

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

SAINT CHRISTOPHER AND NEVIS

SKBHCRAP2022/0004

BETWEEN:

EVANSON MITCHAM

Appellant

and

THE KING

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Trevor Ward

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Douglas Mendes, SC and Ms. Talibah Byron for the Appellant.

Mr. Teshawn Vasquez for the Respondent.

2023: April 27;
July 27.

Criminal Appeal – Appeal against sentence – Murder committed during the course of a robbery with the use of a firearm – Appellant sentenced to 40 years imprisonment – Whether the sentence imposed by the judge was manifestly excessive – Whether the judge erred in treating the planning of the robbery as an aggravating factor of the murder – Whether the judge erred in treating the vulnerability of the victim of the robbery as an aggravating factor of the murder – Whether the judge erred in finding that the offence was an organised criminal activity – Whether the judge erred in failing to give any credit for the degree of rehabilitation achieved by the appellant while incarcerated

On 3rd February 2001, Evanson Mitcham (“the appellant”) and 2 other men approached Arlene Fleming (“Ms. Fleming”) at her BBQ chicken stall. One of the men who was masked and armed with a gun held onto Ms. Fleming’s apron and demanded money from her. Vernal

Nisbett ("Nisbett") came to Ms Fleming's aid and after a brief struggle, the gunman shot Nisbett, killing him. On 10th June 2002, the appellant and the 2 men were convicted of murder. Following a sentencing hearing, the appellant was sentenced to death. He then appealed to the Court of Appeal against his conviction and sentence.

While he was not successful on his appeal against conviction, the Court of Appeal allowed his appeal against sentence and accordingly remitted the matter to the High Court for resentencing. At the High Court, the judge conducted a fresh sentencing hearing, and on 2nd June 2004, the appellant was again sentenced to death ("the second death sentence").

The appellant sought to appeal to the Privy Council. He was granted leave to appeal against his conviction and a stay of execution of the second death sentence pending the hearing of the appeal. However, on 16th March 2009, the Privy Council dismissed the appellant's appeal against conviction.

The appellant obtained leave from the Court of Appeal to appeal out of time against the second death sentence. However, the appellant stated that the Court subsequently communicated to him that he was erroneously granted leave to appeal out of time and it was accordingly revoked.

On 4th June 2015, the appellant sought constitutional redress at the High Court. On 25th October 2018, the judge commuted the second death sentence to life imprisonment holding that the appellant was not entitled to a fixed term of imprisonment. The appellant appealed against that finding.

On 25th March 2021, the Court of Appeal allowed the appellant's appeal against sentence and ordered that the matter be remitted to the High Court so that the appellant could be resentedenced to a term of imprisonment, having regard to the circumstances of the case, as well as the breaches of his constitutional rights. The judge accordingly resentedenced the appellant to 40 years imprisonment.

This appeal concerns the appellant's appeal against his sentence of 40 years imprisonment. The appellant advanced 6 grounds of appeal and the issues arising from those grounds are as follows: (1) whether the judge erred in treating the planning of the robbery as an aggravating factor of the murder, and thereby engaging in double counting; (2) whether the judge erred in treating the vulnerability of the victim of the robbery as an aggravating factor of the murder; (3) whether the judge erred in finding that the offence was an "organised criminal activity" and (4) whether *the judge erred in failing to give any credit for the degree of rehabilitation achieved by the appellant while incarcerated*.

It is worth noting that both parties agreed that the appeal should be allowed, and a lower sentence imposed.

Held: allowing the appeal and varying the sentence by substituting a sentence of 36 years and 6 months for the sentence of 40 years imposed by the judge, the period of 1 year and 4 months spent on remand to be counted towards the sentence, that:

1. The Sentencing Guidelines deliberately afford a measure of flexibility to judges in recognition that there is a wide variety of circumstances under which an offence may be committed, all of which cannot be captured in a guideline. The planning or premeditation of the murder is expressly listed as an aggravating factor in the Sentencing Guidelines. Where however, a murder is committed during a robbery, and there is no evidence of planning and premeditation of the murder, but instead, there is evidence of planning and premeditation in relation to the robbery, that may be regarded as an aggravating factor of the murder. In this case, when one considers the circumstances surrounding the commission of the murder as a whole, the judge did not err in considering the planning and premeditation of the robbery as an aggravating factor. Also, contrary to the views of the appellant, the judge did not double count by considering this factor when setting the starting point of 40 years; in fact, what the judge did was simply note the fact that the murder was committed during the course of the robbery with the use of the firearm when setting the starting point.

Paragraphs 11 and 12 of the **Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019, Practice Direction No. 3 of 2021: Sentencing for the Offence of Murder (re-issued, 26th November 2021)** applied.

2. The vulnerability of the victim is expressly listed as an aggravating factor in the Sentencing Guidelines. Although Ms. Fleming was not the victim of the murder, she was described as a lone female street vendor set upon in a dark alley by 3 masked men, one of whom was armed with a gun, and it was permissible for the judge in the circumstances of the underlying robbery to classify her vulnerability in the manner described, as an aggravating factor of the murder. It would also be illogical to consider the planning of the robbery as an aggravating factor and not the vulnerability of the victim, as they both form part and parcel of the same transaction. The judge did err however in considering “organised criminal activity” as an aggravating factor since he already took into account the planning of the robbery. In addition, the respondent agreed that the judge erred in considering the brandishing of the firearm as an aggravating factor. Having regard to the foregoing, the 8-year uplift to the starting point must be reduced to a 6-year uplift, amounting to 46 years.

Paragraph 12 of the **Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019, Practice Direction No. 3 of 2021: Sentencing for the Offence of Murder (re-issued, 26th November 2021)** applied.

3. The Sentencing Guidelines identify mitigating factors pertaining to the offender which include, so far as relevant to this appeal, genuine remorse and good prospects of rehabilitation. Pursuant to a psychiatric assessment and a social inquiry report, the appellant demonstrated remarkable progress and rehabilitation during his many years of incarceration; a fact conceded by the respondent. The judge however failed to credit the appellant for the strides he made over the many years of his incarceration. The significant degree of rehabilitation achieved by the appellant together with his expression of genuine

remorse was required to be recognised by an appropriate discount in sentence. Accordingly, a discount of 2 years is appropriate; reducing the sentence from 46 years to 44 years. Additionally, having regard to the constitutional breaches suffered by the appellant which the judge properly took into account, the appellant's sentence should be reduced by a further 7 years and 6 months. The period of 1 year and 4 months that the appellant spent on remand shall count towards his sentence.

Paragraph 15 of the **Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019, Practice Direction No. 3 of 2021: Sentencing for the Offence of Murder (re-issued, 26th November 2021)** applied.

JUDGMENT

- [1] **WARD JA:** This appeal against sentence has its genesis in a murder occurring on 3rd February 2001. At about 12:30 am 3 masked men approached Ms. Fleming at her barbecue chicken stall in Basseterre. One of the men, armed with a gun, held on to her apron and demanded money. Nisbett, who was seated close by on a wall, went to her assistance. He grabbed hold of her apron and told the gunman to desist. A brief struggle took place. The gunman then stepped back and fired a shot at Nisbett, inflicting a fatal wound. The 3 masked men then ran off.
- [2] Neither Ms. Fleming nor the other eyewitness was able to identify the masked assailants. The case against the appellant was therefore based entirely on circumstantial evidence. Dayane Lake was a key witness. Moments before the masked men approached Ms. Fleming, Lake and another man were in the company of the appellant and his co-defendants, Fahie and Matthew. Lake testified that Fahie went into a yard and came out with a gun wrapped in a red cloth. Fahie gave the gun to Matthew. Matthew put it in his pants. The 5 men then proceeded to Dorset Park Court. The appellant went off and returned with a plastic bag from which he retrieved and distributed a long sleeve shirt to each of his co-defendants. He then took out a black tam and a small pair of scissors which he used to cut eye holes and fashioned a mask from the tam. Matthew unfolded the red cloth containing the gun. He checked the gun and replaced it in his pants. The appellant and his 2 co-

defendants then went off together. As they were leaving, the appellant turned to Lake and the other man that had been left behind, pointed his finger at him and said, “ah you ain’t seen me”. En route to the location of the robbery, the appellant requested the firearm. The fatal shooting took place not far away from where Lake and the other man were and very shortly after the 3 men had left Lake. Another witness, Jacqueline Hendrickson, testified that she saw 3 men running up the road in the vicinity of a house some 600 yards from the shooting. She recognised the appellant as one of the 3 men.

- [3] On 10th June 2002, the appellant and his co-defendants were convicted of the murder of Nisbett. On 26th June 2002, after a sentencing hearing, the judge sentenced the appellant to death. His co-defendants were both sentenced to life imprisonment.

Procedural history

- [4] A summary of the procedural history of the matter will serve to provide the relevant context in which the present appeal arises. In this regard, I gratefully adopt much of the very helpful summary of the procedural background provided by counsel for the appellant.
- [5] Following his conviction, the appellant appealed both his conviction and sentence. His appeal was heard on 21st and 22nd July 2003. On 3rd November 2003, the Court of Appeal rendered its decision wherein it dismissed the appeal against conviction but allowed the appeal against sentence, on the basis that the procedure employed by the trial judge in imposing sentence after the pleas in mitigation were advanced was not an appropriate manner of giving effect to the new procedure that should be adopted on a conviction for murder, following the consolidated cases of **Hughes** and **Spence**¹ which required, inter alia, that where the prosecution intends to seek the death penalty, notice to that effect should be served on the prisoner no later

¹ St. Vincent Criminal Appeal No. 20 of 1998; St. Lucia Criminal Appeal No. 14 of 1997 (delivered 2nd April 2002, unreported).

than the day on which he is convicted. The Court of Appeal therefore remitted the case to the High Court judge for the appellant to be re-sentenced in accordance with the procedure it had outlined.

[6] On 2nd June 2004, the judge conducted a fresh sentencing hearing and again sentenced the appellant to death. On 7th July 2004, the appellant gave notice of his intention to appeal to the Privy Council against the Court of Appeal's decision of 3rd November 2003.

[7] For reasons which need not be detailed for the purpose of this appeal, matters lay dormant for a while as no further steps were taken by the appellant until 2007 when it appears that he was earmarked for execution. On 12th June 2007, the death warrant was read to him by the Prison Superintendent. The warrant indicated that the appellant was to be executed by hanging at dawn on 19th June 2007. The appellant's attorneys were able to secure from the Privy Council leave to appeal against conviction and pending the hearing of his appeal, a stay of execution. The appellant subsequently sought and obtained from the Court of Appeal leave to appeal out of time against his second death sentence.

[8] On 16th March 2009, the Privy Council dismissed the appellant's appeal against conviction. The Director of Public Prosecutions refused to provide an undertaking that the State would not proceed with the appellant's execution prior to the hearing of his appeal against sentence. Compounding matters was the fact that on or about 30th April 2009, the Chief Registrar informed the appellant's solicitors that the appellant had erroneously been granted leave to appeal against sentence out of time by a single judge of the Court of Appeal, and that leave had therefore been revoked. These developments meant that there was no impediment to carrying out the sentence of the court.

[9] On 4th June 2015, the appellant filed an originating motion seeking redress under section 18 of the Constitution of St. Kitts and Nevis, including an order quashing his

sentence of death, an order substituting a fixed term of imprisonment for the sentence of death, and certain declaratory relief.

- [10] On 25th October 2018, Ventose J granted the appellant certain declarations of breaches of his constitutional rights, commuted the sentence of death to life imprisonment, holding that the appellant was not entitled to a fixed term of imprisonment. On 25th March 2021, the Court of Appeal allowed an appeal against the judge's finding that the appellant was not entitled to a fixed term of imprisonment. The Court of Appeal ordered that the matter be remitted to the Criminal Division of the High Court for the purpose of re-sentencing the appellant to determine the term of imprisonment he should serve, having regard to all the circumstances of the case, but giving appropriate weight to the breaches of his constitutional rights identified by the High Court in its decision of 25th October 2018.

The re-sentencing hearing in the High Court

- [11] The appellant's re-sentencing hearing took place over 2 days on 17th and 21st February 2022 before the Criminal Division judge. On 22nd February 2022, the judge sentenced the appellant to 40 years imprisonment.

The grounds of appeal

- [12] The appellant lodged the following 6 grounds of appeal on 8th March 2022:
- (1) The judge erred in law in giving consideration to the imposition of the sentence of death when the order of the Court of Appeal referring the appellant's case for resentencing had ruled out any question of a death sentence;
 - (2) The judge erred in law when he increased the starting point of 40 years to near the top of the range of sentences because of aggravating factors which do not arise on the facts of the case or are not among the aggravating factors contained in the relevant Sentencing Guidelines;

- (3) The judge erred in law when he took into account an irrelevant factor, namely that the age that the appellant would have attained on his release from prison would be the same as the victim's age when he was killed;
- (4) The judge erred in failing to give any weight or any sufficient weight to relevant mitigating factors relating to both the offence and the appellant including: the appellant's high level of rehabilitation; his remorse; that he was not considered a danger to society; and the fact that there was no intention to kill, only to cause grievous bodily harm;
- (5) The judge erred by improperly double counting as an aggravating factor, the careful planning of the robbery when the robbery was already taken into account when setting the starting point; and
- (6) The sentence was manifestly excessive.

[13] At the outset of the hearing of this appeal, the Court was told that it was common ground between the parties that the appeal against sentence should be allowed. In their written submissions, the respondent conceded that the appeal against sentence should be allowed, and, in the exercise of its powers under section 44(4) of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act**,² the Court should quash the sentence passed by the learned judge and substitute a lesser sentence.

[14] It was common ground between the parties that the judge erred in 2 respects: (a) he had failed to give the appellant any credit for the fact that he had achieved a high level of rehabilitation while in prison (ground 4); and (b) in treating the brandishing of the firearm as an aggravating factor, the judge had engaged in double counting since the use of the firearm was already considered when setting the starting point for the sentence (in part, ground 2). I am of the view that these concessions are rightly made. Additionally, the parties did not take issue with the judge's adoption of

² Cap 3.11, Revised Laws of Saint Christopher and Nevis 2009.

a starting point of 40 years, or with his according a discount of 7.5 years on account of the breaches of the appellant's constitutional rights. Neither is there much daylight between the parties as to what would constitute an appropriate sentence when all relevant factors are taken into consideration. The appellant submitted that an appropriate sentence would be in the order of 35 years while the respondent reckons it would fall between 35-37 years.

[15] What separates the parties and leads to this variation in perspective as to the appropriate sentence is the view they take of the judge's assessment of what constitutes aggravating factors in the case. The appellant contended that the judge was wrong to treat the following matters as aggravating factors of the offence of murder: (a) the finding that there was a significant degree of planning or premeditation of the robbery as distinct from the murder; (b) treating the victim of the robbery as a vulnerable victim as distinct from the victim of the murder; and (c) the finding that the offence was an "organised criminal activity". It is further said that the judge was wrong to uplift the starting point by 8 years on account of his erroneous assessment of the aggravating factors.

[16] For their part, the respondent contended that these matters were all properly regarded as aggravating factors. They however, accepted that, given their concession that the judge double-counted the brandishing of the firearm as an aggravating factor, the uplift of 8 years should be reduced.

Issues

[17] The main issues arising for resolution given the respective contentions of the parties are as follows:

- "(i) whether the judge erred in treating the planning of the robbery as an aggravating factor of the murder, and thereby double counting this as an aggravating factor;
- (ii) whether the judge erred in treating the vulnerability of the victim of the robbery as an aggravating factor of the offence of murder; and

(iii) whether the judge erred in finding that the offence was an “organised criminal activity”.

[18] These issues flow from grounds 2 and 5. However, I will address grounds 1 and 3 first because these may be shortly disposed of. I will then proceed to deal with the more substantive complaints under grounds 2 and 5, ground 4 having been conceded.

Ground 1 – whether the judge erred in law in considering the imposition of the sentence of death when the order of the Court of Appeal referring the appellant’s case for resentencing had ruled out any question of a death sentence

[19] The Court of Appeal’s order dated 25th March 2021 reads in relevant part:

“The matter is remitted to the High Court Criminal Division for the purpose of re-sentencing the appellant to determine the term of imprisonment he should serve, having regard to all the circumstances of the case, but giving appropriate weight to the breaches of his constitutional rights identified by the High Court in its decision of 25th October 2018.”³

[20] The impression that the judge contemplated the imposition of the death sentence seems to be derived from the following passage in the judgment on sentence:

“30. In theory, for this case sentence of death may be available for consideration as it concerns murder, for which under the laws of St Kitts and Nevis, then in 2001, and now, capital punishment may follow, as appears in **s2 Offences against the Person Act Cap 4.21**:

Murder

2. A person convicted of murder shall suffer death as a felon.

31. Over time, through the ECSC the practice has emerged sentence [sic] for murder has ranged from death to a whole life term or to a determinate sentence, so that the seeming mandatory feature death must follow has very much receded, largely owing to case law showing it is unconstitutional for there to be an automatic sentence which cannot take account of mitigation and other relevant features of a case, so that automatic sentence of death would amount to a denial of natural justice. The leading case reviewing this evolution of jurisprudence is the majority judgment of Byron P of the Caribbean Court of Justice in the case of **Nervais et al v Regina**

³ See Record of Appeal, Vol. 1, p. 31.

2018 CCJ 19 (AJ) which found mandatory sentence of death ultra vires the protection of law.

32. Death not being mandatory, in Mitcham's case for re-sentence this court will not contemplate sentence of death for three reasons: first, under the current guidelines, this case on its facts would not attract sentence of death; second, the *Pratt & Morgan* moratorium on execution if a condemned man has been on death row for more than five years, as here, would apply, so that execution would now be unlawful, as inhuman and degrading, in breach of the Constitution, as found by the first declaration of Ventose J; and third, in all the circumstances, sentence of death is now in 2022 not sought by the prosecution, which it must be to be contemplated."⁴

[21] When the judge's remarks are read as a whole, it seems to me that the judge was doing no more than providing a broad overview of the full range and nature of sentences theoretically available on conviction for murder. While he could have economically stated that the sentence of death was off the table because of the terms of the Court of Appeal's Order, the judge's exposition does no more than explain why, in any event, under the **Practice Direction on Sentencing for the Offence of Murder** ("the **Guidelines**" or "the **Sentencing Guidelines**")⁵ and **Pratt & Morgan v AG**,⁶ the sentence of death could not be contemplated. That discussion caused no prejudice to the appellant as it was very clear that the judge recognised that a death sentence could not be contemplated, and ultimately proceeded to sentence on the basis that a determinate sentence was in order. I would therefore dismiss this ground of appeal.

Ground 3 – whether the judge erred in law when he took into account an irrelevant factor, namely, that the age that the appellant would have attained on his release from prison would be same as the victim's age when he was killed

The judge made this observation after he had already calculated what he considered to be the appropriate sentence to be served by the appellant, and when musing on the appellant's eligibility for remission if of good behaviour, which he then proceeded

⁴ See Record of Appeal, Vol. 1, pp. 21-22.

⁵ Eastern Caribbean Supreme Court (Sentencing Guidelines) Rules 2019, Practice Direction No. 3 of 2021: Sentencing for the Offence of Murder (re-issued, 26th November 2021).

⁶ [1993] UKPC 1.

to calculate. The judge then remarked that if his calculation were right, “then Mitcham may finally be released when aged about the same as Vernal Nisbett when he took his life.” It can be agreed that this was a wholly irrelevant observation. Nonetheless, coming at the stage when it did and in context, it was not a factor that played any part in the actual determination of the appropriate sentence to be served by the appellant. I would dismiss this ground of appeal.

[22] I turn now to grounds 2 and 5 which may be dealt with together.

Ground 2 – whether the judge erred in law when he increased the starting point of 40 years to near the top of the range of sentences because of aggravating factors which do not arise on the facts of the case or are not among the aggravating factors contained in the relevant Sentencing Guidelines

Ground 5 – whether the judge erred by improperly double counting as an aggravating factor the careful planning of the robbery when the robbery was already taken into account when settling the starting point

The appellant’s submissions

[23] On behalf of the appellant, Mr. Douglas Mendes SC submitted that on a proper construction of paragraph 12 of the **Sentencing Guidelines**, the planning and premeditation must relate to the offence charged, in this case the murder. There is no evidence of planning or premeditation of the murder. As it relates to the robbery, it was submitted that there is scant evidence of planning and premeditation and certainly no more than is inherent in every typical robbery. Mr. Mendes SC submitted that the **Guidelines** recognise that such planning is inherent in what he called the typical or “garden variety” robbery and accounts for the starting point of 40 years. The framers of the **Guidelines** would not have contemplated that the spur of the moment robbery would be caught within the rubric of the **Guidelines** which would attract the 40-year starting point. Accordingly, Mr. Mendes submitted that there ought not to be an uplift in the starting point on account of the degree of planning involved in the robbery as that would be double counting, since the starting point was arrived at by considering, among other things, the fact that the murder was committed during the course of a robbery and with the use of a firearm.

- [24] In relation to the vulnerability of the victim, Mr. Mendes SC submitted that on a proper construction of the **Guidelines**, the vulnerable victim referenced in the **Guidelines** is the victim of the murder and not the victim of the underlying robbery. The judge therefore erred in treating the vulnerability of the victim of the robbery as an aggravating factor of the offence of murder. In any event, says Mr. Mendes SC, the **Guidelines** provide that a victim is vulnerable, “because young or elderly or had a disability or because geographically isolated.” By this definition, neither the victim of the robbery nor the victim of the murder, fell into this category.
- [25] Lastly, under this ground, Mr. Mendes submitted that the judge erred in characterising the robbery and murder as, “organised criminal activity” and thereby treating this as an aggravating factor. It was submitted that while the robbery contained an element of planning, it did not constitute organised criminal activity which generally refers to, “intricately developed centralized criminal networks which carry out criminal activity as an enterprise.” ⁷

The respondent's submissions

- [26] Mr. Tessaun Vasquez for the respondent took a sharply different view on each of these points. In relation to the planning of the robbery, Mr. Vasquez submitted that it is correct in principle to take account of the spectrum of underlying criminality that can precipitate murder. It was submitted that a murder occurring during the course of a, “spurious or unsophisticated” offence should be treated differently from a murder occurring in circumstances where that other offence was carefully planned. It would not be double counting to have regard to the degree of planning involved in the robbery because the degree of planning of the underlying robbery is used, not to categorise the murder, but to aggravate it. Mr. Vasquez applied the same reasoning to answer the submission that the judge erred in treating the vulnerability of the victim of the robbery as an aggravating factor of the offence of murder.

⁷ See appellant's written submissions at paragraph 59.

- [27] In relation to the characterisation of the offence as, “organised criminal activity” Mr. Vasquez invited the Court to interpret the judge’s remarks as meaning no more than that the offence was a group activity. This is a plausible reading, he submitted, when set in the context of the judge’s emphasis that Ms. Fleming was a lone woman on a street corner being surrounded by 3 men.

Discussion and analysis

- [28] The **Sentencing Guidelines** provide for the types of sentences that may be imposed on conviction for murder and the factors that should guide the court when determining whether the circumstances of the case warrant the imposition of the sentence of death, a whole life sentence or a determinate sentence or detention at the court’s pleasure in certain circumstances. Importantly, the **Guidelines** catalogue a number of aggravating and mitigating factors relating to both the offence and the offender which may be taken into account after the court has established a starting point. paragraphs 11 and 12 provide:

- “11. Having chosen a starting point, the court should take into account any further aggravating or mitigating factors pertaining to the offence, and then as a second step to the offender, to the extent that it has not allowed for them in its choice of starting point. Care must be taken not to double count.
12. Aggravating factors pertaining to the offence (separate from those mentioned in paragraphs 5, 7 and 9) that may be relevant include:
- a. a significant degree of planning or premeditation;
 - b. the victim was vulnerable because young or elderly or had a disability or because geographically isolated;
 - c. ...”

- [29] Paragraph 15 identifies mitigating factors pertaining to the offender which include, so far as relevant, genuine remorse and good prospects of rehabilitation.
- [30] The aggravating and mitigating factors listed there are not meant to be exhaustive. Mr. Mendes voiced concern that giving individual judges too much leeway to add to the list of aggravating factors threatens to produce uncertainty and inconsistency in the approach to sentencing. I cannot agree. The **Guidelines** deliberately afford that measure of flexibility to judges in recognition that there is a wide and varied range

of circumstances under which a criminal offence may be committed, all of which cannot conceivably be captured in a guideline. The judge must therefore be able to identify some feature of the case which, though not listed in the **Guidelines**, may properly and reasonably be regarded as an aggravating or mitigating factor. There would still be accountability as the judge is obliged to explain what factors they considered to be aggravating or mitigating, and their judgment in that regard is always open to appellate review.

[31] I turn now to examine the judge's assessment of the aggravating factors. Applying paragraph 12, the judge assessed the aggravating factors pertaining to the offence in the following way:

"13 Under **para 12**, aggravating is the offending behaviour of the robbery was carefully planned, the victim vulnerable, others greatly endangered, in public, it was organized criminal activity, unprovoked, and there were threats by brandishing the firearm. Moreover, the victim sought to calm the situation, and intervene, to assist a woman wholly unfairly surrounded by three masked men, and the public would expect his being murdered to be met with the strongest sanction.

14 Under **para 13**, no mitigating features apply.

15 As such, in my judgment owing to aggravation the sentence should increase from 40 years toward the top of the range, to 48 years."⁸

[32] As it relates to the aggravating factors pertaining to the offence, I agree that on a plain reading of the **Guidelines**, the planning or premeditation of the offence, meaning the murder, constitutes an express aggravating factor. But does that mean that in circumstances where a murder is committed during a robbery, the degree of planning that went into the robbery cannot be regarded as an aggravating factor in its own right? In my view, the planning or premeditation of the murder itself is but one among a non-exhaustive list of aggravating factors. As such, the level of planning and premeditation involved in the underlying robbery can also be regarded as an aggravating factor of the offence of murder.

⁸ See Record of Appeal, Vol. 1, p. 25: Judgment of Morley J on sentence at paras 13-15.

- [33] Furthermore, to have regard to the planning of the robbery as an aggravating factor is not to engage in double counting as the appellant contended. Whether the murder was in fact committed in the course of a robbery is a different issue altogether from whether the degree of planning of the underlying robbery itself can be an aggravating factor, when the circumstances surrounding the commission of the murder are considered as a whole. In principle, provided that the judge does not have regard to the degree planning of the robbery when setting the starting point, it is open to them to consider this as an aggravating factor of the murder, bearing in mind that the aggravating factors outlined in the **Guidelines** are non-exhaustive. Conversely, where the degree of planning or premeditation of the robbery has been taken into account in setting the starting point, it would be double counting to have regard to it subsequently as an aggravating factor.
- [34] Here, the judge did not take the degree of planning into account when setting the starting point. At that stage, he only considered that the murder was committed during the course of a robbery and with the use of a firearm.⁹ It was therefore permissible for the judge to have regarded the level of planning of the robbery as a discreet aggravating factor of the offence of murder. This is distinct from the mere fact that the robbery occurred. It was neither improper nor an error in principle for the judge to have given consideration to the fact that this murder occurred during the course of a well-planned robbery as opposed to an opportunistic robbery. To hold otherwise would be to require the judge to turn a blind eye to the level of planning that went into the robbery that spurred the murder, no matter how sophisticated as, for example, in the planning and execution of a bank robbery during which a murder occurs.
- [35] Mr. Mendes SC made a further point in the alternative, however. It is that, even if the judge were right to treat the planning of the robbery as an aggravating factor, he was wrong to characterise the degree of planning as significant since no more planning went into this robbery than is typical in a robbery of this nature. In other

⁹ See Record of Appeal, Vol. 1, p. 24: Judgment of Morley J on sentence at para 41.

words, there is nothing in the degree of planning involved here to take it beyond the ordinary and elevate it to the degree of “significant” warranting an uplift in the starting point and which furthermore, would be double counting.

[36] Contrary to Mr. Mendes SC’s submissions, I see no basis for reading into the **Guidelines** an assumption that all robberies must or inherently involve planning and that the spur of the moment robberies are excluded from reckoning when setting the starting point. Whether there was planning or premeditation and the degree of same is not a matter of assumption; it is based on evidence. It is for the judge to assess the evidence to determine the presence and degree of planning and/or premeditation. On a plain reading of the **Guidelines**, all forms of robbery which precipitate murder are included; planned and unplanned, spur of the moment or opportunistic. There is nothing in the language of the **Guidelines** to support the interpretation urged on this Court by Mr. Mendes that reads into the **Guidelines** an assumption that to trigger the starting point of 40 years the robbery must be planned, and that a spur of the moment robbery does not trigger that starting point. I would reject that submission.

[37] In relation to the question of what is meant by a vulnerable victim in the context of the **Guidelines**, in my view, as used in paragraph 12, the term is meant to refer to the victim of the murder. Not only that, since vulnerability is regarded as an aggravating factor yielding an uplift in the starting point, it seems to me that the term vulnerable denotes some peculiar characteristic of the victim or their circumstances. Examples of such characteristics are provided in the **Guidelines** itself: a young or elderly person; a person suffering from a disability; or a person who was geographically isolated. These are non-exhaustive examples.

[38] In oral submissions before this Court, the respondent accepted that the judge did not make a finding in his judgment on sentence that the victim of the murder was vulnerable. In my view, therefore, the question whether the victim of the murder was

vulnerable does not arise. Instead, the judge's focus was the victim of the robbery. In this regard, this is what he said:

"b. The attack was to be in a public place in a dark alley at night by three masked men, one armed with a loaded pistol, on a woman working alone as a street vendor in a modest circumstance, being therefore a crime on a vulnerable person, overwhelmingly overpowerable [sic] by her male attackers, and who surrounded her, the gunman being in front and the other 2 behind her, the gunman laying hands on her, pulling at her apron."¹⁰

[39] To my mind, the circumstances described by the judge in this passage portray a vulnerable victim within the meaning of the **Guidelines**, that is, a lone female street vendor set upon in a dark alley by 3 masked men, one of whom was armed with a gun. While not the victim of the murder, if, as I have concluded, it is permissible to regard the circumstances of the underlying robbery as an aggravating factor, it would be illogical to be able to take cognisance of the planning of the robbery on the one hand but ignore the vulnerability of the victim of the same robbery on the other. They both form part and parcel of the same transaction. I therefore conclude that the judge did not err in treating the vulnerability of Ms. Fleming as an aggravating factor.

[40] The last factor which, it was submitted, the judge wrongly treated as an aggravating factor is his characterisation of the robbery and murder as "organised criminal activity". The context in which this description was used is reflected in the following passage from the judgment on sentence:

"Under **para 12**, aggravating is the offending behaviour of the robbery was carefully planned, the victim vulnerable, others greatly endangered, in public, it was organized criminal activity, unprovoked, and there were threats by brandishing the firearm."¹¹

[41] The **Guidelines** provide that where the offence was an "organised criminal activity" that fact is regarded as an aggravating factor. The **Guidelines** also provide a definition of criminal gang in the following terms: "Criminal gang" means a group of

¹⁰ See Record of Appeal, Vol. 1, p. 12: Judgment of Morley J on sentence at para 16.

¹¹ See Record of Appeal, Vol. 1, p. 25: Judgment of Morley J on sentence at para 13.

three or more persons who share a criminal purpose.” To be clear, the term “organised criminal activity” has a certain connotation involving a more structured, sustained criminal enterprise or operation, not present on the facts of this case. However, in the context in which the judge used the expression, “organised criminal activity” it seems to me that his use of that expression is not to be understood in an overly technical way but simply to mean that the murder occurred against the backdrop of a planned criminal activity by a criminal gang. That said, however, even if that is what the judge meant to convey, given that he had already taken account of the degree of planning involved in the robbery and the fact that it was perpetrated by 3 persons as aggravating factors, it was an error to treat this as an additional aggravating factor.

[42] In summary therefore, I would hold that the judge did not err in regarding the planning of the robbery as an aggravating factor of the murder, did not double count by so finding, and did not err in finding that the victim of the robbery was vulnerable and in treating this as an aggravating factor of the murder. These are all properly regarded as aggravating factors of the offence of murder. I would however hold that the judge double counted when he regarded the “organised criminal activity” as an additional aggravating factor. Added to this, the respondent conceded that the judge erred by double counting the brandishing of the firearm as an aggravating factor.

[43] The result is that the judge improperly regarded 2 matters as aggravating factors, which contributed to his assessment that an uplift of 8 years was appropriate. Considering the errors identified, that 8-year uplift must be reduced. In my view, the aggravating factors would warrant an uplift from the starting point of 40 years to 46 years.

Mitigating factors

[44] No complaint is made about the judge’s conclusion that there are no mitigating factors in relation to the offence. However, as previously indicated, the respondent conceded ground 4, and agreed that the judge erred in failing to give any credit for

the degree of rehabilitation demonstrated by the appellant during the period that he has been incarcerated.

- [45] The Court of Appeal's order dated 25th March 2021 remitting the appellant's case for resentencing reads in part:

"2. The matter is remitted to the High Court Criminal Division for the purpose of re-sentencing the appellant to determine the term of imprisonment he should serve, having regard to all the circumstances of the case, but giving appropriate weight to the breaches of his constitutional rights identified by the High Court in its decision of 25th October 2018.

3. For the purposes of such re-sentencing:

(a) A psychiatrist shall be appointed by the State to prepare a Psychiatric Report on the appellant, a copy of which shall be filed at the Court and served on the parties on or before 14th May 2021.

(b) The Director of Probation and Child Services in the Ministry of Social Development shall cause a Social Inquiry Report to be prepared on the appellant, a copy of which shall be filed at the Court and served on the parties on or before 14th May 2021."¹²

- [46] There can be no doubt that the reason why the Court of Appeal thought it appropriate to order the preparation of a psychiatric and social inquiry report was for the judge to take into account the progress the appellant has made while incarcerated.¹³ Pursuant to the Court of Appeal's order, a psychiatric assessment was produced by consultant psychiatrist, Dr. Izben Williams and a Social Inquiry Report was authored by probation officer, Ms. Tivanna Wharton. That material was before the judge.

- [47] As part of a general narrative before embarking on the sentencing exercise, the judge quoted copiously from the reports. In relation to the issue of whether the appellant was genuinely remorseful, the judge observed that his attitude toward the

¹² See Record of Appeal, Vol. 1, pp. 31-32.

¹³ See *Bernard Coard et al v The Attorney General* [2007] UKPC 7, where the Privy Council allowed the appeal, remitting the case to the Supreme Court of Grenada for the appellants to be sentenced in accordance with the construction of section 230 of the Criminal Code taking into account the progress made by them during their time in prison.

offence had changed from one of denial and lack of remorse to full acceptance of responsibility and remorse. The judge observed:

“Now, he accepts his role in the offence and has persistently shown remorse and insight:

i. In his affidavit of 04.06.15, Mitcham stated at para 22: *‘I am fully aware of the enormity of the wrong that I have committed. I cannot correct that wrong but I can definitely learn from my mistakes and I humbly ask for forgiveness. I have been ever cognizant of the fact that a life was lost and the entire family, friends and loved ones were directly affected, and of the pain and agony and emotional trauma that they went through. I am truly sorry. My family, friends and loved ones and my son went through this identical atmosphere of pain and emotional trauma and loss when my brother was killed, and so did I. Everyone loses when sin is committed. Words cannot adequately convey my profound sympathy and apology to the families connected to the deceased.’* He added at para 24: *I had just turned 20 when I committed my offence. I am now 34 years of age. Understanding comes with time and I have matured with it. My thinking and attitude have completely transformed over the years. I feel I am a changed and improved person, if only I could be given the opportunity to show it.’*

ii. In a comprehensive social inquiry report of 09.06.21 by Tivanna Wharton, noting Mitcham was cooperative, one of eight siblings, without his father present, growing up in deprived circumstances, leaving school without any qualification, with a previous conviction in 1999 for driving without a license, working as a laborer, having a son now 20, she wrote he said: *‘I am remorseful for what happened, very much so. It was not my intent, it is just that someone asked for my assistance and for that I am very sorry. I know that it is something I can’t give back to the family. I am very remorseful for that. I know that I can’t give back a life to the family and loved ones of the deceased and I am regretful and remorseful for that. I don’t really know how to explain the situation but I know I am very remorseful and hope that I can be forgiven by the family. I also hope that he (sic) judge can see the change in me and offer me a second chance at life. I was not there for my son and now that he is going to make 20 this year I believe I can be a positive light in his life so that he may never go down the same path that I did. So I am asking for a second chance. These years being imprisoned has (sic) helped me to gain a better perspective on life and recognize my past mistakes. I have had a lot of time to rehabilitate and believe that I can contribute to our society to ensure that other young men do not end up in the same situation as I did. I am truly sorry for my actions and I am seeking for a second chance at life.’* She added in her final assessment, observing Mitcham retains the support of his mother and siblings, who regularly visit: *‘The first step in rehabilitation is acceptance of guilt. Mitcham has accepted his role in the crime*

committed and has acknowledged his wrongdoing. According to Prison Sergeant Rochester, since being incarcerated, Mitcham has shown exemplary behavior and has not had any infractions registered against him. He has been described as a person who is sometimes forgotten about because of his extremely low profile and good behaviour’.”¹⁴

[48] In relation to the extent of the appellant’s rehabilitation while in prison the judge remarked as follows:

“In a thorough and thoughtful psychiatric report of 31.01.22 by Dr IzBen Williams, a number of important observations are made toward the end:

What threat, if any, Mitcham represents to the public?

Forty-one (41) year old Mitcham, had his formative mind rooted in adverse childhood and adolescent circumstances, with limited opportunities and many unfavourable life events during his first twenty years of life. He attained appreciable recovery and an altered mind-set over the next twenty years, age 21 to 41. This was due in large measure to the humbling experience and unrelenting impact of the protracted and traumatic deathrow existence. There was also, concealed in this experience, opportunity to reflectively process life’s vicissitudes and to embrace its favour.

Despite the absence of any structured psychological support during his twenty-one (21) years of incarceration, sixteen and one third (16 1/3) of which were spent in solitary confinement, Mitcham was able to elaborate his own coping mechanisms while being separated from the gallows chamber by a simple door, most of that time.

Mitcham is today a substantially reformed man. This transformation and his current reordered mindset render him a low risk for assaultive or homicidal behaviour were he to be released back into society. He scores a risk level of 1.5 on a scale of 1-5. This opinion is consonant with criteria set out in the Assault and Homicide Danger Assessment Tool, a multidimensional tool which is endorsed by the American Academy of Psychiatry and the Law. This opinion is buttressed also by clinical considerations.

Mitcham is contrite and he has, notwithstanding his limited formal schooling, remarkably insightful into the life circumstances that influenced his childhood and adolescent years, presaging a shadowy outcome.

What is his current state of rehabilitation?

It is admirable the self-help initiative that Mitcham undertook to repair his literacy status. He had to have become mindful of the importance of these life skills and intent on remedying his deficiency. He also elaborated his own

¹⁴ See Record of Appeal, Vol. 1, pp. 15-16: Judgment of Morley J on sentence at paras 17(b)(i)-(ii).

coping mechanisms. That he has been able to improve himself in these 2 regards, and under the prevailing circumstances, is the more commendable.”¹⁵

[49] The judge further commented on a report from the Deputy Commissioner of Corrections in the following terms:

“In a helpful letter from the prison of 10.02.22, by Deputy Commissioner for Corrections Denzil Harris, being at the prison 20 years, knowing Mitcham since his incarceration, he reports Mitcham a reader of many library books, has long been respectful to prison staff, being calm and quiet, obeying the rules, he has expressed remorse, is easy to work with, remaining positive, is compassionate about others’ situations, and since coming off death row in 2018 has enrolled in programs concerning farming, painting and counselling, so that DCC Harris thinks he can be a productive citizen.”¹⁶

[50] On any view, the appellant had demonstrated remarkable progress and rehabilitation during his many years of incarceration. Regrettably, apart from reciting the contents of the various reports, the judge failed entirely to credit the appellant for the strides he has made over the many years of his incarceration and his seemingly genuine remorse. Both these factors are identified within the **Guidelines** as mitigating factors in relation to an offender. In my view, the significant degree of rehabilitation achieved by the appellant, together with his expression of genuine remorse, constituted powerful personal mitigation which was required to be recognised by an appropriate discount in sentence. In my view a discount of 2 years is appropriate, reducing the sentence from 46 to 44 years.

[51] With adjustments made on account of aggravating and mitigating factors in relation to the offence and the offender, the appropriate sentence would have been a term of imprisonment of 44 years given the circumstances of this case.

[52] However, as mandated by the Court of Appeal, due cognisance is to be taken of the breach of the appellant’s constitutional rights as identified in the judgment of the

¹⁵ See Record of Appeal, Vol. 1, pp. 16-17: Judgment of Morley J on sentence at para 17(b)(iii).

¹⁶ See Record of Appeal, Vol. 1, p 17: Judgment of Morley J on sentence at paras 17(b)(iv).

High Court dated 22nd October 2018. There, Ventose J made the following declarations:

“(1) A Declaration is granted that to execute the Claimant now would amount to inhuman or degrading punishment or other treatment contrary to section 7 of the Constitution.

(2) A Declaration is granted that the Claimant’s right to the protection of the law under section 10(1) of the Constitution was infringed when he was not allowed to make representations to the Committee when it considered his case on 24 April 2004.

(3) A Declaration is granted that the Claimant’s right to the protection of the law under section 10(1) of the Constitution was infringed when the permission previously granted to him by the Court of Appeal to appeal against his sentence out of time was subsequently retracted.”¹⁷

[53] The judge properly took account of these breaches and credited the appellant with 7 years and 6 months. There is no appeal on this point and the parties agree that this was an appropriate level of credit for the constitutional breaches. This credit has the effect of reducing the appellant’s sentence to 36 years and 6 months. The appellant must also be credited with the time spent on remand which the Court is advised amounts to 1 year and 4 months.

¹⁷ See Record of Appeal, Vol. 1, pp. 45-46: Judgment of Ventose J at para 32.

Disposition

[54] For the reasons discussed above, I would allow the appeal and vary the sentence by substituting a sentence of 36 years and 6 months for the sentence of 40 years imposed by the judge. The period of 1 year and 4 months spent by the appellant on remand is to count towards his sentence.

I concur.

Dame Janice M. Pereira

Chief Justice

I concur.

Gerard St. C. Farara

Justice of Appeal [Ag.]

By the Court

Chief Registrar