THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Criminal Division

CRS 046/2009

THE STATE

v

1) AKEEL MITCHELL

&

2) RICHARD CHATOO

FOR

MURDER

Before The Honourable Justice Lisa Ramsumair-Hinds

Date of Delivery: 15 September 2021

Appearances:

Mrs Sabrina Dougdeen-Jaglal, Ms Anju Bhola and Mrs Sophia Sandy-Smith for the State

Mr Mario Merritt and Mr Randall Raphael, instructed by Ms Kirby Joseph for Akeel Mitchell

Mr Evans Welch and Mr Kelston Pope, instructed by Ms Gabriel Hernandez for Richard Chatoo

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SENTENCE RULING

INTRODUCTION

1. The Prisoners are before me at the final stage of a Judge Alone Trial (JAT) on an Indictment with the single count of Murder. On 23 July 2021, I found both Prisoners guilty of capital murder for the death of 6-year old Sean Luke on 26th March 2006. They now fall to be sentenced. I will not recount the facts in this exercise as I am sure that the judgment delivered on 23 July is still quite fresh.

2. I am grateful to the Commissioner of Prisons for facilitating the requests to have Bio-Social Reports and fresh LS/CMI assessments conducted on the Prisoners in under two months, in order to assist the Court and Counsel. I also express my appreciation to Counsel for their submissions, all of which laid bare the extent of the individual effort involved. That said, I regret that I was discouraged by the paucity in one set of submissions, which was late, conceptually flawed and of little assistance[1]. I take the opportunity (as did Moosai JA in **Jason Hosten v The State[2]**) to remind Counsel of the guidance found at paragraph 9 of the Judgment Summary in **Nervais v The Queen[3]**:

> "The trial process did not stop at conviction of the Accused, as sentencing and mitigation were congruent components of a fair trial."

As anxious as parties might be to begin an appellate process[4], Counsel should, at least, recognize the duty to clients and Court at first instance.

[1] There was a two-sentence recommendation which seemed to be directly in conflict with several details in the Bio-Social Report.

[2] Crim. App. No. S 031 of 2016, para 63

[3] [2018] CCJ 19 (AJ)

[4] In this case, Notices of Appeal were filed before sentencing and without any indication of the grounds being relied upon.

3. It would be remiss of me if I did not admit that there is no possible sentencing equation nor jurisprudential philosophy open to me that can truly mitigate the loss of a child's life, especially when it was taken by another child. There is no adequate approach to weigh the proverbial pound of flesh. As a judge, one strives to achieve social justice by incorporating a contemporary perspective; one where hurt and wrong can be ameliorated at times through restitution and mediation. Unfortunately, such an object is an absolute impossibility in some circumstances. Nevertheless, as I look upon the Prisoners and endeavor to ascribe to them the just dessert for the death of young Sean Luke, but not an ounce more than can lawfully be prescribed, I remain respectful of the inexplicable grief of Ms Pauline Bharath, other family members, the local community and society in general. Yes, it was a horrific crime and just as other Judges have done in the past cases involving child offenders[5], I acknowledge your passionate outrage. There are extreme views on a wide spectrum about the appropriate sentence for murder of children by children and it is my hope that right-thinking persons will take the time to read and understand how I arrived at my decision. I promise the Prisoners, the State and society, that this is no light burden, and give you the assurance that it is one that I have undertaken with great caution and careful measure.

THE SENTENCING METHODOLOGY, AIMS and GUIDELINE CASES

4. The authorities are well-settled as to the aims of sentencing and the methodology to be used by sentencing judges. The five principal objects of sentencing are set out in **Benjamin v R**[6], and bear repeating:

[5] For example, at both first instance and on appeal in **Chuck Attin v The State**
[6] (1964) 7 WIR 459.

i. The retributive or denunciatory, which is the same as the punitive;

ii. The deterrent vis-à-vis potential offenders;

iii. The deterrent vis-à-vis the particular offender then being sentenced;

iv. The preventative, which aims at preventing the particular offender from again offending by incarcerating him for a long period; and

v. The rehabilitative, which contemplates the rehabilitation of the particular offender so that he might resume his place as a law-abiding member of society.[7]

Of course, certain of these objects may loom larger than others[8], depending on the individual facts of each case.

5. I have also been guided by the four-tiered methodology which is expected to be applied by all sentencing judges, as set out by their Lordships in **Aguillera, Ballai, Bali and Ayow v The State**[9]. The overall sentencing structure is set out as follows:

i. The calculation of the starting point which takes into account the aggravating and mitigating factors of the offence only; these are the objective circumstances which relate to the gravity of the offence itself and which assist in gauging the seriousness, that is the degree of the harmfulness of the offence;

[7] Ibid, at pgs 460 – 461, per Wooding C.J.

[8] **Farfan v The State** Cr App No 34 of 1980, per Bernard JA

[9] Cr App Nos. 5, 6, 7, 8 of 2015.

ii. An upward or downward adjustment of the starting point (or dependent on the circumstances, and if there is in effect, a cancelling out, no adjustment at all), which takes into account the aggravating and mitigating factors relative to the offender; these are the subjective circumstances of the offender which in turn inform the degree of culpability of the particular offender;

iii. (Where appropriate), a discount for a guilty plea; any deviation from the discount requires particularly careful justification and an explanation which is clearly expressed; and

iv. Credit for the period of time spent in pre-trial custody.[10]

6. **Section 75** of the **Children Act Chap 46:01** provides as follows:

> "The sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years."

7. Had either Prisoner attained the age of 18 years at the time they killed Sean Luke, the automatic penalty by operation of law would have been the imposition of the mandatory death penalty. Certainly, the Prisoners are no longer children, but the law prohibits such a sentence being passed on someone who was not yet 18 when they caused the unlawful death. In March 2006, the Prisoners were 13 and 16 respectively.

8. There are three good reasons for distinguishing the position of child offenders from that of adults[11]:

[10] **Aguillera**, para 24.

[11] **Aaron Thomas Campbell v Her Majesty's Advocate** [2019] HCJAC 58

i. The lack of maturity and an undeveloped sense of responsibility with a concomitant degree of impetuosity and recklessness;
ii. A greater likelihood of falling under the negative influences, from peers and otherwise, including the difficulty of extricating themselves from a criminogenic setting; and
iii. The fact that personality traits of juveniles are more transitory and less fixed than in adults, which means there is a greater capacity for change, with a higher prospect of reintegration and rehabilitation.

These three factors might mitigate the offending and render the offender less blameworthy than might be considered the case for an adult.

9. The applicable penalty is now settled law by virtue of the guidance of the Court of Appeal in **Chuck Attin v The State**[12] that the Prisoner shall be detained during the Court's pleasure, with a minimum term to be served.

10. At paragraph 31 of **Chuck Attin**, the relevant methodology which usurps the mandatory death penalty is stated as follows:

1. Where a person, under the age of 18 at the date of the offence, has been subsequently convicted for murder, he/she shall be sentenced to detention 'during the Court's pleasure.'
2. At the time of the imposition of such sentence, the trial judge must state in open court what he/she considers to be the appropriate minimum sentence (the tariff) to be served. In making a determination of the minimum sentence the court

[12] CRA No. 29 of 2004

must take into account –

a) The penal objectives of retribution and general deterrence;
b) The seriousness of the offence;
c) The principle of individualised sentencing;
d) Any aggravating or mitigating factors; and
e) Any other relevant matters.

3. The trial judge must state in open court his/her reasons for making the order.
4. Aggravating factors relevant to a charge of murder include –
    a) Planning and premeditation;
    b) Taking advantage of an elderly or disabled victim;
    c) Causing torture or suffering to a victim before death;
    d) Killing a person providing a public or security duty;
    e) Treatment of the deceased after death.
5. Mitigating factors relevant to a charge of murder include –
    a) An intention only to do serious bodily harm;
    b) Spontaneous action rather than premeditation;
    c) Mental disability;
    d) The age of the offender.
6. Sentences to be served 'during the Court's pleasure' must be reviewed by a judge of the High Court at 3-yearly intervals, or at shorter intervals if exceptional circumstances arise. An oral hearing will not normally be required unless the Chief Justice thinks that this is necessary. The decision ought however, to be announced in open court.
7. For the purposes of a review of sentence, the Court must be provided with –
    i) A full report on the offender from the

Superintendent of Prisons addressing the conduct of the offender during detention; his/her responses to the punishment and any counselling and/or rehabilitative programmes sponsored by the prison authorities; his/her attitude to the crime, for example genuine sorrow and remorse; any recommendations by the Superintendent for the guidance of the Court;

ii) A report from the Chaplain of the Prisons detailing the offender's response to any moral and/or religious teaching;

iii) An up-to-date medical report from a medical practitioner assigned to the Prisons;

iv) Such other information derived from the record of the case or otherwise as the Court may require.

v) Information relating to the progress and development of the young offender ought to be generated by the appropriate department in the prison, at yearly intervals.

vi) All relevant reports are to be transmitted to the Registrar of the Supreme Court for the purpose of review, every three years. The Registrar must forward the reports to the Chief Justice who will fix the matter for review before a judge, or delegate the task of fixing the matter for review, to another judge.

We recognize however, that in the exceptional case, a review may be required at shorter intervals. An oral hearing will not normally be required, unless

the Chief Justice thinks that is necessary.

11. I agree with State Counsel that the sentencing methodologies in **Chuck Attin** and **Aguillera** can and must be reconciled. For simplicity, I note that the sentencing exercise contemplates the age of the Prisoners in two ways and they do not overlap, nor do they involve double-counting. The first is the lawful departure from the mandatory death penalty. This is general in nature and has little to do with the relative difference in the age of the Prisoners before me. All that entitles him to this mercy is that he had not yet attained the age of 18 when he committed the act, however heinous. The second way in which the Prisoner's age is relevant is at the second stage of the **Aguillera** methodology. It is therefore a very individual approach in that exercise.

12. With respect to the UK authorities supplied to me, I agree with State Counsel's perspective that while they are good, they are of quite limited assistance, having regard to the statutory underpinning of a minimum term in that jurisdiction (i.e. 12 years). I also take note of the guidance of Moosai J (as he then was) in **The State v Dunstan Willis**[13]:

> "Local courts need to guard against the wholesale importation of such minimum terms which are instructive, but may, in our local setting, require modification."[14]

Indeed, Lord Rodger of Earlsferry noted in the **Griffith and Others v The Queen**[15] case (an appeal from Barbados which directly concerned the issue in **Chuck Attin**):

[13] HCA Crim No. S 009 of 2003

[14] Ibid, pg 10

[15] [2004] UKPC 58

"Their Lordships are content to leave it to the judges and officials in Barbados to devise a system for operating such sentences that best suits local conditions."[16]

13. Counsel helpfully provided me with a few local precedents, but these were not all subject to the **Aguillera** methodology. In **The State v Clinton St. John**[17], my learned brother Jack J applied the overlapping considerations with the recognition that there can be no 'carte blanche application of sentencing regimes taken from much older cases'. Some of the cases involved felony murder, and not capital murder, which is quite different, but I nevertheless considered them as generally helpful to this exercise. I noted as well that the 'starting points' were actually fixed after what amounts to a consolidation of stages one and two of the **Aguillera** methodology. As I said, they were nevertheless of assistance. While I considered them all, I list the three which were most useful:

    a. **The State v Leston Paul Harry**[18] – The Accused was 14 years of age. AFTER considering aggravating and mitigating factors relative to BOTH the offence and the offender, the sentencing judge arrived at a term of 21 years (before a further discount was applied for the guilty plea). I note that this Accused acted together with adults. Additionally, another significant factor in mitigation was that he attempted to release the Deceased and after his recapture by the others in the enterprise, the 14-year old Accused was directed by the adults to assist in restraining the victim during the unlawful killing;

[16] Ibid, para 25

[17] CR 0061 of 2014 (Unreported)

[18] H.C. 34/2008 (JEITT Sentencing Handbook)

b. **The State v Kevin Singh**[19] – The Accused was 16 years old. Similarly, AFTER considering the aggravating and mitigating factors relative to BOTH offence and offender, the Judge arrived at a term of 24 years. A distinguishing factor in assessing any diminution in culpability was that he too, acted in concert with adults;

c. **The State v Avinash Pooran**[20]– The Accused was 17 years old. The starting point was calculated as 30 years. Notably, the Accused did not inflict any injuries himself.

14. Although very few were relied upon by Counsel in the first set of submissions (all dated 22nd August 2021), there are in fact a number of local cases involving convictions for capital murder where the Accused persons were under 18 at the time of the crimes. The following cases were instructive:

a. **Chuck Attin v The State**[21] – The Accused was 16 years old. After considering ALL applicable aggravating and mitigating factors, the sentencing judge fixed the minimum 'tariff' at 25 years. I noted on the one hand, that the extent of the violence meted out by the Accused Attin was certainly terrible, and on the other hand that he acted in concert with an adult at the time;

b. **The State v Ian Seepersad and Roodal Panchoo**[22] – The Accused were 17 and 16 years old respectively. After considering ALL aggravating and mitigating factors relative to both offence AND

[19] H.C. 68/2012 (JEITT Sentencing Handbook)
[20] H.C.S. 47/2011 (JEITT Sentencing Handbook)
[21] See Note 12, above
[22] Case No. 68 of 1983 & [2012] UKPC 4

offender, Yorke-Soo Hon J (as Her Ladyship then was) fixed the minimum period, in accordance with the **Chuck Attin** methodology, at 30 years to run from the date of conviction. Her Ladyship noted a particularly significant mitigating factor which marks a stark distinction from the present circumstances. Her Ladyship considered the fact that both Accused readily admitted their guilt and cooperated with the police once confronted, to be "a redeeming factor" which "goes towards their benefit";

c. **The State v Clinton St John**[23] – The Accused was 15 years old. The sentencing judge used the **Aguillera** methodology and (just as I pointed out a few weeks ago), His Lordship Justice Jack was mindful of the issue of double-counting the mitigating effect of age (at page 17 of his unreported decision). His Lordship noted quite a number of aggravating features at tier one of **Aguillera** and arrived at a starting point (counting the mitigating effect of age[24]) of 25 years. At stage two, there was a downward adjustment of two years;

d. **The State v Christon Kellon Adams**[25] – The Accused was 16 years old. Alexis-Windsor J (as the Hon. Judge then was) also used the **Aguillera** methodology and started with 25 years after noting 5 aggravating and 3 mitigating factors. A notable distinction in the aggravating features was the attempt by Adams to conceal the murder by burning the body. More notably, there were significant mitigating factors at tier one of the **Aguillera** methodology, which do not arise before me. At the second

[23] See Note 17, above

[24] I respectfully disagree that age ought to be counted at stage one of **Aguillera**.

[25] CRS. No. 44 of 2016 (Unreported)

stage[26], Her Ladyship included the age in the mitigating considerations and there was a downward adjustment of three years;

e. **The State v Nicholas Rampersad**[27] – The Accused was 14 years old. Lucky J (as the Justice of Appeal then was) calculated the starting point at 25 years and using the **Aguillera** methodology, considered the age as a mitigating factor at the second stage. Interestingly, at the second stage, the judge first made an upwards adjustment (to 27 years) because of the aggravating effect of a previous conviction, before adjusting downwards for the age. The downward discount for age was four years.

15. Counsel for the Prisoners placed great reliance on the **The State v Ramesh Sieunarine**[28]. Indeed, the decision of Moosai J (as His Lordship then was) is quite illuminating, but the factors which lent great mercy in that exercise do not bear any resemblance whatsoever to the matters I now have to consider. The 15-year old Accused, who suffered a lifetime of severe trauma and abuse (not only him but the entire family as well), took up a cutlass which his father had earlier beaten his mother with and chopped him to death. The clear factual distinctions aside, several of the considerations in the decision do not apply today. The ruling itself clearly distinguishes between the sentencing exercise and the subsequent periodic reviews. Indeed, His Lordship was not then considering whether there had been "clear evidence of exceptional and unforeseen progress" in order to reduce the minimum term and release the Prisoner on licence. Rather, the minimum term had already been served, that is "the punitive element

[26] I agree that this is the appropriate stage.

[27] CRS. No. 0005A/2018 (Transcript of Sentencing Ruling)

[28] H.C.A. Cr. No. S 072 of 2005

reflecting the requirements of retribution and deterrence"[29] (one of the primary tasks before me today). The sole issue for determination was whether His Lordship ought to continue the detention after the expiration of the minimum term on preventative grounds, which of course could only be justified if Sieunarine continued to pose a risk to society.

16. Indeed, the three factors I mentioned in paragraph 8 above are not to be examined from the standpoint of the risk the individual may present. Rather, they must be examined so that, where appropriate, the court may ensure that the sentence imposed properly allows for the process of maturation, with the possibility of the development of responsibility and the growth of a healthy adult personality. Noting that distinction, I wish to point out that I paid absolutely no regard to the LS/CMI assessments, neither the older versions nor the more recent. The LS/CMI is a risk and need assessment (RNA) tool which is used as an interpretive aid together with other such instruments in order to assess the forward-looking corrections responsibilities. RNA information is not intended to be used, nor should it be considered as aggravating or mitigating circumstances in determining the length of a prison term[30]. Its proper use is for the purpose of reducing the offender's risk of future recidivism, not sanctioning the offender's past conduct. To that end then, the RNA scores will certainly be of interest to any Judge engaged in the exercise of periodic reviews mandated by the **Chuck Attin** methodology.

Stage One – Aggravating and Mitigating Considerations re Offence ONLY

17. The following are the aggravating factors which I found to be relevant to the

[29] Ibid, para 10

[30] **Malenchik v Indiana** 928 N.E. 2d 564 (2010)

offending itself and they are 14 in number:

i. The prevalence of the offence of Murder;
ii. The gravity of the offence of Murder;[31]
iii. The involvement of more than one attacker;
iv. Some evidence (by inference), though minimal, of planning and premeditation[32];
v. The particular age of the Deceased. At the time of his death, he was merely 6 years old. This tender age reflected a specific vulnerability within the category of victims, especially as it relates to what the 6-year old must have appreciated was happening to him before he died;
vi. Breach of a position of trust, as older playmates/neighbours;
vii. Predatorial nature of the acts (akin almost to grooming) in committing the act in the presence of another young child, closer in age to the victim and not a peer of the Prisoner;
viii. Bizarre, sadistic manner of death;
ix. The use of a weapon, however improvised it may have been;
x. Gratuitous violence, as evidenced by the extent of the internal injuries, to which the Forensic Pathologist testified;
xi. The buggery act which preceded the killing;
xii. The component of physical suffering involved in the killing, as evidenced by the expert opinion of Dr Daisley;
xiii. The attempt to conceal the body/thwart its discovery by moving same; and

[31] I need not explain that gravity is distinct from prevalence, the former having regard to the sanctity of life and the other, a matter of crime statistics.

[32] The departure from the track into the cane where the attack took place required absolutely no verbal communication between the Prisoners.

xiv. Post-offence conduct which involved deliberately misleading[33] villagers and police officers both during the search and the subsequent investigation. (Great care was taken to avoid any double-counting of post-offence conduct, an aspect of which was also relevant at the second stage, but not as against the 2nd Prisoner.)

18. The following are the mitigating factors which I found to be relevant to the offending itself:

i. No weapon was taken to the scene;
ii. No evidence of extensive planning as the fishing trip provided an unanticipated opportunity; and
iii. As it relates to Chatoo, though it involved physical restraint and must have included effort and force (resulting in non-fatal injuries as well), his involvement was limited to that of a secondary party.

19. To be clear, the aggravating and mitigating factors related to the offence itself were applicable to both Prisoners, with the one exception noted for Prisoner Chatoo at paragraph 18.

20. Though suggested by Counsel for both Prisoners that the starting points ought to be fixed in a way that, by calculation, warrants an immediate **Chuck Attin** review for release on licence, I am not at all persuaded by the submissions that either of them has yet been adequately penalized, nor that it is in their or anyone else's interest for them to be returned to society anytime soon, notwithstanding the effluxion of time. The offence is of a kind

[33] The fictitious tall man in the white shirt.

hardly seen; one for which very little can be said in mitigation. Measuring the offence itself, it was uncommonly heinous. I found myself engaged in the dreadful exercise of comparing terrible forms of murder to rank their savagery. Crimes such as yours, are thankfully rare, but that itself highlights the difficulty of meaningful comparison. The subject-matter is highly fact-specific. One Defence Counsel suggested as a mitigating factor that there was only one fatal wound. I respectfully set that aside summarily without recounting the evidence of Dr McDonald-Burris. The crime involved an extremely brutal assault of utmost degeneracy. The fatal injuries were inflicted by the forceful insertion of the cane-stalk into the small child's anus whilst he was still alive causing excruciating pain. No Counsel, with respect, the fatal injuries in this case cannot be listed on the mitigating side of the sentencing equation.

21. Though I must apologize to all right thinking persons that my mind and experience can conceptually appreciate that this could have been worse (I dare not share those evil thoughts here), so that I cannot say that what happened to little Sean Luke was the **Trimmingham**[34] 'worst of the worst' or 'rarest of the rare', to be quite frank, this case came remarkably close to that finding. Having considered the cases outlined earlier, I find that I am in agreement with the State in calculating the appropriate range as 30-35 years. Applying due consideration to the aggravating and mitigating factors listed above and bearing in mind the distinguishing factor for Chatoo, I fixed the starting point for this particular killing at the highest end of the range at **35 years for Akeel Mitchell** and at **33 years for Richard Chatoo**.

22. I next move to **Aguillera**'s second stage and consider the aggravating and mitigating factors which are personal to the Prisoners. As this is based on

[34] **Trimmingham v The Queen** [2009] UKPC 25

the principle of individualized sentencing, as well as disparate starting points, for the remainder of this sentencing exercise, the Prisoners will be dealt with separately. This second stage, I must confess, caused me even more angst. I noted with exceptional care, the guidance of Weekes JA (as Her Excellency then was) in **Jaggernauth and Kanhai v The State**[35]:

> "A Court must have regard when exercising criminal jurisdiction with respect to young persons, that while they bear responsibility for their actions, they deserve some special consideration because of their state of dependency and immaturity."[36]

Stage Two – Aggravating and Mitigating Considerations – Akeel Mitchell

23. As it relates to the Prisoner Mitchell, the following are the factors personal to him which had an aggravating effect:

    i. He inserted himself into the investigation in a manner not typically expected of a child of 13-14. Indeed, he gave quite an impressive summary of activities to the investigators, many which could not have been personally witnessed, including details of the actions taken by the mother of the Deceased (including her trip to the Embassy); and

    ii. He intentionally attempted to alibi himself using the mother of the Deceased. The calculation and coldness involved in this was not only evidence of how cunning the 13-year old child (yet to turn 14) was, but in terms of the immediate post-offence conduct, it is a chilling realization of a total absence of remorse,

[35] CRA Nos. 16 & 18 of 2007

[36] Ibid, para 78

worry and fear in someone so young. Children tend to be terrified of getting caught.

24. As it relates to the Prisoner Mitchell, Counsel suggested that owing to the age difference between **Chuck Attin** and the Prisoner at the time of their offending (that is a difference of 2 to almost 3 years), the latter would have a lower level of appreciation of his offence than did **Chuck Attin**. With respect, not only is that an over-simplification of understanding cognition, development and mental acuity, the contention is unsupported by any clinical assessment. It would have certainly been better to request such an assessment if they wished to advance the point. I would have ordered it. I accommodated every request made for material to assist in mitigation. Nevertheless, the following are the relevant factors which had a mitigating effect:

i. His age at the time of the murder. He had not yet completed his 14th year of life. This factor was the most significant in mitigation and carried considerable weight;
ii. His previous good character, there being no convictions against him;
iii. A positive report from the prison authorities as to his conduct since being incarcerated. This included an impressive list that detailed considerable participation in numerous leisure, sporting and rehabilitation programmes. He certainly availed himself of whatever was offered. It also included achievement and excellence in arts and other cultural events, even competitions. He attained one CSEC pass and applied himself generally to studies in relation to the use of the computer; and
iv. A disposition towards positive growth.

25. I weighed these factors carefully. As it relates to Prisoner Mitchell, I cannot quite capture the nature of the criminal deviance in a 13-year old (almost 14) involved in killing a woman's son and then minutes later, sitting mere feet from her, observing as she slowly realizes that her child cannot be found. This went beyond the post-offence conduct of creating a fictitious story of the tall man in the white shirt. This is why I am distinguishing it. I did not double count here[37]. While I have no evidence that he took pleasure from his observations of the panic being birthed, and then intentionally inserting himself into the narrative of its development, I did shudder at the thought that he had no overwhelming childish desire to hide away in remorse, worry or fear in the immediate aftermath of his own actions as principal. Even worse, it is clear to me, more than a decade later, that the intention then was to have made the mother his alibi witness while her son lay dead, perhaps even before his seminal fluid dried on the child's clothing. I found that the aggravating factors at the second stage warranted an **upward adjustment from 35 to 40 years**.

26. However, the mitigating factors at this stage were of considerable weight. It is at this stage that his age at 13 was most significant. He was quite young at the time he killed Sean Luke, just a few weeks from his 14th birthday. He too, was then a child. This was one of the greatest challenges in the sentencing exercise (for both Prisoners); to appreciate the impact of youth.

27. I considered the trial judge in the **R v Secretary of State for the Home Department, ex parte Venables and Thompson**[38]. The facts are relevant. In that case, two boys aged 10 and ½ years old brutally murdered a 2-year old boy. The Judge had this to say at the sentencing: "… (T)he killing of [JB] was

[37] This aspect of the post-offence conduct was entirely personal to Akeel Mitchell, speaking to his criminality alone.
[38] [1998] AC 407

an act of unparalleled evil and barbarity … In my judgment, your conduct was both cunning and very wicked." And later, "… that means you will be securely detained for very, very many years until the Home Secretary is satisfied that you have matured and are fully rehabilitated and are no longer a danger to others." Society was brutal in its criticism of that judge's 8-year minimum tariff, with more than a quarter million people petitioning for life detention, as compared to a mere 33 letters either supporting the judge's decision or asking for a lower term. That judge had a great measure of reality on his consciousness, as he sentenced those boys while they were **still** quite small, less than a year after the murder. Imagine sentencing 11-year-old children, for any offence, who probably looked like the children pictured in last weekend's newspapers, either celebrating/bemoaning their SEA performance. That is what they looked like. I regret that our criminal justice system was so slow to try this 13-year old and I am hopeful that all the many initiatives and reforms are readily and enthusiastically embraced by all the stakeholders, several of whom are in this sitting, for that is the only way we reduce the backlog and prevent the atrocity of delay.

28. I also considered cases closer to home, where our regional societies tend to demand its pound of flesh for everything with a clarion call for the hangman's noose, yet ignoring the absolute absence of a meaningful deterrent effect on the hydra-headed considerations involved in criminality. In the Bahamas, the Court of Appeal considered the sentencing of a 17-year old who had battered an infant to death[39]. After applying certain factors, the defendant was originally given a minimum term of 25 years. The Court of Appeal found that insufficient attention had been paid to mitigating factors, particularly youth and the prospects for rehabilitation. The 25-year term was

[39] **Rolle v Attorney General**, Bahamas Crim App No 182 of 2010

reduced to 10 years. In Jamaica, just a couple years ago, in **A v R**[40], a 16-year old girl stabbed her 6 year-old half-brother to death. Society was enraged. She eventually pleaded guilty to Manslaughter. It later came to light that there were terrible social considerations which involved abuse at the hands of her step-mother (the deceased's mother) and allegations of sexual and other abuse at the hands of her biological father coupled, with teasing about the abuse from the deceased about her mistreatment at the hands of his mummy and daddy. The Jamaican Court of Appeal used a sentencing model resembling our **Aguillera** methodology[41] and in commending the approach of the Bahamian Court of Appeal, found that insufficient attention was paid to the mitigating effects. Starting with 17 years for that particular manslaughter, they reduced it to 15 years on the basis of age, a positive social enquiry report and susceptibility to rehabilitation. Less the one third for the guilty plea and time spent pre-sentence, it came down to 8 years. Brooks JA had this to say:

> "When considered in the round, a sentence of 8 years' imprisonment would not be a sentence that would incense right thinking members of the public."[42]

29. Using the approach in **A v R**, I took careful note of the mitigating factors relative to the Prisoner himself. The Bio-Social Report shows clearly that, although he had no meaningful relationship with his father, he benefitted from a supportive home environment. He did not suffer the abuse noted in the Jamaican case, nor the exceptional deprivation which affected 10- year olds **Venables and Thompson**. His early childhood was described as stable with caring relationships. His mother was present at every school event,

[40] [2018] JMCA Crim 26

[41] **Meisha Clement v R** [2016] Crim 26

[42] **A v R**, above, para 37

picked him up after school, never allowing him to stray and even moving him to vocational studies when he showed little interest in academics. Even since, he has had the benefit of visits and support from several family members throughout his incarceration. His mother described him as a child who remained at home, playing video games and watching cartoons on television. Unsurprisingly, his childhood pastime developed into an appreciation and affinity for computer animation and graphics. He has communicated a desire to make a career in animation and wishes to pursue studies in film videography. I appreciate the recommendation of Superintendent Scanterbury outlining the evidence of his interest, participation and excellence in computer related activities. He has availed himself of many activities of a recreational and rehabilitative nature, achieving prominence in several. In addition, it is clear that he has talent in some areas of performing arts.

30. Without diluting the barbarity of his crime and his callousness post-offence, Akeel Mitchell was still just 13. Weighing everything in the round, I believe a downward adjustment is warranted, especially with regard to the age and all the components of the positive Bio-Social Report. I therefore adjust the **40 years down to 33 years**. That is a discount of 7 years, which exceeds the discount found in the recent cases I mentioned. It is my considered view that the punitive element reflecting the requirements of retribution and deterrence necessary in a minimum term is served by a term of 33 years.

Stage Three – Discount for any guilty plea – Akeel Mitchell

31. There is no guilty plea to consider and therefore no action at the third tier of **Aguillera**.

Stage Four – Deduction for time served – Akeel Mitchell

32. The law requires a mathematical deduction of all time spent in custody before sentencing[43]. To those who find this somewhat awkward, it really is just mathematics. If I were sentencing him in 2006, as soon as he was charged, it would be the same 33 years. Today, I discount with simple subtraction the time since his arrest on 29 March 2006. 33 years less 15 years 5 months and 18 days leads to a **minimum term of 17 years 6 months and 13 days**.

33. Before turning my attention to the individualized sentencing considerations for the next Prisoner, I wish to note some concerns arising from the Bio-Social Report. Though they did not have a negative effect in calculating the punitive element of the minimum term, they highlight the inappropriateness of an immediate review (as suggested by his lawyers) or even one to be fixed for a period less than 3 years. I make my thoughts plainly understood now and for the purpose of later reviews, primarily so that the offender, Mr Mitchell, appreciates the matters I would be interested in assessing if I had to consider at the review whether there is any "clear evidence of exceptional and unforeseen progress" in order to reduce the minimum term and release the Prisoner on licence (**Sieunarine**):

    i. This Prisoner has expressed no remorse whatsoever, a factor which may influence his development;
    ii. Though he has no record of infractions at the child detention facility, even Supt Scanterbury's sterling commendation came with a fetter as he noted, "Although his disciplinary record is **not**

[43] **Walter Borneo v The State** Cr. App. 7 of 2011; **Callachand & Anor v The State of Mauritius** 2008 UKPC 49; and, **Romeo Da Costa Hall v The Queen** 2011 CCJ 6 (AJ)

unblemished, he has not been involved in any major infractions";

iii. His reported good conduct was also influenced by the fact that he was in an environment where he was considerably older than the other inmates, for quite some time. Indeed, he participated and actually performed well in rehabilitative and other programmes which are designed for and implemented in an environment intended for children and very young adults. He is at the end of his 3rd decade of life and has not yet experienced contending with the maturation process in an appropriately-aged peer environment. That is likely to be a significant challenge;

iv. Even now, he is primarily isolated with Prisoner Chatoo, a situation which is perhaps counter-productive to their individual development;

v. As it relates to his idea of adulthood, it is suggested that he is engaged to be married. While it speaks well about normal things like the importance of family life and social interactions and relationships, that the Prisoner proposed to someone in the circumstances where he still faced an indictment for capital murder and without prospect of earning a living, that defies mature reason and logic;

vi. As I said, without doubt he has talents and an ability with computers. I appreciate that he has goals for a future career in computer graphics. It is a good thing to have goals and ambition, but there is an element of reality absent from this picture. It can be corrected in order to set it on the trajectory to reality, but only by the Prisoner himself. It is clear that he enjoys sitting at a computer and can apply himself to studies in that regard.

However, I emphasize that he has made very little effort towards the basic education required as the foundation for such an aspiring career. He was 14 when he entered the prison system and 16 when given the opportunity to apply himself, whether to academics or vocation. Even with the advantage of remaining at the YTRC well beyond age 18, and the opportunity to try and try yet again, he only obtained one CSEC grade III in Electronic Document Preparation and Management at the age of 24. At page 7 of the Bio-Social Report, it is noted that he "never really showed any interest in academic studies". While I do not believe for a moment that a good life for a contributing citizen is dependent on the formal education system, my point here is related directly to a suggestion about continuing studies in an area that involves matriculation requirements.

Stage Two – Aggravating and Mitigating Considerations – Richard Chatoo

34. It bears repeating that sentencing must be individualized to the offender after the calculation of the starting point. As it relates to the Prisoner Chatoo, there are no aggravating factors personal to him such as to warrant an upward adjustment. I am dealing here with an entirely different individual.

35. As it relates to the Prisoner Chatoo, the following are the factors which had a mitigating effect:

    i. The age at the time of the murder. He was 16 years old at the time (that is about a $4^{th}/5^{th}$ Former). Although a 16-year old has lived a little longer than a child of 13, 14 and 15, and this Prisoner

in particular, had already acquired some knowledge of the working world, his youth was nevertheless the most significant in mitigation and carried considerable weight;

ii. A generally positive report from the prison authorities as to his conduct since being incarcerated. Although there are 3 breaches of institutional rules, his conduct is described as good. To his credit, he showed some determination in his attempts at formal education, earning his first CSEC pass at age 19 (bearing in mind that he went in at age 16) and trying twice thereafter, securing a second at the age of 24. Again, to his credit, around the time he gave up interest in academia (aged 23/24), he immediately turned his attention to vocational pursuits. From 2013 to 2020, he acquired skills in Laundry, Storeroom and even Food Service, buttressing his express aspirations to be a cook; and

iii. A general disposition towards positive growth which appears to be primarily based on the relative stability of his home, his upbringing and the investment into his life of his now deceased mother.

36. Again, without diluting the gross significance of his secondary participation in this murder, he too, was young. Weighing everything in the round, including an application of what is noted in paragraphs 27 and 28 above without repetition, I believe a downward adjustment is warranted, especially with regard to the age and the generally positive Bio-Social Report. I therefore adjust the **33 years down to 27 years**. It is my considered view that the punitive element reflecting the requirements of retribution and deterrence necessary in a minimum term is served by a term of 27 years. The difference in the starting points and adjustments for the Prisoners underscores the importance of individualized sentencing.

Stage Three – Discount for any guilty plea – Richard Chatoo

37. There is no guilty plea to consider and therefore no action at the third tier of **Aguillera**.

Stage Four – Deduction for time served – Richard Chatoo

38. The law requires a mathematical deduction of all time spent in custody before sentencing. Again, it really is just mathematics. If I was sentencing him in 2006, as soon as he had been charged, it would be the same 27 years. Today, I discount with simple subtraction the time since his arrest on 29 March 2006. The time that has passed is 15 years 5 months and 18 days. 27 years less that period leads to a **minimum term of 11 years 6 months and 13 days**.

39. As I did with the 1st Prisoner, I wish to note some concerns arising from the Bio-Social Report. I repeat, they did not have a negative effect in calculating the punitive element of the minimum term, but they highlight the inappropriateness of an immediate review or even one to be fixed in less than the stipulated 3 years. I make my thoughts plainly understood at this time and for the purpose of later reviews, primarily so that Mr Chatoo appreciates the matters I would be interested in assessing if I had to consider whether there is any "clear evidence of exceptional and unforeseen progress" in order to reduce the minimum term and release him on licence (**Sieunarine**):

    i) This Prisoner has expressed no remorse whatsoever, a factor which may influence his development;
    ii) He has shown little interest in rehabilitation programmes

offered to him to date and appears to keep only one companion. I have reservations about this type of isolation on his development, but leave that to the prison authorities;

iii) Although the prison authorities were compassionate in facilitating his virtual attendance at his mother's funeral in August last year, I believe there may be a need to provide some attention to his response to her death as noted in the Report (I consider that to be confidential and will not refer to it); and

iv) There is real concern with respect to family support since her death and likewise, prospects for residence. I encourage that those two areas be explored.

DISPOSITION

40. Akeel Mitchell, you are hereby sentenced to **Detention during the Court's pleasure with a minimum term of 17 years 6 months and 13 days**.

41. Richard Chatoo, you are hereby sentenced to **Detention during the Court's pleasure with a minimum term of 11 years 6 months and 13 days**.

42. In both your cases, your detention will be individually reviewed by a Judge of the High Court 3 years from today, which I now fix as **Friday 13th September 2024**, and thereafter, at 3-yearly intervals. There is a stipulated procedure in **Chuck Attin No. 2 v The State**[44] if an earlier review date can be justified by exceptional circumstances. The purpose of that review is to determine if there is any clear evidence of exceptional and unforeseen progress in order to reduce the minimum terms I now impose and to release you on licence on such terms and conditions as the reviewing Judge

[44] Cr App. No. 29 of 2004: Further Sentencing Guidelines for Young Offenders [17th March 2006]

determines.

43. Please note that your release prior to the expiration of the minimum term is dependent on **clear evidence of exceptional and unforeseen progress** based on matters such as your participation in rehabilitation programmes, skills training, psychological assessments, risk assessments, your medical condition, and psychiatric assessments for any emotional and affective deficits.

44. For the purposes of a review of sentence therefore, I order that the Court must be provided with the following on or before the **15th September annually**:

    i. A full report on the offender from the Superintendent of Prisons addressing the conduct of the offender during detention; his responses to the punishment and any counselling and/or rehabilitative programmes sponsored by the prison authorities; his response to any moral and/or religious teaching; his attitude to the crime, for example genuine sorrow and remorse; and any recommendations by the Superintendent for the guidance of the Court;

    ii. A comprehensive Probation Officer's Report, which must include prospects for reintegration;

    iii. An up-to-date psychiatric and/or psychologic assessment, which must include an evaluation of signs of psychopathy and antisocial tendencies; and

    iv. An up-to-date medical report from a medical practitioner assigned to the Prisons.

POST-SCRIPT:

Please note well that detention at the Court's pleasure with the stipulated minimum terms in the **Chuck Attin** methodology which takes the place of the mandatory death penalty DO NOT operate in the same way as a term of years. These terms are not precise indications of the date when you will be released. Certainly, release on licence is possible before the expiration of the minimum terms, hence the periodic reviews to see if there is evidence of exceptional or unforeseen progress. However, if that is not the case, please take note that release at the expiration of the minimum terms, which is the punitive element of your sentence, is **not automatic** either. This was explored at length by His Lordship Moosai J (as he then was) in the **Sieunarine** case, who noted at paragraph 5[45]:

> "Against this background the Court concludes that the applicant's sentence, after the expiration of his tariff is more comparable to a discretionary life sentence …
>
> The decisive ground for the applicant's continued detention was and continues to be his dangerousness to society, a characteristic susceptible to change with the passage of time."

The expression 'minimum term' is preferred over 'tariff' to make it emphatically clear that, even when released on licence, the offender has not served his sentence which continues for the rest of his life.[46]

While the atrociousness of your crime by itself does not mean you are irreparably corrupt, the nature of the appalling circumstances, especially as it relates to one

[45] Quoting from Hussain v United Kingdom ECHR Case No 55/1994/502/584 at para 54

[46] See Chuck Attin No. 2, para 7

of you, suggests that rehabilitation and reintegration, though always a possibility, are distant goals. You have a lot of work to do.

Though no death penalty applies in this case because of your ages when you killed Sean Luke, I nevertheless leave you with these words: May God have mercy on your souls.

Lisa Ramsumair-Hinds
Puisne Judge