualified right to life. The second consideration is

that the death penalty should be imposed only in the most exceptional and extreme cases of murder. At the hearing, the convicted person must raise mitigating factors by adducing evidence, unless the mitigating factors are obvious from the evidence given at the trial. The burden to rebut the presumption then shifts to the Crown. The Crown must negative the presence of mitigating circumstances beyond a reasonable doubt. The duty of the sentencing Judge is to weigh the mitigating and aggravating circumstances that might be present, in order to determine whether to impose a sentence of death or some lesser sentence.

- [18] It is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person. The death sentence should only be imposed in those exceptional cases where there is no reasonable prospect of reform and the object of punishment would not be achieved by any other means. The sentencing Judge is fixed with a very onerous duty to pay due regard to all of these factors.
- [19] In summary, the sentencing Judge is required to consider, fully, two fundamental factors. On the one hand, the Judge must consider the facts and circumstances that surround the commission of the offence. On the other hand, the Judge must consider the character and record of the convicted person. The Judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case.

The main objections

- [20] Mr. Innocent submitted that the death sentence, which the Learned Judge imposed on the Appellant, was manifestly excessive and wrong in principle. He stated that, at paragraphs 21-24 of the Judgment, the Learned Judge espoused the correct approach which is to be considered for sentencing on a conviction for murder. He contended, however, that notwithstanding this, the Judge erred in a number of ways.
- [21] Mr. Innocent complained, in particular, that the Learned Judge erred when she took into consideration the fact that the draft Criminal Code categorized a murder that was committed in the course of robbery as capital murder. He also complained that she failed to properly weigh or analyze the factors, which she should have taken into consideration in order to determine the sentence and/or incorrectly or unfairly assessed them. He insisted that when the Learned Judge considered the aggravating factors, she afforded the most significant weight to the finding that the murder was committed in furtherance of a robbery. He noted that the Judge found that the murder was not committed in the heat of passion, but that it was planned and premeditated. He submitted that this conclusion came from the evidence that was given at the trial when the Learned Judge was not the trial Judge. He insisted that it would be dangerous for a sentencing Judge, who did not conduct the trial, to be permitted to draw conclusions or inferences of fact from the trial record. He said that, first, the drawing of conclusions and inferences are within the purview of the jury only. Second, no one knows for certain what inferences the jury drew from the facts during the trial.
- [22] The objections against the sentencing aspects of the Judgment may therefore be broadly subsumed under two issues that were raised in the grounds of appeal. One is the objection to the reference in the Judgment to the categorization in the draft Criminal Code of a murder that was committed in the course of robbery as capital. The second is the objection against the manner in which the Learned

Judge weighed and analyzed the factors that she took into consideration for sentencing.

Robbery as capital murder

[23] Mr. Innocent took particular issue with two statements, which the Learned Judge made at paragraphs 26(b) and 29(f) of the Judgment. In those statements, she noted that the murder occurred during the course of an armed robbery. She stated that this type of offence appears to be prevalent and poses a serious threat to the lives of innocent persons in the society, and that it was important to note that the Draft Criminal Code of St. Lucia had identified the kind of murder in this case as a capital murder.

[24] Mr. Innocent contended that the Judge was not entitled to take these factors into account. He insisted that, unlike in Jamaica and Barbados, **the Criminal Code, 1992**, made no provision for the classification of murders as capital and non-capital. He submitted that, in the premises, the Learned Judge erred by relying on provisions that were non-existent at the time of the sentencing. He submitted that she had therefore usurped the authority of Parliament, and was wrong to conclude that the murder in this case fell into the worst categories of murder sufficient to justify the death penalty.

Findings

[25] The circumstances in which the murder occurred were factors which the Learned Judge was entitled to take into account. She could not have categorized the murder in this case as capital murder simply because it was committed in furtherance of a robbery. She was however entitled to consider the fact that the murder was committed in furtherance of an armed robbery in determining the weight that was to be given to the circumstances surrounding the commission of the offence. This is what she did when she assessed the aggravating factors.

(See in paragraph 26 of the Judgment.). Her approach was legitimate in the context of the prevalence of these offences. She did not merely categorize the offence in this case as capital murder because of the provision in the draft Criminal Code. Her reference to the draft Criminal Code was made in passing after she gave reasons why she thought that the circumstances in which the offence was committed made this case one that was in the category of the worst cases of murder.

- [26] At paragraph 26(b) of her Judgment, having stated that the Appellant committed the murder in furtherance of a robbery, the Learned Judge continued:

“Based on what he said before and after the crime, he was motivated by greed, covetousness, dishonesty and a dislike for the deceased; a reprisal for the deceased’s refusal to employ the Accused.”

- [27] In summary, the Learned Judge actually considered the fact that the murder took place in furtherance of a robbery as a relevant factor of the circumstances in which the act was done. She was entitled to do this and therefore did not err having done it.

Analyzing, weighing and assessing the factors

- [28] Mr. Innocent complained that the Learned Judge did not attribute sufficient weight to the mitigating factors that were adduced on behalf of the Appellant. He also complained that the Learned Judge failed to give proper regard to statements that Professor Glenn Elmer Griffin, a Forensic Psychologist, made in his report on his psychological assessment of the Appellant. Learned Counsel further complained that the Judge failed to actually or at all consider the subjective factors and individual circumstances, which might have influenced the Appellant.
- [29] Mr. Innocent said that while the Judge identified the mitigating and aggravating factors, she did not properly relate the mitigating factors to the principles on sentencing in murder cases. Counsel said that the result of the failures, which he

adumbrated, is that the death sentence, which the Judge imposed, was not supported by the weight of the evidence that was adduced during the sentencing hearing.

- [30] Mr. Innocent took issue with two statements that relate to this aspect of the appeal. One statement is at paragraph 24 of the Judgment. In that paragraph, the Learned Judge stated:

"The death sentence should only be imposed in the most exceptional cases where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence. If the Accused's deed is so shocking and [clamours] for extreme retribution, to the point where the society of St. Lucia would demand this Accused's [destruction] as the only punishment for his wrong doing, then retribution must play a decisive role and the death sentence will be the proper sentence."

- [31] The second passage that Mr. Innocent complained of is at paragraph 26(c) of the Judgment. Counsel quoted a small portion of it in his submissions. I shall restate most of it in order to put it into proper context:

"The previous convictions of the Accused reveal, he has a propensity to be violent and dishonest. It would have been a little over five months after he served his six months sentence for stealing from a dwelling house, that he was back planning the robbery of the gas station. The probation report discloses that he began his life of crime at an early age, and despite attempts by his father and the State to correct his behaviour, he continued his life of crime into adulthood. He is a recidivist."

- [32] Mr. Innocent submitted that these statements, in addition to the statements referred to at paragraph 23 of this Judgment, indicate that the Learned Judge accorded minimal weight to the mitigating factors that were presented on behalf of the Appellant. He complained, particularly, that the Learned Judge paid little attention to the Psychological Assessment Report of Professor Griffin and to the Social Inquiry Report. Counsel also submitted that the Learned Judge failed to analyze the mitigating factors in the light of these Reports, and that the Judgment was therefore too heavily weighted in favour of finding aggravating factors.

Findings

- [33] Both Counsel accepted that the Learned Judge stated correctly the basic principles that should guide the court in determining whether to impose the death penalty. In paragraph 23 of her Judgment, the Learned Judge stated, *inter alia*, that due regard must be given to mitigating and aggravating factors in a degree appropriate to the demands of the particular case. She stated that these factors must be weighed with the main objects of punishment, deterrence, prevention, reformation and retribution. The Judge also stated that her task was to consider whether these four objectives can be properly met by a sentence other than death.
- [34] In this case, the sentencing Judge did not conduct the trial. In most murder cases, however, the trial Judge would also be the sentencing Judge. All of the facts and circumstances that surround the offence would be disclosed to the Judge in the evidence that is adduced during the trial. The Judge is at liberty to bear that evidence in mind during the sentencing phase, but only to consider the facts and circumstances in which the offence was committed. The availability of the trial record to a sentencing Judge who did not conduct the trial would have the same effect. A sentencing Judge can only draw such reasonable inferences from the facts, which he or she finds from that evidence that are relevant to the circumstances of the offence.
- [35] At the sentencing hearing, it is the duty of the Crown to present evidence of the character and record of the convicted person, as well as evidence of the factors that might have influenced his action. The Court should, in all cases, request a Probation and/or Social Inquiry Report, which should contain a psychiatric report of the convicted person. This would afford the Court findings which it could consider, particularly alongside any Report that is provided on behalf of the convicted person. Any person who presents or participates in the writing of any part of a Report should always be available for cross-examination, unless the sentencing Judge waives their attendance. Mitigating circumstances and

evidence of the prospects of rehabilitation of the convicted person should be presented on behalf of that person at the sentencing hearing. The Crown must present evidence to rebut this evidence.

[36] In this case, the sentencing Judge was entitled to find, as she did, from the facts that were presented, including the trial record, that the murder was planned and premeditated. She did not err when she made that finding.

[37] My concern, however, is in relation to the manner in which the Learned Judge dealt with the Report of Dr. Griffin. She used it, along with the other Reports, to consider the subjective factors, which influenced the Appellant. She set out some of the findings contained in the Reports in the Judgment and concluded as follows at the end of paragraph 13 and at paragraph 14 of the Judgment:

“Though he [the Appellant] scored an intellectually impaired range he shows no sign of being mentally defective or insane. There was no evidence that he was suffering from any diminished responsibility or mental defect prior to and after the date of the crime. 14. Dr. Griffin’s examination and analysis of the Accused was incapable of discerning the state of mind of the Accused at the date of the crime.”

[38] It is apparent that these are considerations of the state of mind of the Appellant, which are relevant to the trial process rather than to the sentencing process. This was in error because the question is not whether the Appellant’s mind was impaired at the time of the act, so as to afford him a Defence to the charge of murder, but rather, whether or to what degree his state of mind should impact on his sentence for the crime of murder. The Reports should have been used for objectively analyzing the factors that influenced the Appellant’s conduct and his prospects for reform and social re-adaptation.

[39] In paragraph 27(l) of the Judgment, the Learned Judge stated, in setting out the mitigating factors, that the Appellant is a good candidate for rehabilitation. She said that this was borne out in Dr. Griffin’s Report and also in the Status Report of the Director of Corrections. In paragraph 15 of the Judgment, the Learned Judge

noted Dr. Griffin's opinion that the Appellant is unlikely to initiate violence in prison or to attempt to escape, and that his characteristics make him well disposed to therapy and rehabilitation. However, in the Judgment, this was not fully weighed with the other factors in the general analysis. The analysis did not take account of the time that the Appellant spent under the unlawful death sentence or of the possibility of his reform or social re-adaptation. I therefore agree with the submissions that Mr. Innocent made that the Learned Judge did not adequately consider or analyze the relevant factors, or properly weigh the mitigating factors with the principles of sentencing. The appeal therefore succeeds on this ground.

- [40] In the usual course of events, this case would be remitted to the High Court for a new sentencing hearing. However, the issue whether the case falls within the **Pratt and Morgan** principles on account of delay will first be considered.

Delay

- [41] First, I shall state the principles on delay for the purpose of this case. I shall then set out the relevant timelines in this case, the submissions by Counsel and my findings.

The relevant principles

- [42] In **Pratt and Morgan**, the Privy Council stated as follows, at page 26:
- “... in any case in which execution is to take place more than 5 years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman and degrading punishment or other treatment.”
- [43] Since the decision in **Pratt and Morgan**, the Privy Council has explained that the 5-year period is to be treated as a norm from which the courts may depart, if the circumstances of the case require it, rather than as a strict minimum time limit.

- [44] In **Pratt and Morgan**, from pages 24–25, their Lordships stated that if capital punishment is to be retained, it must be carried out with all possible expedition. Their Lordships also stated that capital appeals must be expedited. The aim should be to hear capital appeals within 12 months of conviction and to complete the entire domestic appeal process within approximately 2 years.
- [45] Their Lordships have considered the question whether pre-trial delay, the time between which a person is arrested for murder and the date of conviction, should be taken into account under the **Pratt and Morgan** principle. They held, in **Trevor Nathaniel Fisher v The Minister of Public Safety and Immigration et al**, Privy Council Appeal No. 53 of 1997, that there is no basis for extending the **Pratt and Morgan** principle to include pre-trial delay.
- [46] Their Lordships observed, in the majority judgment in **Trevor Fisher**, which Lord Goff of Chieveley delivered, that under the Constitution, pre-trial and post-trial delays enable an accused or convicted person to invoke different rights. They stated that pre-trial delay goes to the validity of the trial and enables an accused person to apply, under common law, to have the charge dismissed for want of prosecution. An accused person may also apply under the Constitution to have the case tried within a reasonable time. Their Lordships stated that, on the other hand, post-conviction delay pre-supposes a valid conviction. The convicted person's attack is therefore against the punishment (the death sentence) under which a convicted person may invoke the **Pratt and Morgan** principle.
- [47] Their Lordships also held in **Trevor Fisher**, that pre-trial delay may be taken into account on the principle established in **Guerra** [1996] A.C. 397. It is not to be added to the post-conviction delay. Rather, it might be considered as a factor that could create exceptional circumstances, under which a court might hold that a death sentence, which was imposed for a period that is shorter than 5 years, should be commuted to life imprisonment under the **Pratt and Morgan** principle.

Submissions

- [48] Mr. Innocent admitted that only 4 years have elapsed between the date on which the Appellant was convicted and first sentenced to death, and that this does not bring the present case under the 5-year norm in **Pratt and Morgan**. He submitted, however, that the Judge should have applied the exceptional circumstances rule in **Pratt and Morgan**. In this regard he noted that the Appellant was incarcerated under an unlawful sentence of death for about 2 years and 8 months before he was given the opportunity to mitigate his mandatory death sentence, and another 1 year and 4 months from the time that the pronouncement of the second death sentence to the hearing of the appeal against that sentence.
- [49] Mr. Innocent suggested that, for the purpose of determining exceptional circumstances, this Court should take into account the following factors:
- (a) the un-contradicted objective and empirical evidence that suggest that the Appellant has suffered and is suffering mental anguish and psychological dysfunction during and as a result of his incarceration on death row;
 - (b) the Appellant was not given an opportunity to mitigate his sentence for murder for over 1 year after he was convicted and his first sentence of death;
 - (c) the first sentence of death that was imposed upon the Appellant was unlawful;
 - (d) the delay in the sentencing hearing and the appeal proceedings were due to failure in the administrative process rather than to any fault on the part of the Appellant;
 - (e) the delay of 2 years and 8 months exceeded the period of 2 years specified in **Pratt and Morgan** as the time within which the domestic appellate process should be completed.

Findings on delay

[50] In her Judgment, it does not appear that the Learned Judge considered delay independently of the actual sentencing aspect of the case. At paragraph 29(e), she identified two relevant periods of delay. The first was a period of about 1 year and 8 months. This was from the date of conviction, 16th February 2001, and the imposition of the mandatory death sentence to the date on which this Court dismissed the appeal against conviction, 22nd October 2002. The second was the 1-year and about 3 months between the pronouncement of that sentence and the second sentence. At paragraph 29(f), the Learned Judge stated that there are no decisions or existing guidelines that collectively accommodate these periods, and the collective period should not by itself attenuate to reduce the sentence from death to life imprisonment in light of the aggravating circumstances in the case.

[51] The relevant timelines in this case for the purpose of considering delay in the context of the **Pratt and Morgan** and the **Guerra** principles are as follows:

4 th December 1998	Mr. St. Hill was murdered
10 th December 1998	The Appellant was charged for the murder and remanded in prison pending trial
16 th February 2001	The Appellant was convicted and the then mandatory death sentence was imposed against him
2 nd April 2001	In Spence and Hughes , this Court held that a mandatory death sentence under section 178 of the Criminal Code was unlawful
22 nd October 2001	The Appellant's appeal against conviction was dismissed
11 th March 2002	The Privy Council confirmed this Court's decision in Spence and Hughes

9 th November 2003	The High Court conducts a sentencing hearing in relation to the Appellant's conviction for the murder of Mr. St. Hill
12 th November 2003	The Appellant was sentenced to death for the murder after the sentencing hearing
15 th February 2005	Commencement of this appeal hearing
Pre-trial incarceration	2 years and 2 months
Time incarcerated on death row to the sentencing hearing	2 years and 9 months
Time incarcerated on death row between the second sentence and the hearing of the appeal against sentence	1 year and 3 months
Time spent on death row to the hearing of the appeal against the death sentence	4 years

- [52] According to the Privy Council's guidelines, the domestic appeals process in death penalty cases should be completed in about 2 years after conviction and the imposition of a death sentence. In this case, 4 years had elapsed by the time that this appeal was heard. This is sufficient to bring this case within the **Pratt and Morgan** principles on which the death sentence could be vitiated. Even more, however, I think that this case now falls under the **Guerra** special circumstances rule. This is because during the 4 years on death row, the Appellant has laboured under a mandatory death sentence for 3 years and 10 months after this Court held in April 2001 that it was unconstitutional and unlawful. Additionally, the Appellant was incarcerated for about 2 years and 2 months prior to his trial and conviction.

- [53] In any event, it would be futile to remit this case to the High Court for a re-sentencing hearing. This is because the time by which domestic procedures should be exhausted has long passed. Delay that would vitiate the death sentence under the 5-year normative guideline in **Pratt and Morgan** would by then be applicable. In the premises, the only practical course will be to quash the death sentence and to substitute a term of imprisonment for life on the Appellant.

Order

- [54] For all of the reasons stated above, the death sentences that were passed on the Appellant on the 16th day of February 2001 and on the 12th day of November 2003 are hereby quashed and a sentence of life imprisonment is substituted instead.



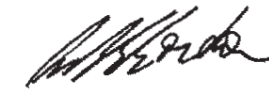
Hugh A. Rawlins
Justice of Appeal [Ag.]

I concur.



Adrian Saunders
Chief Justice [Ag.]

I concur.



Michael Gordon, QC
Justice of Appeal

APPENDIX VII

MENTAL HEALTH ISSUES AND THE DEATH PENALTY

By Edward Fitzgerald Q.C.

1. INTRODUCTORY SUMMARY

1.1 General Principle

The general principle is that the presence of mental disorder should operate at every stage of the process to protect defendants from the death penalty. Thus:

It should bar trial at all if severe enough.

It should operate as a defence to murder, when it satisfies test for insanity or diminished responsibility.

It should operate as a mitigating factor at the sentencing stage and, if demonstrably present at the time of the offence, or the time of sentence, bar the imposition of the death sentence.

It should operate as a mitigating factor at the mercy stage, and justify the grant of pardon wherever it can be shown to have been present at the time of the offence or the time that mercy is considered.

Finally mental disorder should quite independently bar execution – as a matter of common law and constitutional principle – whenever it is present at the time of proposed execution, even if it was not present before.

The underlying principle is that nobody should be convicted of a capital offence, sentenced to death or executed if they were suffering from mental disorder at the time of the offence; and that nobody should be sentenced to death, or executed if illness develops later and is present at the time of either sentence or execution. “Mental disorder” is used here as a convenient generic expression to cover both “mental handicap” (formerly known to the law as “idiocy”) and mental illness (formerly known to the law as “lunacy”).

By “mental handicap” one is broadly referring to that impaired level of intelligence and social functioning associated with an IQ level of below 70 which was held to be a bar to execution in the recent US case of Atkins v Virginia 536 US [2002]. By “mental illness” one is certainly including the major forms of recognised mental illness such as schizophrenia and other psychoses which are associated with the delusional thinking recognised as “insanity” by the M’Naughten test (formerly covered by the legal concept of “lunacy”). But the ban on execution of the mentally disordered advocated here would extend beyond its common law origins to all those suffering from any other form of mental disorder that is now internationally recognised by the WHO in the International Classification of Diseases (ICD). Significantly that would extend to include mood disorders, post-traumatic disorders and severe personality disorders. All these conditions may profoundly affect responsibility for one’s actions or have an impact on one’s competence to face trial or execution.

The common law afforded certain protections from trial on a capital charge, conviction and execution. But these were formerly limited to cases of “idiocy” and “insanity”. As defined in the classic common law test laid down in the M’Naughten rules, this is an extremely limited concept (and is confined to inability to appreciate the position sufficiently to plead; the inability to understand the actual nature of the criminal act or the fact that it is unlawful; and the inability to comprehend the reality or significance of execution). This general and time-hallowed principle was explained thus by Blackstone:

“Idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for [477 US 407] it because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the

humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution”.

But it is arguable that the common law protection “for the mad” should be developed to take account of modern advances in psychiatric science. The M’Naughten test was itself simply a reflection of the rather limited 19th century understanding of psychiatric illness and of the philosophy of mind. It focused on the intellectual appreciation of the quality of the act and its legal implications rather than on the profounder effects of mental disorder on a person’s value judgments, emotions, and powers of self-control. Once the latter approach is adopted, a wider range of mental disorder can be recognised as excusing from responsibility, and exempting from the imposition of the death penalty.

Diminished Responsibility at Trial

The diminished responsibility defence, now introduced by statute in most Caribbean jurisdictions, has extended the limited protection afforded by the common law to provide a defence to those whose mental disorder has either significantly reduced their powers of self-control or distorted their understanding of the moral wrongness of the killing. It is suggested that some form of the diminished responsibility defence should be available in all jurisdictions to protect from conviction of capital crime (i.e. murder) anybody who suffers from a significant degree of mental disorder which reduces their full responsibility for their actions.

Mental Disorder and Sentencing

At the sentencing stage, in jurisdictions where the sentence is now discretionary, and at the mercy stage, there is room for a wider deployment of mental disorder (in its various manifestations) as a mitigating factor preventing the imposition of the death penalty. It is suggested that there is now a jus cogens norm of international law prohibiting both the judicial imposition of the death penalty, and actual execution, in the case of a person suffering from significant mental disorder at the time of the offence, or at the time of sentence or execution.

Mental Disorder as Bar to Execution

There is also a freestanding common law principle that anyone who is insane – or severely mentally handicapped – should not be executed irrespective of whether their disorder was present and was operational at the time of the offence. This is a norm discussed and analysed in the US Supreme Court decision of Ford v Wainwright [477 US 399 (1986)]. This common law protection can now be enforced by constitutional motion, as the Privy Council suggested in the case of Cyril Darville from the Bahamas. The challenge is based on the constitutional prohibition on inhuman treatment or punishment and on the prohibition of arbitrary deprivation of life. There should then be a corresponding right to an evidentiary hearing of the constitutional challenge so that the existence of insanity can be tested by court. (see Ford v Wainwright) Again there is scope for the further development of this rudimentary norm to prohibit the imposition of the death penalty not just in cases of extreme mental handicap or insanity of the M’Naughten type but also in any case where the condemned man’s ability to appreciate the implications of execution, make his peace with his maker, or make an intelligent plea for pardon are seriously impaired by a recognised form of mental disorder.

State’s Duty of Disclosure

An important further protection is the continuing duty on the state at all stages from trial to execution to disclose to the prisoner who is the subject of a capital charge, or at least to his lawyers, any information in the state’s possession that indicates the presence of mental disorder. This is confirmed by the judgment of the Trinidad Court of Appeal in Winston Solomon v The State. The recognition of such a duty ensures that the defendant can invoke the relevant protections from the capital sentence. The acceptance and enforcement of this duty of disclosure is an essential procedural safeguard. Without it, the rights summarised above cannot be made to be “practical and effective”.

In what follows the paper will deal in greater detail with the successive stages at which mental disorder can operate as a protection from the death penalty.

2. UNFITNESS TO PLEAD

2.1 The test for “unfitness to plead” was laid down in R v Pritchard (1836) 7 C&P 303 – which is still cited in the 2005 edition of Archbold at Chapter 4:172. It is “whether the defendant is of sufficient intellect to comprehend the course of the proceedings of the trial, so as to make a proper defence, to challenge a juror to whom he might wish to object, and to understand the details of the evidence”. This test has been approved in later cases such as Ex parte Emery (1969) 2 KB 81 and R v Robertson 52 CrAppR 690.

The test has been restrictively interpreted so that it does not protect from trial those who will simply make bad decisions in the trial process because of their mental disorder. In Robertson it was held that the mere fact that the defendant was, by reason of his persecution mania, “not capable of doing things which were in his best interests” did not make him unfit to plead. So, at present, the plea of “unfitness to plead” really only applies to cases of severe mental illness – where delusional thinking prevents any real appreciation of what is going on – or in cases of such severe mental handicap that the defendant is not capable of understanding the nature of the proceedings. But the Robertson decision may be unduly restrictive in the context of the capital case.

A Mixed Blessing

The plea of “unfitness to plead”, if successful, is a mixed blessing. On the one hand, it does save you from trial and the potential death penalty. On the other, a jury finding of unfitness to plead results in indefinite detention at the executive’s pleasure (in former times “detention until Her Majesty’s Pleasure be known”). And there are throughout the Caribbean persons languishing in prison indefinitely, their cases forgotten and unreviewed, because they have been found unfit to plead and therefore never put on trial at all. Some of them were charged with capital offences; but others with far more trivial offences for which indefinite detention is hardly a proportionate response.

Objections to Indefinite Detention

Such detention at the executive's pleasure without trial of the factual allegations that caused the initiation of the criminal process involves two injustices capable of constitutional remedy:

Firstly, indefinite detention without the proof of even a prima facie case of the allegation made is probably challengeable by constitutional motion as "arbitrary detention" contrary to the constitutional principle that any detention should respect due process rights. The issue of fitness to plead should at least be postponed till a prima facie case has been established – as is now provided for by statute in England (see Archbold 4-167).

Secondly, any form of indefinite detention at the executive's "pleasure" by its very nature contravenes the principle of the separation of powers. This has been established in the case of the detention of juvenile murderers sentenced to detention during Her Majesty's pleasure (see Greene Browne v The Queen [2000] 1 AC 45; DPP v Mollison [2003] 2 AC 411). But the same applies equally to detention at the Governor General's pleasure, or the Chief Minister's pleasure, consequent on a finding of unfitness for trial. The doctrine of the separation of powers requires that the Courts, or some independent tribunal, review the justification (and therefore the legality) of continuing detention from time to time in all such cases; and that they order the release of the detainee if he is no longer mentally disordered or dangerous.

In fact, in most capital cases, the defence will not raise an issue of unfitness. So the issue of mental disorder will tend to be raised not as a bar to trial, but rather as a defence at trial, or a mitigating factor at the sentencing stage, or even later as a reason for mercy, or for a stay of execution.

3. INSANITY & DIMINISHED RESPONSIBILITY

Insanity

The defence of insanity continues to be defined by reference to the limited 19th Century M'Naughten test. That requires that the defence establish, on the balance of probabilities, "that, at the time of the commission of the act, the party accused

was labouring under such a defect of reason, from disease of mind, as not to know the nature or quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong” (Archbold 17-81). This definition of insanity excludes a defence based on uncontrollable impulse (R v Kopsch 19 C.A.R. 550). Moreover, it defines knowledge of the wrongness of the act as knowledge that it is “against the law of the land” (see R v Windle [1952] 2 Q.B. 826 and the M’Naughten rules themselves). The level of knowledge of an “idiot” or very young child might also qualify (see the judgment of the Court of Appeal in R v Sullivan (1984) AC 156).

The defence of insanity, when so defined, is so limited that it tends not to be relied on in any of the jurisdictions that have an alternative defence of diminished responsibility. That is because the wider test of diminished responsibility acknowledges the need to afford at least a partial excuse to those whose disorders affect their powers of self-control, or whose delusional misappraisals lead them to misinterpret behaviour although they still know that killing is against the law. But in the few jurisdictions that do not yet have a defence of diminished responsibility, it is strongly arguable that the defence of insanity should be capable of development to reflect the advances of modern psychiatric science in understanding how mental disorder may affect volition and emotional control, and therefore responsibility.

Diminished responsibility

As to diminished responsibility, this is a defence well known to most of the participating delegates. The defence has now been introduced in most Caribbean jurisdictions by legislation based on Section 2 of the English Homicide Act 1957 (see Archbold at 19-60). Section 2(1) of the Homicide Act, on which the Caribbean statutes are all based, provides:

“2(1) When a person kills or is party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of

mind or any inherent cause or induced by disease or injury) as substantially impaired his responsibility for his acts and omissions in doing or being party to the killing.”

It is for the defence to establish the defence on the balance of probability.

The key ingredients of the defence are threefold:

Firstly the defence must establish the presence of abnormality of mind at the time of the killing. An abnormality of mind has been defined as “a state of mind so different from that of ordinary human beings that the reasonable man would find it abnormal” (R v Byrne (1960) 2 QB 396). The term is “wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that judgment” (R v Byrne).

Next, the abnormality must be shown to have been caused by one of the conditions that are referred to in the bracketed passage “whether arising from a condition of arrested or retarded development etc etc” – i.e. a “condition of arrested or retarded development of mind”, any “inherent cause”, “disease” or “injury”. In effect this list includes any abnormality that arises from mental handicap, or from recognised mental disorders such as psychosis and mood disorders (which are all “diseases”), or from “inherent causes” such as brain damage, epilepsy or other such inherent conditions. The underlying condition need not be permanent, provided it is causative of an abnormality of mind at the time of killing. And, in fact, even episodic depressions, or temporary mood disorders, have been accepted by the Courts as “diseases” or “inherent causes”. So, too, have post-traumatic stress disorders and the “battered wife syndrome” (as in R v Thornton (1996) 1 WLR 158; R v Ahluwalia (1993) CrAppR 133; and State v Ramjattan PC (1999)). Most importantly personality disorders, or severe personality disorders, can qualify as causal conditions giving rise to an “abnormality of mind”. In broad terms, any mental disorder recognised as such by the International Classification of Diseases – ICD – should qualify to support a diminished responsibility plea.

Finally, there must be shown to be a “substantial” diminution of responsibility. But “substantial” means no more than “more than trivial, less than total” (R v Lloyd (1967) 1 QB 175). And proof that the underlying condition made it significantly more difficult for the defendant to control himself than for the normal person should satisfy the test that his responsibility was not “full”, and was therefore “more than trivially affected” or, in other words, “reduced”.

State’s Duty of Disclosure

As is clearly established in the case of State v Winston Solomon by the Trinidad Court of Appeal, there is a duty on the state (which includes the prison authorities, and also any state-run mental hospitals) to ensure that the defence has access to all medical records and all information suggesting a history of mental disorder. The duty applies even if the defence does not ask for the information. The state should therefore research and disclose to the defendant or his lawyers the full mental history of anybody facing a capital charge. This duty clearly extends to materials suggesting prior hospital admissions, or suicide attempts – as was the case in Winston Solomon, where the failure to disclose these materials was a “material irregularity”. But the duty probably extends wider so as to include evidence of any serious childhood disturbance that might suggest or justify a diagnosis of personality disorder.

State funding of psychiatric examination

There is also a duty on the state to fund a psychiatric report where the defendant lacks the means to fund it himself. A failure to provide the resources for a psychiatric examination would violate the principle of a fair trial and the right to due process in any procedure that might end in execution. In this context, the US Supreme Court decision in the case of Ake v Oklahoma 470 US 68 (1985) is a helpful and persuasive authority. That case established the duty of the State to provide an indigent criminal defendant in a capital case with free and competent psychiatric assistance for the preparation of an insanity defence.

Appeals based on new evidence of diminished responsibility

Very often evidence of mental disorder that could support a defence of diminished responsibility or insanity does not emerge until late in the day – after the trial, after the first appeal in the local jurisdiction, or in preparation for the Privy Council hearing, or even later – often after the petition is dismissed by the Privy Council.

This can be the result of a number of possible factors:

Firstly, many defendants do not appreciate or volunteer the fact of their mental history – which is not always apparent – and simply run a Not Guilty plea, and deny involvement in the crime altogether.

Secondly, the absence of resources prevents the state from identifying cases of mental disorder; and the same absence of resources handicaps the trial defence lawyer from identifying mental disorder themselves.

Thirdly, even where mental disorder is identified before trial, the defendant may insist on running a simple Not Guilty defence, and not wish to advance any evidence of his mental disorder at the trial stage.

Sometimes the point can be taken at a later stage without challenging the conviction itself, i.e. as mitigation of sentence in jurisdictions where the death sentence is now discretionary; at the mercy stage; or in support of a constitutional motion to bar execution on grounds of insanity (as happened in the Cyril Darville case in the Bahamas). But, in principle, if a person should never even have been convicted of a murder because he was suffering from mental disorder at the time of the killing, the point should be the subject of an appeal to the Court of Appeal on the basis of new evidence. Such appeals may be lodged out of time in the Court of Appeal; or the Privy Council can be asked to remit the matter back to the Court of Appeal; or alternatively use can be made of the special procedure for an Executive Reference Back to the Court of Appeal that is available in most Caribbean jurisdictions. - Under this procedure, the Governor General or Attorney General is empowered by statute to refer a case back to the Court of Appeal on the basis of new evidence. And there is authority that the refusal to make such a reference is of itself judicially reviewable [Ex parte Hickey (No 2)(1995) 1 W.L.R. 754.

3.7 Test of admission of new evidence

In most Caribbean jurisdictions, the Court of Appeal's approach to the admission of new evidence is based on the old twofold test applied by the English Court of Appeal for the admission of new evidence on appeal (prior to statutory modification in 1995). Thus there is first a statutory provision which, if satisfied, compels the Appeal Court to admit the new evidence (and the test requires a reasonable explanation for the failure to adduce the evidence at trial). The application of that test is exemplified in the case of R v Cardinal Williams from St Vincent. But there is also a wider test justifying the discretionary admission of the evidence, if it is in the "interest of justice" to admit it. This wider discretionary power was the power relied on in most of the "new evidence" cases from the Caribbean in recent years including State v Winston Solomon; and the decision in Labrador v The Queen (2003) 1 WLR 1545. The decision in Labrador contains the Privy Council's detailed analysis of the principles governing the admission of new evidence. This wider discretionary test liberates the court from insisting that the appellant must provide a "reasonable explanation" for his past failure to adduce the evidence at trial in order for the court to admit it as new evidence.

Principles favouring discretionary admission of new evidence

The general principle is still that the defendant should run all available defences at trial (the "one trial" principle referred to in R v Ahluwalia (1993) CrAppR 133). This "one trial" principle poses particular problem when the appellant has denied all responsibility for the crime at trial, but his lawyers then wish to adduce evidence of diminished responsibility on appeal before the Court of Appeal or Privy Council (i.e. to run an inconsistent defence on appeal). In these circumstances, appellate courts are generally reluctant to permit the advancement of such an inconsistent case on appeal (see Ahluwalia). But this general reluctance is outweighed, particularly in capital cases, by considerations of justice; and the general application of the "one trial" principle yields to broader consideration in the following circumstances:

Firstly, where the failure to run the defence was due simply to the absence of supporting evidence at the time of trial through no fault of the defendant, and not because of any “tactical decision” not to deploy it (see R v Campbell (1997) 1 CAR; R v Hobson [1998] 1 CAR 31; and State v Ramjattan PC (1999)).

Secondly, where the failure to run the defence was due to the appellant’s own mental disorder – which prevented him or her from appreciating and revealing his own state of mind at the time, or led him to deny the killing when he obviously did it (see R v Borthwick (1998) CLR 274).

Thirdly, where the failure to run the defence at trial was due to the negligence of the appellant’s lawyers (see R v Ravalia 16.10.1998)

Fourthly, where, though the appellant should have run the defence at trial and has no good reason for not doing so, the evidence is so strong that it is clear that the appellant was, in fact, suffering from diminished responsibility (see R v Dodd; R v Melville (1976) 1 W.L.R. 181).

More generally, where it would result in a miscarriage of justice not to admit the evidence. Thus, in Winston Solomon, the Trinidad Court of Appeal held that failure of the state to disclose the evidence of prior mental disorder to the Appellant’s lawyers afforded a reason for admitting the evidence on appeal though at trial the appellant had denied responsibility for the killing, and run an inconsistent case. As to the proper approach to this wider principle, Lord Bingham’s judgment in the English case of R v CCRC ex parte Pearson [2000] 1 Cr.App.R. 141 contains a helpful analysis of the applicable principles, as does the decision of the Trinidad Court of Appeal in Winston Solomon.

Test after evidence admitted

Once the evidence is admitted the test applied by the Appellate courts tends to be whether the evidence “might well have” resulted in a different verdict if admitted (c.f. Winston Solomon). The Privy Council has recently reviewed the position in

the case of State v Dial PC 16 (2004) and reaffirmed that it may be helpful for the appellate court to test its view by “asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict” (para 31 citing Pendleton at para 19). In most Caribbean jurisdictions the formal statutory test for allowing an appeal is still formulated as one of whether the new evidence shows there has been a “miscarriage of justice”. But the courts have tended to assimilate this test to the English test of whether the verdict can be said to be “unsafe” in the light of the new evidence. So the substantial body of English case law on this issue is still relevant and helpful (see Taylor on Appeals, Sweet and Maxwell, 2001 and see R v Pendleton [2002] 1 W.L.R. 72).

Conclusion on New Evidence

It can therefore be seen that there is still usually some means by which cogent evidence that shows that the case was, in truth, a case of diminished responsibility can be received by appellate courts in exercising their wide statutory discretion to admit new evidence wherever it is in the interests of justice. This seems right. No person should be convicted of murder, or remain convicted of murder, where that conviction carries the death sentence, if his case is in truth a case of diminished responsibility. This principle may now be further supported by a developing norm of international law that prohibits even the conviction of a person of a crime carrying the death penalty in cases where significant mental disorder is present.

4. MENTAL DISORDER AT SENTENCING STAGE

When the death penalty is discretionary, mental disorder is already recognised as one of the most important mitigating factors at the sentencing stage. Thus the presence of a depressive illness was crucial to the non-application of the death penalty to the defendant in R v Reyes, where the Belize Chief Justice found, on sentencing, that there was in fact an element of diminished responsibility even though the defence of diminished responsibility had been rejected by the jury at trial. The presence of mental disorder (in the form of steroid rage) was likewise the main reason given by the sentencing judge (Baptiste J) in St Kitts in the case of R v Berthill Fox for declining to impose the death

penalty on Berthill Fox, a body-builder who had killed his common-law wife and mother-in-law in a fit of anger in circumstances where his powers of self-control were diminished by years of steroid abuse. And mental disorder was again a major reason for the decision of Saunders JA in St Lucia not to impose the death penalty in the case of R v James. By contrast, the St Lucian courts rejected mitigation based on mental disorder and therefore did impose the death penalty in the Cathedral killing case. - That decision is now the subject of an appeal to the Privy Council.

4.2 Burden and standard of proof

At trial, when diminished responsibility is advanced as a defence for murder it has to be established by the defence on the burden of probabilities. But, at the sentencing stage, the general principle is that any mitigating factors should be accepted unless it is negated by the Crown or rejected by the judge, applying the more generous test that mitigating factors must be disproved beyond reasonable doubt (see my paper on The Mitigation Exercise in Capital Cases). This is a further reason why an unsuccessful diminished plea at trial is no bar to re-opening the matter on sentence.

There are infinite gradations in the degrees of responsibility of those with mental problems. Therefore the failure of the defence at trial to satisfy a jury that a person is on the balance of probabilities suffering from a substantial diminution of responsibility should be no bar to raising the issue again at the sentencing stage on the basis that there was at least some degree of reduction of responsibility.

4.4 A jus cogens norm

It is clear that the presence of mental disorder at the time of the offence is a crucial mitigating factor, and is generally accepted as a reason to disapply the death penalty at the sentencing stage. But can one go further? It is submitted that there is now effectively a jus cogens norm of international human rights law that the death penalty should not in any circumstances be imposed on a person who either suffered from significant mental disorder at the time of the offence, or is found to suffer from significant and persisting mental disorder at the time of sentencing.

Support for an absolute prohibition of death penalty for the mentally disordered

The existence of a norm of international law prohibiting the imposition of a death sentence on the mentally disordered can be supported on the following grounds:

Firstly there is clearly a long-standing common law principle that both “idiots” and the “insane” should not be sentenced to death or executed (see Blackstone at 1.3).

Secondly, there is a growing and virtually unanimous international consensus that those suffering from significant mental disorder at the time of the offence, or the sentencing stage, or at the time of execution, should not suffer the death penalty. This principle is illustrated and supported by the recent change of heart by the US Supreme Court when they held in Atkins v Virginia that the imposition of the death penalty on the “mentally retarded” (those possessing IQs of 70-75 or below) would constitute cruel and unusual punishment contrary to the Eighth Amendment. So constitutional norms are now evolving towards the recognition that it is always “cruel” or “inhuman” to execute the mentally disordered.

Thirdly, the existence of an international consensus on this issue is further supported by the Resolutions and decisions of international human rights bodies – including the General Assembly of the UN, the Economic and Social Council of the UN, the UN Human Rights Commission (in a resolution dated 1998) and the Human Rights Committee of United Nations. The full extent of this international consensus is analysed more fully in the Appendix to this paper.

In short, it is now generally recognised to be inhuman to impose the death penalty on those suffering from a degree of mental disorder which either diminishes their responsibility for the offence, or prevents them from fully appreciating the nature of the penalty at the time of sentence or the time of execution.

Reasons expressed by Supreme Court in Atkins

The reasoning of the Supreme Court in Atkins v Virginia is helpful in that it now articulates some of the major reasons for the evolving international norm which is here advocated. It deserved extensive quotation: -

“Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others’ reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability. In light of these deficiencies, the Court’s death penalty jurisprudence provides two reasons to agree with the legislative consensus. First, there is a serious question whether either justification underpinning the death penalty – retribution and deterrence of capital crimes – applies to mentally retarded offenders. As to retribution, the severity of the appropriate punishment necessarily depends on the offender’s culpability. If the culpability of the average murderer is insufficient to justify imposition of death, see *Godfrey v Georgia* 446 US 420, 433, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. As to deterrence, the same cognitive and behavioural impairments that make mentally regarded defendants less morally culpable also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the death penalty’s deterrent effect with respect to offenders who are not mentally retarded. Second, mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanour may create an unwarranted impression of lack of remorse for their crimes.”

- 4.7 As can be seen from this reasoning in *Atkins*, the justification for a general prohibition on the imposition of the death penalty on anybody suffering from

significant mental disorder, is primarily the reduced responsibility of such persons, and the absence of true retributive and deterrent purposes on imposing such a sentence on the mentally abnormal. But some of the additional justifications advanced by the Supreme Court in Ford v Wainwright for the protection of the individual from actual execution apply equally at the sentencing stage as at the final execution stage. – These justifications include the inability of the mentally disordered fully to comprehend the penalty, and to make their peace with God and the world.

Thus, even when the mental disorder was not present at the time of the offence, but has appeared since then – whilst the prisoner is on remand, or during the trial, or whilst he is awaiting sentence – supervening mental disorder itself should bar the actual imposition of the death sentence by the sentencing judge.

Duty of Disclosure

Once the issue of mental disorder has been identified as crucial at the sentencing stage it becomes necessary for the state to provide the necessary resources and funding for a defendant to obtain an adequate independent psychiatric assessment before sentence is imposed.

Issues of Dangerousness and Reformability

Finally, there are other aspects of mitigation on which psychiatric expertise may have bearing once the existence of significant mental abnormality has been established. These include the future dangerousness of the offender and their capacity for reformation. Once the defendant's mental abnormality is established, psychiatric opinion on these further matters is admissible. And psychiatric predictions as to the lack of future dangerousness of the defendant played a significant part in the decisions not to impose the death penalty in the cases of both R v Reyes in Belize and R v Berthill Fox in St Kitts. Generally, where the offence is attributable to the presence of mental disorder, and that disorder is treatable, the likelihood that treatment will render the defendant less dangerous to the public will

operate as a powerful mitigating factor. This will be a further issue raised by the appeal of the Cathedral killers to the Privy Council.

5. MENTAL DISORDER AT MERCY STAGE

The same principles apply at the mercy stage as at the sentencing stage. Indeed in those jurisdictions where the death penalty is still mandatory (such as Barbados and Trinidad), it is only at the mercy stage that the issue of mental disorder as a mitigating factor can be raised.

Therefore it will often be necessary to advance any residual “mental” mitigation, or any freshly discovered matters baring on mental normality at the mercy stage. This will be in the context of representations to the person or body empowered by the Constitution to exercise the prerogative of mercy.

It is important that the mercy decision is now itself reviewable (see Neville Lewis v Attorney-General [2001] A.C. 50). Therefore, any failure to apply the principle that mercy should be extended to spare a condemned man suffering from a significant degree of mental disorder can now be challenged by way of judicial review. And it is strongly arguable that a decision not to commute the death penalty in those circumstances would be wrong in law because it would violate both a common law principle, and an evolving norm of international human rights law. - Alternatively a constitutional motion, based on Blackstone’s exposition of the common law, and the application of the Ford v Wainwright principle, could be initiated to stop the proposed execution of any person suffering from mental disorder. It is to this final protection that we can now turn.

6 PROHIBITION ON EXECUTION OF INSANE

A remedy by way of constitutional motion is now available to bar execution on grounds of cruelty, or inhumanity, in the case of a condemned prisoner who is suffering from mental disorder at the time of execution (whether or not he was so suffering at the time of the original offence). The principle that it is cruel or inhuman to execute the “insane”, (i.e. “mentally ill”) or “the idiot” (i.e. the severely mentally handicapped) is of common law origin. But it has now been endorsed and applied by the US Supreme Court in the

Eighth Amendment in its judgment in Ford v Wainwright. And the identical constitutional norm prohibiting cruel and inhuman treatment may now be invoked to enforce a modern version of the common law prohibition in all jurisdictions with a “Westminster Model” constitution. A constitutional motion modelled on that employed in Pratt and Morgan [1994] 2 A.C. 1, to bar execution after prolonged delay is now the best procedure both to enforce the common law principle protecting the mentally disordered from execution and to ensure its development to take account of modern day psychiatric understanding. Both the substantive law and its procedural application now require further exposition.

6.2 Long authority for bar on execution of mentally disordered

The US Supreme Court in Ford v Wainwright stated the principle clearly:

“We began with the common law. The bar against executing a prisoner who has lost his sanity bears impressive credentials; the practice consistently has been branded ‘savage and inhuman’.”

The Supreme Court then quoted first the passage from Blackstone already cited at 1.3, and then from Sir Edward Coke 3 Institute 6 (6th Edition) 1680:

“By intendment of Law the execution of the offender is for example... but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extreme inhumanity and cruelty, and can be no example to others”.

The rationale of the rule

The rationale of the rule was thoroughly analysed by the US Supreme Court in Ford v Wainwright. The Court’s analysis is of some importance because the underlined rationale of the rule determines the extent of any permissible extension of the principle that those whom the common law would have treated as insane should not be executed. The question is how far this principle can now be extended to cover lesser forms and degrees of mental disorder than those originally

understood to be covered by the concept. In analysing the different rationales of the rule the US Supreme Court first turned to the historical justifications for the rule and then to the way in which the principle is still recognised in contemporary US practice:

“As is often true of common law principles, see *O Holmes, The Common Law* 5 (1881), the reasons for the rule are less sure and less uniform than the rule itself. One explanation is that the execution of an insane person simply offends humanity, *Coke* 6; another, that it provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment. Other commentators postulate religious underpinnings: that it is uncharitable to dispatch an offender ‘into another world when he is not of a capacity to fit himself for it’, *Hawles* 477. It is also said that execution serves no purpose in these cases because madness is its own punishment: *furiosus* [477US 108] *solo furore punitur*. *Blackstone* 395. More recent commentators opine that the community’s quest for ‘retribution’ – the need to offset a criminal act by a punishment of equivalent ‘moral quality’ – is not served by execution of an insane person, which has a “lesser value” than that of the crime for which he is to be punished. *Hazard & Louisell, Death, the State and the Insane: Stay of Execution*, 9 *UCLA L Rev* 381, 387 (1962). Unanimity of rationale, therefore, we do not find. ‘But whatever the reason of the law is, it is plain the law is so’. *Hawles* 477. We know of virtually no authority condoning the execution of the insane at English common law.

This ancestral legacy has not outlived its time. Today, no State in the Union permits the execution of insane. *IT* [488 US 409] is clear that the ancient and humane limitation upon the state’s ability to execute its sentences has as firm hold upon the jurisprudence of today as it had centuries again in England. The various reasons put forth in support of the common law restriction have no less logical, moral and practical force than they did when

first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. See Note, the Eighth Amendment and the Execution of the Presently Incompetent, 32 Stan L Rev 765, 777 n 58 (1980). Similarly the natural abhorrence civilised societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment [477 US 410] prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.”

6.4 The Cyril Darville case and constitutional motions

In the Cyril Darville case in the Bahamas, Darville’s lawyers were able to stay the execution by lodging a constitutional motion on the basis that he was too mentally disordered to be executed. – Darville had been convicted of killing one taxi driver, but admitted to killing eight others, and there was evidence that he had drunk their blood to give himself special powers. He was clearly mentally disordered in some way. But the question arose whether the common law protection applied if he was not suffering from psychosis in the form of schizophrenia – as one defence psychiatrist originally thought - but simply from a severe form of personality disorder, as the second psychiatrist instructed by the defence opined. This question forces one to focus on the rationale of the old common law rule, and its capacity for development to take account of lesser degrees of mental disorder than those extreme forms of mental illness and mental handicap (i.e. M’Naughten insanity and idiocy) that were originally the only grounds on which to invoke the common law prohibition on the execution of the “insane”.

Taking the various rationales for the common law prohibition in turn, they were as follows:

The execution of an insane person offends humanity

This principle of humanity certainly operates to protect those suffering from classic mental illness such as schizophrenia and manic depression and severe forms of mental handicap. But it is arguable that it should now extend further to protect also those suffering from more moderate forms of mental handicap, or from severe personality disorders, which are often themselves due to childhood abuse and deprivation occurring through no fault of defendant. The “instinctive revulsion” test applied by Lord Griffiths in Pratt and Morgan (1994) 2 AC 1 at page 29 to test the inhumanity and therefore the unconstitutionality of the phenomenon of execution after a long delay is equally applicable here. And it is clear that “evolving standards of decency” can lead to an extension of the original common law protection to meet new cases.

Execution does not conform with the principles of retributive proportionality or deterrence.

As to retribution, it is easy to see that retribution should not be visited on a person whose mental disorder makes him less than fully responsible for his actions due to “idiocy” or “M’Naughten insanity”. But retributive appropriateness is also absent where it can be shown that other forms of mental disorder were present that significantly reduced full responsibility.

As to deterrence, it is questionable whether deterrent purposes can ever be served by executing someone suffering from any significant degree of mental abnormality. Deterrence must be directed at those rational enough, and sufficiently capable of self-control to heed the law’s injunctions.

(iii) Inability to comprehend the significance of execution

It is clearly wrong that anyone should be executed who is either too deluded

or too intellectually handicapped to understand the nature of the death penalty, or the significance of the execution, - as with the pitiful offender in the US who asked if he could come back and finish his desert after his execution. The question is how far this principle can be extended to cases where the offender does have some basic understanding, but is not fully able to comprehend the significance of the death sentence. It is submitted that any significant intellectual or emotional defect at the time of execution should always be sufficient to qualify the execution as “inhuman treatment”.

Incompetency to defend self

A further rationale that can be derived both from Blackstone and from the decision in Ford v Wainwright is the incompetency of the condemned man to defend himself adequately in any last ditch appeal or plea for mercy. Again the logic of this rationale is that it should extend to protect any prisoner whose capacity to defend himself for his life is impaired by significant degree of mental disorder whether or not that disorder would satisfy the old common law test of incompetency for execution.

(v) Inability to make one's peace with one's maker

This religious rationale for the common law rule may be of questionable applicability in modern times. But someone who is incapable of making his peace with the world and saying good bye to his family in any meaningful way should still – it is submitted – be covered by the protection. Again, this may well justify an extension of the protection beyond those with profound handicap or severe delusions to include those who are too emotionally damaged to make their peace with this world before being sent to the next.

Limits of the US Approach

In the US, the common law and constitutional prohibition on the execution of the insane has been very narrowly interpreted by the courts (see Miller and Radelet's “Executing The Mentally Ill” at chapters 8-10). In the US, too, the common law

test has been interpreted as consistent with a process whereby the mentally ill death row inmate is first cured sufficiently to be judged competent for execution and then executed. But, neither the restrictive interpretation adopted by the US courts, nor the concept of “curing to kill” would be consistent with the approach adopted by the Privy Council to the prohibition on inhuman or cruel treatment or punishment. Thus: -

The evolving principles of basic humanity identified by the Privy Council in the cases of Pratt, and R v Reyes as underlying the prohibition on inhuman or cruel treatment contained in all the Caribbean constitutions would operate in favour of a generous interpretation of the scope of the prohibition on executing the mentally disordered. Such an approach would take account of all recognised forms of mental disorder that operated for one of the afore mentioned reasons or other to make the application of the death penalty inappropriate.

It would be wholly inconsistent with the approach to the need to humanity in the execution of the death penalty adopted in the cases of Pratt and Morgan and Guerra v Baptiste [1996] 1 C.A.R. 533 to respite execution on grounds of mental disorder and then, at some later date, to issue of fresh warrant on the basis that the offender was sufficiently cured to warrant execution. The notion of serial warrants, or long delays in execution simply to cure the person sufficiently to later justify the execution, is inconsistent with the whole philosophy of the Pratt decision.

Thus the protection of the mentally disordered from execution is a dynamic norm, hallowed by the common law, enforceable by constitutional motion, and capable of evolution as an international norm of basic humanity. It is probably still greatly underutilised and underdeveloped in Commonwealth jurisdictions. Might it not have been resorted to to save the tragic “Mr Shit” (so called because his mother had abandoned him in a public latrine as a baby and the boys at the orphanage where he was brought up called him “Mr Shit”) no less than it proved effective to save Cyrill Darville in the Bahamas? After all, it is overwhelmingly likely that, if “Mr Shit” had been

psychiatrically examined, he would have been found to have suffered from at least a severe form of personality disorder.

Mechanism of Enforcement

The fact that this protection is enforceable by constitutional motion is particularly important. The whole point of the ruling in Ford v Wainwright was that the US Constitution required an evidentiary hearing in which the prisoner had a right to full disclosure, and full participation in the process by which both the presence and the significance of mental disorder was to be determined. In Ford the issue was whether Ford suffered from a mental illness which had developed on death row in the form of schizophrenia - which was the view of the majority of the psychiatrists who reported to the governor - or whether he was malingering and simply suffered from a “maladaptive disorder” – which was the view of the rather hardhearted psychiatrist whose opinion the governor had chosen to follow when he decided that the execution should go ahead. A determination of such a crucial issue by the governor without any proper hearing was held to be a denial of due process.

Due process requirements

Thus the decision in Ford established that the condemned man who raises his insanity as a legal bar to execution has a right to an evidentiary hearing that conforms with the requirements of “due process”. The minimum requirements laid down by the Supreme Court in Ford v Wainwright broadly conform with the procedural requirements that are implicit in all of the Caribbean constitutions as necessary to ensure respect for the separation of powers and the principles of natural justice. In particular: -

Firstly, the decision maker on the merits of the application must be judicial.

This requirement can only really be satisfied if the court itself accords a full evidentiary hearing on a constitutional motion. – What the court cannot do is to leave the matter to the executive, or to the mercy process,

and then merely act as a reviewing body applying administrative law principles.

Secondly, the hearing before the judicial decision maker must at least “encourage accuracy in fact finding” as to the condemned man’s incompetency for execution, and “permit unrestricted adversary presentation”. So the prisoner’s lawyers must be able to present evidence, challenge the state’s psychiatric evidence, and have access to a state funded expert of their own.

7. CONCLUSION

Thus the prohibition on the imposition and the execution of the death penalty operates at each successive phase of the trial, sentencing and execution process. It is sanctified by time honoured common law principles, capable of refinement and evolution in accordance with our developing understanding of psychiatry and, more importantly, it is enforceable at every stage of the process by evolving procedural safeguards. At the conviction stage advocates should take full advantage of the new evidence rules to ensure appeals against conviction and sentence. At the mercy stage advocates should seek to enforce the basic norm that the mentally disordered should not be executed, and do this by way of judicial review of any decision not to commute the death penalty in the case of a mentally disordered offender. And advocates should make full use of the mechanism of constitutional motions to stay executions wherever an outstanding issue of mental disorder remains unresolved at the time that a warrant of execution is read.

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