IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Crim. App. Nos. 5, 6, 7, 8 of 2015

BETWEEN

(1)	**Lauren Aguillera**	**– Appellant No. 1**
(2)	**Shawn Ballai a/c Jarvis**	**– Appellant No. 2**
(3)	**Evans Ballai a/c Tiny a/c Bully**	**– Appellant No. 3**
(4)	**Richie Ayow**	**– Appellant No. 4**

AND

The State **Respondent**

PANEL:

P. Weekes J.A.

A. Yorke-Soo Hon J.A.

M. Mohammed J.A.

APPEARANCES:

Ms. A. Francis and Ms. S. Kalipersad for Appellant No. 1

Mr. D. Khan, Mrs. R. Mankee-Sookram and Mrs. U. Nathai-Lutchman for Appellant Nos. 2 and 3

Mr. B. Dolsingh and Mr. C. Seelochan for Appellant No. 4

Mrs. A. Teelucksingh-Ramoutar, Assistant D.P.P. for the Respondent

DATE DELIVERED: 9th June, 2016

JUDGMENT

Joint Judgment Delivered by P. Weekes J.A., A. Yorke-Soo Hon J.A. and M. Mohammed J.A.

Introduction:[1]

(1) These appeals raise **points of broad application** as to what is meant by:

(a) The term **"the starting point" in sentencing**;

(b) The **overall sentencing methodology** that is best suited to this jurisdiction; and

(c) Various matters relating to **guilty pleas**.

(2) The four appellants pleaded guilty to the offence of murder on the basis of the felony murder construct. The death penalty was not considered appropriate since the facts of the case did not constitute a *"worst of the worst"* scenario. The judge did not consider a sentence of life imprisonment to be appropriate since the appellants were not beyond rehabilitation.

(3) The basic facts as agreed upon and set out by the judge in his sentence were that the deceased, Robert Ramnath a/c "Metal Man", made his living by trading in scrap metal. Oral and written admissions given by three of the four appellants detailed a plan to rob the deceased as he was regarded as always having cash. The deceased was contacted by one of the appellants and lured to a location by being told that that appellant had scrap metal to sell. On 10th August 2006, when the deceased arrived at the designated location, he was told that the scrap metal was located in the bushes. The four appellants got into the deceased's car and directed him to the forest where the scrap material was supposed to have been located. When they got to a bushy area, the deceased was set upon, robbed, severely beaten, and his body was then thrown down an incline. The appellants drove away with the deceased's car which crashed into an electricity pole some time later that day. The case against the fourth appellant relied entirely on circumstantial evidence later detailed in this judgment.

[1] Judicial Research Counsel - Pravesh Ramlochan

The Admissions:

(4) Relative to Appellants Nos. 2, 3 and 4, the core of the case against them was contained in admissions given orally and in writing to the police. After the outline of the planning of the offence and how the deceased was lured to the designated location, each appellant gave an account of the fatal beating of the deceased.

For ease of understanding, the appellants would be referred to by name.

Shawn Ballai claimed that while he told his confederates to take the money but leave the deceased, Evans Ballai hit the deceased twice with a piece of iron which was then taken by Aguillera who *"finished the man off"*.

Evans Ballai said that Aguillera hit the deceased on his head with a piece of iron and Shawn Ballai stamped on his head. He claimed that Aguillera had a piece of iron which he gave to him and coerced him into hitting the deceased. He hit the deceased in his neck area while Ayow kicked the deceased in his ribs. Shawn Ballai then ordered him and Ayow to dispose of the body in the nearby bushes. Afterwards, he, Evans Ballai, took a piece of upholstery from the deceased's car and placed it over the body.

Ayow claimed that after hearing the deceased screaming to take the money and pleading for his life, he saw Aguillera hit the deceased eight times on his head with a piece of iron. Evans Ballai also hit the deceased on his head about three times. Ayow admitted to kicking the deceased four times in his ribs and he also threw the deceased in the bushes after being ordered to do so. Afterwards, he, together with Shawn Ballai, threw a cardboard box over the body of the deceased.

The Circumstantial Evidence:

(5) Another limb of the prosecution case against the Ballais and Ayow and the only limb of the prosecution case against Aguillera, who did not make any admissions to the police, consisted of circumstantial evidence. This circumstantial evidence emanated from the accounts of the witnesses Jimmy Ryan, Marcus Amarsingh and Kerry Ryan. Jimmy Ryan saw a car driving up the road with five (5) passengers, that is, the driver along with four (4) other men. Sometime later, immediately before the car had crashed into a pole, he saw the same car being driven with only four (4) persons inside. Jimmy Ryan identified Aguillera and Shawn Ballai as two (2) of the men who were in the car that crashed. When the car crashed, Marcus Amarsingh recognised Ayow as one of the men in the car, having known him for about 3 years before. He also observed a man with a Rastafarian hairstyle, later identified as Aguillera, coming out of the driver's seat. Kerry Ryan also observed a man with a Rastafarian hairstyle driving the car before it crashed and later identified Aguillera and Evans Ballai as persons who were in the said car that had crashed.

(6) The Post Mortem Examination report revealed that the deceased sustained the following injuries:

> *"There is massive crush injury of the head with depression ("sinking in") and deformity of the central area of the face as well as the lower right face.*
>
> *There are extensive fractures (breaks) of the skull and mandible (lower jaw).*
>
> *There are abrasions (scrapes) over the right side of the face as follows:-*
> *(1) 1.7 x 0.5cm, adjacent to the right ear, 12cm behind the front of the face and 17cm below the top of the head.*
> *(2) 1.7 x 1.0cm, 7.5cm right of the midline and 17.5cm below the top of the head.*

(3) 1.5 x 1.2cm, 3.5cm right of the midline and 22cm below the top of the head.

There are chop wounds/lacerations (scalp tears) as follows:-

(a) 5.5cm, over the front of the top of the head and extending forward unto the forehead, centred 0.5cm left of the midline, 2.2cm behind the front of the forehead and 2.0cm below the top of the head.

(b) 5.0cm, over the back of the head, 6.0cm right of the midline, 3.5cm in front of the back of the head and 6.0cm below the top of the head.

There are lacerations (skin tears) as follows:-

(i) 1.5 x 0.6cm, over the top of the lower lip, 1.5cm right of the midline and 20cm below the top of the head.

(ii) 1.6 x 0.3cm, across the midline and through the base of the lower lip, 21cm blow the top of the head.

(iii) 2.0 x 0.3cm, over the anterio-lateral (towards the front and outside) of the right mandible, 3.2cm right of the midline and 23.5cm below the top of the head.

(iv) 3.0 x 0.7cm, over the back of the head, adjacent to the right ear, 5.0cm in front of the back of the head and 10cm below the top of the head.

(v) 1.4 x 0.3cm, over the back of the head, adjacent to the right ear, 5.5cm in front of the back of the head and 10cm below the top of the head."

The pathologist opined that the deceased had died from massive craniocerebral (head) traumatic injuries.

The Judge's Sentencing Remarks - Transcript of Sentencing - 10th February 2015, pages 2-9.

(7) The judge, in sentencing, formed the view that Appellant No. 1 was the main mover behind the plan to rob the deceased and the one who made use of significant violence against him which resulted in his death - see **Transcript of Sentencing – 10th February 2015 – page 5, lines 4-7.**

Appellant No. 1 (Lauren Aguillera) was thirty-five (35) years old at the time of the offence and had previous convictions for larceny, assault, robbery, office breaking and possession of drugs for the purpose of trafficking.

Appellant No. 2 (Shawn Ballai) was twenty-six (26) years old at the time of the offence and had four convictions, one for possession of an offensive weapon and three for drug possession.

Appellant No. 3 (Evans Ballai) was eighteen (18) years old at the time of the offence and had no previous convictions.

Appellant No. 4 (Richie Ayow) was the youngest at the time of the offence, being seventeen (17) years old, and he had no previous convictions.

The judge formed the view that given the circumstances of the killing and the injuries sustained by the deceased, the matter was placed at the upper reaches of the scale of seriousness - see **Transcript of Sentencing – 10th February 2015 – page 8, lines 44-46**.

The judge expressed the view that a sentence of thirty (30) years was appropriate, it being the sentence that might have been imposed upon a verdict of guilty, after a trial - see **Transcript of Sentencing – 10th February 2015 – page 9, lines 4-8.**

The Judge did not give the usual one-third (1/3) discount for the guilty pleas as he concluded that the pleas were tactical ones because of the strength of the prosecution case. He accordingly applied a reduced discount of twenty-five percent (25%) - see **Transcript of Sentencing – 10th February 2015 – page 9, lines 1-23.**

The judge then took into account the reduced discount of twenty-five percent (25%), amounting to seven (7) years and six (6) months, for the guilty pleas.

The judge applied full credit for the time spent in pre-trial custody which he said amounted to eight (8) years and six (6) months. The judge also included the seven (7) month period between the guilty pleas entered on the 10th July, 2014 up until the date of the sentencing on the 10th February, 2015. Accordingly, the period of eight (8) years and six (6) months represented the full time between the date that the appellants entered custody on the 11th August, 2006 and the date of their sentencing on the 10th February, 2015.

The judge further differentiated the level of involvement of Appellant No. 4 who, apart from his good character, and young age, had played a comparatively minor role. To take account of this, the judge reduced this appellant's sentence by a further period of two years - see **Transcript of Sentencing – 10th February 2015 – page 9, lines 24 – 28.**

The final sentences arrived at were:

Appellant No. 1 (Lauren Aguillera)	-	Fourteen (14) years
Appellant No. 2 (Shawn Ballai)	-	Fourteen (14) years
Appellant No. 3 (Evans Ballai)	-	Fourteen (14) years
Appellant No. 4 (Richie Ayow)	-	Twelve (12) years.

These sentences were ordered to run from the date of their imposition on the 10th February, 2015.

The Grounds of Appeal:

Appellant No. 1

(8) Ms. Francis, counsel for Aguillera contended that the judge erred when he did not give him the opportunity to put forward his version of events. The thrust of this argument appears to be that the Judge should have conducted a ***"Newton"*** hearing. The effect of a ***"Newton"*** hearing is, that in the event of a dispute between the parties about the material facts of the offence, if the dispute is serious enough to have a significant effect on sentence, the prosecution will either have to call evidence in support of their version at the said hearing or allow sentence to be passed on the basis of the defence version: see **Blackstone's Criminal Practice 2012 at page 1639.** All of this is done before the sitting judge alone (that is, without a jury), who would determine which party was telling the truth.

Ms. Francis' submission was that there was no proper basis for the judge to conclude that Aguillera was the moving force and primary planning mind behind the robbery.

Discussion:

(9) Aguillera had not made any verbal or written admissions. However, prosecuting counsel at the trial had gone into very substantial detail in outlining the circumstances of the offence. The admissions of appellants Nos. 2, 3 and 4 depicted the involvement of appellant No. 1 in graphic detail. All three accounts under caution unequivocally painted the picture of appellant No. 1 as being the driving force behind the attack and the person who had inflicted the greatest level of physical and gratuitous violence, on the deceased. It was to these facts that appellant No. 1 had pleaded guilty.

(10) A sentencing court, in order to effectively perform its function in sentencing multiple offenders, must necessarily be able to take into account the broader picture, on the objective facts, which emerges from the statements of fellow participants, who have all pleaded guilty. This is a course which is otherwise prohibited in terms of proof of guilt. We reiterate what was said in the case of **Nadia Pooran v The State** Crim. App. No. 32 of 2015, at para. 37:

> *"………We observe that while all of these facts do not emerge on the appellant's cautionary statement,* ***we are nonetheless entitled to glean the broader picture, on the objective facts, which emerges from the statements of fellow participants, who all pleaded guilty.*** *We are cognizant that in doing so, no evidentiary rule is capable of being violated because no probative consideration can and is being given to what one confederate alleges against another confederate, in an out of court statement, in terms of the level of participation.* ***We are simply engaged in the exercise of depicting the broader picture and its objective underpinnings, against the background of which the culpability of the appellant stands to be realistically assessed, rather than in somewhat truncated, artificial and thus potentially misleading isolation.***" (emphasis ours)

If the trial judge did not perform this exercise, he would have been acting upon a truncated, artificial and potentially misleading picture of the level of involvement of appellant No. 1.

(11) The judge prudently enquired as to whether the facts, which had been extensively outlined, were admitted. The facts as outlined were expressly admitted by Counsel acting on behalf of appellant No. 1 - see **Transcript of Sentencing – 10th July 2014 – page 17, lines 30-39**. There was no subsequent request from Defence Counsel to have the factual basis of the guilty plea clarified or re-examined.

(12) When sentencing, the judge alerted himself to the need for caution in assessing the depiction of the offence, mindful of the risk with multiple defendants of a self-serving minimisation of roles and the exaggeration of the roles played by others - see **Transcript of Sentencing – 10th February 2015 – page 6, lines 32-36.**

(13) The plea of guilty had therefore been an unequivocal one. The record of what transpired before the judge comprehensively contradicts any suggestion that appellant No. 1 or his Counsel laboured under any misapprehension as to precisely what the underlying facts were. There was therefore no need, in such circumstances, for the judge to conduct a Newton hearing.

This ground is therefore without merit.

<u>Appellant No. 2; Appellant No. 3:</u>

(14) Mr. Khan submitted on behalf of the Ballais that the judge erred **first** of all in selecting *"the starting point"* for the term of sentence at the higher range than was appropriate.

Second, it was submitted that the judge erroneously concluded that the appellants' participation was not of a relatively limited involvement in inflicting violence on the deceased. (sic)

Third, it was submitted that the judge failed to apply a one-third (1/3) discount for the early guilty pleas of the appellants and in error applied a discount of one-quarter (1/4), based on his conclusion that because of the strength of the prosecution case, the guilty plea was entered partly for tactical reasons.

The first and third grounds of appeal advanced by Mr. Khan in relation the Ballais are of equal application to all four appellants and we therefore considered them in that vein.

Fourth, it was submitted that the Judge failed to consider and give sufficient weight to the good character of Evans Ballai and accordingly, a more severe sentence than was appropriate for him was imposed.

The starting point:

(15) Mr. Khan submitted that the judge selected a starting point for the term of sentence at a higher range than was appropriate. Relying on the decision in **Nadia Pooran v The State**, he submitted that the starting point should have been twenty-five (25) years and therefore the sentence imposed was too severe.

Mr. Khan further submitted that in deciding the starting point for the sentence, the judge must only consider the aggravating and mitigating factors relative to the offence and not relative to the offender.

Discussion:

(16) It is important to establish clarity as to what is meant by the term *"the starting point"* in sentencing.

Our review of sentencing decisions reveals that the terms *"the starting point"* and *"the appropriate sentence",* have been, on occasion, used interchangeably and even in a conflated manner: see **Marlon Gregory John v The State** Cr. App. No. 39 of 2007; **Michael Graham v The State** Cr. App. No. 15 of 2009; **Jerome Jobe v The State** Cr. App. No. 11 of 2011; **The State v Ramesh Sieunarine** H.C.A. Cr. No. S 072 of 2005; **The State v Angela Ramdeen** Cr. No. 258 of 1996; and **The State v Otto Lancaster** Indictment No. 5 of 2010.

In **Nadia Pooran v The State** supra at para. 25, there is a suggestion that the starting point is the "but for" or the notional sentence, that is, the sentence that would otherwise have been imposed given the mix of aggravating and mitigating factors. The judgment does not explicitly say whether these are aggravating and mitigating factors relative to the offence and/or to the offender. However, the tenor of that paragraph and what precedes it, suggests that the starting point takes into account the aggravating and mitigating features of both offence and offender.

(17) We have also observed that on several occasions, all relevant sub-issues relevant to the sentence have been amalgamated by the sentencer, so that there is little real sense of whether the various strands of relevant factors were duly taken into account at the most appropriate stage of what is a multi-tiered process. This synthesised approach (in Australia, termed *"the instinctive synthesis"* method of sentencing), has been an acceptable methodology in the past and it has continued in a few Commonwealth jurisdictions, upon a principled basis. However, can it properly survive the many developments in sentencing law, all designed to promote a greater level of consistency in sentencing?

(18) In order to address the impression that there is a disparity in sentencing when that may not have always been the case, but more fundamentally in an attempt to settle a principled methodology for sentencing, we have decided to place the term *"the starting point"* under the jurisprudential microscope and in so doing, attempt to ascertain its meaning. We keep uppermost in our minds the observations of Lord Lane C.J. in **R v Bibi** [1980] 1 WLR 1193, "*...We are not aiming at uniformity of sentence; that would be impossible. We are aiming at uniformity of approach."*

(19) **New Zealand**:

We have found decisions from New Zealand to be of particular assistance on the meaning of the term *"the starting point"* in sentencing.

In **R v Mako** C.A. 446 of 1999 it was said that the starting point for a sentence is *"the true point of comparison with other offending, before individual aggravating and mitigating factors are taken into account. Fixing the starting point is the mechanism for seeking consistency in sentencing."*

In **R v Norfolk** C.A. 195 of 2001, it was noted that the assessment of starting points is not capable of exact arithmetical gradation or scaling.

In **R v Gemmel** C.A. 267 of 2001, it was decided that the starting point should reflect all aspects of the case except the plea.

In **R v Hooker** C.A. 154 of 2001, the New Zealand Court of Appeal said at para. 7:

> "*.... it is perhaps unfortunate that the term "starting point" is used in judgments in two different ways. Sometimes the term is used to reflect the opening position before a consideration of aggravating and mitigating circumstances. At other times, the term is used to reflect the position before mitigating circumstances are taken into account, that is, aggravating features are built into the so-called starting point".*

Thus, it can be seen that New Zealand was once bedevilled with the current problem in this jurisdiction, with the term "*the starting point"* being utilized in somewhat different ways in the sentencing of offenders.

In **R v Taueki, Ridley and Roberts** [2005] NZLR 372, a decision of the Court of Appeal of New Zealand, the Full Court clarified that the "starting point" should be understood as the sentence appropriate when aggravating and mitigating circumstances relating to the offending are taken into account, but excluding aggravating and mitigating features personal to the offender. The starting point is the sentence, determined in this way, for an

adult offender after a defended trial. We consider several parts of this decision to be of direct relevance and thus quote extensively from it. O'Regan J. said:

> ***[8] "……….. The modern approach to sentencing uses as a reference point a starting point taking into account aggravating and mitigating features of the offence, but excluding mitigating and aggravating features relating to the offender. Put another way, a starting point "is the sentence considered appropriate for the particular offence (the combination of features) for an adult offender after a defended trial": R v Mako [2000] 2 NZLR 170. When we use the term "starting point" in this judgment that is what we mean.***
>
> *…………………………………………..*
>
> *…………………………………………..*
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> *…………………………………………..*
>
> *[28]* ***Setting the appropriate starting point for sentencing will involve an assessment of a number of features which add to or reduce the seriousness of the conduct and the criminality involved. As this Court noted in Mako, it is the particular combination of those variable features which requires assessment for sentencing in each case. The Court went on to say: "the task of placing the particular combination of features comprising an offence in its proper relative position on the scale of seriousness is a matter of judgment calling for the careful exercise of the sentencing discretion. Features of the offending requiring assessment cannot be exhaustively listed***."
>
> *[29] As the Court did in* ***Mako****, we propose to set out a number of factors which will bear on the assessment of the appropriate starting point and, in the context of GBH offending, the appropriate sentencing band.*
>
> *[30] We do, however, emphasise that a sentencing Judge needs not only to identify such factors, but also to evaluate the seriousness of a particular factor. For example, premeditation is identified as a factor, but it may vary in particular cases from full scale planning and orchestration of a concerted vicious attack to a period of a few minutes or so after a perceived slight during*

which the offender decides to take revenge. ***The evaluative task is an important aspect of sentencing: without it, there would be a danger of a formulaic or mathematical approach to the assessment of sentencing starting points***.

Matters contributing to the seriousness of GBH offending:

(a) *Extreme violence……*

(b) *Premeditation……*

(c) *Serious injury……*

(d) *Use of weapons……*

(e) *Attacking the head……*

(f) *Facilitation of crime……*

(g) *Perverting the course of justice……*

(h) *Multiple attackers……*

(i) *Vulnerability of victim……*

(j) *Home invasion……*

(k) *Gang warfare……*

(l) *Public official……*

(m) *Vigilante action……*

(n) *Hate crime…*

Matters reducing the seriousness of GBH offending

[32] Matters which may be seen as leading to lower starting points are:

(a) *Provocation……*

(b) *Excessive self-defence……*

………………………………………………
………………………………………………
………………………………………………

[35]

(a) *………………………..*

(b) ***We have provided for some overlap in the margins of the bands, to reflect the fact that categorising GBH offending is an evaluative exercise involving the exercise of judgement, rather than a formulaic categorisation of criteria. We are endeavouring to maintain a degree of flexibility which appears to be missing from the Hereora categories****………………………….*

…………………………………………

…………………………………………

…………………………………………

Flexibility

[42] ……… But the suggested bands and starting points should be used flexibly, and where any particular feature or combination of features has some unusual character, the starting point should be adjusted to reflect that. …… ***Sentencing Judges will also need to exercise judgement in assessing the gravity of each aggravating feature. The features of the offending in each case must be carefully assessed in order to establish a starting point which properly reflects the culpability inherent in the offending. Where there are multiple offenders with different levels of involvement in the offending, the actual culpability of each offender will need to be assessed. However, there is no requirement to draw fine distinctions: Solicitor-General v Lam (1997) 15 CRNZ 18 at 25.***

[43] ***To achieve the objective of greater consistency, it will be necessary for sentencing Judges to articulate in a transparent way the basis on which they have determined the appropriate band, and the factors which have guided their assessment of the starting point. It will be important that the starting point is identified before attention is turned to the personal circumstances of***

the offender, because the starting point will provide the basis for assessing the consistency of one case with another.

Circumstances of the offender:

[44] ***Once a starting point has been determined in accordance with the above criteria, it is then necessary to determine whether the aggravating or mitigating factors relating to the offender's particular personal circumstances require that the actual sentence should be higher or lower than the starting point………..”*** (emphasis ours)

(20) The position in **R v Taueki** remains good law in New Zealand. In the later decision of **Hessell v R** [2010] N.Z.S.C. 135, to which reference is made later in this judgment in dealing with the subject matter of guilty pleas, it was said at para. 55 that nothing in **Hessell** should be taken as suggesting a departure from the flexible approach followed in New Zealand. There has been no Supreme Court decision from New Zealand which has cast doubt on this approach and up to this year, trial judges in that jurisdiction routinely applied the **Taueki** formulation – see for example the case of **R v Ferris-Bromley** [2016] NZHC 772/2016.

(21) In attempting to ascertain the meaning of "*the starting point"* in sentencing, we have also turned our attention to the use of that term in some other Commonwealth jurisdictions. Although these jurisdictions have approached the issue through somewhat different routes, the end result was the same as in New Zealand. The UK position can be seen in **Practice Statement** dated 31st May 2002 and reported at [2002] 2 Cr. App. R. 18. For the Canadian perspective see: **R. v. Arcand** 2010 ABCA 363 and **R v Innes** 2012 ABCA 283.

(22) We are in agreement with the exposition of the New Zealand Court of Appeal in **R v Taueki** as to what is meant by the term *"the starting point"* in sentencing. It is the sentence which is appropriate when aggravating and mitigating factors relative to the **offending** are taken into account, but which **excludes** any aggravating and mitigating factors relative to the **offender.**

We therefore accept the correctness of Mr. Khan's submission on what is meant by the term *"the starting point"*.

In this jurisdiction, there has been an occasional misalignment between the proper meaning and the actual usage of the term *"the starting point"* and an ensuing lack of clarity as to what precisely is meant by that term. In view of this, we now clarify that we adopt the approach in New Zealand as adumbrated in **R v Taueki** supra.

This approach is both consistent with contemporary sentencing practice and has the considerable advantage of being simple, well defined and neatly streamlined. This approach will better support the systematic and orderly explanation by sentencers of how decisions are reached. In this way, the Court of Appeal will better be able to assess whether the sentencers have given too little or too much weight to particular factors. This approach will enable decisions to be analysed and compared in terms of their objective and subjective components. Consistency in sentencing will be promoted and if any inconsistency persists or is evident, the problem areas will be more readily identifiable. In all, judicial accountability will be enhanced – see Judicial Commission of New South Wales Number 25 – December, *2002* ***"Sentencing Methodology: Two Tiered or Instinctive Synthesis"***. This approach will in turn facilitate the perspicacious observations of Street CJ in **R v Rushby** [1977] 1 NSWLR 594 at 597, *"...It is cool reason, not passion or generosity that must categorize sentencing as all other acts of judgment."*

(23) In the calculation of what constitutes a starting point, a strictly mathematical approach cannot be countenanced. A mathematical approximation of all of the relevant factors, may on the face of it demonstrate structure and transparency, but it operates as an unacceptable fetter on the judge's sentencing discretion.

We endorse the position expressed in **R v Norfolk** supra (New Zealand), that the assessment of the starting point is not capable of exact arithmetical gradation or scaling. The two matters that are susceptible to more exact mathematical calculation are the appropriate discount for a timely guilty plea and credit for time spent in pre-trial custody.

Methodology:

(24) The overall sentencing structure should, in general terms, (apart obviously from containing the judge's explicit reasoning on all relevant issues) reflect the following matters:

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

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

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

(iv) Credit for the period of time spent in pre-trial custody.

(25) While this is a criminal appeal involving the felony murder construct, it cannot have escaped notice that the adopted definition of the starting point and the recommended structure for sentencing applies across the board to practically all criminal offences, indictable and summary. The modern trend of sentencing requires full transparency which judges and magistrates can best achieve by the adoption of this methodology.

<u>General Factors Relating to the Offender:</u>

(26) With respect to aggravating and mitigating factors relative to the **<u>offender</u>**, the following salutary observations of Gault J. in the decision of **<u>R v Mako</u>** CA 446/99 are equally applicable to our jurisdiction:

> *"[62]* ***Once the appropriate starting point is fixed, adjustments can be made in mitigation to allow for such matters as*** *…* ***assistance to the authorities, age and other personal circumstances. At the same stage matters of aggravation may warrant some increase. These could include the offender's criminal history, the fact of bail or parole at the time of offending and the like****….*
>
> *……………………………………….*
>
> *……………………………………….*
>
> *[64] As this Court made clear in* ***Smart*** *there is no justification for treating those assigned roles other than of confronting the victims as less culpable unless they are truly less than full participants. The lookout, the getaway driver, may in fact be the ringleader.*
>
> *[65]* ***Youth and the prospects of rehabilitation may be mitigating factors****. Offenders, and there seem a disturbing number, who have accumulated considerable lists of convictions while still in their teens cannot expect leniency in sentencing for serious aggravated robbery offences. As noted in the judgment of the Full Court of the High Court in* ***Cooper*** *a high proportion of aggravated robberies in this country are committed by teenagers.* ***In some cases young offenders may have been directed by others who are older. It would only encourage that practice to impose lower sentences unless there are real prospects of rehabilitation and unlikelihood of re-offending.***
>
> *[66] However, where the offender is a* ***youth*** *who is in relevant respects a* ***first offender and appears genuinely motivated to reform,*** *there may be benefit*

both to the offender and society in a significantly reduced sentence. Whether this is so in a particular case requires a realistic assessment which gives proper weight to the fact that aggravated robbery even when committed by an immature offender, remains serious violent offending." (emphasis ours)

See also **Jawan Jaggernauth and Andrew Kanhai v The State** Cr. App. Nos. 16 & 18 of 2007.

(27) Judges and Magistrates, in considering the aggravating and mitigating factors relevant to the **offender**, must be wary of ascribing a set numerical value to particular factors. The nature of these factors, in any event, do not lend themselves readily to the setting of such values.

While we have adopted a preferable methodology for sentencing, it is nonetheless axiomatic that the exercise of sentencing must contain an appropriate level of flexibility. This level of flexibility is most evident at the second stage or tier of the process. Consistent with the need for a level of flexibility, nothing in this judgment is to be taken as authority for the proposition that set numerical values must be pegged to various aggravating and mitigating factors.

What is required is that the relevant factors be taken into account by the sentencer and that appropriate adjustments be made to the starting point. Ultimately, the figure derived after the second stage adjustment, should aim to broadly (and not with mathematical exactitude) reflect the mix of aggravating and mitigating factors relative to the particular offender.

Application:

(28) In this case, the aggravating features relating to the **offence** are:

- The extent of the planning, from the day before, and the level of premeditation;
- An underlying offence for gain (robbery);

- The involvement of multiple attackers;
- The use of a piece of iron as a weapon;
- The infliction of a large number of very serious injuries;
- The use of gratuitous violence; and
- The concealment of the body.

There are no mitigating factors relative to the **offence.**

We have examined earlier decisions on sentences imposed upon the basis of the felony murder construct, most notably the case of **Alexander Don Juan Nicholas, Gregory Tan and Oren Lewis v The State** C.A. Crim.1-6/2013. However, since the expression *"the starting point"* was not employed before in a standardised manner, we are of the view that those cases are of limited assistance to us in providing a definitive range of sentences. Judges previously arrived at sentences, on occasion, based upon somewhat different understandings of what matters were to be appropriately factored in at various stages of the sentencing exercise. Therefore, while they are in some ways useful, the previous authorities predating the decision of this Court in **Fizul Rahaman v The State** Cr. App. No P027/2015 (31st May, 2016), do not consistently reflect a clear, universalised approach to the starting point and in citing them, counsel must be mindful of this and exercise appropriate restraint.

Following on from this, it would also be premature to suggest any range of sentences. As the adopted meaning of the term *"the starting point"* settles into common usage, a new body of case law will evolve, from which helpful comparators may be eventually drawn.

Undoubtedly, as more and widely varied matters come before the court for the assessment of appropriate sentences, we will see a band emerging which takes into account various aggravating and mitigating factors. No one case can settle this issue.

When we consider the relevant features of this case, a starting point of thirty (30) years is appropriate. This figure reflects the inherent seriousness of the offending and the existence of multiple egregious aggravating factors relating to the offence.

In a particular case which involved an even greater array of extremely serious aggravating factors relative to the offence, namely, a home invasion, a breach of trust, and the infliction of a very large number of horrific injuries by one person, a starting point of thirty-five (35) years has been considered to be appropriate – see **Fizul Rahaman v The State**, oral judgment delivered by Weekes J.A. on 31st May, 2016.

It can therefore be deduced that the judge in this matter operated from well within the identified starting point, when he arrived at the appropriate figure of thirty (30) years, before making deductions for the guilty plea and the time spent in pre-trial custody.

Levels of involvement:

(29) Mr. Khan further contended that the Judge erred in concluding that the participation of the Ballais was not of a relatively limited nature in inflicting violence to the deceased.

While it is accurate to say that Shawn Ballai, on his account, did not inflict physical violence on the deceased, he nonetheless participated in all the material aspects of planning and executing the crime. At one stage he told his confederates to leave the man alone but he never withdrew from the enterprise which had as its objective, robbery with violence, and during the furtherance of which, extreme violence was employed in his immediate presence.

With respect to Evans Ballai, he too was involved in all stages of the planning and execution of the offence. In addition, on his admission, he accepted hitting the deceased in the area of his neck with the piece of iron.

In our view, Mr. Khan's contention is without a proper foundation. The judge correctly concluded that in the specific context of this offence, the involvement of the Ballais were not of a relatively limited nature. This is because the offence involved not only an elaborate plan to lure the deceased to a location which supposedly contained scrap metal in some

bushes, but also involved the intense and vicious beating of the deceased at the said location, which all occurred in the presence of all the appellants at some stage. As noted in para. 42 of **R v Taueki** supra, while the actual culpability of each offender will need to be assessed, there is no requirement to draw fine distinctions.

Good Character of Appellant No. 3:

(30) Mr. Khan also submitted that because of the good character of Evans Ballai, he should have received a less severe sentence.

The judge had before him on the one hand, the good character of Evans Ballai and on the other, the multiple aggravating factors of the offence. The combination of aggravating factors made the offence so abhorrent, that the good character of this appellant was insufficient to merit a reduction in the starting point. The sentencing judge does not look at one factor in isolation and out of context but rather has to evaluate the entirety of the circumstances of the offence and the offender. We can identify no fault with the sentencing decision of the judge not to sentence Evans Ballai to a lesser term because of his good character.

The Guilty Pleas:

(31) Mr. Khan submitted that the judge erred in failing to apply a one-third (1/3) discount for the appellants' guilty pleas, concluding that they were motivated by tactical reasons because of the strength of the prosecution case and that they were entitled instead to a reduced discount of twenty-five percent (25%).

The position in New Zealand is again instructive. Initially, with respect to a guilty plea, the position in New Zealand had been that a scale discount for a guilty plea should be given without regard to the strength of the prosecution case. This was because the discount had to

be predictable for defence counsel and their clients and also easy for judges to apply in busy court lists. This approach also avoided unnecessary complexity in resolving disputes over the strength of the prosecution case that could distract from the utilitarian value of the discount.

The Supreme Court of New Zealand in **Raymond Everest Hessell v R** [2010] N.Z.S.C. 135, however, disapproved of this heavily structured approach in favour of a more open ended evaluation of the full circumstances of each individual case. This meant that a consideration of the strength of the prosecution case could not be automatically excluded as it might in some cases be conceivably relevant as part of the judge's evaluation of the surrounding circumstances of the guilty plea and what it signified. The Supreme Court also made several pertinent observations about some relevant factors that may be weighed in assessing the true value of a guilty plea.

McGrath J. who delivered the judgment of the Supreme Court said:

> *[64] ……… **Remorse is not necessarily shown simply by pleading guilty. Sentencing judges are very much aware that remorse may well be no more than self-pity of an accused for his or her predicament and will properly be sceptical about unsubstantiated claims that an offender is genuinely remorseful. But a proper and robust evaluation of all the circumstances may demonstrate a defendant's remorse. Where remorse is shown by the defendant in such a way, sentencing credit should properly be given separately from that for the plea.***
>
> *[65] **In summary, the policy reasons for giving credit for guilty pleas in sentencing do not justify an approach which treats as irrelevant, or of peripheral relevance, the circumstances in which the plea is entered and what they indicate about acceptance of responsibility for the offending. The credit given should also legitimately reflect the benefits provided to the system and to participants in it. Overall, the sentencing task remains one of evaluation that leads to what the judge is satisfied is the right sentence for***

offending in light of the offender's acknowledgement of guilt and all other relevant circumstances.

…………………………………….

……………………………………

Conclusion

*[70]………***There are, however, strong reasons of principle for requiring that the allowance which can and should be given should be the result of evaluation of all the circumstances in which the plea is entered. When it is entered is only one of those circumstances.***

………………………………

[72] ……… ***For the reasons given in this judgment, we consider that the heavily structured nature of this approach involved an inappropriate departure by the Court of Appeal from the statutory requirement of evaluation of the full circumstances of each individual case. As well, the particular approach carries the unacceptable risk of pressuring persons to plead guilty to offences charged when they were not guilty.***

[73] ***There is no objection in principle to the application of a reduction in a sentence for a guilty plea once all other relevant matters have been evaluated and a provisional sentence reflecting them has been decided on. Indeed there are advantages in addressing the guilty plea at this stage of the process (along with any special assistance given by the defendant to the authorities). It will be clear that the defendant is getting credit for the plea and what that credit is. This transparency validates the honesty of the system and provides a***

degree of predictability which will assist counsel in advising persons charged who have in mind pleading guilty.

[74] ***But, as we have emphasised, the credit that is given must reflect all the circumstances in which the plea is entered, including whether it is truly to be regarded as an early or late plea and the strength of the prosecution case. Consideration of all the relevant circumstances will identify the extent of the true mitigatory effect of the plea.***

[75] ……… ***Whether the accused pleads guilty at the first reasonable opportunity is always relevant. But when that opportunity arose is a matter for particular inquiry rather than formalistic quantification. A plea can reasonably be seen as early when an accused pleads as soon as he or she has had the opportunity to be informed of all implications of the plea.***

[76] ***At the other end of the range, there may be cases in which there are significant benefits from a plea, warranting a sentence reduction, even though the plea comes very late****. After a trial has commenced some real justification should be required before any allowance is made but there are from time to time instances where an allowance is justified.*

[77] ***All these considerations call for evaluation by the sentencing judge who, in the end, must stand back and decide whether the outcome of the process followed is the right sentence****."* (emphasis ours)

(32) We agree with the general reasoning in **Hessell v R** supra and reiterate what we consider to be some key points for judges to bear in mind during sentencing, when dealing with a guilty plea:

(i) Remorse may be sometimes demonstrated by a guilty plea but it is not necessarily exemplified by it;

(ii) If after a thorough and robust evaluation by the judge, a defendant's remorse is manifest, sentencing credit may be given to it, separate and apart from the guilty plea; while a guilty plea may be an admission of responsibility, in the face of an inevitable conviction, there may in reality be very little remorse for which separate sentencing credit can properly be given – see **Najeeb Dawood v R** [2013] NZCA 381;

(iii) Precisely **when** a plea of guilty is entered, is **only one** of several circumstances that must be evaluated by the judge;

(iv) The usual discount of approximately one-third (1/3) may be properly reduced if it is clear that the plea is motivated by tactical considerations. In this regard, the strength of the prosecution case may, on occasion, be a relevant factor to be evaluated in considering all the circumstances in which the plea is entered. When a judge considers that this might be a relevant factor, he ought to invite counsel on both sides to address him on the issue. When the judge has found that the prosecution case is a strong one so as to justify a reduction in the usual discount of approximately one-third (1/3), he should give brief reasons for so concluding. Such a reduction in the usual discount must be approached with caution and requires particularly careful justification and an explanation in the reasons which is clearly expressed. In **R v Caley and Others** [2012] EWCA Crim. 2821, Hughes LJ said at para. 24:

> *"... the various public benefits which underlie the practice of reducing the sentence for a plea of guilty apply just as much to 'overwhelming'*

cases as to less strong ones…judges ought to be wary of concluding that a case is 'overwhelming' when all that is seen is evidence which is not contested…even when the case is very strong indeed, some defendants will elect to force the issue to trial, as indeed is their right. It cannot be assumed that defendants will make rational decisions or ones which are born of any inclination to co-operate with the system, but those who do, merit recognition. When contemplating withholding a reduction for a plea of guilty in a very strong case, it is often helpful to reflect on what might have been the sentences if two identical defendants had faced the same 'overwhelming' case and one had pleaded guilty and the other had not…."

See also **R v Paul Wilson** [2012] EWCA Crim. 386;

(v) It may on occasion be tempting for sentencers to avoid a reduction in sentence for a plea of guilty when the statutory maximum sentence is low or there is some other inhibiting factor and the resulting sentence is considered to be insufficient. This temptation must be resisted. The sentencer cannot remedy perceived defects or shortcomings by the refusal of the appropriate discount: see **R v Caley** supra per Hughes LJ at para. 25. The cautious and careful approach outlined in para. (iv) above and in this paragraph reflects the need to give significant weight to the distinct and far-reaching public benefits which result from a guilty plea;

(vi) Whether a defendant pleads guilty at the first reasonable opportunity is always relevant – this is, however, a matter for particular inquiry rather than formalistic quantification;

(vii) We remind trial judges of the methodology explained in **Nadia Pooran v The State** (which adopted the reasoning in the decision of **Terry Daly v The State** Cr. App. No. 1 of 2012 per Yorke-Soo Hon J.A.) for calculating the appropriate

level of discount (usually in the order of approximately one-third (1/3)), and at what stage to do so – see paras. 19-26; and

(viii) With respect to (vi) supra, we consider that the first real opportunity to plead guilty is upon arraignment. While there is an earlier technical opportunity to plead guilty available at a preliminary enquiry, in the absence of case management rules and given the current state of Court lists, this is not a first opportunity when viewed from any reasonable pragmatic point of view.

We turn to examine the strength of the prosecution case. The case was premised not only on oral and written admissions but also on the circumstantial evidence of the witnesses Jimmy Ryan, Marcus Amarsingh and Kerry Ryan.

In law, an admission which is properly proved or which is accepted by the maker without any relevant qualification, has the potential to be the highest in the scale of evidence, since it is a declaration against self-interest: see **Cross and Tapper on Evidence** 10th Ed. at pages 659-663. Circumstantial evidence, once it is of an independent nature (as in this case), derives its potential force from the unlikelihood of coincidence - see **Cross and Tapper on Evidence** 10th Ed. at pages 30 and 31. Circumstantial evidence, when placed alongside an admission, can lend support to aspects of it.

For these reasons, we are of the view that the prosecution case in this matter was of a strong nature. Accordingly, the judge acted well within the parameters of the discretion entrusted to him in concluding that because of the strong prima facie quality of the prosecution evidence, the pleas were (at least in part), tactical in nature and attracted a reduced discount of twenty-five percent (25%). We can identify no basis upon which to interfere with the exercise of the Judge's discretion.

All of the four (4) grounds of appeal advanced on behalf of Appellants Nos. 2 and 3 are without merit.

Appellant No. 4:

(33) Mr. Dolsingh on behalf of Richie Ayow submitted that the difference of two (2) years in the sentence imposed on this appellant, when compared with the other appellants, did not adequately reflect the very minimal role played by Ayow when contrasted with the roles of the other appellants. He submitted that this was particularly so given the comparatively young age of Ayow. Mr. Dolsingh submitted that the difference between the sentences imposed on Ayow and the other appellants should have been in the region of five (5) years and that the difference of two (2) years was unjustifiably narrow. Mr. Dolsingh relied on the decision of **Nadia Pooran v The State** supra in support of his argument.

We wish to respectfully observe at the outset, that we frown upon any unqualified attempt to import into this appeal, or any other appeal, sentences from other cases, which involve their own idiosyncratic mix of aggravating and mitigating factors.

Discussion:

(34) The level of involvement of Ayow was a factor to which the judge frontally directed his attention. The judge factored into account Ayow's good character, his age at the time of the offence and his relatively limited involvement in the offence - see **Transcript of Sentencing – 10th February 2015 – page 9, lines 24 -28.**

The differential properly reflected the different levels of involvement.

Mr. Dolsingh further submitted that the Judge did not give sufficient weight to the strong prospects of Ayow for rehabilitation. The transcript of the judge's sentencing remarks, however, reflects that the judge did address his mind to the dedication of the appellant to religion during his incarceration, the comparatively weighty factor of his co-operation with the police from the point of his arrest, that he exhibited remorse to the probation officer and that in the view of the probation officer, he was not regarded as posing a high risk to society of re-offending - see **Transcript of Sentencing – 10th February 2015 – page 6, lines 4 – 22.**

It is therefore manifest that when the judge's remarks on sentencing are read as a whole, he was appropriately mindful of and duly considered the strong rehabilitative prospects of Ayow.

This ground is therefore without merit.

Disposition:

(35) We have found no merit in any of the grounds of appeal filed on behalf of the four (4) appellants.

Accordingly, the appeals of the four (4) appellants against the sentences imposed on them are dismissed.

The sentences imposed by the judge are affirmed.

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P. M. Weekes J.A.

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A. Yorke- Soo Hon J.A.

..……………..…………
M. Mohammed J.A.