

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCRA2023/0001

BETWEEN:

KURTLY GARVEY CADETTE

Appellant

and

THE KING

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Eddy D. Ventose

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Al C. Elliot and Ms. Mercaira Malaykhan for the appellant
Mr. Linton Robinson and Mr. Curtis Raphael and Mr. Peter Moyston
for the respondent

2025: January 16;
April 9.

Criminal appeal – Appeal against sentence – Legitimate expectation of sentence – Sentence indication – Right to legal representation in criminal proceedings – Whether the sentence imposed is unfair - Whether the sentence imposed is excessive and disproportionate

On 3rd May 2017 before a judge of the High Court, the appellant was committed to stand trial for the offence of murder. The prosecution contended that on 25th November 2016, the appellant intending to cause grievous bodily injury, did cause the death of Elie Mathurin a.k.a. Boxi (“the deceased”) contrary to section 85 (b) and 87 (2) of the Criminal Code Revised Laws of St. Lucia. Through his counsel at the time, the appellant expressed his interest in entering an early guilty plea for the lesser offence of manslaughter. The prosecution was ordered by the learned judge to review the evidence and advise on their position.

On 24th May 2017 on behalf of the appellant, counsel orally requested a sentence indication. On 17th November 2017, the prosecution made an application to withdraw and substitute the indictment filed on 17th May 2017 with an indictment filed on 17th November 2017. The application was granted and counsel for the appellant in the lower court requested time to advise the appellant on the new indictment. The appellant was arraigned on this fresh indictment and pleaded not guilty to the charge of murder. A sentence indication was again requested on 8th March 2018 and the court ordered the filing of an agreed summary of facts and submissions to advance the matter. By 15th June 2018 neither the agreed summary of facts nor submissions had been filed. However, during the course of the proceedings, the learned judge enquired of the prosecution an appropriate sentence in terms of years that they would be willing to accept if agreed by the appellant's counsel. The prosecution suggested that a range of 6-8 years may be appropriate. The matter was adjourned to 21st June 2018 to allow the appellant to confer with his counsel.

When the matter was called on 21st June 2018, counsel for the appellant indicated that he was under the impression that the judge had given a sentence indication at the previous hearing. Both counsel for the prosecution and the presiding judge robustly contradicted this assertion making it clear that although counsel for the prosecution may have made certain representations regarding sentence, the judge had not issued any sentence indication. The matter was briefly stood down and when it eventually resumed, the indictment was reread to the appellant and he pleaded guilty to murder. The judge thereafter fixed a sentencing hearing for 4th December 2018 and ordered that the prosecution file submissions addressing sentencing.

The matter came up for sentencing on 2nd May 2019. Neither the prosecution nor the appellant had filed submissions as was previously ordered. The appellant's counsel was also by that time elevated to the High Court bench. The court again adjourned the matter to allow the parties to file submissions. Ultimately, on 5th March 2020, the matter came up for sentencing before a different judge ("the sentencing judge"). The sentencing judge proceeded to sentence the appellant to 25 years imprisonment for the offence of murder. The appellant was at that time unrepresented.

Dissatisfied with the sentencing judge's decision, the appellant lodged his appeal on 6th March 2023 (amended on 25th July 2024) in which he advanced three grounds of appeal, namely: (1) that the sentence was unfair; (2) the sentence was unlawful and (3) the sentence was excessive and disproportionate.

Held: allowing the appeal against sentence, setting aside the sentence of 25 years imprisonment and imposing a sentence of 13 years, 4 months and 22 days, that:

1. An appeal against sentence is an appeal against the sentencing judge's discretion. It is not the function of an appellate court considering an appeal against sentence to conduct a sentencing hearing. Its task is to determine whether the sentence was manifestly excessive or wrong in principle.

R v Chin-Charles; R v Cullen [2019] 1 WLR 5921; [2019] EWCA Crim 1140 applied; ; **Steve Gurrie v The Queen** GDAHCRAP2013/0004 (delivered 5th April 2022, unreported) applied applied; **Franklyn Perkins v The Queen** MNIHCRAP2017/0005 (delivered 28th November 2018, unreported) applied.

2. Whether the court should intervene in the interests of justice to alter a sentence on the basis of a legitimate expectation depends entirely on what was said and what transpired at the hearing before the court in a particular case. Casual or non-binding remarks by a judge are insufficient to establish a legitimate expectation of a specific type of sentence. In this case, it is readily apparent that at every stage the learned judge made it clear that she was not and had not made any pronouncements on sentence. Having reviewed the transcript of proceedings, and the sequence of statements made by the learned judge, both before and after the appellant's guilty plea, the Court is unable to conclude that the learned judge's remarks taken as a whole would have created a legitimate expectation of a sentence within the range of 6-8 years (after a guilty plea).

R v Gillam [1981] Crim LR 55 applied; **R v Horseferry Road Magistrate's Court ex parte Rugless** (2000) 164 JP 311 applied; **R v Rees** [2023] EWCA Crim 387 applied; **R v Toni Page** [2005] EWCA Crim 406 applied; **R v Nibraz** [2023] EWCA Crim 1343 applied.

3. A judge has an unfettered discretion to refuse altogether to give a sentence indication or to delay/defer an indication. In this case, following the initial request for a sentence indication, the learned judge repeatedly ordered the parties to provide submissions in order to give a proper sentence indication following the guidelines of **R v Goodyear**. Neither party filed submissions as ordered. It is therefore inapposite for the appellant to claim unfairness when he did nothing in the court below to assist the learned judge in making the sentence indication that he requested.

R v Goodyear [2005] EWCA Crim 888 applied.

4. The Saint Lucia Constitution Order and the Criminal Code allow for accused persons to have access to counsel at all phases of criminal proceedings. The Constitution details an accused individual's right to counsel and effective assistance, the right to present a defence and to due process. Moreover, the established practice in Saint Lucia is that when a defendant is charged with the offence of murder, the court would ensure that the defendant is legally represented and where he is unrepresented, it is the duty of the court, whether requested or not, to assign counsel to him as a necessary prerequisite of due process of law. This moral imperative persists not only during the course of a substantive trial, but also during sentencing. The appellant in this case was charged with murder contrary to section 85(b) and 87(2) of the Criminal Code and was therefore entitled to have legal assistance of his choosing or to have legal assistance assigned to him. The appellant in this case had legal representation up to the point when he entered the guilty plea. Though the learned judge assigned legal counsel to the appellant, it is clear from the record of appeal that neither of the assigned attorneys were present

on the day of the sentencing hearing and the appellant was left unrepresented. Further, in circumstances where the allocutus was not put to the appellant and he was not invited to offer submissions to the court which would mitigate the harshness of his sentence, the sentencing judge would not have considered the personal circumstances of the appellant, despite being required to do so. Accordingly, the sentencing judge erred in the exercise of her discretion. It accordingly falls on this Court to examine the circumstances and seek to determine whether in all the circumstances the sentence of 25 years imprisonment is just and appropriate.

Section 3(2) of the const. **Rudolph Lewis v The Queen** SVGHCRA2009/016 (delivered 16th April 2012, unreported) applied

5. The new Sentencing Guidelines on murder cannot be applied in order to test whether or not a judge committed an error of principle in sentencing the appellant before the date of its promulgation. Thus, it falls to this Court in determining whether or not the sentence imposed was excessive, to apply the principles and guidelines that were long established in the case law and which were applicable at the time of the appellant's sentencing hearing. The Court is obliged to give deliberate consideration to: (i) the circumstances of both the offender and the circumstances in which the offence was committed; (ii) the principles of sentencing namely retribution, deterrence, prevention and rehabilitation; (iii) the maximum penalty for the offence and the appropriate notional sentence; (iv) the mitigating and the aggravating factors, weighing them against each other; and (v) the credit to be given to the guilty plea entered on re-arraignment.

Akim Monah v The Queen GDAHCRA2021/0015 (formerly GDAHCRA2014/0002) (delivered 23rd February 2022, unreported) applied.

6. The practice of the regional courts, according to the authorities, was to adopt a notional sentence of 30 years starting point for the offence of murder and thereafter to consider both the aggravating and mitigating factors in the case to fashion the appropriate sentence. Weighing the mitigating factors against the aggravating factors in this case, the mitigating factors outweigh the aggravating factors. A reduction of 5 years is appropriate in bringing the appellant's sentence to 25 years imprisonment. Given the procedural confusion in the matter and the fact that a new indictment had been filed and substituted, the Court is inclined to agree and treat the appellant's plea as occurring at first instance and he is thus entitled to a 1/3 full discount for his guilty plea. Following this discount, the appellant's sentence would be 16 years and 7 months. A further reduction of 3 years 3 months and 8 days for the time spent by the appellant on remand brings the appellant's new sentence to 13 years, 4 months and 22 days.

Yanne Drysdale v The Queen SLUHCRA2017/0003 (orally delivered 8th November 2021, unreported) applied; **Simon Marius v The King** SLUHCRA2008/0007 (delivered 16th January 2025, unreported) applied; **Shonovia Thomas v The Queen** BVIHCRA2010/0006 (delivered 27th August 2012, unreported) applied.

JUDGMENT

Introduction

- [1] **ELLIS JA:** On 21st June 2018 the appellant, Kurtley Garvey Cadette, pleaded guilty to a single count of murder contrary to section 85(b) ad 87(2) of the **Criminal Code of Saint Lucia** (the “**Criminal Code**”)¹ and on 5th March 2020 he was sentenced to 25 years’ imprisonment. This is an appeal against the sentence imposed on him by the learned sentencing judge. The background facts of the case are set out below.

Background/Facts

- [2] The prosecution’s case was that on 25th November 2016 the appellant and the deceased engaged in a quarrel near the Fond Assau Bus Stand. The deceased began walking away from the appellant, but the appellant followed him near Carro’s Place which is opposite from the Fond Assau Primary School. There, the appellant went into a shed near Carro’s yard, emerged with a 2x2 post and proceeded to strike the deceased at his back, around his waist area and to his buttocks with the post. Thereafter, the deceased fled from the appellant whereas the appellant disposed of the 2x2 post.
- [3] In the days that followed, the deceased complained about aches on his body and on 27th November 2016 the deceased was transported to Victoria Hospital. The deceased underwent surgery on the evening of 28th November 2016, however, on 30th November 2016 the deceased succumbed to his injuries and was pronounced dead with the cause of death stated to be ‘Marked pulmonary oedema consequent on anaemia, status-post splenectomy due to splenic rupture from blunt trauma with massive blood loss’. The appellant was arrested shortly thereafter.

¹ Chap. 3.01 of the Revised Laws of Saint Lucia.

Procedural Background

[4] The procedural background of the case in the lower court is imperative in understanding the context out of which the present appeal arises. During the course of the hearing of this appeal, counsel for the appellant agreed with the respondent's version of events that took place in the lower court. That procedural history was set out by counsel for the respondent in his submissions in the following terms:

- (a) On 3rd May 2017 the appellant was committed for the offence of murder. Through his counsel at the time, Mr. Shawn Innocent (as he then was), the appellant expressed his interest in entering an early guilty plea in for the lesser offence of manslaughter. The prosecution was ordered by Justice Taylor-Alexander (or "the first judge") to review the evidence and advise on their position in relation to accepting that early guilty plea to manslaughter.
- (b) On 24th May 2017, counsel for the appellant in the lower court, Mr. Innocent, orally requested a sentence indication on behalf of the appellant. The prosecution was not yet in a position to advise on whether the plea to the offence of manslaughter was acceptable and therefore the parties were ordered to file submissions on the sentence indication and time was extended to allow the prosecution to consider its position.
- (c) On 5th October 2017, the indictment was read to the appellant and he entered a plea of not guilty to the charge of murder but guilty to the charge of manslaughter. The prosecution requested an opportunity to speak to the family of the deceased before indicating whether it accepted the plea proffered by the appellant or not.
- (d) On 17th November 2017 the prosecution made an application to withdraw and substitute the indictment filed on 17th May 2017 with an indictment filed on 17th November 2017. The application was

granted and counsel for the appellant in the lower court requested time to advise the appellant on the new indictment. On 22nd January 2018 the appellant was arraigned on the fresh indictment and pleaded not guilty to the charge of murder. The matter was then fixed for case management.

- (e) On 6th March 2018 counsel for the appellant in the lower court indicated that following discussions with the prosecution, there had been no agreement between the parties with regard to the lesser plea of manslaughter by virtue of an unlawful act or provocation and as a result the matter was stood down to allow the prosecution time to consider its position further concerning the manslaughter plea.
- (f) On 8th March 2018 the prosecution informed the court of the difficulty they faced with accepting the plea to manslaughter as they were of the view that although the evidence did not reveal an intention to kill, it strongly supported an intention to cause grievous bodily injury. A sentence indication was again requested by Mr. Innocent on behalf of the appellant. The court ordered the filing of an agreed summary of facts and submissions to advance the matter.
- (g) By 15th June 2018 neither the agreed summary of facts nor submissions had been filed. On that day, the learned judge enquired of the prosecution an appropriate sentence in terms of years that they would be willing to accept if agreed by Mr. Innocent. The prosecution suggested that a range of 6 to 8 years imprisonment would be appropriate, and Mr. Innocent then requested a short adjournment to confer with the appellant. The court complied and the matter was adjourned to 21st June 2018.
- (h) On 21st June 2018, counsel for the appellant in the court below indicated that he was under the impression that the court had given a sentence indication at the previous hearing. This was not so. The

proceedings were stood down for 10 minutes to give Mr. Innocent an opportunity to advise the appellant. Upon return the appellant pleaded guilty to murder when the indictment was reread. The court fixed a sentencing hearing for 4th December 2018 and ordered that the prosecution file submissions on which they intended to rely on for sentencing.

- (i) On 2nd May 2019, the matter came up for sentencing. Neither the prosecution nor the appellant had filed submissions as was previously ordered. Further, Mr. Innocent was now serving as a High Court Judge in another jurisdiction. The court adjourned the matter further to allow the parties to file submissions in relation to the sentencing hearing.
- (j) The matter was next heard on 5th December 2019 where the court informed the appellant that a new attorney would have to be assigned to him before sentencing and assigned Mrs. Andra Gokool-Foster and in the alternative, Mr. Alberton Richelieu to represent the appellant at the sentencing hearing. The matter was then refixed for sentencing.
- (k) On 5th March 2020 the matter came up for sentencing before a different judge Williams J, as she then was (the sentencing judge). Despite the appellant not having the benefit of legal representation at the hearing, the sentencing judge proceeded to sentence him to 25 years imprisonment for the offence of murder.

The Grounds of Appeal

- [5] Dissatisfied with the learned judge's decision on sentence, the appellant lodged his appeal on 6th March 2023, in which he advanced 3 grounds of appeal (amended on 25th July 2024) namely that:

- (a) the sentence was unfair to the appellant;
- (b) the sentence was unlawful; and
- (c) the sentence was excessive and disproportionate.²

[6] On the day of the hearing however counsel for the appellant indicated his intention to abandon the second ground of appeal. This ground had been advanced on the basis that the sentence of twenty-five (25) years imprisonment is in breach of the provisions of Rule 11 of Practice Direction No. 2 of 2015, as a sentence indication of six (6) years imprisonment was previously given, and no exceptional circumstances were noted by the sentencing judge for the departure from that sentence indication. Having accepted that there was no sentence indication given by any judge during the course of the matter in the lower court, counsel for the appellant quite correctly withdrew this ground of appeal. Therefore, the appeal proceeded on grounds 1 and 3 and I will take those grounds in turn.

Ground 1 – Whether the sentence was unfair to the appellant

[7] Counsel for the appellant Mr. Elliot submitted that on 5th March 2020 when the appellant was sentenced, he was neither represented nor was he given an opportunity to obtain legal representation. Mr. Elliot suggested that stemming from this, the appellant was not given the opportunity to give a plea in mitigation at the sentencing hearing. Additionally, the appellant was not given the benefit of a sentence indication although one had been requested by the appellant prior to sentencing. Counsel for the appellant concluded that all those errors of procedure resulted in unfairness to the appellant.

[8] Counsel for the respondent, Mr. Robinson in his submissions acknowledged that a Sentence Indication Request had been filed on 26th March 2018. Counsel for the respondent also submitted that at no point did the court prior to sentencing pronounce a 'formal sentence indication' in accordance with the principles laid down

² Amended Ground of appeal filed on 25th July 2025.

in **R v Goodyear**³ and **Practice Direction No. 2 of 2015 (Sentence Indications)**. Therefore, in the respondent's view, the sentencing judge was not bound by the sentence range of 6 to 8 years which the respondent suggested formed the basis of the appellant's plea as there had been no formal pronouncement of a sentence indication in accordance with the principles of **Goodyear** and **Practice Direction No. 2 of 2015 (Sentence Indications)**. The appellant agreed.

- [9] Further, counsel for the respondent pointed to the uncertainty between the prosecution and the defense in the court below evidenced by the fact that no submissions nor summary of agreed facts were provided to the judge as ordered by her on 8th March 2018⁴. Counsel for the respondent further submitted that having failed to assist his cause in the court below by not complying with the order of the judge to provide submissions on which she could make use of to provide a sentence indication in line with **Goodyear**, the appellant cannot claim unfairness at the appellate level that a sentence indication was not given.
- [10] Remarkably, counsel for the respondent then shifted his attention to an argument not enunciated in the appellant's submissions. He submitted that the apparent agreement by all the parties to the sentence range suggested by the prosecution with the appellant's guilty plea which had been entered on the back of that suggestion gave the appellant a legitimate expectation that he would receive a sentence within that range. Counsel for the respondent relied on the English judgment in **R v Gillam**⁵ to state that where the content of any comments made by a judge to a defendant or to counsel during the course of adjourning gives rise to a legitimate expectation of a particular type of sentence, the Court may be bound by the implied promise. Counsel for the respondent admitted that although that case concerned whether the appellants were suitable for a non-custodial sentence the fundamental issue before the court was whether there has been something in the nature of a promise as to a type of sentence which has been expressed or implied

³ [2005] EWCA Crim 888.

⁴ Page 34 of the Record of Appeal.

⁵ [1981] Crim LR 55.

to the accused. He therefore commended this judgment to this Court in support of his submission that following the discussions between the parties and the judge, there was an implied promise to the appellant to sentence him with a sentence within the range of 6 to 8 years imprisonment. Counsel for the respondent submitted that that promise was breached when he was sentenced to 25 years imprisonment. Keeping in mind that his guilty plea was entered on the basis of that promise, counsel concluded that the appellant's sentence of 25 years should be set aside as it was unfair and a sentence within the range of 6 to 8 years should be substituted.

- [11] As to whether the sentence was unfair since the appellant was neither represented nor given the opportunity to be represented at the sentencing hearing, the respondent conceded that the appellant was not represented on the day that he was sentenced. The respondent made reference to the **Criminal Code** of Saint Lucia and submitted that a defendant who is arrested for the offence of murder has a right to have legal assistance of his choosing or legal assistance assigned to him. Although the appellant was represented by counsel from the outset, he was unrepresented at the time of sentencing and neither of the counsel assigned to him for the purpose of sentencing was present on the day. Stemming from the appellant's lack of legal representation, the appellant was not afforded an opportunity to mitigate the harshness of his sentence, resulting in unfairness in the sentence handed down by the sentencing judge.

Discussion

- [12] It is critical to highlight the general principles which guide the Court in determining appeals against sentence.
- [13] An appeal against sentence is an appeal against the sentencing judge's discretion. In **R v Chin-Charles; R v Cullen**⁶ Lord Burnett CJ stated that:

"The task of the Court of Appeal is not to review the reasons of the sentencing judge as the Administrative Court would be a public law decision. Its task is to determine whether the sentence imposed was

⁶ [2019] 1 WLR 5921; [2019] EWCA Crim 1140.

manifestly excessive or wrong in principle. Arguments advanced on behalf of appellants that this or that point was not mentioned in sentencing remarks, with an invitation to infer that the judge ignored, it rarely prospers. Judges take into account all that has been placed before them and advanced in open court and in many instances, have presided over a trial. The Court of Appeal is well aware of that”.

- [14] This reasoning was adopted by Baptiste JA in providing reasons for the Court’s decision in **Steve Gurrie v The Queen**⁷. He states that:

“Appeals against sentencing to the Court of Appeal are not conducted as exercises in re-hearing ab initio. It is not the function of this Court on appeal against sentence to conduct a sentencing hearing. On appeal, a sentence is examined to see whether there was an error in law or in principles or whether it was manifestly excessive, and those questions are determined according to the law and practice obtaining at the time the sentence was passed by the judge.”

- [15] Similarly in **Franklyn Perkins v The Queen**⁸ Williams JA (Ag.) stated that ‘an appellate court may interfere with a sentence where the sentencing judge exceeded his jurisdiction that is, gave a sentence greater than the maximum; where the sentence was manifestly excessive; or where the procedure adopted in sentencing was unfair.’

- [16] Having framed the role of the appellate Court in this appeal, I turn to consider the grounds of appeal.

- [17] Ground one of the appellant’s appeal, which challenges the fairness of the appellant’s sentence, raises a number of issues which must be considered in turn.

Did the appellant have a legitimate expectation that he would be sentenced to 6-8 years?

- [18] I accept that there is a line of authorities commencing with **R v Gillam** in which it was held, that where a court postponed sentence so that an alternative to custody

⁷ GDAHCRA2013/0004 (delivered 5th April 2022, unreported).

⁸ MNIHCRA2017/0005 (delivered 28th November 2018, unreported).

could be examined, and that alternative was found to be a satisfactory one in all respects, the sentencer ought to adopt the alternative since a feeling of injustice might otherwise be aroused. So where a court adjourns for a pre-sentence report and gives a provisional indication that it is considering a community sentence, it should not subsequently pass a custodial sentence if the pre-sentence report suggests that a community sentence would be a suitable method of dealing with the offender. Further, judging from the dictum in **R v Horseferry Road Magistrate's Court ex parte Rugless**,⁹ it appears that the principle set out in **Gillam** has a broader application in sentencing. In that case the English court stated:

"The relevant principles of law governing the point raised by this application are well established. In **R v Nottingham Justices, ex parte Davidson**, Queen's Bench Divisional Court CO/0921/99, delivered May 12, 1999 and, so far as I know, unreported, Lord Bingham of Cornhill CJ said at p 1 of the transcript:

'If a court at a preliminary stage of the sentencing process gives to a defendant **any indication as to the sentence** which will or will not thereafter be passed upon him, in terms sufficiently unqualified to found a legitimate expectation in the mind of the defendant that any court which later passes sentence upon him will act in accordance with the indication given, and if on a later occasion a court, without reasons which justify departure from the earlier indication, and whether or not it is aware that indication, passes a sentence inconsistent with, and more severe than, the sentence indicated, the court will ordinarily feel obliged, however reluctantly, to adjust the sentence passed so as to bring it into line with that indicated.'" Emphasis added

- [19] It follows from this that a sentencer must also ensure that neither his comments nor his conduct during the sentencing hearing raise the expectation that a custodial sentence will not be imposed.¹⁰ Where the court adjourns for a further assessment and investigation, the defendant should be told in clear terms that he must not assume from the fact that the court is ordering a further adjournment that he is likely to receive any particular form of sentence or that a custodial sentence is ruled out, whatever the further inquiry may reveal.¹¹

⁹ (2000) 164 JP 311.

¹⁰ **R v Jackson** [1996] Crim LR 355.

¹¹ **R v Chamberlain** (1994) 16 Cr App Rep (S) 473.

- [20] In **R v Rees**¹², the English Court of Appeal provided erudite guidance to judges as well as counsel when it held that great care must be taken when conducting discussions about sentence prior to plea. The court recommended that discussions of that kind between counsel and the court should take place in the presence of the defendant and any indications from the judge should be given in clear terms so that their intentions were unambiguously understood by all concerned. If a judge was seeking to give an indication in an inappropriate way, it was the responsibility of counsel on both sides to ensure that proceedings were conducted in accordance with the law.
- [21] In this appeal, surprisingly it is counsel for the respondent who has advanced that such an expectation was engendered in the court below and he argued that this Court must gather from the conduct of the learned judge an unequivocal promise that created a legitimate expectation in the mind of the appellant.
- [22] Whether this Court should intervene in the interests of justice to alter a sentence on this basis depends entirely on what was said and what happened at the hearing before the court in the particular case. If the judge adjourns a sentencing exercise for a specific disposal to be investigated, but indicates in clear terms that all options remain open, then depending upon the precise circumstances and on what happened at the hearing, an argument based upon legitimate expectation is unlikely to succeed: see **R v Toni Page**.¹³
- [23] In considering the respondent's arguments, it is therefore necessary to consider the transcript of proceedings prior to the appellant's guilty plea. At the outset, it is clear that no expressed promise was made by the learned judge during case management. Counsel for both parties agree on that point. Instead, counsel for the respondent guided the Court to the transcript of proceedings from 15th June 2018

¹² [2023] EWCA Crim 387.

¹³ [2005] EWCA Crim 406.

where the prosecution put forward a range of 6-8 years on a guilty plea.¹⁴

[24] This Court was then guided to the transcript on 21st June 2018¹⁵ where in addressing the court, counsel for the appellant suggested that the court had proffered a sentence indication on the previous occasion that the matter came up. The transcripts reflect that both the counsel for the prosecution and the learned judge disputed that assertion, contending instead that while a request for a sentence indication may have been advanced and a suggested sentencing range proffered by the prosecution, there was no agreement reached and certainly no sentence indication given by the learned judge. At some point in the somewhat stilted discussion between those present the following exchange is recorded:

MR. GREENE: I, I provided a - -

MR. INNOCENT: I, I and I think that was agreed.

MR. GREENE: No, that wasn't agreed.

MR. INNOCENT: It wasn't agreed.

MR. GREENE: Um-hum. What was, what was to happen was that - -

THE COURT: Perhaps it's agreed this morning, Mr., Mr. Greene.

MR. GREENE: Well, it is for - -

THE COURT: Perhaps Counsel has agreed this morning, that's why he's saying so.

MR. GREENE: What, what is to ha - - what was to happen is that my learned friend.

[25] Counsel for the respondent suggested that by the judge stating "perhaps it's agreed this morning" with reference to the range of 6-8 years that was previously disagreed by the parties, the judge implied that the range provided was not only accepted by both parties, it was also accepted by her. In essence, counsel for the respondent has asked the Court to infer, from brief exchanges in the lower court, a promise that the sentence range suggested by the prosecution established a legitimate

¹⁴ Page 48 of the Record of Appeal.

¹⁵ Page 57 - 58 of the Record of Appeal.

expectation of the appellant receiving a sentence within that range. I am unable to do so.

[26] Having reviewed the transcript, it is readily apparent that at every stage the learned judge made it clear that she was not and had not made any pronouncements on a sentence indication. The transcripts reveal that the learned judge was quick to correct Mr. Innocent's understanding of what had taken place at the 15th June 2018 hearing. There followed unequivocal avowals by both the prosecution and the judge which would have made clear that the learned judge had never given an indication, and that it was the Director of Public Prosecutions who suggested that particular range. What is evident is that despite the fact that it would have been clear to the appellant and his counsel that at no point did the learned judge ever render a determination on this matter, nevertheless, after the matter was adjourned for 10 minutes, the indictment was read to the appellant and he then pleaded guilty.

[27] Having reviewed the transcript of proceedings, and the sequence of statements made by the learned judge, both before and after the appellant's guilty plea, I am unable to conclude that the learned judge's remarks taken as a whole would have created a legitimate expectation of a sentence within the range of 6 -8 years (after a guilty plea) even if the prosecution may have been inclined to that disposition. In arriving at this conclusion, I have been guided by the English Court of Appeal's reasoning in **R v Nibraz**.¹⁶ In that case, Mr. Nibraz pleaded guilty to multiple offences under the Serious Crime Act 2015 and assault charges, resulting in an initial sentence of 27 months imprisonment. He appealed against this sentence, contending that the judge's comments during re-arraignment suggested a non-custodial sentence was likely, thereby establishing a legitimate expectation which was not met. The Court meticulously reviewed the circumstances and concluded that no such legitimate expectation existed, upholding the original custodial sentence.

¹⁶ [2023] EWCA Crim 1343.

[28] The court's judgment extensively references several cases to illustrate the doctrine of legitimate expectation in the context of sentencing.¹⁷ After carefully scrutinizing the appellant's claims, the sequence of statements made by the judge, both before and after his guilty plea, the Court concluded that the judge's remarks were tentative and did not unequivocally promise a non-custodial outcome. The court made clear that casual or non-binding remarks by a judge are insufficient to establish a legitimate expectation of a specific type of sentence. In rejecting the appellant's claim of a legitimate expectation for a non-custodial sentence, the court affirmed that sentencing remarks lacking explicit commitments do not constrain judicial discretion. That judgment therefore confirmed a judicial approach in which judges should exercise their discretion to impose custodial sentences based on the merits of the case, irrespective of earlier comments that do not form part of a binding agreement.

Request For Sentence Indication

[29] Turning now to the argument from counsel for the appellant that the appellant was not given the benefit of a sentence indication, although one had been requested by the appellant prior to sentencing. It is uncontested by the respondent that the appellant orally requested a sentence indication. Indeed, the recorded transcript of proceedings of 8th March 2018 makes that clear. Moreover, on 26th March 2018 a formal request for a sentence indication was filed.

[30] The procedure by which a defendant can obtain an indication as to the sentence to be imposed upon a guilty plea is governed by the classic case **R v Goodyear** and has been utilised in our Court on several occasions.¹⁸ The following excerpt from

¹⁷ R v Gillam (1980) 2 Cr. App. R. (S) 237; R v CD [2018] EWCA Crim 571; R v Stokes (1983) 5 Cr. App. R (S) 449 and R v Houghton & Alexander (1985) 7 Cr. App. R. (S) 299; R v Norton & Claxton (1989) 11 Cr. App. R. (S) 143; R v Toni Page [2005] EWCA Crim 406.

¹⁸ See Director of Public Prosecutions v Shane Williams ANUHCRA2018/0011 (delivered 3rd July 2020, unreported).

the **Goodyear** guidelines is instructive in the present appeal:

“A judge should not give an advance indication of sentence unless one has been sought by the defendant; however he remains entitled, if he sees fit, to indicate that the sentence, or type of sentence, on the defendant would be the same whether the case proceeds as a plea of guilty or goes to trial, with a resulting conviction. He is also entitled in an appropriate case to remind the defence advocate that the defendant is entitled to seek an advance indication of sentence. **A judge may refuse altogether to give an indication, or may postpone doing so, with or without giving reasons. Where the judge has in mind to defer an indication, he will probably explain his reasons, and further indicate the circumstances in which, and when, he would be prepared to respond to a request for a sentence indication. If at any stage a judge refuses to give an indication it remains open to the defendant to seek a further indication at a later stage.** However, once a judge has refused to give an indication, he should not normally initiate the process, except to indicate that the circumstances have changed sufficiently for him to be prepared to consider a renewed application for an indication. Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case. If, after a reasonable opportunity to consider his position in the light of the indication, the defendant does not plead guilty, the indication will cease to have effect.”
Emphasis added.

[31] The legal principles set out therein have essentially been replicated in Practice Direction No.2 of 2015 reissued under the **Eastern Caribbean Supreme Court Criminal Procedure Rules**. From the above-mentioned guidelines, it is clear that not only does a judge have the unfettered discretion to refuse altogether to give a sentence indication; a judge also has the discretion to delay/defer an indication.¹⁹

[32] In my view, the criticism leveled by the appellant by which he contends that the learned judge erred in refusing to provide a sentence indication when one was sought ignores some critical factors. The reality is that after the sentence indication was initially requested on 24th May 2017, the learned judge directed that submissions on the sentence indication and a probation report be filed. That order was not complied with by either party. Again, on 8th March 2018 the appellant requested a sentence indication on behalf of the appellant. Again, the learned judge

¹⁹ Directions 3.9 – 3.11 of Practice Direction No. 2 of 2015.

ordered that the parties agree the facts and file submissions so that she may give a sentence indication. The parties failed to comply with the order of the judge. Finally, on 21st June 2018 the learned judge inquired on the status of the submissions on the sentence indication. After discovering no submissions had been filed by either party, the learned judge ordered those submissions to be filed by 28th September 2018. When the matter came up for sentencing, neither the prosecution nor the defence had filed submissions as previously ordered.

- [33] In my view the learned judge cannot be faulted for requesting submissions from the parties to give a proper sentence indication following the guidelines of **Goodyear**. The parties in the lower court even failed to establish agreed facts upon which the learned judge could determine an appropriate sentence. It is therefore inapposite for the appellant to claim unfairness on appeal when he did nothing in the court below to assist the judge in making the sentence indication that he requested. It is my considered opinion that had the appellant assisted the learned judge by filing the submissions that he was ordered to on several occasions, the judge would have been in a position to provide a sentence indication. Barring this, the judge had no basis to properly make an indication. This argument therefore cannot be sustained by the appellant.

Lack of legal representation during sentencing.

- [34] The appellant's contention that during the course of the hearing on 5th March 2020 he was unrepresented and that he was not given an opportunity to be represented or afforded an opportunity to offer a plea in mitigation were conceded by the respondent. Counsel in this appeal are also *ad idem* that this failure resulted in unfairness to the appellant which warrants the setting aside of the sentencing judge's sentence. I am compelled to agree with that conclusion for the following reasons.

- [35] Firstly, the **Saint Lucia Constitution Order** (the "Constitution")²⁰ and **Criminal**

²⁰ Section 3(2) of the Saint Lucia Constitution Order.

Code allow for accused persons to have access to counsel at all phases of criminal proceedings. The **Constitution** details an accused individual's right to counsel and effective assistance, the right to present a defence, and to due process. Section 6.9 1 (c) and (d) of the 8th Schedule to the **Criminal Code** imposes an obligation on a magistrate during the initial hearing in indictable matters to inform the defendant of his right to retain legal representation including the right to request an adjournment to retain legal representation and the right to have legal representation appointed at the expense of the state in certain indictable offences.

[36] It appears that it is now an established practice in St. Lucia that when a defendant is charged with the offence of murder that it is the duty of the court to ensure that the defendant is legally represented and where he is unrepresented, it is the duty of the court whether requested or not to assign counsel to him as a necessary prerequisite of due process of law. This practice no doubt stemmed from the fundamental right enshrined in the **Constitution** which would no doubt have informed the statutory provisions referenced. I am further satisfied that this moral imperative, extends not only during the course of a substantive trial (proving guilt or innocence) but during sentencing.

[37] Indeed, the principle that a person being charged with a capital offence such as murder must be represented by an attorney has been said to apply even where legislation does not provide for such an inherent right. For instance, in the Trinidad Court of Appeal case of **Habib v The State**²¹ Bernard C.J stated that:

“In the case where a person is unrepresented by attorney on a trial for a capital offence, prior to the Legal Aid and Advice Act it was a rule of law that before his arraignment that accused person had to be represented by an attorney. See in this connection s.39 of the Criminal Procedure Act. This latter provision, however, has since been repealed by the Legal Aid and Advice Act. Even though the particular provision has been repealed, it follows, nevertheless that in accordance with the scheme and spirit of the Legal Aid and Advice Act, the necessity for legal representation in such event still obtains. The necessity for an accused person on a capital charge to be represented by attorney from the outset of his trial, and indeed on his

²¹ (1989) 43 WIR 391.

arraignment, exists even if that accused person when he is arraigned before the court volunteers information to the court that he wished to take a certain course.”

In this appeal, the appellant was charged with murder contrary to sections 85(b) and 87(2) of the **Criminal Code**. Section 87 creates one of the indictable offences contemplated by section 6.9 1 (c) and (d) the 8th Schedule to the **Criminal Code**. It follows that the appellant was entitled as of right to have legal assistance of his choosing or to have legal assistance assigned to him. As indicated, it is common ground that although the appellant had legal counsel up to the point when he entered the guilty plea, following the elevation of Mr. Innocent (his then counsel) to the bench, he did not have the benefit of such or indeed legal representation thereafter.

[38] It was evident that the first judge understood the necessity of assigning legal representation to the appellant after it became clear that his attorney was unavailable. The learned judge assigned legal counsel in Mrs. Andra Gokool-Foster and in her absence Mr. Alberton Richelieu. It could be gleaned from the Record of Appeal however that neither of the assigned attorneys were present on the day of the sentencing hearing and the appellant was left unrepresented as he attempted to speak to the learned sentencing judge on his own.²²

[39] The transcript for the sentencing hearing held on 5th March 2020 begins abruptly and neither side in this appeal advanced any evidence which would assist this Court in determining whether the learned sentencing judge attempted to make any inquiry as to the representation or lack thereof of the appellant at the outset of the hearing. Indeed, neither counsel for the appellant nor counsel for the respondent were able to provide further assistance as to exactly what took place during the sentencing hearing outside of what can be gleaned from the transcript from that day.

[40] What is clear to me however is that at the hearing on 2nd May 2019, the presiding

²² Page 92 of the Record of Appeal.

judge at the time clearly appreciated that fact. The following exchange is recorded:

“MISS CYRIL: Yes, My Lady, yes, My Lady, I wish to apologize, My Lady, the learned director has indicated to me to indicate to this court that he humbly apologize for the fact that his submissions has not been filed in this matter as it was an oversight on his part and he’s truly, truly, truly apologetic in that manner, as that is not the norm for him, My Lady. My Lady, he also wants the issue as to whether this defendant is going to have any attorney for the, as the - -

THE COURT: Yes, well, that’s another issue I have to determine but that does not relieve him from filing his submissions.

.....

THE COURT: I want to apologize, we had fixed today for a sentencing hearing. In order for us to proceed with the sentencing hearing the attorney for the defendant, Kurtley Cadette, should have been present, that is, Mr. Innocent, who is currently serving as a High Court Judge in another jurisdiction. Not only that but, Mr. Innocent, did not prepare submissions; all right, Mr. Cadette. So I am incapable of proceeding with the sentencing hearing. The Director of Public Prosecutions was also under an obligation to prepare submissions so that we could have this hearing today. The Director of Public Prosecutions has also reneged on his obligations, he has not filed submissions so I’m incapable of proceeding today, all right, Mr. Cadette so I have to adjourn the sentencing hearing. I recognize that you have been waiting to be sentenced for some time and so I’m going fix the matter, I believe in July, by which time I expect Mr. Innocent to be back. I’m also not able to proceed in the absence of Mr. Innocent, because Mr. Cadette is before the Court for the offence of murder so he has to be represented for me to proceed. Thank you. I’m going to direct that submissions - -“

[41] At a later hearing in December of 2019, the presiding judge continues to treat with the thorny issue of the appellant’s lack of representation. In the transcript of proceedings of 5th December 2019, the following exchange is recorded:

THE COURT:	Do you have an Attorney now?
THE DEFENDANT:	No.
THE COURT:	Were we the ones who assigned Mr. Innocent to Mr. Cadette?
	Was it - - did, did you hire Mr. Innocent or did we assign him to you?

THE DEFENDANT:

I hired him.

THE COURT:

Okay. Are you aware that he's no longer a practicing Attorney?

THE DEFENDANT:

Yeah.

THE COURT:

So, what I want to find out is, is it your intention to hire another Attorney or do you want the Court to assign you an Attorney, because we're ready to, sentence you, but we need to have - - we can't do it, you can't do it on your own because of the offence. The offence is serious, it's murder and the law indicated that you have to have representation at all times

THE DEFENDANT:

(Inaudible)

THE COURT:

Yes, I know. I feel the same way, Mr. Cadette But we, can assign you an attorney. ... We can assign you an attorney.

THE DEFENDANT:

Okay.

...

THE COURT:

All right. Can we assign - - whom do we assign? See if Mr. Richelieu is still there...

THE ORDERLY:

He left already My Lady.

THE COURT:

Mrs. Smith, can we assign Mrs. Andra Gokool-Foster. Mr. Cadette, I'm going to assign you Mrs. Andra Gokool-Foster, all

right. Mr. Cadette.

...

THE COURT:

All right, so I'll do Mrs. Foster and
in her absence. Mr. Alberton
Richelieu, all right.

[42] The matter was accordingly adjourned to 5th March 2020. When the matter next came up for hearing on 5th March 2020 before a different coram, it is readily apparent from the transcript of the proceedings that the appellant was not legally represented. The respondent wisely submitted that as the *allocutus* was not put to the appellant and he was not invited to offer a plea in mitigation that would also be unfair to him. He would therefore have been deprived of an opportunity to offer representations which could mitigate the harshness of his sentence. I am inclined to agree.

[43] The following exchange is recorded in the transcript and makes clear that the appellant would have been severely disadvantaged by his lack of legal representation:

THE COURT: Cadette or whatever; you had something to say?

THE DEFENDANT: Yes, Your Worship, I have something to tell you, Your Worship.

THE COURT: What's that? I can't hear you.

THE DEFENDANT: (Inaudible). Yeah, Your Worship, you, you hearing me now?

THE COURT: I can hear you.

THE DEFENDANT: My Lady.

THE COURT: I can hear you.

THE DEFENDANT: My lawyer told me he had talk to, talk to you and - -

THE COURT: Me?

THE DEFENDANT: - - you-all had (inaudible).

THE COURT: No, no, no not me.

THE DEFENDANT: Mr. Shawn, Mr. Shawn Innocent didn't contact you, My Lady?

THE COURT: What is he saying? I can't - -

THE ORDERLY: If Shawn Innocent didn't contact you.

THE COURT: Nobody contacted me. I've given my decision, I don't intend to argue with you about my decision right now, thank you very much, 25 years. Next. You can leave now.

- [44] In **Rudolph Lewis v The Queen**²³ an appeal from St. Vincent and the Grenadines, Edwards JA writing on behalf of the court, cited the following dictum of Rawlins J.A. [Ag.] (as he then was) in **Mervyn Moise v The Queen**:²⁴

"It is a mandatory requirement in murder cases for a judge to take into account the personal and individual circumstances of the convicted person. The judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person. ... The judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these factors may vary according to the overall circumstances of each case."

- [45] Ultimately, this Court in **Rudolph Lewis** determined that because the judge omitted to consider the personal circumstances of the appellant, he erred in the exercise of his discretion it was the duty of the appellate court to consider afresh and exercise its own deliberate judgment on the sentence that this murder required. In this appeal, I am satisfied that a similar course must be applied here. Accordingly, it falls to this Court to examine the circumstances and seek to determine whether in all of the circumstances the sentence of 25 years imprisonment is just and appropriate.

I therefore turn to the submissions on Ground 3 of the appeal.

²³ SVGHCRA2009/016 (delivered 16th April 2012, unreported).

²⁴ Saint Lucia Criminal Appeal No. 8 of 2003 (delivered 15th July 2005, unreported) at paras. 18 and 19.

Ground 3 – Whether the sentence was excessive and disproportionate

- [46] In relation to this ground, counsel for the appellant submitted that the sentence was in excess of that permitted by law. Counsel for the appellant suggested that the learned sentencing judge was bound to consider the way the offence was committed and then be guided by the relevant aggravating and mitigating factors before sentencing. He submitted that the sentence given by the judge does not confirm that such consideration was given. Counsel for the appellant took guidance from **Direction 3 of 2021** on Sentencing Guidelines for the offence of murder.
- [47] Counsel for the appellant further submitted that contrary to the Sentencing Guidelines, the learned sentencing judge in arriving at the starting point referred to decided cases, none of which were comparable to the factual circumstances of the appellant's case. Counsel for the appellant further submitted that the learned sentencing judge departed from the Sentencing Guidelines and had little or no regard to any mitigating factors prior to sentencing.
- [48] The respondent has conceded that the appellant's sentence was excessive and disproportionate. However, counsel for the respondent submitted that although the **Eastern Caribbean Supreme Court Sentencing Guidelines** were first promulgated in September 2019 and become effective on 1st October 2019, the Practice Direction specific to sentencing for murder first came to effect on 1st September 2020. As a result, there were no sentencing guidelines in respect of the offence of murder when the appellant was sentenced on 5th March 2020. The appellant therefore cannot advance his arguments on the basis of sentencing guidelines which were not in force at the date of the appellant's sentencing.
- [49] Counsel for the respondent further submitted that although the sentencing judge referred to decided cases, the facts of which were vastly graver than the facts of the appellant's case, her ultimate sentence imposed on the appellant was significantly

more lenient than the sentences imposed in these cases. Therefore it cannot reasonably be argued that she applied a similar starting point to these cases when she sentenced the appellant. In the respondent's view, where the learned sentencing judge erred in crafting the appellant's sentence is when she failed to give little or no regard to any mitigating factors of the offence and the offender. It was submitted that the sentencing judge's failure to account for these mitigating factors led to a sentence being imposed on the appellant that was excessive and disproportionate. The respondent urged the Court to follow the decision of **Yanne Drysdale v The Queen**²⁵ where a sentence of life imprisonment was found to be excessive as a result of the learned judge's failure to apply the principles of sentencing.

Discussion

[50] I have already established that an appellate court should only interfere with a sentence passed if it is not justified by law; is passed on the wrong factual basis; some matter has not been properly taken into account; or where it was wrong in principle or manifestly excessive. The appellate court should not interfere with the decision of the sentencing court merely on the ground that it might have passed a different sentence.²⁶

[51] It is useful at this point to consider the sentencing judge's remarks.²⁷ The transcript does not appear to be complete and begins abruptly with the judge apparently taking note of aspects of the presentencing report, noting that: "Report of the defendant's stealing habit, although he denied that. Overall, the residents held the view that the defendant was not a menace to the community." She then considers a number of cases which were presumably used as comparables. Thereafter she concludes (apparently applying a starting point of 30 years):

"There has been a number of serious aggravating factors in this case and the case falls within the range of a serious grave crime. I will also take into account personal circumstances. I will treat his guilty plea as coming at the

²⁵ SLUHCRA2017/0003 (orally delivered 8th November 2021, unreported).

²⁶ See *R v Newsome*; *R v Browne* [1970] 2 QB 711.

²⁷ Page 96 of the Record of Appeal.

first reasonable opportunity and the defendant will get a full discount on his sentence because of his guilty plea. The aggravating factors would move the sentence up to five to 35 years. The 1/3 discount on an early guilty plea would reduce the sentence to 24 years and eight months. His time spent on remand is three years; therefore I will sentence him to 25 years' imprisonment."

- [52] I am in agreement with counsel for the respondent that the Sentencing Guidelines relied upon by the appellant in his submissions to the Court cannot be applied in the present matter. In that regard, I am guided by the dictum of this Court in **Akim Monah v The Queen**²⁸ where at paragraph 46 Blenman JA (as she then was) held that:

"I agree with learned Senior Crown Counsel Ms. Greenidge that in conducting this exercise, this Court regrettably cannot have recourse to the new Sentencing Guidelines that were recently promulgated. It is apparent that the sentencing judge conducted the hearing and imposed the sentencing of 18 years imprisonment many years before the new comprehensive Sentencing Guidelines were implemented in our courts. Clearly it is not appropriate to utilise the new Sentencing Guidelines in order to determine whether the judge committed an error of principle. While the new Sentencing Guidelines are very comprehensive and conduce to the uniformity in the approach to sentencing, they cannot be applied in order to test whether or not a judge committed an error of principle in sentencing the appellant long before the date of promulgation of the new Sentencing Guidelines"

- [53] I am therefore satisfied that it falls to this Court in determining whether or not the sentence imposed was excessive, to apply the principles and guidelines that were long established in the case law and which were applicable at the time of the appellant's sentencing hearing.

- [54] As in **Akim Monah**, this Court is obliged to give deliberate consideration to: (i) the circumstances of both the offender and the circumstances in which the offence was committed; (ii) the principles of sentencing namely retribution, deterrence, prevention and rehabilitation; (iii) the maximum penalty for the offence and the appropriate notional sentence; (iv) the mitigating and the aggravating factors,

²⁸ GDAHCRAP2021/0015 (formerly GDAHCRAP2014/0002) (delivered 23rd February 2022, unreported).

weighing them against each other; and (v) the credit to be given to the guilty plea entered on re-arraignment.

[55] Again, as in **Akim Monah**, this Court is required to consider the appellant's age at the time of the commission of the offence, the maximum sentence for the offence, the notional sentence that should be utilized, the guilty plea. Credit has to be given to the time that he has spent in custody and reduced from the sentence that is imposed.

[56] Before engaging any sentencing exercise, a court must consider the relevant details of the offending. In this appeal, the appellant has not provided a summary and appears to be content with that summarized under the heading **"Facts Supporting Conviction"** in counsel for the respondent's written submissions at paragraphs 4 – 14. By way of brief summary, it is said that one Shawn Alfred ("Shawn") described being in the company of the appellant in a shed next to the Fond Assau Primary School on Saturday, 26th November 2016 about 2:00 a.m. Whilst they were there, the deceased came walking down the road venting about being ridiculed and bullied. The appellant shouted, "Eli, what happen to you?" Shortly after, the appellant approached the deceased and there was an exchange of words between them. Shawn stated that the deceased then walked away with one Christopher Lionel ("Christopher") in the direction of a place called "Ping Pong". The appellant walked back to the shed and grabbed a piece of wood which was about 2 feet long. Despite being instructed to leave the deceased alone by Shawn, the appellant walked away in the same direction the deceased had gone in.

[57] About ten minutes later, Shawn observed the appellant walking back up the road. He threw the piece of wood and a bottle next to the shed and continued walking. Shawn next saw the deceased about 8:00 a.m or 9:00 a.m that morning at the front of a vehicle. The deceased informed him that his body was in pain. Shawn last saw the deceased at a gap on Sunday, 27th November 2016 where he spoke to him for a short while.

- [58] Shawn subsequently showed Crime Scene Officer, Cpl. 635 Irvin Mesmain, the piece of stick the appellant had retrieved from under the shed. On the morning of Sunday, 2nd November 2016, the deceased went to Edward Joseph ("Edward") requesting a body rub. When Edward began rubbing the deceased, he felt like the deceased had suffered damage on the interior of his body and that his bones were broken. He advised the deceased to seek urgent medical attention. Edward quickly summoned the deceased's sister, Verna Mathurin, to his home. Upon her arrival, she called the ambulance who eventually came for the deceased and transported him to the Victoria Hospital.
- [59] The deceased underwent surgery sometime during the evening on Monday, 28th November 2016. Despite that surgery, on Wednesday, 30th November 2016, he succumbed to his injuries. He was pronounced dead at 4:15am that morning. The appellant was arrested that same morning. A post mortem examination of the deceased was conducted by Dr. Heather Emmanuel on 30th November 2016 at the Victoria Hospital mortuary. The cause of death was stated to be, "Marked pulmonary oedema consequent on anaemia, status-post splenectomy (Biopsy number 993-16) due to splenic rupture from blunt trauma with massive blood loss (more than two litres 2L)".
- [60] On Friday, 2nd December 2016 at the Babonneau Police Station, both Christopher and Shawn positively identified the appellant by way of Confrontation as the individual who was involved in the altercation with the deceased. That same day, WPC 644 Delia Samuel read a charge of murder to the appellant for causing the death of the deceased.

Starting Point/Benchmark

- [61] According to section 87(2) of the **Criminal Code** under which the appellant was charged, the prescribed penalty for non-capital murder is life imprisonment. In

deciding an appropriate sentence in any given case a court must have regard to the legislative scheme prescribed under the **Criminal Code** which guides punishment and restorative justice. However, where (as in this case) the relevant legislative framework in place at the time of the appellant's sentencing prescribed no statutory benchmarks in regard to murder there is a need to turn to the common law.

- [62] In **Akim Monah**, this Court determined that the appropriate starting point on a notional sentence should be 30 years. Blenman JA held at paragraph 48 that 'this is in keeping with the settled approach of the courts in this jurisdiction and she cited cases such as **Desmond Fletcher v The Queen**²⁹. This position is also confirmed in **Yanne Drysdale**³⁰ and in **The Queen v Clinton Gilbert and Curlan Joseph**³¹ where the starting point for murder accepted by the Court was 30 years. Applying the dicta in these judicial authorities, in my view, the learned Judge correctly arrived at a starting point of 30 years. It would clearly have been the practice of the regional courts to adopt a 30 years starting point for this offence and thereafter to consider both the aggravating and mitigating factors in the case to fashion the appropriate sentence.

Aggravating factors of the offence and offender

- [63] Turning now to consider the aggravating and mitigating factors of the offence. The respondent submitted that the aggravating factors of the offence are (i) the offence was committed in the view of the public and (ii) the offence was unprovoked. The respondent further submitted that there are no aggravating factors pertaining to the appellant as his two previous convictions are spent.

Mitigating factors of the offence and offender

- [64] The mitigating factors suggested by the respondent include: (i) that the offence was not planned or pre meditated and (ii) that there was an intention to cause serious

²⁹ GDAHCRA2015/0011

³⁰ And see *Kamal Liburd et al v The Queen*³⁰ Criminal Appeal Nos. 9 and 10 of 2003 (delivered 22nd November 2004, unreported).

³¹ SLUHRD2006/0020 SLUHRD2006/0026 (delivered 15th October 2015, unreported).

bodily harm rather than to kill. Further, the respondent submitted that the appellant (iii) cooperated with the police investigation at the initial stages and showed genuine remorse and (iv) the fact that the majority of residents in his neighbourhood held the view that the appellant was not a menace to the community and that he has good prospects for rehabilitation. When compared to the probation officer's pre-sentence report,³² I am of the view that the respondent's submissions accurately reflect the mitigating factors to be considered in calculating a sentence for the appellant.

[65] I again refer to **Yanne Drysdale** for a comparative framework to weigh the aggravating and mitigating factors. In that case, this Court considered an appeal against sentence where the appellant was convicted for the murder of his estranged girlfriend and was sentenced to life imprisonment. The Court found that the sentence of life imprisonment imposed on the appellant was excessive and should be set aside since the judge in the court below failed to apply the appropriate principles of sentencing. The Court considered the aggravating factors of the offence including the prevalence of the offence, the premeditation involved, the fact that the deceased received multiple stab wounds, another person was also injured in the attack and that the incident occurred in a public place. The Court considered that there were no mitigating factors of the offence and in the circumstances shifted the starting point to 35 years from the agreed 30 years.

[66] With regard to the aggravating factors of the offender, the Court considered that the appellant was abusive to the deceased. In terms of mitigating factors of the offender, the Court considered that the appellant had no previous convictions, the fact that the court below accepted that he was remorseful, that he was gainfully employed at the time of the incident and that there were good prospects of rehabilitation. The Court found that in those circumstances, the mitigating factors of the offender outweighed the aggravating factors and the notional sentence was reduced by 5 years.

³² Page 75 of the respondent's list of authorities.

[67] In **Simon Marius v The King**³³, the appellant was convicted for the murder of his former girlfriend's bodyguard. The appellant appealed his sentence on the following grounds: (i) While the trial judge listed the correct considerations and considered the correct authorities that a sentencing judge ought to consider when sentencing a convicted person, the judge failed to properly exercise his discretion in sentencing insofar as he failed to consider the possibility of reform and social re-adaptation of the appellant, (ii) the judge failed to properly evaluate the evidence placed before him insofar as he failed to employ the appropriate or any sentencing methodology prior to imposing a sentence on the appellant, (iii) the judge failed to take into account the time spent by the appellant in custody prior to sentence and failed to make any mathematical calculation deducting said time when he calculated the length of the sentence from the date of the sentence and (iv) the judge failed to address his mind to the possibility of imposing a sentence other than life imprisonment when determining the appropriate sentence to be imposed instead of the death penalty and in so doing improperly exercised his discretion in sentencing the appellant.

[68] The aggravating factors of the case included the use of a firearm to shoot the deceased, the degree of premeditation and planning, the fact that the appellant's former girlfriend could have been killed in the attack, the commission of the offence in public and that it was an unprovoked act involving a history of violence against the appellant's former girlfriend. The mitigating factors considered were the appellant's previous good character, the fact that he was suffering from a mental disability at the time of the commission of the offence and his good prospects for rehabilitation. The Court came to a starting point of 35 years and after considering the mitigating factors, made a reduction of 4 years to take the appellant's sentence to 31 years.

[69] As I have mentioned, in accordance with the authorities of this Court, I will start with

³³ SLUHCRA2008/0007 (delivered 16th January 2025, unreported).

a notional sentence of 30 years imprisonment. I have weighed the mitigating factors against the aggravating factors and find that the mitigating factors outweigh the aggravating factors. When the present case is compared to **Yanne Drysdale** or **Simon Marius** where the offending was particularly grave and deliberate, it seems fitting to me that a reduction must be made to the appellant's notional sentence. In my view a reduction of 5 years is appropriate as there was no planning or premeditation and there was no intention to kill, bringing the appellant's sentence to 25 years imprisonment.

[70] The next step is to consider that the appellant pleaded guilty to the offence of murder once he was re-arraigned. Although Blenman JA in **Akim Monah** held a view that a discount of thirty percent was appropriate insofar as the appellant in that case pleaded guilty at the second occasion, the sentencing judge in the present matter gave a full 1/3 discount. Given the procedural confusion surrounding this matter and the fact that a new indictment had been filed and substituted, I am inclined to agree and treat the appellant's plea as occurring at first instance. After that discount, the appellant's sentence would be 16 years and 7 months.

[71] Finally, the appellant's time spent on remand from his arrest on 26th November 2016 to his sentencing on 5th March 2020 must be deducted. The Court of Appeal in **Shonovia Thomas v The Queen**³⁴ found at paragraph 69 that:

"The position regarding time spent on remand has been addressed by the Privy Council in *Callchand & Anor v State of Mauritius (Mauritius)* and the Caribbean Court of Justice in *Romeo Da Costa Hall v The Queen*. Useful guidance has been given in these cases. The primary rule is that in the absence of unusual circumstances a judge should fully credit a prisoner for pre-sentence custody. If the judge seeks to depart from the primary rule, he must state reasons for not granting a full deduction or no deduction at all. In *Callachand*, the Board stated at paragraph 9:

'It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing.'

³⁴ BVIHCRA2010/0006 (delivered 27th August 2012, unreported).

[72] It is unclear from the Record of Appeal whether a reduction for time spent on remand was given to the appellant. It certainly is unclear from the learned sentencing judge's reasoning how the sentence would have increased from 24 years and eight months to 25 years imprisonment after taking into account the time spent on remand.

[73] Nonetheless, following the learning of **Shonovia Thomas** and after reducing the appellant's sentence (16 years and 7 months) for his time spent on remand (3 years and 3 months and 8 days) the appellant's new sentence would be 13 years, 4 months and 22 days.

Disposition

[74] It follows from this analysis that I find that the learned sentencing judge erred by failing to consider any mitigating factors of the offence and the offender and as a result handed down a sentence that was excessive and disproportionate. Accordingly, I will allow the appeal against sentence, set aside the sentence of 25 years' imprisonment imposed by the learned sentencing judge, and impose a sentence 13 years, 4 months and 22 days.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Eddy D. Ventose
Justice of Appeal

By the Court

Chief Registrar