REBUPLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cr S. No. 042 of 2011

Between

THE STATE

AND

NICHOLAS HABIB

Mrs. Sabrina Dougdeen-Jaglal and Mr. Anslem Leander for The State.

Mr. Subash Panday for Nicholas Habib.

SENTENCING NOTE

[1] On October 31, 2017, the prisoner, Nicholas Habib, pleaded 'guilty' of murder upon arraignment on an indictment which charged him with murder in the killing of Gerard Bocas. The killing was alleged to have occurred on October 10, 2005. The plea was entered on the basis that the 'felony/murder rule' applied to the circumstances of the killing, in that the killing occurred in the course of a violent arrestable offence (robbery).[1]

[2] The prisoner had previously requested an indication of the maximum sentence that was likely to be imposed on him in accordance with the procedure approved in *R v Goodyear.*[2] The learned judge gave an indication

[1] By s 2A(1) of the Criminal Law Act, Chap 10:04, where a person embarks upon the commission of an arrestable offence involving violence, and someone is killed in the course or furtherance of that offence, all persons engaged in the course or furtherance of that arrestable offence are liable to be convicted of murder, even if the killing was done without the mental intent of murder.
[2] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, [2005] 3 All E.R. 117, [2005] 2 Cr. App. R. 20, [2006] 1 Cr. App. R. (S.) 6.

on August 17, 2017. On September 21, 2017 the prisoner informed the court that he accepted the indication given by the learned judge and wished to plead to the indictment. The prosecution having indicated that the plea of 'guilty' was acceptable on the basis set out at [1] above, the prisoner now falls to be sentenced. The principal purpose in setting out this note is to address the approach taken in giving the indication in this case.

[3] To summarize that approach, one notes that after the prisoner had intimated through his counsel that he proposed to seek an indication, it was necessary to present agreed facts to the court. Written submissions were invited from defence and prosecution; after submissions were received the learned judge then considered those submissions and gave the indication on August 17, 2017. In giving the indication, the facts were set out *in extenso*, after which the law was explored. This discussion of the law involved consideration of the various objectives of sentencing as well as adherence to the approved sentencing methodology and consideration of mitigating and aggravating factors of the commission of the offence. In effect, it was the passing of sentence. The submissions presented by counsel on both sides for the purposes of the *Goodyear* indication were detailed and extensive enough that when the court enquired about sentencing submissions *after* the prisoner had entered his plea his counsel was content to rest on the submissions that had been made to the learned judge for the purpose of the indication.

[4] I am respectfully of the view that this procedure is not appropriate and that it is not what is contemplated by the decision in *R v Goodyear*[3]. Setting out my thesis in a short, pithy manner I would state that *R v Goodyear*[4] is a decision which speaks to a specific aspect of criminal procedure – the appropriateness of counsel seeking the views of the trial judge on his client's likely penalty in

[3] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, [2005] 3 All E.R. 117, [2005] 2 Cr. App. R. 20, [2006] 1 Cr. App. R. (S.) 6.
[4] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, [2005] 3 All E.R. 117, [2005] 2 Cr. App. R. 20, [2006] 1 Cr. App. R. (S.) 6.

the course of advising him on his plea; it is not a decision on sentencing procedure.

The state of the law – the procedure before *Goodyear* and the change it wrought.

[5] In *R v Goodyear*[5] the English Court of Appeal decided that a judge was entitled to give an indication of the likely maximum sentence on a guilty plea on a request from the defendant in the Crown Court. This decision effected a change in the practice which had obtained before. That previous practice was informed by the decision in *R v Turner*[6] which, after the decision in *Goodyear*, need no longer be followed. An understanding of the state of the current law is therefore best gained from the perspective of what the previous practice dictated.

What did *R v Turner* decide?

[6] The defendant in *R v Turner*[7] was on trial on a charge of theft. He had 16 previous convictions. Two witnesses had already given evidence for the prosecution; the police witnesses were due to testify next. The defendant's counsel was of the view that the case was not going well. His unease was heightened by the fact that he had instructions from the defendant to attack the police witnesses, accusing them of fabricating the evidence against the defendant.

[7] Counsel calculated that an attack by the defendant on the integrity of the police witnesses would result in his previous convictions being put before the

[5] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, [2005] 3 All E.R. 117, [2005] 2 Cr. App. R. 20, [2006] 1 Cr. App. R. (S.) 6.
[6] [1970] 2 Q.B. 321
[7] ibid.

jury.[8] During a break before the police witnesses were called counsel gave the defendant strong advice to seriously consider changing his plea to one of guilty. Counsel expressed his view that if the defendant were to plead guilty, given the facts of the case, there might well be a non-custodial sentence, but that if he pursued the course of attacking the police witnesses and his convictions came out there was likely to be a term of imprisonment on conviction.

[8] After extended discussions, during which the defendant maintained his resolve to fight, counsel indicated that he wanted to discuss the matter with the court. Having done so, counsel returned and expressed his personal assessment and opinion to the defendant: that if he were to be convicted after having attacked the police witnesses a sentence of imprisonment was very likely; whereas if he were to plead guilty at that stage he was likely to receive a fine or other penalty that did not involve imprisonment. While they were engaged in their discussions, word was sent to the defendant and counsel that the court would be resuming shortly. There was a further brief interview between counsel and client. The defendant then indicated that he would change his plea. He did so when the indictment was put to him again. The court imposed a fine on the defendant, with an alternative of imprisonment on non-payment.

[9] On the defendant's appeal it was argued that trial counsel exercised undue pressure on him, which was beyond the duty of counsel, causing the defendant to feel compelled to retract his plea. In those circumstances he had no free choice in the matter. The Court of Appeal made it clear that it was appropriate for counsel to give advice about a plea to a defendant, even doing so in strong terms, so long as it was made clear that the choice of plea is that of the defendant. The issue that troubled the appellate court however,

[8] The trial took place in January 1970; the admissibility of the defendant's previous convictions was governed by the Criminal Evidence Act 1898.

had to do with possibility that the advice conveyed to a defendant might be conveyed as the advice of someone who had been to see the judge, and that the advice represented the judge's views of the case. Because of the brief interview that had occurred between the defendant and trial counsel immediately before returning to court, which was after counsel had been to see the judge, the Court of Appeal felt driven to the view that the mind of the defendant could not have been disabused of the view that the opinion expressed by counsel was the opinion of the court. In those circumstances, the defendant had no real choice in the matter of his plea.

[10] In allowing the appeal and quashing the conviction, the Court of Appeal made certain observations for the guidance of counsel and judges. While recognizing that freedom of access between counsel and the court was important, so that counsel might discuss the case with the court, the court cautioned that a judge should never indicate a sentence that he is minded to impose. The Court of Appeal reasoned that to indicate a sentence of a particular type as being likely after a plea of guilty while a more severe sentence would likely follow a conviction, would be to impose undue pressure on an accused person, thereby depriving him of the complete freedom of choice as to his plea. The only permissible indication which the Court of Appeal thought a judge could give was as to the *type* of penalty that would be imposed, regardless of a plea of guilty or conviction after trial, e.g. a probation order, a fine, or a custodial sentence.

The change wrought by Goodyear.

[11] Thirty-five years after its decision in *Turner*,[9] while continuing to recognize the fundamental principle that a defendant is personally and exclusively responsible for his plea, which must always be made voluntarily and free from

[9] [1970] 2 Q.B. 321

any improper pressure, the English Court of Appeal ruled, in *R v Goodyear*[10], that it is unobjectionable for a defendant to instruct his counsel to seek an indication from the judge of the maximum sentence that would be imposed if he were to plead guilty at the stage at which the indication was sought.

[12] The Court of Appeal summarized the decision in *Turner*[11] as providing that, though it was appropriate for counsel to give advice to his client, including advice as to the likely sentence on a plea of guilty, counsel could express his own, sometimes ill-informed views, but information as to the thought-processes of the person who would eventually have to impose the sentence, the judge, was impermissible.

[13] Careful analysis of the decision in *Turner*[12] demonstrated that, though it might be regarded as an attempt to impose undue pressure on a defendant if his lawyer's advice amounted to a subtle admonition that he ought to plead guilty, otherwise the court had somehow signaled that the consequences were likely to be worse, the case did not address the situation where *the defendant initiated an approach to the judge*, seeking to gain an insight into his view on likely sentence. The Court of Appeal asked itself the question whether it continued to be appropriate, in the time since the decision in *Turner*[13], for counsel to give his client advice about the advantages that might accrue to him from an early plea of guilty, with that advice being necessarily incomplete for want of the views of the person who, ultimately, has the responsibility of passing sentence after a plea.

[14] The Court of Appeal expressed the view that "there is a significant distinction between a sentence indication given to a defendant who has deliberately chosen to seek it from the judge, and an unsolicited indication directed at him

[10] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, [2005] 3 All E.R. 117, [2005] 2 Cr. App. R. 20, [2006] 1 Cr. App. R. (S.) 6.
[11] ibid
[12] ibid.
[13] ibid.

from the judge, and conveyed to him by his counsel."[14] If the request for information emanates from a defendant then the judicial response cannot constitute improper pressure. The defendant who seeks the insight into the judge's thinking is more fully informed in making the decision as to his plea than the defendant whose decision is founded on the advice of counsel that is based on what counsel believes the judge's views are likely to be.

[15] On further careful analysis, the Court of Appeal could discern no clash between the principle that a defendant's plea must always be voluntary and free from improper pressure, and a process where a defendant personally informs his counsel to seek an indication from the judge as to his view of the maximum sentence that would be imposed. In other words: 'What is the worst that could happened to me if I were to plead guilty at this stage?' The approach to the judge had the effect of substituting counsel's "educated guess" as to the likely sentence with the more accurate view of the person whose responsibility it is to pass sentence.

What does the judge require in order to give an indication?

[16] Having come to the conclusion that the *Turner*[15] constraints on the judge expressing his view on sentence should no longer be followed, the Court of Appeal in *Goodyear* issued guidelines intended to ensure common process and the continued safeguard against the creation or appearance of judicial pressure on a defendant.[16]

[17] The Court of Appeal stated that any indication of sentence should normally be confined to the maximum sentence if a plea of guilty were tendered *at the stage at which the indication is sought*. The judge should not seek to give his view of the maximum level of sentence following conviction by the jury. This

[14] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2538 [49].
[15] [1970] 2 Q.B. 321
[16] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2538 [53] – [70].

would require giving the indication on a hypothetical basis, with a judge feeling compelled to err on the high side to cover all possible eventualities of a trial. Additionally, a comparison between the judge's indication of the maximum penalty after conviction and that likely to be imposed at the stage when an indication is sought is likely to constitute pressure to tender a guilty plea.

[18] If the judge is required to give an indication of the maximum sentence at the stage when the indication is sought, what should that indication be based on? The Court of Appeal made it clear that an indication should not be sought on the basis of hypothetical facts; there must be an agreed, written basis of plea. Unless there is an agreed basis of plea the judge should refuse to give an indication because he may become inappropriately embroiled in negotiations between prosecution and defence about which plea is appropriate and about the "true" facts. An agreed basis should be reduced into writing before an indication is sought.

[19] If there is no final agreement about the plea or the basis of the plea, but the defence nevertheless seeks an indication, prosecuting counsel should remind the judge that an indication of sentence should not be given until the basis of the plea has been agreed or the judge is of the view that he can properly give the indication without the need for a *Newton*[17] hearing. Given the requirement that the sentence indication should be based on an agreed plea and/or an agreed basis of plea, it is difficult to see how an indication could be given in the absence of a firm, agreed factual footing. The Court of Appeal clearly indicated its view that a *Newton*[18] hearing is inappropriate in the context of an application for a maximum sentence indication.

[17] *R v Newton* (1982) 77 Cr App R 13
[18] ibid.

[20] On August 14, 2015 the Chief Justice of Trinidad & Tobago issued a Practice Direction[19] on the subject of Sentence Indications following on the decision in *Goodyear*.[20] The Practice Direction provides that a judge may give a sentence indication if he is satisfied that there is sufficient information available to him at the time the request is made. That information should include a summary of the facts agreed between prosecution and defence and information regarding any previous convictions of the defendant. The judge may also request a pre-sentencing report to assist in giving the indication.

What is a defendant saying when he seeks an indication?

[21] The English Court of Appeal expressed the expectation in *Goodyear* that a sentence indication would normally be sought at the plea and case management hearing. This would constitute the first opportunity for a defendant to plead guilty and would maximize the amount of any discount he would be entitled to on the basis of an early plea.[21] But what is a defendant saying when he requests a sentence indication? It seems clear that the defendant must be asking a question along the following lines: 'proceeding on the basis that I accept the material which the prosecution has gathered (or presented up to this point) in its case against me, what is the maximum sentence that is likely to be imposed on me if I were to plead guilty at this stage of the proceedings?' Having regard to the fundamentals of the presumption of innocence and the burden of proof, a request for a sentence indication must be a 'without prejudice' acknowledgement by the defendant of the prosecution's case, because if he were to reject the indication the trial is to proceed without reference to any overtures having been made to seek an indication. It seems equally clear that, the indication having been sought, the process must follow on the basis that the prosecution's case is made out.

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[19] *Supreme Court of Trinidad and Tobago, Practice Direction, Sentence Indications* Trinidad and Tobago Gazette (Extraordinary), No 90 of 2015, August 25, 2015

[20] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, [2005] 3 All E.R. 117, [2005] 2 Cr. App. R. 20, [2006] 1 Cr. App. R. (S.)

[21] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2543 [73].

If this is so, then the agreed facts that are presented for the purpose of seeking the indication should demonstrate that the guilt of the defendant is made out on the prosecution material.

What is the judge saying when he gives an indication?

[22] The major objective of the changes wrought by *Goodyear* is to avoid the creation or appearance of judicial pressure on a defendant. The English Court of Appeal anticipated that defendants would make better-informed decisions whether to plead or not, with a trickle-down effect of more guilty pleas, a reduction in the number of trials and less inconvenience to victims and witnesses.[22]

[23] Because a *Goodyear* indication is normally confined to the maximum sentence if a guilty plea were tendered at the stage at which it is sought,[23] what the judge must be saying in giving an indication is: 'this is the worst that will happen to you'. In my view, the judge should not attempt to say: 'this is what you will get'.

The process.

[24] That the process of seeking and receiving a *Goodyear* indication is intended to be a relatively short one, which is not the same as that involved in the passing of sentence after conviction is borne out by the 'flow' of steps contemplated by the English Court of Appeal in *Goodyear*. The Court regarded the starting point as being a defendant's responsibility for his plea which, if he were to tender a plea of guilty, must be done voluntarily and without improper pressure. An indication, once given, binds the judge who has given it as well as any other judge who becomes responsible for the case. It was expected that the judge who had given an indication would thereafter

[22] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2539 [53].
[23] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2538. See the discussion at [54].

deal with the case immediately. A defendant may be given a reasonable opportunity to consider his position in light of the indication, but if he does not plead guilty after he has had that opportunity, the indication lapses. If the facts of the case are uncomplicated, the Court expected that the plea would be taken on the same day.[24] If an indication has been sought, the Court did not see that the process required an opening by the prosecution, or a plea in mitigation by the defence. Those steps being appropriate to the situation where there has been a plea of guilty. The Court anticipated that the process would be very short, with minimal comment from the judge apart from giving the indication – for the very reason that the defendant may reject the indication – in which event the trial would have to proceed. A request for an indication having been made, all that the judge would be deciding is whether to respond, and if so, how, to that request.[25]

[25] The point to be made here is that the giving of an indication does not require the structure and methodology that are required in respect of the actual passing of sentence. Clearly, the giving of an indication ought not to be a flippant, off the cuff stating of a random number; on the other hand, having regard to the fact that that indication may be rejected out of hand by the defendant, it ought not, in my respectful view, take up days and hours of court and judicial time with the preparation of submissions and the considering of sentencing methodology.

[26] In discussing the procedure to be followed, the Trinidad & Tobago Practice Direction provides that the judge who has decided to give a sentence indication should give both sides an opportunity to be heard; and that, where appropriate, the attorneys may provide references 'to the guidelines set out in *R v Goodyear* and any such other assistance as the judge may require'.[26]

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[24] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2541 [61].
[25] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2543 [77].
[26] *Supreme Court of Trinidad and Tobago, Practice Direction, Sentence Indications* Trinidad and Tobago Gazette (Extraordinary), No 90 of 2015, August 25, 2015 direction 3.8

Is this 'opportunity to be heard' an opportunity for prosecution and defence to make their respective submissions regarding the appropriate sentence to be passed, with due consideration being given to the aggravating and mitigating factors of the offence and of the offender?[27] Are these 'references' that the attorneys may provide intended to be references to sentences passed by other courts in similar fact situations? In other words, is this intended to be a sentencing 'dry run'? In my respectful view, the answer to both questions must be in the negative – for the simple reason that a judge, in giving a maximum sentence indication pursuant to the principles set out in *Goodyear*, is not engaged in the sentencing component of the judicial function. If a *Goodyear* indication is intended merely to provide an insight into the mind of the judge for the benefit of a defendant who is contemplating a guilty plea, and if it is intended that the process of seeking the indication, of providing the indication and of deciding whether to accept the indication should not be lengthy (because of the fact that the indication may be rejected and the trial will have to proceed), then the steps and procedure that are necessary when passing sentence after conviction cannot be appropriate when a defendant has merely asked 'If I were to plead guilty now, what is the worst that can happen to me?'.

[27] Counsel for the accused in the case before this court filed extensive submissions regarding sentencing, the prosecution replied to these with its own submissions on the appropriate sentence. The agreed facts having been filed on June 5, 2017, the learned judge delivered her maximum sentence indication on August 17, 2017. The learned judge addressed her mind to all of the relevant sentencing principles. Drawing from the guidance contained in *Rahaman v State*[28] and *Aguillera et al v State*[29], she addressed her mind to the starting point and the aggravating and mitigating features of

[27] See *Aguillera et al v The State* (2016) 89 WIR 451
[28] Trinidad & Tobago Cr App No P 027/2015
[29] ibid.

the offence and the offender. Because the courts were not sitting during August, the prisoner could not signal his acceptance of the indication until he returned to court on September 21, 2017. In my respectful view, having regard to the methodology adopted and the matters that the learned judge addressed her mind to, this indication was effectively a sentencing ruling rather than an indication of the maximum sentence that was likely to be imposed upon a plea of guilty. This is not intended to critique the methodology or content of the ruling, but to respectfully disagree with the procedure adopted and its appropriateness in response to a request for a *Goodyear* indication.

[28] Having addressed her mind to the principles that become relevant in passing sentence, the learned judge gave an indication which was stated to be 'inclusive of a one third discount for pleading guilty' of 20 years. I understood this to mean that that indication of 20 years is the sentence that represents two thirds of the 'appropriate sentence' (whether one refers to it as the 'starting point' or otherwise) – with one third having been deducted in the giving of the indication on the basis of an anticipated guilty plea. In my view, by adopting that approach and expressing her conclusion in this manner, the learned judge was saying 'this is what you will get' – the imposition of a sentence, rather than saying 'this is the worst that can happen to you if you were to plead guilty' – the provision of an indication of sentence.

What constitutes 'the basis of the plea'?

[29] The English Court of Appeal stated that an indication should not be sought on the basis of hypothetical facts, but that, where appropriate, there must be an agreed, written basis of plea.[30] If the offence is one where it is possible to arrive at a conviction by different methods, then the appropriate 'route' should be set out and agreed between prosecution and defence. An obvious

[30] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2541 [62], [66].

example is a charge of manslaughter, where it is possible to arrive at such a verdict because of a lack of intent to kill or cause grievous bodily harm on the part of the defendant. But it is also possible to arrive at a verdict of manslaughter on a charge of murder. If the material on deposition demonstrates that there were things said or done which are likely to have caused the defendant to loose his self-control, then the Director of Public Prosecutions may consider that it is appropriate to accept a plea of guilty of manslaughter on a charge of murder. In those circumstances, the prosecution's position will have been clearly communicated to the defence, and the 'basis of the plea' will be clear and agreed. In those circumstances, an indication will be sought on the basis that the defendant is 'without prejudice prepared to plead guilty to manslaughter'.

[30] An additional situation may arise where the charge is murder, but the prosecution's material discloses that the killing occurred while the defendant was engaged in the course or furtherance of a violent, arrestable offence (as in the instant case). In such circumstances, a conviction of murder following the application of the felony/murder rule will not necessarily result in the imposition of the death penalty.[31] The prosecution may therefore consider that a plea of guilty of murder is appropriate, but that the imposition of the death penalty is not appropriate. In this situation, the 'basis of plea' will be clear and an indication will be sought on the basis that the defendant is 'without prejudice' prepared to plead guilty to murder on the basis of the felony/murder rule with the penalty being a finite term of years and not the imposition of the death penalty. In giving the indication, the judge will then set a 'cap' on that finite term of years.

[31] In my view, because a *Goodyear* indication is sought on a 'without prejudice' basis, and because the defendant is entitled to fully contest and challenge

[31] *Miguel v The State of Trinidad and Tobago* [2011] UKPC 14, [2012] 1 A.C. 361, [2011] 3 W.L.R. 1296

the prosecution's case if he rejects the indication, the request for an indication ought not to be an opportunity for the defendant to put forward his 'contentions' or his 'version of the events' or even to mitigate the circumstances of the offence. If the indication is accepted and the defendant pleads guilty, he then has the opportunity to present his mitigation before the court passes sentence. The indication must be sought on the basis that the material on deposition establishes the commission of the relevant offence. The request for an indication would therefore be to say 'If I were to accept the prosecution's allegations as set out in the depositions and plead guilty at this stage, what is the worst that could happen to me?'

[32] In other words, the 'facts', which constitute the prosecution's allegation, are to be derived from the deposition materials; in seeking an indication, the defendant must accept these 'facts'. The 'basis of plea' is to be derived from these 'facts'. The 'basis of the plea' may be discussed and negotiated between prosecution and defence, but an indication cannot be sought unless there has been an agreed basis of the plea. *Goodyear* provides that if there is a dispute about a particular fact which counsel for the defendant believes to be effectively immaterial to the sentencing decision, that difference should be recorded in the material to be presented to the judge, so that he can make up his own mind.[32] What is to be noted here, however, is that the prosecution's facts must form the substratum on which the indication is to be given.

[33] But what if there has been no agreement? The Court in *Goodyear* thought it necessary to stipulate certain matters which are the specific responsibility of the prosecutor. First among those matters is that the prosecutor is responsible for reaching agreement as to the plea, or the basis of the plea. The Court stated that an indication should not be given until the basis of the plea had been agreed. If a defendant sought an indication despite the lack

[32] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2541 [66].

of agreement as to the plea or the basis of the plea, the judge should only give an indication if he is of the view that he can give an indication in the face of a lack of agreed facts without a *Newton* hearing.[33]

[34] *Goodyear* makes it clear that a defendant who seeks an indication is attempting to gain an insight into the thinking of the judge. Such a defendant will be better informed when he comes to decide whether he should tender a plea of guilty. Having been presented with the agreed facts of the allegation, the judge must address his mind, in the round, to the question posed by the court in *R v Goodyear*: 'What would be the maximum sentence if my client were to plead guilty at this stage?'[34] Answering this question requires the judge to take the agreed facts into consideration and provide an estimate of the maximum sentence that is likely to be imposed.

[35] It is perhaps obvious that a defendant will only disagree with an indication if he considers that it is too high; in which event, he will simply reject it. Equally obviously, if the indication is low he will accept it and seek to bind the court. Regardless of his view, a defendant cannot appeal against an indication that he disagrees with. If the Director of Public Prosecutions disagrees with an indication (perhaps because he considers it to be too lenient) there is nothing that he can do. In the same way that a defendant cannot appeal against an indication, the Director of Public Prosecutions cannot appeal against an indication that he disagrees with.

[36] Any appeal by the Director of Public Prosecutions will be in respect of a sentence passed on conviction, not in respect of the level of an indication which might have lead to a plea of guilty and an eventual sentence. If a defendant had rejected an indication and proceeded to trial and was eventually convicted, his right of appeal will seek to challenge the severity of

[33] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2542 [70](a).
[34] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 2537 [38].

the sentence actually imposed. He cannot seek to challenge the level of the indication that had been given by suggesting that his conviction came about because of that (rejected) indication which was too high, perhaps thereby 'forcing' him to go to trial. In short, neither the prosecution nor the defence can cause the content of a *Goodyear* indication to be reviewed on appeal. This is because an indication merely provides an insight into the mind or thinking of the judge. Although it is akin to the passing of sentence, and although it requires the judge to address his mind to possible sentence, the giving of an indication is not the exercise of the sentencing component of the judicial function – which is subject to appeal. There is no aspect of the decision in *R v Goodyear*[35] which addresses sentencing procedure; in other words, the English Court of Appeal did not direct English judges to address their minds to the English sentencing statutes or case law in order to give the indication. The judge is required only to address his mind to the question that is posed when an indication is sought.

[37] Returning to the instant matter, a Probation Officer's Report was not available at the time that the *Goodyear* indication was given. It was requested and prepared after the prisoner had entered his plea. In its conclusion, the report described the prisoner as lacking in empathy, guilty, conscious (sic) or remorse. He is recorded as having shallow experiences of feeling or emotions. He is described as being impulsive, with a weak ability to defer gratification and control his behavior. He is irresponsible and fails to accept culpability for his actions.

[38] I have previously noted (at [28] above) the manner and terms in which the indication was given by the learned judge. I have also noted (at [34] above) that an indication is supposed to an estimate of the 'worst that could happen' to the defendant who seeks it. If this is so, then it is the responsibility of the judge who gives the indication, to allow for the fact that it is the sentencing

[35] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532

process which will take into account aggravating and mitigating factors of the offender (as per *Aguillera et al v State*). If the mitigating factors are significant these may lead to a movement downward from the 'starting point'. If the aggravating factors of the offender are significant and they outweigh the mitigating factors then there ought to be a movement upward from the 'starting point'.[36] An indication which is composed and delivered in the manner of the passing of sentence leaves no room for movement.

[39] As noted above, the prisoner accepted the indication given by the learned judge. Having accepted the indication, it became binding. The court in *Goodyear* noted that judicial comity as well as the expectation aroused in the prisoner requires that he will not receive a sentence that is greater than the indication.[37] The Trinidad and Tobago Practice Direction provides that a sentence indication becomes binding once the defendant accepts it within its effective period and pleads guilty to the offence, unless information comes to hand and the judge is of the view that that information materially affects the basis on which the indication had been given.[38] While it may be said that the content of the Probation Officer's Report painted the prisoner in a less than flattering light, I am not of the view that its contents amount to information which materially affects the basis on which the indication had been given.

[40] It might appear that a solution to the apparent problem of insufficient information at the time of giving an indication might be to request a probation or other report to provide information which might assist the judge in giving the indication. In my view, this proposition is problematic because of the delay that results from requesting a probation report. But there is a more fundamental issue at play – in that a probation report is usually prepared to assist in the sentencing process. It is predicated on a finding of guilt, whether

[36] See *Aguillera et al v The State* (2016) 89 WIR 451
[37] [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, 254 [61].
[38] *Supreme Court of Trinidad and Tobago, Practice Direction, Sentence Indications* Trinidad and Tobago Gazette (Extraordinary), No 90 of 2015, August 25, 2015 direction 11.1

because of a plea of guilty or a conviction after trial. A defendant who has requested a *Goodyear* indication has not acknowledged his guilt; he is merely seeking information to assist his decision-making. It clearly is not appropriate to request the preparation of such a report on what must be a hypothetical basis. In my view, such a report ought not to be requested in the provision of a *Goodyear* indication.

[41] On the agreed facts that formed the basis of the instant indication a group of friends were gathered on October 10, 2005 at the Cover Girls Bar. The prisoner entered the bar and announced a robbery. In the course of carrying out that robbery, Gerard Bocas, one of the patrons, was shot. He died from his injury.

[42] In addition to the charge of murder, the prisoner is also charged in a separate indictment with:

i. Wounding with intent contrary to s 12 of the Offences Against the Person Act;
ii. Robbery with aggravation contrary to s 24(1) (a) of the Larceny Act;
iii. Assault with intent to rob contrary to s 24(1)(a) of the Larceny Act.

He has pleaded 'guilty' to the counts set out in that indictment.

[43] I accept the apparent view of the learned judge that an appropriate starting point in respect of the offence of murder is 30 years. Given the circumstances of the killing of the deceased in the course of carrying out a robbery, I discern no aggravating factors of the offence. Though the Probation Report does not paint the prisoner in a good light, his lack of remorse and empathy do not constitute aggravating factors of the offender. This is not, in my view, an aspect of the personal circumstances of the

offender which warrants an increase in the sentence to be imposed. I discern no additional aggravating factors in respect of the offender. He is entitled to a full one-third discount, which would amount to 10 years. This leaves a sentence of 20 years. On the information provided, he had been in custody from October 26, 2005 – making a period of 12 years and 5 months as of March 28, 2018. This left a period of 7 years and 7 months to be served in respect of the murder.

[44] In respect of the wounding and robbery charges I sentenced the prisoner as follows:

i. Wounding with intent – 7 years' imprisonment;
ii. Robbery with aggravation – 6 years' imprisonment;
iii. Assault with intent to rob – 7 years' imprisonment;

Having regard to the time that the prisoner has spent in custody and to the fact that all of the charges arose out of a single incident, I ordered that the sentences for the wounding and robbery charges are to run concurrently with the sentence imposed in respect of the murder conviction. The sentences for the wounding and robbery charges are to be recorded as having been served. The remainder of the sentence in respect of the murder conviction was to begin from March 28, 2018 – the date on which sentence was pronounced. That sentence was to be at hard labour.

Dated this 3rd day of May, 2018

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HAYDEN A. ST.CLAIR-DOUGLAS
Judge