REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. Nos. 1-6 of 2013

BETWEEN

ALEXANDER DON JUAN NICHOLAS
GREGORY TAN
OREN LEWIS

APPELLANTS

AND

THE STATE

RESPONDENT

PANEL:

P M Weekes, JA
A Yorke-Soo Hon, JA
R Narine, JA

APPEARANCES:

Mr. K. Scotland and Ms A. Watkins for first appellant
Mr. J. Singh and Ms. N. Mankee-Sookram for second appellant
Mr. D. Khan for third appellant.
Ms. D. Seetahal and Ms. R. Reyes for the State

DATE DELIVERED: 17th December 2013

JUDGMENT

Delivered by P. Weekes, JA

1. These appeals against sentence traverse territory hitherto uncharted in our jurisdiction. The appellants, who were jointly charged, were the first in Trinidad and Tobago to plead guilty to murder. It is abundantly clear from the available transcripts that at trial, the judge, prosecutor and counsel for each appellant regarded the case as one of felony murder and the trial proceeded on that basis.

2. When first arraigned, the appellants pleaded not guilty, and the prosecutor made an opening address and two witnesses testified. There was then a short adjournment and on the resumption of the trial, the appellants indicated their intention to change their plea and the State indicated its intention to accept the new plea. Since the appellants were prepared to plead guilty to the very offence with which they were charged, thereby depriving the State of any discretion, the State's acceptance of the plea can only be interpreted to mean that it was prepared to treat with the matter on the basis of felony murder. The appellants were re-arraigned, pleaded guilty and the jury, as directed, returned the appropriate verdicts.

3. Apart from murder, the appellants were jointly charged with, kidnapping, robbery with aggravation and false imprisonment, to which they all pleaded guilty.

4. After hearing pleas in mitigation in respect of each appellant and considering probation officers' reports, the judge sentenced each appellant to "life imprisonment without the possibility of parole" on the charge of murder. They were also sentenced to eight years hard labour for robbery with aggravation, six years imprisonment for kidnapping and six years imprisonment for false imprisonment, these sentences to run concurrently.

5. The appellants appealed their convictions for murder. We note that each filed a notice of appeal against conviction for larceny but our most careful perusal of the transcripts in this matter do not disclose that they were ever arraigned on or pleaded guilty to that offence. Their submissions, both written and oral, were confined to the sentences for murder. We therefore confine our attention to their appeals against sentence for murder.

6. The issues raised by these appeals are:

    i. Was the sentence imposed by the Court below in excess of its jurisdiction?

    ii. If so, what is the range of sentences available to the Court of Appeal (as would have been available to the court below) in substituting an appropriate sentence?

    iii. Is the court's discretion in sentencing in cases of felony murder to be fettered by the view that the prosecution takes of the matter?

    iv. What, if any, obligation lies on the judge to indicate his contemplated range of sentencing on a plea of guilty in felony murder (or generally)?

    v. When is a life sentence appropriate in a case of felony murder?

7. We observe that the judge gave an extensive ruling on sentence in which he considered at length and in great detail authorities on the several issues raised. Even though no criticism has been made of some parts of his analysis, we have repeated some of it here for context and completeness.

Sentence imposed by the Court

8. The first issue will be the easiest to address. The sentence imposed by the judge, "life imprisonment without the possibility of parole", is unknown to our law, since we have never legislated the parole system into being despite much discussion thereon nor is parole part of the common law. While a judge has the jurisdiction to order a life sentence, not to be released before the expiration of a specified number of years[1], he cannot usurp the function of the Commissioner of Prisons (by virtue of the Prison Rules[2]) to give a remission of sentence. After excising "without the possibility of parole", what remains is a life sentence. In ***Allan Henry and others v the Attorney General and Commissioner of Prisons***[3], per Rajkumar J, a life sentence means imprisonment for the rest of the natural life of the prisoner.

[1] Section 69A of the Interpretation Act Chap 3:01.

[2] Rule 285 of the Prison Rules Chap 11. No.7.

[3] CV 2007-0406 page 64.

The respondent, readily conceding that the sentence imposed is untenable, suggested that it be so construed.

9. The appellants submitted that a life sentence is wholly inappropriate in the circumstances of this case and as such is excessive. We will return to this contention.

Range of Sentencing in Felony Murder

10. It is perhaps advisable at this stage to establish the full range of sentencing options available to a judge when, either by guilty plea or jury verdict, there is a conviction for murder in the context of felony murder. Before us, counsel for the State and counsel for the appellants all agreed that the death penalty is available to the sentencing judge in the circumstances. In ***Miguel v The State***[4] it was held that the imposition of a mandatory death penalty is unconstitutional in cases of felony murder. That case was confined to the mandatory nature of the penalty but is properly interpreted to mean, that the death penalty remains available to the sentencing authority as a discretionary punishment at the upper end of the range. Lord Clarke, delivering the judgment of the Board stated,

> *"for the purposes of section 6(1)(c) of the Constitution, an enactment could not "alter" an existing law which had existed before the Constitution came into force but had since been abolished; that, therefore, the 1997 Act which had introduced section 2A of the Criminal Law Act did not fall within section 6(1)(c); that, accordingly, since the mandatory death penalty had been held to be cruel and unusual punishment, sentence of death based on a conviction under section 2A was contrary to section 5(2)(b) and so unconstitutional."*

When is the discretionary death penalty appropriate?

11. The provision in ***section 4 of the Offences Against the Person Act***[5] that *"every person convicted of murder shall suffer death"*, has as previously mentioned, been tempered by ***Miguel***. In every case of sentencing on a conviction for felony murder the judge must

[4] [2011] UKPC 14.

[5] Chap 11:08.

consider what sentence is appropriate in the given circumstances. Consideration of the imposition of the death penalty ought to be reserved for cases in which there has been a finding of guilt and the circumstances are especially egregious and a flagrant assault on the sensibilities of all right thinking persons in the society. This is not to deny the discretion of a judge to impose such a sentence in a case in which there has been a plea of guilty, but that would apply only in the most egregious circumstances.

12. It is perhaps useful to look at some authorities from other jurisdictions in order to determine the types of circumstances that should properly attract a discretionary death penalty. English authorities are of little assistance for the reason that the maximum penalty in that jurisdiction is life imprisonment [***Murder (Abolition of Death Penalty) Act 1965 s 1(1)***]. In any event, prior to 1965, the death penalty was mandatory. We must therefore rely on case law from other common law jurisdictions.

13. In ***R v Trimmingham***[6], an appeal to the Privy Council from St. Vincent (which has the discretionary death penalty in cases of murder), the appellant was found guilty of murder and sentenced to death. The Board took the opportunity to outline two basic principles guiding a sentencing judge when considering the imposition of the death penalty. Lord Mance said:

> *"the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional* ***"the worst of the worst"*** *or* ***"the rarest of the rare"****. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are also to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death, the Court must be properly satisfied that these two criteria have been fulfilled*.[7]

14. In ***Trimmingham***, the appellant and another man went to a piece of land on which the deceased, a 68 year old man kept goats. The appellant, who was carrying a firearm, had resolved to rob the deceased. The appellant told the other man to hide and wrestled the

[6] [2009] UKPC 25.

[7] Ibid at [21].

deceased to the ground, threatening him with the gun. He demanded money and the deceased told him that he could take the goats if he would leave him alone. The other man begged the appellant to stop but the appellant did not. He then took the deceased some distance away and struck him in the stomach causing him to fall onto the bank of a ditch. He then threw the deceased into the ditch and slit his throat with the cutlass of the deceased. The appellant then cut off his head with the same implement. He removed the trousers of the deceased and wrapped the head in them. He handled the penis of the deceased and made a vulgar remark. He positioned the body of the deceased in the ditch and slit his belly, telling the other man that he did that to stop the body from swelling. He covered up the body and stuffed the trousers containing the head into a hole in a nearby field. The appellant took six goats belonging to the deceased which he later attempted to sell.

15. We have set out the facts in some detail in order to get an appreciation of what might or might not be considered *"the worst of the worst"* or *"the rarest of the rare"*. The Privy Council found that these facts, though gruesome and appalling, did not amount to *"the worst of the worst"*. In their view, while this was undeniably a very bad case of murder, and one committed for gain, the conduct fell short of being among *"the worst of the worst"* such as to call for the death penalty, it being the ultimate penalty. Their Lordships found that while the appellant behaved in what they termed "a revolting fashion", this case was not comparable with the worst cases of sadistic killings. They also opined that the aim of keeping the appellant away from society entirely was achievable without causing him to be put to death.

16. The Privy Council stated affirmatively in ***Maxo Tido v R***[8] that the two principles set out in ***Trimmingham*** are to be assessed cumulatively so that in determining the proper sentence, one cannot look only to the gravity of the offence as the measuring rod for the imposition of the death penalty, but must also consider psychiatric or probation reports in order to determine the possibility of reform of the accused. Lord Kerr, delivering the judgment of the Board in ***Maxo Tido***, gave little clarity to the two terms which have now become all but decisive in the determination of whether or not to impose the death sentence. His Lordship

[8] [2011] UKPC 16.

only stated that *"the death sentence – the ultimate and final sentence – had to be reserved for the wholly exceptional category of cases within that most serious class of offence."*

17. In India, a jurisdiction which also has a discretionary death penalty in cases of murder, the Supreme Court, in the case of ***Aijitsingh Hanamsingh Gujral v State of Maharashtra***,[9] considered the appropriateness of the discretionary death penalty in circumstances in which the appellant was convicted of murdering four members of his family by pouring a large quantity of petrol over them and setting it alight while they slept. He was sentenced to death at first instance on the basis that it was *"the rarest of the rare"* for which the death penalty was appropriate. His appeal was dismissed and the death penalty upheld, Markandey Katju, J said:

> *"The death penalty was given only in the 'rarest of rare' murder cases when the alternative option was unquestionably foreclosed. In determining the culpability of a defendant and the final decision as to the nature of the sentence, the court should balance the aggravating and mitigating circumstances of the case. A distinction had to be drawn between ordinary murders and murders which were gruesome, ghastly or horrendous. While a life sentence should be given in the former, the latter belonged to the category of 'rarest of rare' cases and should attract the death penalty.* ***The expression 'rarest of rare' could not be defined with complete exactitude*** *although there were broad guidelines from previous authorities which aided its interpretation. According to those guidelines, a* ***defendant deserved the death penalty where the murder was grotesque, diabolic, revolting or of a dastardly manner so as to arouse intense and extreme indignation in the community and when the collective conscience was petrified or outraged****. It also had to be seen whether the* ***defendant was a menace to society and would continue to be so, threatening its peaceful and harmonious existence.*** *The Court had to inquire further and believe that the* ***defendant could not be reformed or rehabilitated*** *and would continue committing criminal acts...."[Emphasis ours]*

18. Other considerations which the Indian Supreme Court has taken into account are: (1) the manner of commission of the murder; (2) the motive for commission of the murder – whether the murder is committed by a hired assassin for the sake of money; (3) the magnitude of the crime – whether the killing involved multiple murders; and (4) the personality of the victim – when the murder victim is an innocent child, a helpless woman, when the victim is a person

[9] [2011] INSC 949.

vis-à-vis whom the murder is in a position of domination and trust, when the victim is a public figure, member of the armed forces or the justice system.[10]

19. We are of the opinion that the approach employed by the Indian Supreme Court is helpful in interpreting the learning in ***Trimmingham***, (even though it was not referred to in either of the cases) particularly so when that court recognised that in an analysis of what is *"the worst of the worst"* or *"the rarest of the rare"* some attention must be paid to the sensibilities of the particular society or community in which the offence was committed. It is perhaps ironic that, for the purpose of the imposition of the discretionary death penalty, the more depraved and brutish the society, the more heinous the behaviour needed to warrant it. Each set of circumstances must be measured against the experiences and sensibilities of the relevant jurisdiction.

20. It is clear that when the circumstances of the instant appeal are considered, repugnant as they may be, they cannot by any measure be considered "*the worst of the worst"* or "*the rarest of the rare".* Our society has unfortunately experienced murders far more disturbing, revolting and deviant than that perpetrated by the appellants. We must therefore move on to consider the position of the appellants that a life sentence is equally inappropriate.

Is the Judge bound by the State's decision not to seek the death penalty?

21. At the hearing in this appeal, in response to a question from the Court, Ms. Seetahal opined that a trial judge is bound to accept the decision of the prosecution not to seek the death penalty. She relied on the authority of ***Nardis Maynard v R***[11]. In that case, reference was made to the procedural guidelines for sentencing set out by Sir Denis Byron CJ in ***Evanson Mitcham et al v The D.P.P***[12].

[10] Mulla and Another v The State [2010] INSC 90.

[11] Crim. App. 12/04 OECS.

[12] Nos. 10, 11 & 12 of 2002.

22. In ***Maynard*** Rawlins, JA states *"The guidelines in* ***Evanson Mitcham*** *require* ***the prosecution, where it intends to pursue the death penalty****, to give notice to that effect no later than the day upon which the accused is convicted. In such cases the prosecution is required to set out the grounds on which death penalty is considered appropriate. The guidelines further require that once the prosecution has 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. 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 convicted person. The burden of proof in the sentencing hearing is on the prosecution and the standard of proof shall be beyond reasonable doubt. The trial judge should give written reasons for his or her decision at the sentencing hearing.* ***However 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 accused may be sentenced right away in the normal fashion". [Emphasis ours]*

23. The Board also expressed similar sentiments in ***R v White***[13], an appeal from Belize. Sir John Dyson JSC, delivering judgement of the Board, particularly endorsed the guidelines set out by Conteh CJ in ***R v Reyes***[14] for the prosecution, trial and sentencing of accused charged with murder. These guidelines bear repeating and are as follows:

    i. as from the time of committal, the prosecution should give notice as to whether they propose to submit that the death penalty was appropriate;

    ii. the prosecution's notice should contain the grounds on which they submit the death penalty was appropriate;

    iii. in the event of ***the prosecution so indicating and the trial judge considering that the death penalty might 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;*

[13] [2011] 2 LRC 208; [2010] UKPC 22.

[14] [2003] 2 LRC 688.

iv. *the 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 might have reasonable materials for the preparation and prosecution 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 proposed to rely on in relation to the sentence; and*

vi. *the judge should give reasons for his decision including the statement as to the grounds in which he found that the death penalty had to be imposed in the event that he so concluded and he should also specify the reasons for rejecting any mitigating circumstances. [Emphasis ours]*

24. The guidelines speak to circumstances in which the trial judge and prosecution agree that the death penalty is or is not appropriate. The reference to agreement clearly indicates that there is a separate exercise of discretion for the trial judge and the prosecution and that the trial judge is therefore not bound to be or act in agreement with the decision of the prosecution. Of course, a trial judge must be exceedingly slow, where the prosecution has declined to seek the death penalty in a case of felony murder, to contemplate it among the range of sentences for consideration. This would only occur in the most unusual of circumstances but we are reluctant to fetter the discretion of the trial judge by the exercise of an extra-judicial discretion by the Director of Public Prosecutions.

Obligation of Judge indicate the contemplated sentence

25. The common law has never placed a mandatory obligation on a judge to indicate the sentence or type of sentence which he is minded to impose when a matter arises before him. Lord Parker CJ in ***R v Turner***[15] held that a judge should never indicate the type of sentence which he is minded to impose, save in the most exceptional circumstances. However, the English Court of Appeal in the case of ***R v Goodyear***[16] declined to follow the learning in ***Turner*** and laid down guidelines for judge, defence and prosecution counsel to follow with respect to the early indications of sentence. Lord Woolf CJ enumerated the following principles:

[15] [1970] 2 All ER 281 at 285.

[16] [2005] EWCA Crim 888.

The Judge

(i) A judge should not give an indication of sentence unless one has been sought by the defendant; (ii) however, the judge remains entitled to indicate that the sentence, or type of sentence, on the defendant would be the same whether the case proceeds as a plea of guilty or goes to trial, with a resulting conviction; (iii) he is also entitled in an appropriate case to remind the defence advocate that the defendant is entitled to seek an advance indication of sentence; (iv) where an indication is sought, the judge may refuse altogether to give an indication, or may postpone doing so, with or without giving reasons; (v) where the judge has in mind to defer an indication, the probability is that he would explain his reasons, and further indicate the circumstances in which, and when, he would be prepared to respond to a request for a sentence indication; (vi) if at any stage the judge refuses to give an indication (as opposed to deferring it) it remains open to the defendant to seek a further indication at a later stage; (vii) however, once the judge has refused to give an indication, he should not normally initiate the process, except, where it arises, to indicate that the circumstances have changed sufficiently for him to be prepared to consider a renewed application for an indication; (viii) once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case; (ix) if, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect and ; (x) where appropriate, there must be an agreed, written basis of plea, otherwise the judge should refuse to give an indication.

Defence Counsel

(i) Though the judge has the power to give an appropriate reminder to the advocate for the defendant, the process of seeking a sentence indication should normally be started by the defendant; (ii) the defendant's advocate should not seek an indication without written authority, signed by his client, that he, the client, wishes to seek an indication; (iii) the advocate is personally responsible for ensuring that his client fully appreciates that, (a) he should not plead guilty unless he is guilty, (b) any sentence indication given by the judge remains subject to the entitlement of the Attorney General (where it arises) to refer an unduly lenient sentence to the Court of Appeal, (c) any indication given by the judge reflects the situation at the time when it is given and if a 'guilty plea' is not tendered in the light of that indication the indication ceases to have effect, (d) any indication which may be given relates only to the matters about which an indication is sought; (iv) an indication should not be sought while there is any uncertainty between the prosecution and the defence about an acceptable plea or pleas to the indictment, or any factual basis relating to the plea; (v) any agreed basis should be reduced into writing before an indication is sought; (vi) where there is a dispute about a particular fact which counsel for the defendant believes to be effectively immaterial to the sentencing decision, the difference should be recorded, so that the judge can make up his own mind; (v) the judge should never be invited to indicate levels of sentence which he may have in mind depending on possible different pleas and; (vi) in the unusual event that the defendant is unrepresented, he would be entitled to seek a sentence indication of his own initiative, but

for either the judge or prosecuting counsel to take any initiative and inform an unrepresented defendant of this right might too readily be interpreted as or subsequently argued to have been improper pressure.

The Prosecution
(i) If there is no final agreement about the plea to the indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication, which the judge appears minded to give, prosecuting counsel should remind him of this guidance, that normally speaking an indication of sentence should not be given until the basis of the plea has been agreed, or the judge has concluded that he can properly deal with the case without the need for a *Newton* hearing; (ii) if an indication is sought, the prosecution should normally enquire whether the judge is in possession of or has had access to all the evidence relied on by the prosecution, including any personal impact statement from the victim of the crime, as well as any information of relevant previous convictions recorded against the defendant; (iii) if the process has been properly followed, it should not normally be necessary for counsel for the prosecution, before the judge gives any indication, to do more than, (a) draw the judge's attention to any minimum or mandatory statutory sentencing requirements, and where he would be expected to offer the judge assistance with relevant guideline cases, or the views of the Sentencing Guidelines Council, to invite the judge to allow him to do so, and (b) where it applies, to remind the judge that the position of the Attorney General to refer any eventual sentencing decision as unduly lenient is not affected and; (iv) in any event, counsel should not say anything which may create the impression that the sentence indication has the support or approval of the Crown.

26. These guidelines reflect an approach that is consonant with the contemporary trends in criminal case management in our jurisdiction and we commend them to trial judges.

27. The further obligation of the judge to adhere to his indication, save in wholly exceptional circumstances was borne out in the case of ***R v Brown***[17]. There, the judge gave a ***Goodyear*** indication that he would be minded either to suspend the sentence or impose a community order combined with costs and compensation, the defendant having pleaded guilty to assault occasioning actual bodily harm. Subsequently, the defendant was sentenced to 12 months detention in a young offender institution, suspended for 2 years; and, inter alia, made the subject of a 150-hour unpaid work order; and made to pay compensation of £400 to the victim. On appeal, the suspended sentence was quashed and substituted with a community order with an unpaid work requirement of 150 hours. The compensation also remained in

[17] [2008] EWCA Crim 1137.

place. This was because the indication was that the sentences were to be in the alternative and that had to be honoured.

Circumstances in which a life sentence is appropriate

28. The judge, in his ruling, was of the opinion that where the death penalty was inappropriate, the starting point for consideration must be life imprisonment. He cited several authorities from Commonwealth jurisdictions to support this view. We are of the opinion that he was wrong. His error lay in the fact that the cases and their examples cited dealt with a situation in which the discretionary death penalty was under consideration and the authorities held that in such circumstances the starting point should be life imprisonment and from there one would go on to consider whether or not the imposition of the death penalty was appropriate. These authorities were not considering where the death penalty was 'off the table', how one should determine the appropriate sentence. We are of the view that where a life sentence is at all a consideration, the first factor to be determined is the rehabilitative possibilities of the convict.

29. Counsel for the appellants and the State examined several cases from the Eastern Caribbean Supreme Court in order to assist us on this issue. While none of them is on 'all fours' with the present case, there are some similarities which make them helpful in determining the issue. The Eastern Caribbean courts have had a discretionary death penalty in all cases of murder since the decision in ***Hughes and Spence v R***[18] in 2002.

Death penalty not sought by the D.P.P.

30. In ***The State v Kenrick Tyson***[19] the facts revealed a cold-blooded plan to rob and kill the deceased for profit. The accused had previous convictions though not for offences of violence. He had a bad reputation in the community and a negative social report. He

[18] [2002] 2 LRC 531.

[19] ECSCJ No. 136.

expressed no remorse for his actions and in all the circumstances the judge held that a sentence of life imprisonment was appropriate.

31. In ***R v Rudy Monelle***[20], the accused, who rendered his common law wife unconscious and then burnt her to death, was convicted for murder. The probation report after the event disclosed that he showed no remorse and had threatened to "wipe out" the entire family of the deceased. Blenman J, found the act of murder to be very brutal, warranting a sentence that appropriately reflected "the society's abhorrence for the heinous crime". It was held that a sentence of life imprisonment would best serve the interests of justice when considering that the accused had no previous convictions.

32. In ***R v Kevil Nelson***[21] a police officer shot a suspect following an altercation with another officer. Though the Court considered the use of the firearm to be an aggravating circumstance, it found that "*the type and gravity of the murder was not extreme"*[22]. The convict had no previous charges or convictions nor any disciplinary charges of substance in his eighteen years of service. Harris, J, having taken into consideration his lack of premeditation, expression of remorse, and good social enquiry report, as well time served, sentenced him to 22 years imprisonment.

Death penalty sought by the D.P.P.

33. In ***Harry Wilson v R***[23] the appellant had killed his two year old daughter and attempted to murder another daughter and his wife and was convicted for murder. He appealed against conviction and sentence. The Court of Appeal, in quashing the death sentence, held that the appellant had a good chance of rehabilitation and that in all the circumstances a life sentence was appropriate.

[20] ECSCJ No. 88.

[21] DOMHCR 2011/0024; ECSCJ No. 341.

[22] Ibid page 4.

[23] VC 2005 CA 5; Civ. App. 30 of 2004.

34. In ***R v Dougal***[24] the appellant, who had no previous convictions, was convicted for the murder of two persons whom he shot and killed while they slept in their beds. He was sentenced to death. He expressed no remorse and his actions which were found to be cold and calculating. On appeal the sentence was reduced to life imprisonment not to be eligible for parole before 45 years, the Court of Appeal considering that his actions did not fall within the categories of *"the worst of the worst"* or *"the rarest of the rare"*.

35. In ***Rudolph Lewis v R***[25] the Court of Appeal found that the offer of a plea of guilty at the first opportunity, even where there was no indication that the death penalty would not be sought, carried a lot of weight. Further, the appellant was shown to have acted under circumstances of domestic emotional stress following a volatile relationship with his wife, whom he stabbed 21 times occasioning her death. There was nothing to suggest that the appellant was a danger to society. He was sentenced to 25 years.

36. The judges of the Eastern Caribbean Supreme Court, in the aforementioned cases, in considering the imposition of a sentence of life imprisonment, have taken the into account: 1) the seriousness of the conduct of the appellant; 2) the expression of genuine remorse; 3) probation reports to gauge whether the appellant is fit for social re-adaptation; 4) the antecedents of the appellant; and 5) the presence of pre-meditation. Therefore, a life sentence is inappropriate where on a consideration of all these circumstances, the balance is tipped in favour of the appellant.

37. Apart from the circumstances of the offence, what must loom large in considering whether a life sentence is appropriate is the possibility or likelihood of the appellant being rehabilitated to the extent that he could be safely returned to society. Where there is evidence or information to suggest that this goal is achievable, a court must be slow to incarcerate an appellant for the rest of his natural life.

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[24] [2011] JMCA Crim 13.

[25] ECSCJ No. 94.

38. In the instant case, the probation report received in respect of each of the appellants seems to suggest that each of them is capable of being rehabilitated or reformed to the requisite extent.

Agreed factual basis of plea in instant case (extracts from ruling of judge at sentence)

39. August 27, 2002 was the last time that Jerry David Boodoo, ("the deceased"), was seen alive by his sister Cheryl. The deceased owned a Sunny motor car, registration number PAU 7751 which he plied for hire as a driver. About four months earlier, Sheldon Abdool had been playing poker in Brazil when he met accused nos.1 and 2. Abdool told accused no.1 that he wanted some Sunny car parts and accused no.1 told him that he could arrange to get some for him.

40. Around 10 p.m. on or about August 27, 2002 a man named Junior Malcolm Barthol was at the taxi stand in Arima when he met accused no.1. Accused no.1 told him that he and some other men were going for a car and that they needed another person to go along with them. Barthol and accused no.1 walked up to the Dial where they met accused nos. 2 and 3. Accused no.1 walked further up the road while Barthol and accused no. 3 went to the taxi stand.

41. Later, the deceased came onto the taxi stand driving PAU 7751. Accused no. 3 told Barthol to go sit in the front seat while he went into the seat behind Barthol. Accused nos. 1 and 2 approached and asked the deceased if he was going to La Horquetta. The deceased said, 'yes'. Accused no. 1 then got into the car and sat behind the driver. Accused no. 2 went into the back seat, just behind Barthol and accused no. 3 sat in the middle of the back seat. The deceased drove off with the three accused and Barthol in the car.

42. Along the way, in a dark spot, accused nos. 2 and 3 pulled the deceased into the back seat of the car. Accused no. 1 then went into the driver's seat. Accused nos. 2 and 3 began beating the deceased. Accused no. 1 drove and ended up in Talparo. Accused nos. 2 and 3 were struggling throughout with the deceased. Accused no. 3 asked the deceased where he had the money and the deceased told them that it was on the driver's seat. Accused no. 1 then searched and found the money which was a mere $63.00.

43. During this time the deceased begged the men, to spare him, telling them he had a little daughter to take care of and he urged them to simply take the car and leave. However, accused no. 3 told accused no. 1 *"this man see too much"* and said to Barthol, *"youth man, you have to stay quiet on this one eh".* Barthol asked accused no. 1 if they were really going to kill the man. Accused nos. 2 and 3 continued to beat and cuff the deceased. They then removed the deceased's belt from his waist and began choking him with it. Barthol heard the deceased gasping for breath and then he heard a crack. After which, accused no. 3 said *"he dead".* Accused no. 1 said, *"allyuh kill the man boy, that is lifetime in jail"* and steupsed.

44. Accused no. 1 then stopped the car. Accused no. 1, Barthol and the other two accused got out of the car and put the deceased into the trunk. They returned to the car and went to a gas station where accused no. 1 put gas in the car and spent the $63.00 they got from the deceased. Barthol and the three accused went to Manzanilla where they threw the deceased into a river.

45. The appellants returned to the car and were driving towards Sangre Grande when they ran off the road. A man named Ian Henry, a wrecker driver, was coming in the opposite direction. He saw the vehicle crash. Accused no. 1 approached Mr. Henry and spoke with him. Accused no. 2 ran into the fig patch while accused no. 3 and Barthol remained by the car. Mr. Henry eventually pulled the car out with his wrecker. The car was back on the road, the three accused and Barthol returned to the vehicle and accused no. 1 drove to the home of Sheldon Abdool. By that time it was between 4 a.m. and 5 a.m. the following day.

46. Accused no. 1 spoke with Abdool, told him he had a Sunny downstairs, and asked if he was interested in it. Abdool and accused no. 1 then went downstairs to look at the car. He told the men to follow him to Las Lomas. Abdool got into his car while the men returned to PAU 7751 and followed him to Anil Singh's house at Maraj Trace in Las Lomas. Barthol and accused no. 3 wiped down the car while accused no. 2 took the CD deck and CDs. Accused no. 1 took a bag of tools from the car. Barthol and the three accused then got into Abdool's vehicle and left, leaving the car with Anil Singh.

47. On September 1, 2002 the body of the deceased was found floating in some mangroves in the Mitan River. A post mortem examination was performed on the body on September 3, 2002 by Dr. Eastlyn Mc Donald Burris, but due to the advanced state of decomposition of the body, the pathologist was unable to determine the cause of death. However, the pathologist indicated that her findings did not exclude several possible causes of death, namely: (1) ligature strangulation; (2) the application of an arm lock; (3) a severe blow to the neck which strikes a particular nerve in the neck and causes sudden death; (4) suffocation; and (5) drowning. The pathologist also indicated that the front of the deceased's neck was invaded by maggots which is suggestive that there was an injury to that site, as maggots tend to invade areas of recent trauma or injury.

48. On September 18, 2002 the police arrested accused no. 2 who, when interviewed under caution, denied knowing anything about the death of the deceased. On September 19, 2002 accused no. 2 was again interviewed under caution and this time he told the police, *"Me Oren, Alexander and Junior really went to take the man car but is Oren who lock the man neck and kill him".* Accused no. 2 went on to say that around 10:30 p.m., they boarded the car on the Arima Taxi Stand. On reaching Marching Corner, Oren (accused no. 3) told the driver he taking it right here. The driver stopped the car and Oren held him in a headlock and pulled him into the back seat. He said Oren took out the man's belt and started choking him. After a while the man went unconscious. Oren also hit the man some elbow to the throat. He (accused no .2) suggested that they drop the man out and Alexander (accused no. 1) said they would carry him to Mayaro and throw him in the river. He said that Oren (accused no. 3) and Junior (Barthol) threw the man in the river. When they were leaving Mayaro the car ran off the road and a wrecker pulled them out. Alexander took the car to St. Helena and dropped it by an Indian man who then dropped them home.

49. The investigator, Inspector George, asked accused no. 2 if he was willing to give a written statement and he agreed to do so after he showed the police where Oren, Junior, Alexander and the Indian man lived. Later that afternoon accused no. 2 took the police to the homes of Sheldon Abdool, accused no. 1, accused no. 3 and Barthol. Accused no. 1 was seen at his home and arrested. Accused no. 2 directed the police to Tecuma Boulevard, La Horquetta

where the pointed out Marching Corner as the spot where they took the deceased's car and pulled him in the back seat. He was cautioned and he said *"I going to show all you the road we pass".* Accused no. 2 directed the police to drive from La Horquetta to Manzanilla Mayaro Road. On reaching the Mitan Bridge, accused no. 2 pointed and said *"this is where we throw the man over the bridge in the river".*

50. Meanwhile between 7:00 p.m. and 8:15 p.m. that evening, Sgt. Watson interviewed accused no. 1 under caution and he replied *"Is Oren and Tan who kill de man, I only drive de car".* Sgt. Watson asked accused no. 1 if he would give a written statement and he said *"leh me think about it tomorrow and I will let you know".*

51. On September 20, 2002 around 5:30 a.m., the police returned to Brazil where they arrested accused no. 3 and Junior Barthol. Around 1:00 a.m. accused no. 3 was interviewed under caution and he replied, *"I only hold the man in ah headlock. I don't know if he dead when we throw him in the river".* Accused no. 2 gave a written statement under caution in the presence of a Justice of the Peace. Accused no. 3 gave a written statement under caution in the presence of another Justice of the Peace. Accused no. 1 gave a written statement under caution in the presence of Justice of the Peace, Kelly Ramnarase Maharajh.

52. On September 21, 2002 the police held a further interview with accused no. 2 under caution and asked him about the deceased's cell phone. He replied, *"I doh have the man phone all I do was dial Lisa number 643-8950 but ah didn't talk to nobody, after that ah give Oren the phone."* On that same day, September 21, 2002 Abdool led the police to the home of Anil Singh.

53. We have set out these facts in detail so that an analysis may be made of what is the appropriate sentence in all of the circumstances.

54. The judge considered as aggravating factors – *"(1) the prevalence of this type of offence; (2) the fact that the offence was committed in pursuit of financial gain, namely the stealing of the motor vehicle of the deceased; (3) the fact that attempts were made by all three accused to conceal the commission of the offence, and that in particular they did so by disposing of the*

body of the deceased; and (4) the fact that the deceased was the father of a young child and that he pleaded with the accused for his life. These are all matters which impact on the culpability of each accused. I have given them due consideration and, for the reasons that I shall outline hereinafter, I find that they are of significant weight in the particular circumstances of this case". [26]

55. Before the trial judge, counsel submitted that the following factors should be considered in mitigation namely- *"(1) the relative youth of the accused (appellant no. 1 - 26, appellant no. 2 - 29, appellant no. 3 -21); (2) the fact that they each tendered an early guilty plea; (3) in respect of the first accused, Alexander Don Juan Nicholas, the fact he did not "participate" in the actually beating of the deceased; and (4) the fact that the accused co-operated with the police and confessed their involvement in the offence".*[27] The judge found that these factors carried "very little weight".

56. He further opined, *"the accused's pleas to murder on the basis of the felony murder rule were in my view, tendered at the earliest possibility opportunity [sic] and the circumstances, in which they were tendered, do not lead me to conclude that the pleas were tendered for tactical reasons. However, the facts of this case, to which the accused have pleaded reveal that they have indeed committed a very serious and senseless crime against a vulnerable taxi driver. In that regard therefore, even though a plea of guilty has been tendered, a discount for such a plea would only have any real or practical effect if the Court is minded to impose a term of years as opposed to a life or death sentence. In other words, with respect to the issue of the appropriate discount being given to the accused for their early guilty pleas, this would of course only be a relevant consideration if the Court proposes to impose a term of years on the accused, and not a life or death sentence."*[28]

[26] Ruling [145] at p 53.

[27] Ruling [146] at p 53.

[28] Ruling [151] at p 55.

57. We find ourselves unable to agree with the trial judge's assessment of the mitigating factor of the guilty plea. There is a long established principle that an early and/or non-tactical plea of guilt attracts a "discount", unless there is compelling reason to deny it. Whatever the starting point, the "discount" is to be applied so that in circumstances in which, at first blush, a life sentence appears appropriate, the existence of a guilty plea, would serve to mitigate that the imposition of that sentence. The inevitable result will be a term of years. It is circuitous to argue that where a life sentence is appropriate, the "discount" cannot be given effect.

58. The reports on all three appellants from the probation officer are of importance. From the judge's ruling he found that "*the probation officer's reports of all three accused showed that they each had expressed regret and remorse and all came from fairly decent families. Accused no. 1 is depicted as an "intelligent" and charismatic individual. He is said to have seven O'Level subjects. Accused no. 2 is the father of an eleven year old daughter who he has never met. Although the product of an abusive family situation the report indicates that he was also exposed to an extended family environment that attempted to expose him to the proper moral and societal values. In respect of accused no. 3, his report revealed that he has a daughter who was born during his remand. Many persons who were interviewed expressed the view that he made a poor choice influenced by negative peers. The matters raised in these reports are all important to the rehabilitative aspect of the Court's sentencing exercise and I have given them due and indeed, full regard in the context of this case"*.[29]

59. Since none of the reports, in the view of the trial judge, or in our view for that matter, indicates that any of the appellants is beyond rehabilitation or reformation, a life sentence would appear to be inappropriate in the circumstances. It is difficult to understand what the judge meant when he said that he had given the reports "due" and "full regard" given the fact that he went on, without further comment on the reports, to impose a life sentence.

[29] Ruling [159] at p 57.

Submissions on term of years

For Appellant No.1

60. Mr. Scotland argued that a term of years ranging between 20-22 years would be appropriate in all the circumstances. He asked this Court to consider in particular that: (1) appellant no. 1 did not know that the deceased was killed; (2) did not participate in any acts of violence; and (3) had pleaded guilty early on in the trial before any substantial evidence was led, therefore saving the court's time. We note that it is only the matters at (1) which were not before the trial judge. He further argued that his client should receive a lesser sentence than his co-appellants since his participation in the actual killing was less than theirs.

61. The State responded that he was no less culpable since it was to him that his co-appellant addressed the comment *"this man see too much"*. This clearly meant that murder was in contemplation of the co-appellant and appellant no. 1 did not resile from the joint enterprise or make any attempt to stop his co-appellants from killing the deceased. She further argued that his conduct was aggravated by the fact that after the deceased was killed, he bought drinks and food with the $63.00 dollars stolen from the deceased.

For Appellant No. 2

62. Mr. Singh, submitted that 25-35 years was an appropriate sentence in this case. He relied on the case of ***Balkissoon Roodal v The State***[30]. In that case the appellant was sentenced to twenty-seven years and there was use of a firearm, which he considered to be a particularly egregious, aggravating circumstance. Though he agreed that the Court must send a clear message that taxi drivers form an important part of the functioning of society and so the sentence must be indicative of the seriousness of the offence, he however, asked the court to consider that there was no use of a firearm in this case. He accepted that the introduction and use of the belt of the deceased was indeed an aggravating circumstance.

For Appellant No. 3

63. Mr. Khan submitted that in all the circumstances, including the conduct of appellant no. 3, his early guilty plea, the probation report and awful upbringing, a sentence of 20-25 years,

[30] HC Crim. 182/97.

not taking into consideration the time served, would be appropriate. In support of this conclusion, Mr. Khan relied on the case of ***Shelley Ann Anganoo v The State***[31]. It is important to make some distinctions between that case and this present appeal.

64. ***Anganoo*** was a case in which the appellant, 18 years at the time, brutally attacked the deceased resulting in his death. She pleaded guilty to manslaughter and was sentenced to life imprisonment at first instance. On appeal against the severity of the sentence, Narine JA, delivering the judgment of the Court of Appeal took the following mitigating factors into account in reducing her sentence to 15 years with hard labour: (1) the age of the appellant; (2) that while on remand she sought to further her education; (3) that she had spent five years in prison; (4) she pleaded guilty at the first instance showing genuine remorse; (5) she was previously of good character; (6) she was a person who was easily swayed by others; and (7) the appellant's cousin and co-accused was the main actor in the joint enterprise (it is worthwhile to note here that Anganoo's co-accused, Pooran, was also sentenced to 20 years in the High Court). Many of the factors operating in Anganoo's favour are not available to the appellants.

For the State

65. The State has submitted that in all of the circumstances the sentence of thirty-five (35) years is appropriate for each appellant. Ms Seetahal found there to be no reason to make a distinction between the sentences of appellant no. 1 and his co-appellants since looked at in the round, his conduct was no less egregious.

66. We have taken the matters referred to above into consideration in light of the learning and our stated views. This was a brutal and, if one may say so, unnecessary murder of a citizen doing nothing more than trying to earn an honest living. Unfortunately, this scenario is not uncommon in our jurisdiction. Apart from the facts already mentioned, we note that appellants no. 2 and no. 3 used the deceased's own belt to kill him; the deceased begged his robbers turned assailants for his life as he had a daughter to care for; appellant no. 3 must have formed an intention to kill and or cause grievous bodily harm to the deceased when he

[31] Cr. App. No. 39 of 2008.

said *"this man see to much"*; appellant no. 3 elbowed the deceased in his neck several times after the deceased had died; after the incident, the appellants went to a gas station to buy snacks and drinks with the deceased's money while the deceased was in the trunk of his own vehicle; the appellants in a final senseless act dumped the deceased in the river and left him there; and the appellants proceeded to sell the parts of the car the following morning. These are aggravating circumstances.

67. The mitigating circumstances are, however, equally important. The probation reports of all of the appellants in this matter show that each of them expressed remorse over the incident. Appellants no. 2 and 3, it appears from the report, are the product of an abusive family situation whereas accused no. 1 came from a stable family. All three of them have participated in teaching other inmates while in prison. The reports conclude by stating that they are all good candidates for reform and social re-adaptation.

68. We are of the opinion that a sentence of thirty years is appropriate in all of the circumstances. We find no reason to distinguish between appellant no. 1 and his co-appellants. We are required to take into account the period spent in custody awaiting trial. (***Walter Borneo v The State***[32] and ***Callachand & Anor. v The State of Mauritius***[33]). To date of sentencing, the appellants had spent ten years and two months in custody and this must be subtracted from the considered sentence.

[32] Cr. App 7 of 2011.

[33] [2008] UKPC 49.

Disposition

69. The appeal of each appellant against sentence is allowed. Their sentences are varied to one of nineteen years and ten months with hard labour. Their sentences are to run from the date of sentence.

P. Weekes
Justice of Appeal

A Yorke-Soo Hon
Justice of Appeal

R. Narine
Justice of Appeal