

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRA 2007/003

BETWEEN:

JERRY MARTIN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mde. Janice M. Pereira

Justice of Appeal

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

Appearances:

Dr. Joseph S. Archibald QC for the Appellant

Mrs. Candace Raphael-DeJonge, Senior Crown Counsel for the Respondent

2010: January 14;

2011: June 6.

Criminal Appeal – Murder – Life imprisonment – Appeal against sentence – the Parole Act 2009 – Virgin Islands (Constitution) Order 1976 (As Amended) (the “1976 Constitution Order”) – Virgin Islands (Constitution) Order 2007 (the “2007 Constitution Order”) – Mandatory life imprisonment for the offence of murder – Discretionary life imprisonment for the offence of murder – Section 150 of the Criminal Code 1997 – the Criminal Justice Act 2003 (UK) – Compatibility of penalty for the offence of murder with the doctrine of the separation of powers

On 29th March 2007, the appellant, Jerry Martin, was convicted of the murder of Rolland Serrano and sentenced to life imprisonment. The deceased had been shot outside his apartment building at Sea Cows Bay on the morning of 15th September 2005, during a robbery, and died subsequently from his gunshot wound on 10th October 2005. The appellant originally appealed only against his conviction on three separate grounds. The Court however, subsequently allowed him to appeal against sentence also, because there had recently been a fundamental reappraisal of the sentencing regime for murder in the

Virgin Islands, brought about both by case law and the Parole Act 2009. The appellant's appeal against sentence was limited to the sole ground that "the sentence of life imprisonment is not automatic on the verdict of guilty of murder."

Held: dismissing the appeal and affirming the appellant's conviction, as well as his sentence of mandatory life imprisonment, that:

1. The penalty in section 23(1) of the Criminal Code 1997¹ is clearly a fixed penalty prescribed by legislative judgment for the offence of murder having regard to its gravity, despite the different circumstances in which the offence may be committed. That fixed penalty under the principle in *Deaton v The Attorney General and the Revenue Commissioners* [1963] I.R. 170 is not incompatible with the doctrine of the separation of powers under the 1976 Constitution Order, nor for that matter the 2007 Constitution Order. That legislative judgment must be respected subject of course to any statute-based regime for a tariff to be fixed which is compatible with the Constitution, and/or for review or clemency.

Peter Whelan v The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General [2010] I.E.S.C. 34 applied.

2. The Court has not been placed in the position to be able to determine and state whether the appellant may be eligible to be considered for parole, or to state a minimum period of imprisonment that he should serve before being considered for parole for the first time. Consequently, the Court would decline to exercise the jurisdiction envisaged by section 30(2) of the Parole Act 2009. In accordance with that section of the Act however, the appellant may apply to the High Court for a review of the sentence imposed.

JUDGMENT

[1] EDWARDS, J.A.: On 29th March 2007, the appellant was convicted for the murder of Rolland Serrano, a business man operating the Puerto Rico Lottery in the British Virgin Islands. The deceased was shot outside of his apartment building at Sea Cows Bay on the morning of 15th September 2005, during a robbery, and died subsequently from his gunshot wound on 10th October 2005.

[2] The appellant was on the date of his conviction sentenced to life imprisonment. In passing sentence the learned trial judge stated:

¹ Act No. 1 of 1997 of the Laws of the Virgin Islands.

“You have heard the verdict of the jury. The charge on which you were indicted, the charge of murder and by the laws of the British Virgin Islands as to the penalty, the Court has no discretion on the penalty. So you are hereby sentenced to life imprisonment.”

The Appeal

[3] On 11th April 2007, the appellant appealed only against his conviction. The hearing of the appeal was traversed on several occasions, on the appellant's applications with the approval of the Director of Public Prosecutions. The applications were made in anticipation of a fundamental reappraisal of the sentencing regime for murder, following the order of the Privy Council in other matters;² as well as certain proposed changes in the law reflected in the Bill for the Parole Board Act, 2009.

[4] On 20th May 2009, the Parole Act³ came into force in the British Virgin Islands. Section 30(2) of the Parole Act states as follows:

“Where on the commencement of this Act, a criminal appeal is pending before the Court of Appeal, the Court may, in delivering its judgment, revise the sentence of the High Court to bring it into conformity with this Act.”

[5] Section 9 of the Parole Act which contains relevant provisions for the purposes of this appeal states as follows:

“(2) A judge upon sentencing a person to imprisonment for life, shall state whether such person may be eligible to be considered for parole and, if a person is found to be so eligible, state a minimum period of imprisonment that such person shall serve before being considered for parole for the first time.

...

(5) For the purposes of determining the length of that part of the sentence which a prisoner has served, any period pending the determination of an appeal against conviction or sentence shall be taken into account as if he or she has served that period as part of the sentence, unless the court hearing the appeal otherwise directs.”

² The Privy Council remitted the matter of sentencing for murder to the Court of Appeal for further consideration of the mandatory sentence of life imprisonment in *Lorne Parsons v The Queen* Criminal Appeal No. 2 of 2006 (BVI) and *Clinton Hamm v The Queen* Criminal Appeal No. 3 of 2006 (BVI).

³ Act No. 7 of 2009 of the Laws of the Virgin Islands.

- [6] It is against this background that on 11th January 2010 we granted the appellant permission to appeal against sentence also; and further, to limit the appeal to an appeal against sentence only on the ground that “the sentence of life imprisonment is not automatic on the verdict of guilty of murder.” The appeal against conviction was thereby treated by the court as abandoned.
- [7] An historical insight into the law governing the punishment for murder in the Virgin Islands and the United Kingdom puts the issues arising from the ground of appeal and the arguments of counsel into proper perspective. Formerly, the sentence of death was the penalty for murder where it was provided by sections 2 and 3 of the **Offences Against the Person Act**⁴ that: “2. Whosoever is convicted of murder shall suffer death as a felon. 3(1) Upon every conviction for murder, the Court shall pronounce sentence of death, and the same may be carried into execution...”
- [8] Although the revoked Constitution Orders of the Virgin Islands⁵ did not provide for the imposition of the death penalty, they recognized the sentence of death as a lawful penalty, by vesting in the Governor the right of pardon and the power to commute or remit punishment including the death sentence, imposed by any court exercising criminal jurisdiction. Section 11 of the repealed **Virgin Islands (Constitution) Order 1976 (As Amended)**⁶ (“the 1976 Constitution Order”) provided for the establishment of and procedure for an Advisory Committee on the Prerogative of Mercy (comprising the Attorney General, the Chief Medical Officer and four members appointed by the Governor after consultation with the Chief Minister) which the Governor was to consult with prior to deciding whether to exercise his powers of clemency under section 10 of the 1976 Constitution. A similar provision exists in section 44 of the **Virgin Islands (Constitution) Order 2007** (“the 2007 Constitution Order”) which came into force on 15th June 2007.

⁴ Cap. 53, Revised Laws of the Virgin Islands 1991.

⁵ See The Virgin Islands (Constitution) Orders 1967 to 1971 and The Virgin Islands (Constitution) Order 1976 (As Amended).

⁶ Statutory Instruments 1976, No. 2145 (now repealed).

[9] Section 10 of the 1976 Constitution Order is similar to section 43 of the 2007 Constitution Order, save for the provision in section 10(3) and its proviso, which is absent from section 43 of the 2007 Constitution Order. Section 10 of the 1976 Constitution Order provided the following:

“10. (1) The Governor may, in Her Majesty’s name and on Her Majesty’s behalf –

(a) grant to any person concerned in or convicted of any offence against any law in force in the Virgin Islands a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any sentence passed on that person for such an offence;

(c) substitute a less severe form of punishment for that imposed by any sentence for such an offence; or

(d) remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to Her Majesty on account of such an offence.

(2) In the exercise of his powers under this section the Governor shall consult with the Committee established under section 11 of this Order, but he shall decide whether to exercise any of those powers in any case in his own deliberate judgment, whether the members of the Committee concur in his decision or otherwise.

(3) Without prejudice to the provisions of the last foregoing subsection, whenever any person has been sentenced to death (otherwise than by Court Martial) for an offence against any law in force in the Virgin Islands the Governor shall call upon the judge who presided at the trial to make him a written report of the case of such offender and shall cause such report, together with such other information derived from the record of the case or elsewhere as the Governor may require, to be taken into consideration at a meeting of the Committee so that the Committee may advise him on the exercise of his powers under this section in relation to that person:

Provided that if it is impracticable to obtain such a report, the Governor may act without such a report, but in that case shall, if practicable, cause to be taken into consideration a report furnished by the registrar of the court after consulting counsel for the prosecution and defence in the case.”

[10] By section 3 of the Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991 (“the Imperial Order”)⁷ the penalty was changed where it was

⁷ Imperial Statutory Instrument 1991 No. 988. This Order which extends to the territories of Anguilla, British Virgin Islands, Cayman Islands, Montserrat and Turks and Caicos Islands came into force on 10th May, 1991.

enacted that: “Notwithstanding the provisions of any other law in force in the Territory, no person shall be sentenced to death by any court in the Territory for the crime of murder, and a person convicted of murder shall be sentenced to imprisonment for life.”

- [11] Subsequently, section 150 of the Criminal Code 1997 (“the Code”)⁸ re-stated the law thus: “Any person who is convicted of murder is liable to imprisonment for life.” Section 23(1) of the Code provides further:

“A person liable to imprisonment for life or any other period may be sentenced to a shorter term, except in the case of a sentence passed in pursuance of section 150.”

- [12] This legislative history clearly indicates that traditionally, the legislature’s intention has been to distinguish murder as a uniquely grave offence from other types of offences which also carry a maximum penalty of life imprisonment.⁹ The penalty for murder in the Virgin Islands is presently interpreted as mandatory life imprisonment, while for these other types of offences it is discretionary life imprisonment.¹⁰

The Submissions of Appellant’s Counsel

- [13] Learned Queen’s Counsel, Dr. Archibald, questioned the interpretation that the learned trial judge placed on section 23(1) of the Code; and he submitted that this interpretation should be changed because of the current Constitution and the practice obtaining in England. He contended that section 115(1) of the 2007

⁸ Act No. 1 of 1997 of the Laws of the Virgin Islands.

⁹ See sections 117(1), 152, 153(2), 163, 210(2) and 212(3) of the Virgin Islands Criminal Code 1977 which provide the maximum penalty of life imprisonment for the offences of rape, attempted murder, manslaughter, wounding or causing grievous bodily harm with intent, robbery and aggravated burglary respectively.

¹⁰ See also section 160 of the Prison Rules dated 19th June 1956, and amendments made under section 27 of the Prison Ordinance which provide for remission as follows: “Arrangements shall be made by which a prisoner serving a sentence of imprisonment, whether by one sentence or by consecutive sentences, for a period exceeding one month, including a person committed to prison in default of payment of a sum adjudged to be paid by a conviction, may by good conduct and industry, become eligible for discharge when a portion of his sentence not exceeding one third of the whole sentence has yet to run: Provided that nothing in the said arrangements shall authorize the reduction of a period of imprisonment to a period less than 31 days.”

Constitution Order obliges the Court to interpret section 150 of the Code¹¹ in such a manner as to conclude that it does not mean an automatic whole-life sentence, but rather at least a specific term of years to be imposed by a trial judge subsequent to the verdict.¹² He submitted that the automatic whole-life sentence restrains the judge from carrying out a judicial function by exercising his/her discretion in determining the appropriate sentence to be imposed based on the appellant's culpability, his personal circumstances, and the circumstances of the offence. He contended that the punishment of life imprisonment for murder should be imposed after a sentencing hearing has been conducted.

The Respondent's Position

- [14] Learned Senior Crown Counsel Mrs. Raphael-DeJonge, submitted that the Parole Act came into force to bring into conformity the law as it related to the mandatory life sentence with that which obtains in the United Kingdom under the Criminal Justice Act 2003, recognising the human rights and constitutional implications involved in the mandatory life sentence. She submitted that the issue raised by the ground of appeal against sentence has now become an incontestable point in light of section 30 of the Parole Act; and it would be an effort in futility to pronounce on such an issue when it would have no retroactive effect. I do not agree with this posture for the following reasons. It cannot be said that the issue presented is no longer determinative of a live controversy. This is not a matter in which the Court is being asked to give an advisory opinion on the constitutionality of the mandatory life sentence. The issue raises a significant and important question not previously determined by this Court which may have implications for

¹¹ See paragraph 11 above.

¹² Section 115 of the 2007 Constitution Order states: "115(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of or in consistency with this Constitution and shall be construed with such adaptations and modifications as may be necessary to bring them into conformity with this Constitution ... (2) The Legislature may by law make such amendments to any existing law as appear to it to be necessary or expedient for bringing that law into conformity with this Constitution or otherwise for giving effect to this Constitution; and any existing law shall have effect accordingly from such day, not being earlier than the appointed day, as may be specified in the law made by the Legislature. (3) In this section "existing laws" means laws and instruments (other than Acts of the Parliament of the United Kingdom and instruments made under them) having effect as part of the law of the Virgin Islands immediately before the appointed day.

other territories also within the jurisdiction of this Court. As Dr. Archibald pointed out, the jurisdiction of the Court of Appeal does not arise from the provisions under the Parole Act. It arises from the challenge to the constitutionality of the sentence. It appears to me that it is only after the Court determines the issue at hand that the matters arising from the enactment of section 30 of the Parole Act may be addressed. I therefore do not regard the issue as a moot one.

Analysis of the Submissions for the Appellant

[15] At the time when the sentence was passed on the appellant, it was the 1976 Constitution Order that was in force. The 2007 Constitution Order came into force on 15th June 2007, more than a month after the sentence was passed.

[16] Section 67 of the 1976 Constitution Order which is comparable to section 115 of the 2007 Constitution Order states :

“67. (1) The existing laws shall, as from the coming into operation of this Order, be construed with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order.

(2) (a) The Governor may, by order published in the Gazette and made at any time before the expiration of one year commencing with the coming into operation of this Order, make such amendments to any existing law as appear to him to be necessary or expedient for bringing that law into conformity with the provisions of this Order or otherwise for giving effect or enabling to be given to those provisions.

(b) An order made under this subsection shall have effect from such date, not being earlier than the coming into operation of this Order, as may be specified therein, and may be revoked or amended in relation to any law affected thereby by the authority competent to repeal or amend that law.

(3) In this section “existing law” means any Act or Ordinance enacted by any legislature established for the Virgin Islands or the former Colony of the Leeward Islands, or any rule, regulation, order or other instrument made thereunder, that has effect as part of the law of the Virgin Islands immediately before the coming into operation of this Order.”

[17] In one of the cases that Dr. Archibald relied on: *Bowe (Forrester) and Davis (Trono) v R*,¹³ the appellants challenged the constitutionality of the requirement

¹³ (2006) 68 W.I.R. 10 (Bahamas Privy Council Appeal).

that sentence of death be passed on adults (other than pregnant women) convicted for murder; where successive Constitutions of the Bahamas had explicitly recognized and preserved the death penalty. The Privy Council evaluated the parties' conflicting submissions and authorities on the constitutional provisions in the Bahamas Constitutions of 1963, 1969 and 1973, on the main issue¹⁴ that the mandatory death penalty prescribed by section 312 of the Penal Code of the Bahamas was an inhuman and degrading punishment¹⁵. Having accepted in principle the proposition that under an entrenched and codified Constitution on the Westminster model, consistent with the rule of law, any discretionary judgment on the measure of punishment which a convicted defendant should suffer must be made by the Judiciary and not by the Executive, the Privy Council reasoned that:

"[42] The task of the court today is not to conduct a factual enquiry into the likely outcome had the present challenge been presented on the eve of 1973 Constitution. ... The task is to ascertain what the law, correctly understood, was at the relevant time, unaffected by later legal developments, since that is plainly the law which should have been declared had the challenge been presented then ... What matters is what the Constitution says and what it has been interpreted to mean ... The appellants should not be denied such protection because, a quarter century before they were condemned to death, the law was not fully understood. [43] The Board will accordingly advise Her Majesty that section 312 should be construed as imposing a discretionary and not a mandatory sentence of death. So construed, it was continued under the 1973 Constitution." (My emphasis)

[18] The rationale for its decision was that section 4(1) of the 1963 and 1969 Constitutions imposed a mandatory duty to construe existing laws with such modifications, adaptations, qualifications and exceptions as were necessary to bring them into conformity with the constitutional provisions on (inter alia) human rights; and since section 312 of the Penal Code required the death penalty

¹⁴ At paragraphs 28 and 29.

¹⁵ All of the Constitutions contained a provision similar to section 3 of the 1963 Constitution which provided "(1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the Bahama Islands immediately before the coming into operation of this Constitution."

(subsequently recognised to be an inhuman or degrading punishment) to be imposed on any person convicted of murder (apart from the excepted category of persons), section 312 should have been construed before the 1973 Constitution as prescribing the imposition of a discretionary penalty (and not mandatory) for murder; despite article 30(1) of the 1973 Constitution which precluded any challenge to an existing law on the grounds of inconsistency with the human rights guarantees.

[19] Dr. Archibald did not in his written or oral submissions identify any provision(s) on human rights in the 2007 Constitution Order that the existing law in section 150 of the Code was not in conformity with, unlike the situation in *Bowe (Forrester)* and *Davis (Trono)*. In any event, the 1976 Constitution Order contains no human rights provisions. Applying the reasoning of the Privy Council in *Bowe (Forrester)* and *Davis (Trono)*, I am of the view that the constitutional issue raised by Dr. Archibald should be resolved by ascertaining what the law including the provisions in the 1976 Constitution Order, correctly understood, was on 28th March 2007, when sentence was passed, unaffected by the legal developments arising from the enactment of the *Parole Act 2009*. This authority therefore is of limited scope in advancing the submission as to the constitutionality of section 150 in my view.

[20] Dr. Archibald also referred us to the decision in *R v Robinson*¹⁶ where one of the issues for the Court of Appeal, arose from the provision in section 288(1) of the *Criminal Code Act 1970* as amended. This provision enacted that: “Any person who commits the offence of murder shall be sentenced to imprisonment for life: Provided that where any person is sentenced under this section, such person shall, before any application for his release on licence may be entertained or granted by the Parole Board established by the *Parole Board Act 2001*, serve at least fifteen years of the term of his imprisonment.” The issues raised in that appeal were: (a) whether in light of the Constitution of Bermuda specifically section 1 (Fundamental Rights and Freedoms of the Individual); section 3 (Protection from Inhuman Treatment); and section 5 (Protection from Arbitrary Arrest or Detention)

¹⁶ (2009) 74 W.I.R. 243 (Court of Appeal of Bermuda).

the word “shall” in section 288(1) should be read as “may” in order to construe the section as authorising a discretionary and not a mandatory sentence of life imprisonment; and (b) whether the proviso to section 288(1) should be declared absolutely void and inoperative for imposing a minimum tariff period of 15 years for all cases of murder, regardless of the circumstances of the individual case and offender.

[21] Nazareth J.A. at paragraph 18 of the judgment observed:

“Whilst the legislature can determine what conduct is to be regarded as criminal, and what sentences may be passed for each offence, this power can only be exercised in general terms. The legislature cannot act in *hominem* (*Liyanage v R* [1966] 1 ALL ER 650, [1967] 1 AC 259), nor may it determine what sentence shall be passed in individual cases. The underlying principle was discussed in the judgment of the Privy Council in *Bowe (Forrester) v R* [2006] UKPC 10, (2006) 68 W.I.R. 10 which was concerned primarily with the ‘clear line of demarcation between the power and authority of the judiciary and the power and authority of the executive’ (per Lord Bingham at [36]) but which also referred to the question whether ‘judicial power was intended to be shared with the legislature’ and to the ‘clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case’...”

[22] Having reviewed the numerous authorities from the United Kingdom in support of the arguments advanced for the parties, the Court rejected the appellant’s contention that section 288(1) should be read as authorising a discretionary rather than a mandatory life sentence. The Court allowed the appeal to the extent that it held the reference to a 15 year minimum period in the proviso to section 288(1) of the Criminal Code Act 1970, as amended to be unconstitutional and void, in so far as it purports to impose a minimum tariff period of 15 years for all cases of murder which is a matter for the trial judge. It was concluded also (at paragraph 23 of *R v Robinson*) that “when passing a sentence of life imprisonment under s 288 (1) of the Act, as amended, the trial judge is required as part of the sentencing process to determine what minimum period of the sentence shall be served as the so-called tariff period, namely, for the purposes of retribution and deterrence in the circumstances of the particular case; and ... we determine that the appellant shall

serve a minimum period of 12 years before becoming eligible for parole under the Parole Board Act 2001”.

- [23] Considering that this question of constitutionality has not been raised by the appellant within the context of the provisions in the new Parole Act 2009, or in connection with any specific human rights provision(s), my assessment has to proceed on a qualitatively different footing from the decisions in *Bowe (Forrester)* and *Davis (Trono)* and *Robinson*. I am therefore of the view that this court must determine the ground of appeal and Dr. Archibald's submissions broadly on the issue concerning the separation of powers under the Constitution Order 1976 as amended, on the basis that the legislature by enacting sections 23(1) and 150 of the Code which is interpreted to mean that a mandatory life sentence is to be imposed for the offence of murder, has usurped the powers of the judiciary which are incompatible with the Constitution. Before addressing these matters it is convenient to review the practice obtaining in England which Dr. Archibald advocates should be applied in the Virgin Islands.

The Practice in England

- [24] Mandatory life imprisonment has also been the sentence for murder in the United Kingdom since the abolition of the death penalty there in 1965. Traditionally, this sentence was treated as indeterminate in England up until their evolving jurisprudence and statute law changed the approach to their tariff-fixing regime. Unlike the situation in the Virgin Islands, it was enacted in section 1(2) of the *Murder (Abolition of Death Penalty) Act 1965 (UK)* for the trial judge to make public recommendations at the time of passing sentence, as to the minimum period of years which would elapse before the Secretary of State exercises his discretion to order release on licence. Section 2 of this same Act further stipulated that no person convicted of murder would be released on licence unless the Home Secretary had previously consulted the Lord Chief Justice and the trial judge, if available. No similar provisions exist in the Virgin Islands domestic law.

[25] In *R v Secretary of State for the Home Department, Ex p. Doody*¹⁷ the judgment of Lord Mustill at pages 552 to 556 helpfully chronicles the history of the punishment for murder after this 1965 Act in the following manner:

“(3) Two years later, the Parole Board was created by the Criminal Justice Act 1967. As part of the new scheme the provision for consultation with the Lord Chief Justice and the trial judge was repealed and replaced by a similar requirement, on this occasion made applicable to discretionary as well as mandatory life sentences, and coupled with the condition that the Home Secretary should not release the prisoner unless he was recommended to do so by the Parole Board. In practice the advice of the Parole Board was not obtained (in the absence of exceptional mitigating circumstances) until the Board conducted a first review of the prisoner’s sentence after seven years of custody; and the opinion of the Lord Chief Justice and the trial judge ... [“the judges”]] was not at this stage sought unless a recommendation by the Board for release was seriously in prospect (4) ... Throughout this period trial judges continued to write privately to the Home Secretary expressing their opinions on the offence and the offender, although the practice of making recommendations as to minimum sentence, permitted by section 1(2) of the Act of 1965, steadily diminished. (5) So matters continued until 1983, when in response to pressure of public opinion the Home Secretary (Mr. Leon Brittan) announced a series of radical changes in the existing policies relating to the release of prisoners on parole and licence. ... These included the creation of a completely new philosophy and practice for the release of life prisoners on licence. ... This practice was to have the following features. (i) The joint Home Office/Parole Board committee, which had been established to recommend the date for the first review by the Parole Board was disbanded. (ii) Instead, the Home Secretary would himself, after consulting the judges “on the requirements of retribution and deterrence,” fix the date for the first review. (iii) The review would normally take place three years before the expiry of the “period necessary to meet the requirements of retribution and deterrence.” This would give sufficient time for preparations for release, if the Parole Board were to recommend it ... (vi) The consultation with the judges required by section 61 of the Criminal Justice Act 1967 would take place when release was an actual possibility. (vii) In the case of certain types of murder the prisoner would not normally be released until 20 years or even longer had been served ...”

[26] In summary, this practice resulted in the Home Secretary fixing a “tariff” for each case of life imprisonment, both mandatory and discretionary after consultation with the trial judge and the Lord Chief Justice. The tariff would represent the punitive

¹⁷ [1994] 1 A.C. 531

element of the sentence, reflecting what was required by way of retribution and deterrence. It would be the minimum period which the offender was to spend in prison. At its expiry, he would be released unless it was considered that there were grounds to continue his imprisonment. The decision as to whether to release the prisoner at the post-tariff stage was also to be made by the Home Secretary. Since 1983, the Home Secretary's role in the administration of life sentences has been the subject of repeated challenges, both in the domestic courts and before the European Commission and the European Court of Human Rights. Tariff-fixing was accepted by the domestic courts and Strasbourg jurisprudence and also the European Commission as an administrative procedure governing the implementation and not the determination of the sentence, with the result that Article 6(1) of the Convention¹⁸ did not apply to it.

[27] The practice raised several issues in *Ex p. Doody* including whether it altered the status of the judge's sentence, and whether the fixing of the tariff by the Home Secretary formed part of the sentencing process. This case established that the Home Secretary was required to exercise his discretion fairly when fixing the tariff. Accordingly, the prisoner was entitled to know the recommendations of the judiciary as to tariff and the prisoner was entitled to make representations to the Home Secretary.

[28] In 1991 the Strasbourg Court held in *Thynne, Wilson and Gunnell v The United Kingdom*¹⁹ that the practice attracted the protection of the European Convention on Human Rights. It was held that article 5(4) of the Convention²⁰ requires that there be access to a body with judicial characteristics to determine whether continued detention is lawful. The United Kingdom practice was held to violate this article since the decision to continue imprisonment was taken by the Home

¹⁸ Article 6(1) states that: "In the determination...of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

¹⁹ (1991) 13 E.H.R.R. 666. The three applicants received discretionary life imprisonment sentences. Their tariff periods had expired and they were not released by the Home Secretary. They complained about the lack of regular judicial scrutiny of the lawfulness of their detention.

²⁰ "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Secretary, a member of the Executive, and not by a court or a sufficiently judicial body.

- [29] In *Wynne v United Kingdom*²¹ which concerned a mandatory life prisoner, the Strasbourg Court found that there was no violation of Article 5(4) of the Convention in relation to the continued detention after release and recall to prison of a mandatory life prisoner convicted of an intervening offence of manslaughter, the tariff element of which had expired. The Court also explained the rationale for treating mandatory life imprisonment differently from discretionary life imprisonment thus at pages 346 to 347:

“33. The Court recalls its judgment in *Thynne, Wilson and Gunnell v United Kingdom* where it held that discretionary life prisoners were entitled under Article 5(4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court. This view was taken because of the very nature of the discretionary life sentence which, unlike the mandatory life sentence, was imposed not because of the inherent gravity of the offence but because of the presence of factors which were susceptible to change with the passage of time, namely mental instability and dangerousness. A clear distinction was drawn between the discretionary life sentence which was considered to have a protective purpose and a mandatory life sentence which was viewed as essentially punitive in nature. ...35...the mandatory sentence belongs to a different category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender. That mandatory life prisoners do not actually spend the rest of their lives in prison and that a notional tariff period is established in such cases ... does not alter this essential distinction between the two types of life sentence. 36. ...the court sees no cogent reasons to depart from finding in the *Thynne, Wilson and Gunnell* case that, as regards mandatory life sentences, the guarantee of Article 5(4) was satisfied by the original trial and appeal proceedings and confers no additional right to challenge the lawfulness of continuing detention or re-detention following revocation of the life licence.”

- [30] Another significant decision on the practice was in *Regina v Secretary of State for the Home Department Ex parte Anderson*²² where the applications of

²¹ (1994) 19 E.H.R.R. 333.

²² [2002] 2 W.L.R. 1143.

Anderson and another, who were convicted for murder and sentenced to mandatory life imprisonment, complained that the Home Secretary had fixed a tariff superior to that recommended by the judiciary i.e. 20 years instead of 15 years, and 30 years instead of 16 years. The applicants invited the Court to hold that the existing practice violated article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998 UK²³ which came into force on 2nd October 2000. On appeal against the dismissal of the applications, the Court of Appeal rejected the appeals, and held that Parliament had deliberately chosen not to interfere with the Secretary of State's discretion as to the length of the tariff in the case of a mandatory life prisoner although this tariff-fixing exercise was a sentencing exercise, or so closely analogous to a sentencing exercise. That the jurisprudence of the European Court of Human Rights also recognised that there was a material difference between a mandatory and a discretionary life sentence; and accordingly, until developments in that jurisprudence required a different decision, the Court should not interfere with the clearly expressed views of Parliament that the Secretary of State was entitled to fix the tariffs of mandatory life sentence prisoners.

- [31] Subsequently, in *Stafford v United Kingdom*²⁴ the European Court of Human Rights held on 28th May 2002, after a detailed review of case law, on the existing practice, that: (a) *Wynne v UK* was not definitive and should be re-examined; (b) that the domestic jurisprudence in England and Wales showed that there was in reality no difference in principle between mandatory and discretionary life sentences; (c) that the tariff-fixing exercise was part of the sentencing process; (d) that accordingly, the post-tariff detention period raised issues of potential unlawfulness and required compliance with article 5(4) of the Convention; (e) that the United Kingdom was in contravention of article 5(4) of the Convention in that the decision whether to release after the tariff period was not taken by a body qualifying as judicial, but by the Home Secretary; (f) that the continued

²³ Supra note 17.

²⁴ (2002) 35 E.H.R.R. 32.

imprisonment pursuant to the Home Secretary's decision after expiry of the tariff period where there was no risk of violent offending infringed article 5(1) of the Convention which limits the deprivation of liberty to include among other things, the lawful detention after conviction by a competent court the United Kingdom's treatment of mandatory life sentences.

[32] Following the decision in *Stafford*, the House of Lords decided in *R v Secretary of State for the Home Department Ex parte Anderson*²⁵ in November 2002, that in accordance with the will of Parliament expressed in the Human Rights Act 1998, they should seek to give effect to the decision of the European Court in *Stafford*. Subsequently, Parliament enacted sections 269 to 277 of the Criminal Justice Act 2003 ("Act 2003").

[33] In accordance with section 269 of Act 2003 all courts passing mandatory life sentences are required to order the minimum term the prisoner must serve before the Parole Board can consider release on licence, unless the seriousness of the offence is so exceptionally high that a whole life order is appropriate and the early release provisions should not apply. The court must take into account the seriousness of the offence (or the combination of the offence and any one or more offences associated with it); and any time served in custody on remand: (see section 269(3)). In considering the seriousness of the offence judges must have regard to the general principles set out in Schedule 21 of Act 2003: (see section 269(5)(a)). The court must first allocate a starting point, and then consider any aggravating or mitigating factors, plus the effects of the defendant's previous convictions, any plea of guilty and whether the offence was committed on bail. The court has a duty to state in open court, in ordinary language its reasons for arriving at the minimum term, including which starting point in Schedule 21 it selected and why: (see section 270). The court can depart from the statutory guidance where appropriate, but it must state its reasons for departing from that guidance: (see section 270(2)(b)).

²⁵ [2002] 3 W.L.R. 1800; [2002] 4 All E.R. 1089.

- [34] The current sentencing regime in England now provides therefore that a life sentence is comprised of a punitive period (“the tariff”) and, when the tariff has expired a subsequent period of preventative detention.

The Virgin Islands Regime Before the Parole Act 2009

- [35] The practice obtaining in England was never adopted by the Virgin Islands, and cannot be successfully grafted onto the Virgin Islands’ regime for very good reasons. There is material divergence from the English position which is primarily due to the statutory framework existing in the Virgin Islands which is different from that existing in England. The sentence of mandatory life imprisonment for murder truly took effect as an indeterminate sentence in the Virgin Islands. The learned trial judge adopted the established practice under the relevant statutory provisions and, sentenced the appellant to mandatory life imprisonment. This is an indefinite period as neither the judge nor the appellant knows how long he will in fact serve, or whether he will ever be released. In the execution of the sentence, the probability or availability of executive clemency is an integral part of the institutional framework in which the indeterminate sentence is to be served. By the operation of this non-judicial measure, the appellant could be released either unconditionally or on licence in the future.

- [36] I now return to the matter of the separation of powers under the 1976 Constitution Order. In one of the decisions that learned counsel Mrs. Raphael-DeJonge brought to our attention *David Roberts v The Queen*,²⁶ it was argued among other things on behalf of the appellant that the imposition of a sentence of life imprisonment for murder, where there exists no formalised system of parole for fixing a maximum punitive penalty, violated the doctrine of separation of powers; in that it is an indeterminate sentence that effectively hands over to the Executive the decision as to the actual length of sentence the offender will serve. The Court of Appeal concluded (at paragraph 31) that:

“The maximum sentence for murder is death. After a sentencing hearing he was sentenced to life imprisonment by the court. Mr. Roberts was

²⁶ Criminal Appeal No. 8 of 2008 (St. Vincent and the Grenadines), delivered 16th September 2009.

deprived of his liberty in execution of the sentence of the court. It did not fall to the executive to determine the measure of punishment he would undergo. The decision on the length of sentence was not entrusted to the executive. The discretion as to the severity of the punishment to be inflicted was always the province of the judiciary. The judicial exercise of sentencing was exercised by the judiciary. [32] ... It is true that under section 65(1) of the Constitution the Governor-General may grant a pardon, respite or effect an act of remission in respect of a convicted person. In so doing the Governor-General would not be engaging in or performing a sentencing exercise. It is an act of executive clemency. In the circumstances, the separation of powers doctrine would not be violated. Support for that proposition is found in the case of *Reyes v R*²⁷."

[37] However, Dr. Archibald's contention is somewhat different from that in *David Roberts v The Queen*. I do not understand Queen's Counsel to be questioning the effect of the exercise of the prerogative of mercy where there is a sentence of discretionary life imprisonment for murder. In *David Roberts* it was not a mandatory life imprisonment but a discretionary life imprisonment that was imposed after considering whether the death sentence, which has not been abolished in St. Vincent and the Grenadines, was appropriate. Dr. Archibald is challenging the fixed mandatory life imprisonment penalty which was imposed by the judge without carrying out any sentencing exercise where the death sentence has been abolished.

[38] Learned counsel Mrs. Raphael-DeJonge also referred us to *Thelbert Edwards v The Queen*²⁸ in which it was argued that the mandatory minimum sentence of 5 years provided by section 73(1)(b) of the Motor Vehicle Road Traffic Act No. 10 of 2003²⁹ for the offence of causing death by dangerous driving, contravened section 5 of the Saint Lucia Constitution which provided that no person shall be subject to torture or to inhuman and degrading punishment or other treatment. It was held that section 73(2)(a) is in breach of section 5 of the Constitution in that the mandatory minimum sentence of five years imprisonment for the crime of causing

²⁷ (Belize) [2002] UKPC 11 per Lord Hoffmann at paragraph 44.

²⁸ Criminal Appeal No. 3 of 2006 (Saint Lucia).

²⁹ "73 (1) No person shall – (a) cause the death of another person by dangerous driving; or (b) drive dangerously on any road.

(2) A person who contravenes section 1 (a) commits an offence and is liable on conviction on indictment as follows – (a) to imprisonment for a term of not less than five years and not more than fifteen years;"

death by dangerous driving constitutes inhuman and degrading punishment. However, this decision must be distinguished from the present case. As previously stated, there is no allegation that an identifiable human rights provision was contravened; and furthermore, the Virgin Islands provision does not provide a mandatory minimum sentence.

[39] The circumstances existing in the recent case *Peter Whelan v The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*³⁰ presented a similar issue as the present appeal in my view. In that case, section 1 of the Criminal Justice Act 1990 of Ireland abolished the death penalty while section 2 provides for a mandatory life sentence for the crime of murder, leaving the courts no discretion but to impose it once a person is convicted of the crime. Article 13.6 of the Constitution as amended vests in the President the right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction; and further provides that such powers can also be conferred by law on other authorities.

[40] Section 2(1) of the Irish Criminal Justice Act 1960, as amended by the Criminal Justice (Temporary Release of Prisoners) Act 2003 confers on the Minister the discretionary power to grant temporary release to persons imprisoned subject to such specified conditions in certain specified circumstances. It was argued that this section enables the Minister to select the punishment which a person convicted of murder must undergo and offends against the separation of powers doctrine pronounced on by O'Dalaigh C.J., in the early authority of *Deaton v Attorney-General and the Revenue Commissioners*³¹.

[41] O'Dalaigh C.J. in *Deaton* authoritatively declared the law thus:

“There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the

³⁰ [2010] I.E.S.C. 34 (delivered 14th May 2010).

³¹ [1963] I.R.170. This authority was approved and applied by the Privy Council in *Bowe (Forrester) and Davis (Trono)* (at page 30).

characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the offence must bear the same punishment. But if the rule is stated by reference to a range of penalties to be chosen from according to the circumstances of the particular case, then a choice or selection of penalty falls to be made. At that point the matter has passed from the legislative domain. ... Traditionally, as I have said; this choice has lain with the Courts. Where the Legislature has prescribed a range of penalties the individual citizen who has committed the offence is safeguarded from the Executive's displeasure by the choice of penalty being in the determination of an independent judge. The individual citizen needs the safeguard of the Courts in the assessment of punishment as much as on his trial for the offence. The degree of punishment which a particular citizen is to undergo for an offence is a matter vitally affecting his liberty; and it is inconceivable to my mind that a Constitution which is broadly based on the separation of powers could have intended to place in the hands of the Executive the power ... to select the punishment to be undergone by citizens. It would not be too strong to characterize such a system of government as one of arbitrary power. ... In my opinion the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive."

[42] The appellant's counsel in *Peter Whelan* contended that the sentence of mandatory life imprisonment was not a fixed penalty within the *Deaton* principle since the Minister has the ultimate say on how long the prisoner sentenced to life imprisonment will actually remain in prison; and the provision requiring a court to impose a mandatory life sentence in such circumstances constitutes an unconstitutional breach of the separation of powers. Another parallel proposition was that the offending provision should be interpreted as permitting a judge imposing a life sentence under section 2 to make a recommendation as to the minimum period the prisoner should be required to serve before the Minister should consider remission or conditional release. This would permit a judicial input into the sentencing and respond adequately to the constitutional principles of proportionality and separation of powers.

[43] It was held among other things that section 2 of the Act of 1990 in requiring the imposition of a mandatory life sentence for murder is not repugnant to the

Constitution; that the sole function of the Court under the clear terms of section 2 is to impose a sentence of life imprisonment which is compatible with the Constitution; that a life sentence imposed pursuant to section 2 is a sentence of a wholly punitive nature which does not incorporate any element of preventative detention; that the offender may by virtue of a discretionary power vested in the Executive be temporarily released under the provisions of the relevant legislation on humanitarian or other grounds; that the exercise of that discretion is not one to which the prisoner is entitled as of right as it is a privilege or a concession accorded to him at the discretion of the Executive which is clearly not on par with the right to liberty enjoyed by the ordinary citizen.

[44] Murray C.J., in delivering the judgment of the Court, stated: (i) that the legislature in the exercise of its legislative powers may choose in particular cases to impose a fixed or mandatory penalty for a particular offence; (ii) the crime of murder has always and legitimately been considered to be one of profound and exceptional gravity and, in the Court's view, one for which the State is entitled to impose generally a punishment of the highest level which the law permits, and given that it is an offence which is committed when, and only when a person is unlawfully killed and that the person so doing intended to kill or cause serious injury, it is one which can therefore be properly differentiated from all other crimes including manslaughter; (iii) that the duty to impose a sentence which is proportionate or appropriate to the circumstances of the case only arises where a judge is exercising a judicial discretion as to sentence to be imposed within the parameters laid down by the law, and it does not arise where a court is lawfully imposing a fixed penalty generally applicable to a particular offence as described in *Deaton*.

[45] I adopt and apply this reasoning of Murray C.J. to sections 23(1) and 150 of the Criminal Code 1997. The penalty in section 23(1) is clearly a fixed penalty prescribed by legislative judgment for the offence of murder having regard to its gravity, despite the different circumstances in which the offence may be committed. Indeed, these provisions mirrored the Imperial Order of the U.K extended to the Territory, which substituted mandatory life for mandatory death

when it enacted the Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991 referred to at paragraph 10 above. That fixed penalty under the principle in *Deaton* is not incompatible with the doctrine of the separation of powers under the 1976 Constitution Order, nor for that matter the 2007 Constitution Order. That legislative judgment must be respected in my view, subject of course to any statute-based regime for a tariff to be fixed which is compatible with the Constitution, and/or for review or clemency.

- [46] There is therefore no lawful reason to adapt or modify these questioned statutory provisions so as to bring them into conformity with the Constitution. I would uphold the decision of the trial judge which imposed an automatic sentence of mandatory life imprisonment on the appellant without conducting a sentencing hearing. That, however is not the end of the matter, having regard to the statute-based regime currently existing and in particular section 30(2) of the Parole Act³² which gives this Court a discretion to consider revising the sentence to bring it in conformity with this Act.

The Court's Discretion to Revise Sentence

- [47] Dr. Archibald exhorted the Court to set a precedent in the OECS jurisdiction in particular, to ensure that in every case of a conviction for murder there should be a starting point of a sentence of a specific number of years, having regard to the degree of culpability of the convicted person on the facts of the case, to be increased or reduced according to well established factors; and that the issue of parole should be considered along the same lines as now obtains in England.
- [48] Learned Senior Crown Counsel countered by stating that this Court ought not to exercise that discretion in light of all of the circumstances of the case. She urged the Court to remit the matter to the High Court for the trial judge who would be au fait with all of the circumstances of the case to pronounce on the eligibility for

³² "Where on the commencement of this Act, a criminal appeal is pending before the Court of Appeal, the Court may in delivering its judgment, revise the sentence of the High Court to bring it in conformity with this Act."

parole, and where necessary the minimum term, having regard to section 30(1) of the Parole Act.

- [49] Applying the practice existing in England under Act 2003, she submitted that despite section 30(1) of the Parole Act, by paragraph 6 of Schedule 22 of Act 2003, the practice for transitional cases where no minimum term has been set is for the Home Secretary to refer the case to the High Court for a minimum term to be set. The procedure is similar to where the prisoner applies to the High Court Judge for a review of the minimum term previously set by the Home Secretary. That practice under paragraph 3 of Schedule 22 of Act 2003, requires the High Court Judge to consider (a) the trial judge's report, (b) the antecedents of the prisoner; (c) any representations made on behalf of the offender; (d) written representations made on behalf of the victim's family as to the impact of the offence upon them should the family wish it. By a Practice Direction in *Attorney General's Reference No. 38 of 2008*³³ the Crown Prosecution Service should also be invited to make whatever representations to the Court it considers to be appropriate. She submitted that were the Court to consider revising the sentence, it would be doing so in a vacuum, without the necessary representations and information being made available to assist the Court in making the determination.

The English Procedure

- [50] There are no domestic rules prescribing the standards and criteria to be adopted in revising the sentence of the appellant or setting the minimum period for imprisonment. Section 48 of the Criminal Procedure Act³⁴ mandates that matters of procedure not expressly covered by domestic legislation be regulated by the law of England and the practice of the Superior Courts of Criminal Law in England. Learned counsel Mrs. Raphael-DeJonge has by these submissions helpfully guided the Court and we are grateful for this assistance.

³³ [2008] E.W.C.A. Crim. 2122 (Reginald Wilson).

³⁴ Cap. 18 Revised Laws of the Virgin Islands 1991.

- [51] I note that Dr. Archibald has made no representations to assist us in accepting his proposal that the normal starting point of 12 years be varied to take into account aggravating and/or mitigating factors relating to the offence and the offender. It is not explained on what basis the starting point would be 12 years.
- [52] The basic starting points are set out in Schedule 21 of Act 2003:
- (a) For adults 21 years and over there are four starting points:
 - a whole life order,
 - 30 years,
 - 25 years (effective from 2nd March, 2010); and
 - 15 years.
 - (b) For 18 to 20 year olds there are three starting points:
 - 30 years,
 - 25 years (effective from 2nd March, 2010); and
 - 15 years.
 - (c) For youths there is one 12 year starting point.
- [53] The record does disclose (at Tab 4 page 73 lines 4 to 7) that the appellant was 26 years old at the date of the offence, having been born on 13th May 1979. The guidelines under Schedule 21 establish that for an offender over 21 years, a whole life is appropriate where the Court takes the view that the seriousness of the offence is exceptionally high; and the seriousness of the offence is determined by applying Schedule 21 and the aggravating and mitigating factors. Examples are given in Schedule 21 for the types of murder which may be included as being exceptionally serious. There are also examples of the types of murder which may be included as being not so serious to warrant a whole life order, but the seriousness of the offence is particularly high as to attract a starting point of 30 years; and a murder involving the use of a firearm, or a murder done for gain in the course of a robbery falls in this 30 years starting point category.

[54] I am therefore of the view that having regard to the applicable procedure previously mentioned, this Court has not been placed in the position to be able to determine and state whether the appellant may be eligible to be considered for parole, or to state a minimum period of imprisonment that the appellant should serve before being considered for parole for the first time. Consequently, I would decline to exercise the jurisdiction envisaged by section 30(2) of the Parole Act. In accordance with section 30(2) of the Parole Act the appellant may apply to the High Court for a review of the sentence imposed.

[55] I would dismiss the appeal and affirm the fixed sentence of mandatory life imprisonment in the circumstances.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice M. Pereira
(formerly Janice George-Creque)
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal