

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: AXAHCV2023/0017

BETWEEN:

**[1] ROMEIN BROWNE
[2] CUTHWIN DAVIS
[3] ALEXIS CONNOR**

Claimants

-and-

THE ATTORNEY GENERAL OF ANGUILLA

Defendant

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Mr. Darshan Ramdhani KC, with him Mr. Carlyle Rogers for the Claimants
Mr. Anthony Astaphan KC, with him Mr. Sasha Courtney and Mr. Theon Tross for the Defendant

2023: November 3,
2024: June 14.

Murder – Mandatory life sentence – Minimum tariff – Trial judge functus officio – Fundamental rights and freedoms – Inhuman or degrading treatment – Fair trial – Protection of the law – Claimants convicted of murder and sentenced – Whether trial judge functus officio when proceeding to sentence claimants after issuing commitment warrant which imposed life sentences – Whether trial judge bound to impose life imprisonment pursuant to Section 188 Criminal Code in accordance with Section 37(2) Criminal Code – Whether Section 188 prohibits trial judge from setting minimum tariff before life sentence becomes reducible – Whether Section 37(2) unconstitutional – Whether trial judge has discretion to impose determinate sentence – Whether mandatory sentence of life imprisonment violating claimants’ right to freedom from inhuman or degrading treatment – Whether Section 37(2) violating claimants’ right to fair trial and protection of the law – Constitution Order of Anguilla 1982, Sections 3(1)(b), 6 and 9 – Criminal Code (Chap. C140, Revised Statutes of Anguilla 2000) Sections 37(2) and 188.

JUDGMENT

[1] **Moise, J.:** On 12th June 2009, the claimants were all convicted, by a jury, for the murder of Shane Fraites. On 30th June 2009, they were all sentenced by the trial judge on account of their convictions. The claimants have now filed an originating motion in which they seek, among other things, a declaration that their rights, pursuant to sections 3, 6 and 9 of the Constitution Order of Anguilla, have been breached. They also seek declarations setting aside their sentences and an order that they be resentenced.

The Facts

[2] After conviction by a jury for Shane Fraites' murder, counsel for the claimants in their criminal trial raised certain arguments before the trial judge. In essence, the arguments centered around the principles espoused by the Court of Appeal and the Privy Council in the cases of **Newton Spence v R**¹ and **Peter Hughes v R**.² These were two separate cases, from Saint Vincent and the Grenadines and Saint Lucia, in which the constitutionality of mandatory death sentences were scrutinized. As it relates to the claimants currently before this court, it was argued before the trial judge that the imposition of a mandatory sentence of life imprisonment for the offence of murder was subject to the discretion of the sentencing judge. It is apparent from the evidence presented that counsel for the crown was, at that time, unfamiliar with the cases of **Spence** and **Hughes**. The sentencing hearing was therefore adjourned to 30th June 2009 in order for counsel to file submissions on sentencing. A Social Inquiry Report on each of the claimants was also ordered.

[3] Although it is quite apparent from the transcript of the proceedings, that the trial judge did not proceed to sentence the claimants on that day, a warrant of commitment was nonetheless signed and issued by the trial judge. This warrant states as follows:

¹ SVGHCRA1998/0020 (delivered 2nd April 2001, unreported).

² SLUHCRA1997/0014 (delivered 2nd April 2001, unreported).

To all Police Constables or other Peace Officers in Anguilla and to the Superintendent of Prison of the Common Goal in Anguilla

*The Accused [was] on the **12th day of June 2009** convicted before the Hon. Madam Justice Tana'ania Small Davis sitting at The Valley, Anguilla, upon an Indictment for having:*

On or about the 4th day of March 2006 at West End, in the Island of Anguilla, with malice aforethought, caused the death of Shane Fraites by an unlawful act.

Murder, contrary to Section 186 (1) as provided for by Section 188 of the Criminal Code, Revised Statutes of Anguilla, Chapter C140.

AND IT WAS HEREBY ADJUDGED that:

Romein Browne (also called "***Speedaro***"), ***Cuthwin Davis*** (also called "***Chubby***") ***and Alexis Connor*** each be given the term of LIFE IMPRISONMENT and in respect of Alexis Connor his sentence is to run concurrent with his sentences passed at the Anguilla Magistrate Court on the 12th April 2007 and at the High Court on 22nd June 2007, respectively, upon his conviction of offences contrary to Section 248 (a) and Section 203 of the Criminal Code, C140, Revised Statutes of Anguilla.

This is to command you to convey the accused to the Royal Gaol, there to be imprisoned accordingly.

Given under my hand and seal this 12th day of June 2009 at The Valley in the island of Anguilla.

[4] This warrant indicated that the claimants were sentenced to life in prison with no minimum tariff set. It is worth noting, at this stage, that it is not customary for trial

judges to sign warrants of commitment. That is normally the duty of the Registrar of the High Court. In addition to that, where a sentencing hearing is deferred subsequent to conviction, a warrant of committal pending sentence is normally issued, again at the hand of the Registrar.

[5] In keeping with the judge's order of 12th June 2009, counsel for the parties duly filed submissions. Social Inquiry Reports were submitted, and the trial judge conducted the sentencing exercise on 30th June 2009. I note, at this stage, that the submissions filed by counsel for the claimants in the criminal trial were not exhibited in evidence. The transcripts reveal that the trial judge indicated on 30th June 2009, that only a synopsis of her reasons was given in open court. She indicated that a more fulsome account of the reasons for her decision on sentencing would be provided at a later date. It is unclear to this court as to whether those reasons were ever submitted, as they were not exhibited in this case. The court must therefore rely on the transcript of proceedings for what was said.

[6] Nothing in the transcripts addressed the issue raised as it relates to **Spence** and **Hughes**. I say so because the transcript of the decision does not mention the cases and what was specifically noted in the submissions about them. It is also apparent that the trial judge did not address the question of whether she was bound by the provisions of section 37(2) of the **Criminal Code**,³ neither did she address the constitutionality of the section. This section effectively made life sentences for murder in Anguilla mandatory. The trial judge proceeded to sentence the claimants each to life in prison but set a minimum tariff before they may be eligible for early release. The claimants were each sentenced as follows:

- (a) Romein Browne and Cuthwin Davis were both sentenced to life imprisonment of which a minimum of 30 years must be served.
- (b) Alexis Connor was sentenced to life imprisonment of which a minimum of 20 years must be served.

³ Chap. C140, Revised Statutes of Anguilla 2000.

[7] One issue which is worth noting is the age of the claimants at the time of the offence. Romein Browne was 18 years old on 4th March 2006 when Shane Freitas was murdered. Cuthwin Davis and Alexis Connor were both 16. One other issue to note, however, is the rather gruesome nature of this crime as was outlined by the trial judge during her sentencing remarks. After their sentencing on 30th June 2009, a commitment warrant was again signed, this time by the Registrar of the High Court, reflecting the sentences which had been duly passed on that day in open court. It is also worth noting that the transcripts do not indicate that the time which the claimants spent on remand was to count towards the minimum tariffs set. However, each of the claimants were committed to prison and did not appeal their sentences.

The Originating Motion

[8] It is against this backdrop that the claimants have filed this originating motion seeking the following relief:

- (a) A declaration that the automatic life sentences respectively imposed on the Claimants on 12th June 2009 are unlawful and unconstitutional as being in breach of sections 3(1)(b), 6 and 9 of the Constitution, and are therefore null, void and of no effect.
- (b) A declaration that the Trial Judge, having sentenced the Claimants on 12th June 2009, became *functus* and had no lawful authority or jurisdiction to re-sentence the Claimants on 30th June 2009, and that the respective sentences imposed on the Claimants on 30th June 2009 are unlawful and unconstitutional as being in breach of sections 3(1)(b), 6 and 9 of the Constitution, and are therefore null, void and of no effect.
- (c) An order quashing the warrants of sentence dated 12th June 2009 and 30th June 2009.

- (d) An order directing that each of the Claimants be taken forthwith to a Court of law and they each be sentenced in accordance with law.
- (e) A declaration that the sentences imposed on the Claimants on 30th June 2009, which include tariff periods of 30 years in the cases of the 1st and 2nd Claimants and 20 years in the case of the 3rd Claimant, before they become eligible for parole, are unconstitutional and in breach of sections 3(1)(b), 6 and 9 of the Constitution and are therefore null, void and of no effect.
- (f) A declaration that the only lawful sentence open to the Court to impose on the Claimants at the time of their convictions for murder on 12th June 2009 under section 186 of the **Criminal Code**(then in force) was life imprisonment as provided for under section 188 and in light of section 37(2) of the said code.
- (g) A declaration that the warrant of sentence dated 12th June 2009 is the sentence of the Court on the Claimants following their convictions for murder as provided for under section 188 of the **Criminal Code** (then in force) and that the Claimants are eligible for parole after serving 15 years from that date as provided under section 12(2)(b) of the **Parole of Prisoners Act**.
- (h) Damages.
- (i) Costs.
- (j) Such further orders as this Honourable Court deems fit.

[9] The defendant has filed an affidavit in opposition to this motion. Ms. Erica Edwards, Senior Crown Counsel in the office of the Attorney General, deposed to an affidavit in which she states that she was present and part of the prosecution team when the claimants were tried for murder. In her affidavit she highlights much of what I have already outlined in the facts. Ms. Edwards asserted that there was no sentencing hearing conducted on 12th April 2009. As such, the commitment warrant could have

only been issued in error. She also states that she was present at the sentencing hearing on 30th June 2009 and that the trial judge considered submissions made by counsel acting on behalf of the claimants before her sentence was handed down.

The claimants' submissions

[10] In written submissions filed on 30th October 2023, Mr. Ramdhani KC, on behalf of the claimants, argues firstly, that the trial judge, having issued a commitment warrant on 12th June 2009, was *functus officio* when she proceeded to sentence them on 30th June 2009. He states that it is the claimants' case that they were sentenced to life imprisonment on 12th June 2009. It is Mr. Ramdhani's submission that, notwithstanding the discussions on the application of section 37(2) of the **Criminal Code**, and the subsequent adjournment of the matter, the trial judge signed and perfected a 'warrant of commitment in the High Court after conviction' on that same day. Counsel goes on to argue that "even if it is accepted that she wanted to simply remand each Claimant until the 30th day of June 2009, that is not what the Learned Judge in fact did. What the Learned Judge did was to 'adjudge' and impose a sentence of life imprisonment on each Claimant." It was further submitted that there is nothing in the warrant issued on 12th June 2009 which indicates that it was expected that there would be a 'remand to prison' and a return for sentence on 30th June 2009. It is, as submitted by counsel, significant in this regard that there is nothing in that 'warrant' that requires or commands that each claimant was to be brought back to court on 30th June 2009.

[11] Mr. Ramdhani relied on the South African authority of **Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector Including Organs of State and Others**⁴ where it was stated that 'it was settled law that the general principle was that, once a court had duly pronounced a final order, it became *functus officio* and had no power to alter the order.' Reliance was also placed on the case of **R v Essex Justices Ex**

⁴ [2022] 1 LRC 303.

*parte Final; Same v Same*⁵ for the proposition that the court cannot simply change orders once executed because it may be considered 'convenient to do so'. In that case it was stated that after the court had imposed a sentence it had no power to reopen it.

[12] The claimants' case is that if the court were to find that the trial judge was *functus* when she proceeded to sentence them on 30th June 2009, then that later sentence is void and of no effect and the sentence as outlined in the commitment warrant of 12th June 2009 is the valid sentence imposed. In light of that, the court is invited to go on to find that the sentence imposed on 12th June 2009 is unconstitutional as it relied on section 37(2) of the **Criminal Code**, which in itself is unconstitutional. In order to place this submission in its proper context a closer look at the legislative regime is necessary.

[13] At the time of the sentencing of the claimants, section 188 of the **Criminal Code** set out the powers of sentencing for convictions for murder.⁶ The section stated that 'any person who is convicted of murder is liable to imprisonment for life.' Had the legislation ended there, there would have been no difficulty as section 43 of the **Interpretation and General Clauses Act**⁷ makes it clear that a life sentence would have been a maximum sentence available to a trial judge. There would have therefore been a discretion to impose a lower sentence after taking into account the various sentencing principles then established in case law. However, the **Criminal Code**, goes on to note the following in section 37(2)⁸:

'A person liable to imprisonment for life or any other period may be sentenced to a shorter term, except in the case of a sentence passed in pursuance of section 188.'

⁵ [1962] 3 All ER 924.

⁶ The provisions are now contained in section 189 of the Criminal Code but remain the same.

⁷ Chap. 125, Revised Statutes of Anguilla 2000.

⁸ The current section refers to section 187 instead of 188. However, the substance of what is contained in the various sections remain the same.

[14] The effect of this section is that it makes life imprisonment a mandatory sentence for the offence of murder in accordance with section 188 of the **Criminal Code**. There would therefore be no discretion on the trial judge to impose a determinate sentence as opposed to one of life imprisonment. The question as to whether or not the judge is, by virtue of this section, prohibited from setting a tariff for a minimum period of incarceration before a life sentence becomes reducible is another issue which must be addressed.

[15] Mr. Ramdhani's submission is that a judge is bound to follow a law, despite the fact that it may be unconstitutional, unless a declaration to that effect is made. He states in his submissions that 'it is well established that a court must give effect to the laws and shall not disregard such laws because the Court considers it right to do so.' In support of that argument counsel placed reliance on the Privy Council decision in **Patrick Reyes v R**⁹ where the following was stated:

"The ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted. This is sometimes described as deference shown by the courts to the will of the democratically elected legislature. But it is perhaps more aptly described as the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it."

[16] The Privy Council went on in the following paragraph to state that:

"When...an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue... about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not. Decided cases around the

⁹ (2002) 60 WIR 42.

world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation.”

[17] The argument being made here is that the court cannot simply disregard the express provisions of the law and act in a manner which is contrary to it. As it relates to the manner in which the court ought to proceed where there are questions about the constitutionality of a legislative provision, reference was made to the case of **Ghandi Nawaf Mallak v The Minister for Justice, Equality and Law Reform**.¹⁰ Here the Constitutional Court of South Africa stated that:

“It is well established in the jurisprudence of this court that it will not address an issue as to the constitutionality of a law, if the case before it can be resolved without declaring the law to be unconstitutional. In particular, the court will endeavour to interpret a section of a statute so as to conform with the Constitution and, only if that is not possible, will it consider declaring the provision incompatible with the Constitution.”

[18] The starting point, therefore, would have been to determine whether the issues in the case could have been resolved without declaring the law to be unconstitutional. If it was possible to interpret the law in a way which is compatible with the constitution, then that interpretation ought to have been adopted and applied. It is only if this is impossible should the court go on to consider whether the provision should be declared to be incompatible with the constitution. Reference was then made to the case of **Board of Management of Trim Joint District School v Kelly**¹¹, where Lord Atkinson stated that ‘to construe the statute as if it were not there, even for the most benevolent object, is not, I think, permissible. It amounts, in my view, to legislating, not interpreting or declaring the law.’

¹⁰ [2012] 3 IR 297.

¹¹ [1914-15] All ER Rep Ext 1453.

[19] Mr. Ramdhani went on to argue that when one examines the provisions of section 37(2) of the **Criminal Code**, the section is quite clear. There is no other sentence available to a judge after a conviction for murder, but to sentence a defendant to life in prison. There is no other way in which the section can be interpreted. In the case of the claimants, when they came for sentencing in June 2009, Mr. Ramdhani argues that the judge had no discretion but to impose a life sentence on them in the absence of a declaration that section 37(2) of the **Criminal Code** was unconstitutional. In light of that argument, the court was referred to the decision of the Caribbean Court of Justice (CCJ) in the case of **August v R**¹² where the following was noted:

In the instant case, the learned trial judge applied the principles in **Agripocal v R**¹³ and sentenced the appellant to life imprisonment. He was bound to do so by the legislature. (See also **R v Santos**,¹⁴ where Moore J stated clearly that she had no other option but to impose the mandatory life imprisonment.) In the appeal of **Ical**, counsel for the appellant complained that the sentence of life imprisonment imposed was harsh and excessive. He referred the court to the case of **Adolph Harris v The Attorney General of Belize**,¹⁵ where the court imposed on the appellant a determinate term of imprisonment of 20 years for the offence of murder, as authority for the proposition that a mandatory life imprisonment is contrary to the Belize Constitution. This court, in its judgment in **Ical**, said that counsel did not direct the court to any passage in the judgment which might be said to constitute such authority and, further, the counsel in Harris had not advanced such position. As a result, the court rightly pointed out that at the final paragraph:

‘Without the benefit of full argument on the point, we are not prepared to regard this judgment of the court below as containing more than obiter dicta

¹² (2016) 89 WIR 201.

¹³ 13 March 2008, Criminal Appeal No. 6 of 2007, unreported.

¹⁴ 13 February 2015, Indictment No. C86/13, unreported.

¹⁵ 11 December 2006, Claim No. 339 of 2006, unreported.

on the subject-matter of this ground. We consider, in these circumstances, that the sentence of life imprisonment, being one fixed by law, was rightly imposed on the appellant.'

[20] Mr. Ramdhani therefore goes on to submit that the trial judge erred in the manner in which she proceeded to sentence the claimants. It is submitted that what ought to have been done was that section 37(2) of the **Criminal Code** ought to have been scrutinized for its compatibility with the constitution. If that had been done, it would have been clear that the section was unconstitutional. Once that determination had been made, the judge was nonetheless bound to follow the law unless she took the additional step of declaring the law to be unconstitutional. That was the approach taken in the cases of **Reyes** and those of **Spence** and **Hughes**. A declaration was necessary before the statute could be ignored.

[21] One issue which emerges from the submissions of the claimants, is the question of the reducibility of the life sentence. As I indicated before, there was not much contained in the transcripts as to the trial judge's position on the constitutionality of the section; neither was there any explanation as to why she felt capable, in law, of setting a tariff for each claimant. It is also unclear as to whether counsel who appeared on behalf of the claimants had even made a submission as to whether the section was in fact unconstitutional and should be declared so. The only discernible submission I have gathered from the transcripts was that on the authority of **Spence** and **Hughes**, the court retained a discretion in the exercise of its sentencing powers. The submissions on the full extent of that discretion were not presented in the case before me.

[22] However, during the course of the hearing on 12th June 2009, the trial judge made reference to a constitutional motion which was then before the court for its consideration. She intimated that it was a matter which was to come before her on a subsequent date. That was the case of **Abraham Harrigan v The Attorney**

General¹⁶ in which the same trial judge came to consider the constitutionality of section 37(2) of the **Criminal Code**. The decision in that case has come under some measure of criticism in the present case by counsel for the claimants and I will consider it in more detail later on in this judgment. It would suffice at this stage to state that counsel for the claimants submits that the judge in that case decided that the mandatory life sentence would be proper in all cases once a tariff was set. In that way, the court considers the mitigating factors which are peculiar to the offence and the offender and sets a minimum period for which he must be incarcerated before he is considered eligible for parole. Learned King's Counsel went on to submit that:

"Where the Learned Judge fell into error was when Her Ladyship conflated a mandatory life sentence for certain categories of murder with a life sentence for all categories of murder. The former – meaning certain categories of serious murder - has been deemed to be proper once not irreducible. The latter – meaning all kinds of murder - must be unconstitutional following the learning of **Spence** and **Hughes**."

[23] Mr. Ramdhani submits that, even if the court were to find that the trial judge was not *functus* on 30th June 2009 when she sentenced the claimants to life in prison and set tariffs for the potential early release, those sentences must also be unconstitutional. The submission is that even though the judge's decision in **Harrigan** came after, her rationalization in that case must have been the basis upon which she felt capable of setting tariffs along with the life sentence imposed on the claimants on 30th June 2009. Given the submission that the Learned Judge was wrong in **Harrigan**, it is argued that the approach taken in the sentencing of the claimants on that date was also wrong.

[24] In addition to that, counsel for the claimants submit that the trial judge, even in setting tariffs, failed to consider whether or not the remission allowed for under section 7(1)

¹⁶ AXAHCV2009/0052.

of the **Prison Regulations**¹⁷ applies to the tariff period. Under those regulations, prisoners who are sentenced to a definite term of imprisonment are entitled to a one-third remission of their sentences on account of good behaviour and lack of any breach of the prison rules. The learned judge was also criticized for not taking into account the more than 3 years that the claimants had spent in custody prior to the sentencing when setting the tariff for the minimum period in which they were to remain incarcerated.

The Attorney General's Submissions in Response

[25] The sole dispute of fact identified by counsel for the respondent was that no automatic life sentence or any sentence was pronounced upon the Claimants on 12th June 2009 as alleged by them or at all. It is submitted that a review of the transcripts will reveal quite clearly what the trial judge ordered on 12th June 2009. There was no sentence, but rather directions were given prior to the sentencing exercise which was adjourned to 30th June 2009. Despite what was stated in the warrant, it was argued that the clear and obvious purpose of the warrant was to detain or commit the Claimants pending the sentencing hearing scheduled for 30th June 2009. This took place as was ordered on that date.

[26] It is therefore submitted, on behalf of the Honourable Attorney General, that the trial judge was not *functus* when she handed down her decision on sentencing on 30th June 2009. Mr. Astaphan KC submitted that the court ought to examine all of the evidence in order to determine the true nature of the order of the trial judge on 12th June 2009. The commitment warrant in and of itself does not give a true picture of what transpired. It was therefore submitted that, on the evidence contained in the transcripts, it is clear that the Trial Judge did not divest herself of her sentencing jurisdiction, as the Claimants and their Counsel well understood and knew. The Judge, on the evidence, retained the jurisdiction to convict on 30th June 2009, which she did on the submissions of the Claimants and without objection.

¹⁷ RRA P75-1.

[27] It is submitted further that, on the strength of the authorities of **Lawrence v R**,¹⁸ and **Spence** and **Hughes**, the trial judge was obliged by law to disregard the mandatory sentence, and conduct a sentencing hearing, which she did on 30th June 2009. It was, according to counsel for the Attorney General, only after these factors were taken into account, did the trial judge proceed to sentence the claimants.

[28] It is therefore argued that the sentences imposed on the claimants on 30th June 2009 were consistent with the constitution. It is submitted that the law, as it stood on 30th June 2009, required that the trial judge exercise a discretion and take into account mitigating and other factors. This was done, not only without objection from the claimants' counsel, but on the basis of the very submissions made on account of the learning in **Spence** and **Hughes**.

[29] It is submitted, further, that in sentencing the claimants, the trial Judge had the discretion to impose minimum or maximum periods of imprisonment. There was no fetter on her discretion save that the sentences ought to be fair and reasonable, and not excessive. It is argued that, in light of the facts of the case, the sentences are not excessive. Further to that, it is noted that on 30th June 2009 no argument was made before the trial judge as to the constitutionality of her sentencing powers as contained in the legislation. In furtherance of that submission counsel referred the court to the case of **Alleyn v R**¹⁹ where Anderson J stated that:

“This Court has emphasized its unhesitating acceptance that the rehabilitation of the offender is a factor that must be considered by the sentencing judge in fashioning the appropriate sentence and that it will be for others in the criminal justice system to ascertain when rehabilitation has been accomplished. However, in discharging its judicial function to fashion an appropriate sentence we are equally sanguine in the view that the sentencing judge when imposing a life sentence (as distinct from a

¹⁸ [1933] AC 699 (PC).

¹⁹ [2020] 1 LRC 238 (CCJ).

determinate sentence) not only has the authority but, we venture to say, the responsibility to recommend the tariff or minimum period of sentence to be served for purposes of deterrence and punishment. The judge, having within his or her purview, the detailed knowledge of the facts of the case, any instructive reports, should weigh up all the factors, aggravating as well as mitigating, and recommend, as a term of the sentence of life imprisonment, a tariff or minimum period to be served before there is any possibility of release. Recommending a minimum period of incarceration is consistent with the constitutional rights to a fair hearing before an independent and impartial tribunal, protection of the law and equality before the law.”

[30] Counsel went on to submit that the claimants’ reliance on the **Parole of Prisoners Act**²⁰ is misplaced because the Act was not in existence when they were sentenced in 2009. The trial judge could not have then been influenced or fettered in any way by the provisions of that Act.

[31] It is argued, in the alternative, that the allegations made by the Claimants do not meet the threshold required for establishing a case of cruel and inhuman treatment. The court was referred to the cases of *Harding v The Attorney General of Anguilla*²¹ and *Attorney General of Saint Lucia v Henry and Noel*²² in support of the submission that a specific type and level of conduct, treatment, infliction and suffering is required on the pleadings and evidence for the claimants to meet and cross the threshold of cruel and inhuman treatment. None of this had been sufficiently pleaded or proved.

[32] One further point raised by the defendant in oral submissions relates to the decision of the Privy Council in the case of *Coard & Others v The Attorney General of*

²⁰ Chap. P3, Revised Statutes of Anguilla 2000.

²¹ CA No. 13 OF 2000.

²² [2022] 1 LRC 579.

Grenada.²³ In particular, the court was referred to paragraphs 26 to 29 of that judgment where, after considering various authorities on the constitutionality of the death penalty, the following was noted:

“...The result is that section 230 of the Criminal Code must be interpreted to mean and has meant since the Constitution came into force in 1974, that the death penalty for murder is discretionary: a person convicted of murder may be sentenced to death but may instead be given a lesser sentence. The judge did not exercise this discretion and the sentence was therefore unlawful.

Mr. Dingemans submitted, however, that the validity of the sentence of death was just as much *res judicata* as the validity of the conviction. If, as the Privy Council held in *Bowe's* case, the sentence was unconstitutional by 1986, the point could just as well have been taken before the Court of Appeal in 1991. The appellants are no longer “in the judicial system” and their only remedy is to petition the Governor-General under section 60 to grant them executive clemency or refer their cases back to the Court of Appeal.

In the ordinary way, there would be both logic and practical sense in Mr Dingemans' argument. But this is no ordinary case. Firstly, the application to this case of the doctrine of *res judicata* is somewhat artificial. The legality of the mandatory death sentence imposed upon the appellants has never been the subject of judicial decision. It is true that it could have been raised before the Court of Appeal in 1991 and the Board's decision in *Bowe's* case shows that if it had been raised, the correct answer would have been that it was unlawful. However, that follows from the principle that judicial decisions on the meaning of the Constitution have retrospective effect. Nonetheless, in practice (as was shown by the citation by Lord Bingham in

²³ [2007] UKPC 7.

Bowe of earlier cases before the Board), it is unrealistic to expect that the argument which succeeded in Bowe would have been entertained, let alone succeeded, before the Court of Appeal.

Secondly, the sentence in question was death. If the appellants were still at risk of execution, there can be little doubt that the Board would not allow the principle of *res judicata* to stand in the way of granting relief to prevent the carrying into effect of an unlawful sentence. But the validity of the life sentence substituted by the warrant of commutation is dependent upon the validity of the sentence of death. In the absence of such a sentence, the Governor-General has no power to order that the appellants be imprisoned for life and the appellants therefore remain held in detention without lawful authority.”

[33] The argument being made is simply that, notwithstanding the express wording of section 37(2) of the **Criminal Code**, the judge retains a discretion. There is no need to declare the section unconstitutional. If the constitutional vice can be cured by reading the section in light of the constitution, then this is what the trial judge is obligated to do. It was submitted that the Privy Council has advised that the imposition of a penalty without discretion must be cured by the judge. Reliance was also placed on the case of **Alleyne v R** where, it is submitted, the CCJ encouraged a similar approach.

Analysis

[34] Having assessed the pleadings as well as the submissions presented, I am of the view that the first issue for consideration is whether the Trial Judge was *functus* when she came to sentence the claimants on 30th June 2009. The answer to that question necessarily influences the constitutional issue raised by the claimants as it determines which of the two sentences highlighted in the case is the correct sentence of the court. I have concluded that the trial judge was not *functus* when she sentenced the claimants on 30th June 2009 and that the sentences as contained

in the warrant of commitment on that day are the sentences lawfully imposed after their convictions. I have come to that conclusion for a number of reasons.

[35] Firstly, I agree with the submissions of counsel for the Attorney General where it is stated that the court ought to examine the facts and what transpired after the claimants' convictions in total. I can glean nothing controversial in the authorities referred to by Mr. Ramdhani. However, in examining the transcripts which have been made available, I am not satisfied that the trial judge had in fact adjudged and determined the sentences imposed on the claimants on 12th June 2009. The evidence clearly shows that, after having heard various submissions from counsel at the trial, the hearing was adjourned, and directions were given for submissions and a social inquiry report to be filed. Those directions were followed, and the court proceeded to conduct a hearing in accordance with the orders pronounced in open court on 12th June 2009.

[36] Contrary to the submissions of counsel for the claimants, I do not find that the trial judge proceeded to ignore a previous order merely because it was convenient to do so. No one in the process, including the trial judge, appeared to labour under any apprehension that a sentence had been handed down on 12th June 2009. No one appeared to have been ignoring a previous order out of mere convenience. What transpired was that the actual orders proclaimed in open court were being followed.

[37] Secondly, I am not of the view that what was contained in the commitment warrant of 12th June 2009 is an accurate reflection of the judge's order as proclaimed in open court on that day. There is no authority presented to me to suggest that the commitment warrant can override the express declaration of the judge in open court. I am unaware of any practice or legal authority which even empowers the trial judge to sentence defendants in criminal proceedings other than in open court, let alone by way of warrant. The warrant appears to be a document which is designed to authorize the prison authorities to incarcerate a defendant on account of him having been sentenced prior. It is not even customary that such documents be signed by the trial judge.

[38] To my mind, when considering the evidence as a whole, it seems clear that the terms of the warrant of 12th June 2009 were in error and do not reflect the true order of the court. I am therefore satisfied that this does not reflect the sentence imposed on the claimants. It follows that the sentences imposed on 30th June 2009 are the true and lawful orders of the trial judge as it relates to their sentences after conviction. It is therefore left for the court to consider the constitutional issues raised in light of this finding.

The Constitutionality of Mandatory Life Sentences

[39] It is important, firstly, to place the issues relating to mandatory sentencing in a proper legal context. I make a first point here that, whilst the learning in the cases of **Spence** and **Hughes** is critical to any discussion on the issue, these two cases do not stand as authority for the proposition that mandatory sentences are unconstitutional as a matter of course. I make this observation because counsel for the claimants have submitted that the trial Judge fell into error when she conflated a mandatory life sentence for certain categories of murder with a life sentence for all categories of murder. The former – meaning certain categories of serious murder - has been deemed to be proper once not irreducible. The latter – meaning all kinds of murder - must be unconstitutional following the learning of **Spence** and **Hughes**. Counsel did not present any authority which goes as far as to make that very point. It is therefore important to give some consideration as to how those issues have developed in case law since the decisions in **Spence** and **Hughes** were handed down.

[40] The second point which I wish to make is that the Trial Judge came under some measure of criticism in submissions for the decision she made in the case of **Harrigan**. However, I wish to note that this was a decision made by this court in 2009. At that stage, the cases of **Spence** and **Hughes** had been delivered for less than a decade. Since the decision in **Harrigan** the courts have continued to grapple with the application of those principles as it relates to mandatory life sentences, or

perhaps even mandatory sentences in general. In the context of the Caribbean in particular, the CCJ has subsequently delivered a number of judgments which touch on that issue. To a great extent, the issue remains somewhat debatable and unsettled in case law. Nonetheless, the development of the jurisprudence within the context of the Caribbean is worth some consideration. It is important therefore to firstly give consideration to the rationale put forward by the trial judge in **Harrigan** and to address the discussion which has continued in case law in this matter to date.

[41] In **Harrigan**, after considering the authorities on mandatory minimum sentences, the Learned Judge concluded that ‘the weight of the authorities makes it clear that the mandatory life sentence is not unconstitutional for breaching the doctrine of separation of powers.’ In coming to that conclusion, the judge referred to the case of **Hinds v R**²⁴ where the Privy Council did find that the mandatory sentence of detention at hard labour during the Governor General’s pleasure, which was under scrutiny in that case, was in fact unconstitutional on account of its breach of the separation of powers. However, she went on to refer to the case of **Spence** and noted that in that case the court of appeal had found that ‘...a mandatory sentence fixed by the legislature is not inconsistent with the independence of the judiciary.’ The Learned Judge also referred to the case of **Roger F.P. de Boucherville v The State of Mauritius**²⁵ where it was noted that a mandatory life sentence may not be a breach of the separation of powers but may fall afoul of the provisions of the constitution for its lack of proportionality.

[42] The judge in **Harrigan** then went on to consider the question of whether the mandatory life sentence imposed in Anguilla breached Mr. Harrigan’s right not to be subject to cruel, inhuman and degrading treatment. At paragraph 130 of the judgment, Her Ladyship stated as follows:

“Inhuman and degrading punishment means punishment that is grossly disproportionate to what would have been appropriate. In other words, to

²⁴ [1977] AC 195.

²⁵ [2008] UKPC 37.

condemn a man to life in prison without giving him the opportunity to persuade the court that this would, in his case, be disproportionate and inappropriate [and] is to treat him in a way in which no human should be treated. If the court does not have the discretion to take into account the individual circumstances of an individual offender and offence in determining sentence, then it means the mandatory sentence is liable to be disproportionate. As said by Saunders JA as he then was in **Hughes v R**: 'The dignity of human life is reduced by a law that compels a court to impose life indiscriminately upon all those who are convicted of murder.'

[43] It would seem therefore, that the trial judge did find that the mandatory life sentence may very well fall foul of the right against inhuman and degrading treatment on account of its lack of proportionality. She went on to note that 'it has always been a fundamental principle of sentencing that the time must fit the crime; that criminal penalties must be proportionate to the gravity of the offence.' The question for consideration was therefore whether the decision in cases of **Spence** and **Hughes** in relation to mandatory death sentences would be equally applicable to mandatory sentences of life imprisonment. For an answer to that question, the learned judge referred again to the case of **de Boucherville** where the following was noted:

"Such a sentence, mandatorily imposed, was subject to almost all the vices held to be inherent in the mandatory death sentence itself. It permitted no distinction to be drawn between one offence of murder and another, despite the great and well-known disparity between the culpability of different murderers, even where an intention to kill is a necessary ingredient of the offence. It allowed no account to be taken of the youth, age, vulnerability or circumstances of the individual offender. It gave the defendant no opportunity to plead for a lesser penalty before being deprived of everything worth living for, save life itself. It permitted no account to be taken of a defendant's remorse or the prospects of his rehabilitation. A hearing which gave the court no scope to mitigate such a sentence was not a fair hearing,

and a penalty so inflicted was inhuman and degrading punishment or other treatment.”

[44] The learned judge in *Harrigan* went on at paragraph 40 to state that:

“Every offender is entitled to have his particular circumstances considered. In practice in Anguilla, and in the Claimant's case, the sentence is passed without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender. It cannot meet the test of justice if a person who commits the worst kind of murder, whatever that may be perceived to be, whether after the torture of a child over a number of days, should be sentenced to exactly the same punishment as one who may have been driven to murder after long years of abuse at the hand of the deceased. It therefore means that the sentence may be wholly disproportionate to the defendant's criminal culpability.”

[45] It would seem therefore, that the learned judge accepted that section 37(2) of the **Criminal Code**, as it was contained in the legislation in Anguilla, was potentially in breach of those principles. There was nothing in the legislation which created any discretion on the part of the judge to consider the mitigating circumstances of the convicted person. She went on to state that ‘if the convicted person is being detained beyond a period which represents either punitive or preventative objectives, the sentence is disproportionate and constitutes inhuman treatment where there is no longer any danger to the society’. However, the judge went on to note that:

“...it is clear that whole life tariff is not necessarily unconstitutional, that is, breaching the inhuman and degrading treatment protection. The case of *R v Secretary of State for the Home Department Ex p Hindley*²⁶ is authority for the proposition that there can be cases where the crimes are so wicked

²⁶ [2001] 1 AC 410.

that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence. However, what is required is that there should be an exercise of judicial discretion in setting the appropriate tariff that represents the length of time required to be served by the prisoner as punishment.”

[46] To my mind, what is being expressed here is that it is quite possible for a whole life sentence to be entirely proportionate to the crime for which the defendant has been convicted. It is not inhuman, nor is it degrading in any way to be imprisoned for life if the crime one has committed warrants such a sentence. But such a sentence should only be imposed after the offender has been given an opportunity to argue against it on account of various mitigating factors in his favour. Depriving him of that opportunity would render the sentencing hearing unfair. The challenge, however, with the aforementioned statement, is that it suggests that the inhuman and degrading character of such a sentence, or perhaps its lack of proportionality and unfairness, can, be adequately mitigated by exercising a discretion to impose a tariff which represents the length of time required to be served by the prisoner as punishment. The remainder of the life sentence becomes reducible after that point on account of whether the defendant is any more a danger to society. I have to say, for my part, that I do not entirely agree with this statement. However, I do acknowledge that the learned judge had some legal authority upon which she had based her conclusions.

[47] In the case of *R v Lichniak; R v Pyrah*²⁷ the House of Lords came to consider the question of mandatory life sentences. As was noted in that case, the legislation in England at that time imposed a life sentence on those who committed murder as adults. The question for consideration before the court was whether section 1(1) of the Murder (Abolition of Death Penalty) Act 1965 was incompatible with article 3 of the European Convention on Human Rights on the grounds that the mandatory life sentence for murder was arbitrary and/or disproportionate; and/or in breach of article

²⁷ [2002] UKHL 47.

5 of the European Convention on Human Rights on the grounds that the mandatory life sentence for murder is arbitrary.

[48] There was discussion in that case on the provisions of section 2 of the Criminal Sentencing Act, 1997. That section imposed a mandatory life sentence on persons who had committed certain serious offences in circumstances where there were previous or other convictions of serious offences. I will return to this in a moment. However, I note that in the consolidated cases of *Lichniak; Pyrah* it was argued that convicted murderers should not be sentenced to imprisonment for life unless they appeared to present a danger to the public. Counsel for the appellants in that case focused on the preventative elements of a life sentence which relates to those who are dangerous. The argument here is that where there is no evidence that a convicted murderer is a future danger to the society, it is disproportionate for a sentence imposed on him to reflect the second deterrent element after the punitive stage of his sentence had been imposed. It would therefore suffice, in the right circumstances, to impose a determinate sentence. Taken from the decision of the House of Lords in that case, counsel for the appellants there argued that:

“First, convicted murderers serving the tariff term of their mandatory life sentences cannot know whether they will be released at the end of it or not, and so (unlike prisoners serving determinate sentences) will spend years on end uncertain about their date of release. Secondly, at the end of the tariff term it is for the prisoner to show that it is safe to release him, the onus being on him. Thirdly, even when released the prisoner remains liable to recall for the rest of his days if he is thought to present a danger to the safety of the public. In the cases of those judged to be dangerous or potentially so, these safeguards served a valid penological purpose. But in the cases of those not judged to be dangerous, the safeguards serve no valid penological purpose; they are arbitrary, excessive and disproportionate; and so they offend articles 3 and 5 of the convention”.

[49] After considering those submissions, Lord Bingham noted that this argument was “neither trivial nor misconceived. The sentence of life imprisonment is now the most severe penalty for which the law provides. There are grounds for concern if the sentence is imposed on those who, despite the seriousness of their crimes, could be adequately punished by a determinate sentence. Indeed, any mandatory or minimum mandatory sentence arouses concern that it may operate in a disproportionate manner in some cases.” Despite Lord Bingham’s acknowledgement of these concerns, he nonetheless rejected the arguments and upheld the mandatory life sentence. He stated as follows:

“First, sitting judicially, the House is concerned to decide not whether the mandatory life sentence for murder is desirable or necessary but whether it is lawful. Unless the sentence is shown to be unlawful, the appeals must fail. Secondly, the House must note that section 1(1) of the Murder (Abolition of Death Penalty) Act 1965 represents the settled will of Parliament. Criticism of the subsection has been voiced in many expert and authoritative quarters over the years, and there have been numerous occasions on which Parliament could have amended it had it wished, but there has never been a majority of both Houses in favour of amendment. The fact that section 1(1) represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled: see **Brown v Stott**²⁸; **R (Mahmood) v Secretary of State for the Home Department**²⁹. It may be accepted that the mandatory life penalty for murder has a denunciatory value, expressing society’s view of a crime which has long been regarded with peculiar abhorrence.”

²⁸ [2001] 2 WLR 817, 834 – 835, 842.

²⁹ [2001] 1 WLR 840, 854-855, paragraph 33, and 856, paragraph 38.

[50] I make a number of observations as it relates to this particular statement. Firstly, I note here that Lord Bingham was of the view that what was under scrutiny was not the desirability and necessity of the mandatory life sentence, but its lawfulness. He went on to argue that the mandatory life sentence was the settled will of parliament, and some deference must be observed to that will. He also acknowledged that this in and of itself is not a conclusive reason for upholding the section. However, in my view, in Anguilla there is a written constitution, which guarantees certain fundamental rights to the citizen and clearly outlines the fundamental role of the judiciary in sentencing offenders. Although the courts must defer to parliament's settled will, that will must also subject itself to the constitution at all times. Here, the court is directly engaged not merely in the question of whether the terms of section 37(2) of the **Criminal Code** are desirable and necessary, but whether they fall afoul of the constitutional principle of proportionality, in that the section appeared, at least at the time of the decision in *Harrigan*, to create no exceptions or discretion on the court but to impose this sentence on all convictions for murder. If the section is incompatible with the constitution of Anguilla, it becomes unlawful and ought not to stand.

[51] Lord Bingham also went on to state as follows:

“...the mandatory life sentence is imposed only on those who have been proved to have taken a life or lives, as adults, with the intention of doing so or of causing serious physical injury and whose responsibility for their conduct was not found to be diminished. While, therefore, there will be those (of whom those who kill as an act of mercy, or battered wives, or those who overreact to a perceived threat may provide the best examples) who may reasonably be judged very unlikely to resort to violence again, the discussion inevitably takes place with reference to a person who is shown to have resorted to violence once, with fatal consequences to another. This in itself distinguishes this class of case from that to which section 2 of the 1997 Act applied, since it is clear that an offence may fall within the statutory

definition of a serious offence and yet fall far short of a serious crime, as was the case in *R v Offen*³⁰ as well as in *R v Buckland*³¹ before it.”

[52] In my view, this statement highlights a distinction which Mr. Ramdhani sought to draw in his own arguments. Here it is clear that this mandatory life sentence is not imposed on persons under the age of 18 and was not imposed on those whose responsibility for their conduct was not found to be diminished in any way. I take the statement to mean that Lord Bingham is not here speaking about a finding of diminished responsibility for which the offence will be reduced to one of manslaughter, but an acknowledgement that there may be cases which rise to the level of murder for which such diminishing features will place a qualification on the imposition of a mandatory life sentence. At the time of the offence of the claimants in the case before me, two of them were 16 years old. Although the legislation in Anguilla at the time placed them in the category of adults for the purpose of criminal responsibility, this is hardly a feature of this case the court can simply ignore. There was also no room to consider whether there were features of the case which may have proven that the offenders’ responsibility was somewhat diminished. Lord Bingham, there, gave a non-exhaustive list of examples. None of these featured in the legislation in Anguilla at the time of the claimants’ sentences or at the time of the decision in *Harrigan*.

[53] Lord Bingham then went on to note as follows:

“I do not consider that the appellants’ complaints are of sufficient gravity to engage articles 3 and 5(1) of the convention. Those articles protect very important rights: article 3 the right not to be subjected to torture or to inhuman or degrading treatment or punishment, article 5(1) the right not to be deprived of liberty save in accordance with a procedure prescribed by law and save in a number of specified cases, of which the first is lawful

³⁰ [2001] 1 WLR 253.

³¹ [2000] 1 WLR 1262.

detention after conviction by a competent court. But the convention is concerned to prevent significant, not minor, breaches. It has been held that mistreatment must attain a certain level of severity to breach article 3: ***Tyrer v United Kingdom***³² ; ***Costello-Roberts v United Kingdom***³³ . With reference to article 5, in determining the arbitrariness of any detention regard must be had to the legitimacy of the aim of detention and the proportionality of the detention in relation to that aim. So the significance of the appellants' complaints must be viewed in the context of their treatment as a whole.”

[54] It is in reliance on these principles, at least partially, the learned judge in ***Harrigan*** concluded that although section 37(2) of the **Criminal Code** may be problematic, the lack of proportionality could have been mitigated by the court's own introduction of a tariff in order to reflect the punitive elements of the sentence and the remaining portion of the life sentence would only be served in prison if there are grounds to believe that the offender remains a danger to the public. He is therefore capable of putting mitigating factors to the court, in order to argue for an appropriate tariff to reflect the punitive aspect of his crime. What he is incapable of doing however, is arguing for a determinate sentence, rather than a life sentence with a tariff.

[55] It is important to highlight some other distinguishing factors between the case of ***Lichniak*** and what was obtained in Anguilla at the time of the ***Harrigan*** decision, as well as the sentencing of the claimants in this case. Firstly, when Lord Bingham referred to the tariff period being set in the imposition of life sentences, he was referring to a procedure which was then outlined in the legislation in the UK. There was no such legislation or any provision in Anguilla which regulated the imposition of a tariff in life sentence cases. The **Parole of Prisoners Act** which now governs these issues, was passed subsequent to this. There was also no provision in the criminal law which treated 16-year-olds as children for the purpose of criminal

³² (1978) 2 EHRR 1, para 30.

³³ (1993) 19 EHRR 112, paras 30-32.

convictions and sentencing. This has since changed. There was therefore no form of classification in Anguilla at the time. These are issues to which I will return. However, I wish to address some cases from the Caribbean region in which the issue of life sentences was discussed, and which were referred to by both parties in the case before me.

[56] The first case which I wish to consider is that of ***Alleyne***. This case is important because one of the issues which was raised therein was that of the definition of life imprisonment. The CCJ came to consider ‘whether the imposition of a life sentence meant incarceration for the natural life of the prisoner or for some shorter term.’ This is an important element of the discussion because Mr. Astaphan KC, for the Attorney General, has argued that it is possible to interpret section 37(2) in a manner which is compatible with the constitution without declaring the section unconstitutional. In my view, if the term “life imprisonment” does not mean imprisonment for the defendant’s natural life, then perhaps the trial judge was not incorrect in her decision to determine that she had the right to exercise a discretion to impose a tariff without declaring section 37(2) of the **Criminal Code** unconstitutional.

[57] In ***Alleyne***, JCCJ Anderson noted that, at the time of the hearing, in Barbados when a sentence of life imprisonment is imposed, no minimum tariff was being set. There was no legislation which regulated this issue. This is a similar situation to what obtained in Anguilla at the time of the sentencing of the claimants as well as the hearing of the constitutional motion in the ***Harrigan*** case. Despite this, JCCJ Anderson noted the following:

“...judicial recommendation of a minimum period of incarceration when handing down life sentences is not fundamentally based on the authority of legislation. There are, rather, more profound considerations at stake. Sentencing is quintessentially a judicial function and is first and foremost an exercise of judicial discretion. That discretion cannot properly be exercised by non-judicial bodies. Regard to established sentencing principles requires that the sentencing judge must consider punishment, deterrence, and

rehabilitation in fashioning a just and appropriate sentence. Rehabilitation is inextricably linked to the prospect of release but cannot be definitively evaluated or pronounced upon sentencing. Much will depend upon the correctional systems in place for rehabilitation and the response to them by the prisoner, as well as the prisoner's overall attitude and conduct. These matters will necessarily be assessed sometime after sentencing, by others, although the judiciary may nonetheless be involved. A sentence of life imprisonment rarely means that the prisoner will remain in prison for the rest of his natural life. That being so, it follows that a life sentence is not in itself a sentence of punishment or deterrence; it is the imposition of the tariff which carries the greater force as punishment and deterrence. And the appropriate sentence to serve the purposes of punishment and deterrence must necessarily remain, as a constitutional imperative, a matter exclusively for the judiciary."

[58] In that judgment JCCJ Anderson went further on to say that "in discharging its judicial function to fashion an appropriate sentence we are equally sanguine in the view that the sentencing judge when imposing a life sentence (as distinct from a determinate sentence) not only has the authority but, we venture to say, the responsibility to recommend the tariff or minimum period of sentence to be served for purposes of deterrence and punishment. ...Recommending a minimum period of incarceration is consistent with the constitutional rights to a fair hearing before an independent and impartial tribunal, protection of the law and equality before the law."

[59] For the majority of the judges of the CCJ in the **Alleyne** case, the point is being made that, even though there was no legislative provision empowering the judge to impose a minimum tariff, it was nonetheless a constitutional imperative that this is considered. In recommending this minimum tariff, the judge would be acting in a manner which is consistent with the constitutional right to a fair trial before an impartial and independent tribunal. Doing so would also secure the protection of and equality before the law, of all persons being sentenced. I agree with what was

expressed in that decision insofar as it relates to the setting of a minimum tariff in handing down a life sentence.

[60] In light of this, I do not accept the submission of counsel for the claimants that the judge was duty bound to first declare section 37(2) of the **Criminal Code** unconstitutional before embarking on the process of setting the minimum tariff. In my view, section 37(2) was not designed to prohibit the setting of a tariff, but merely to indicate that a life sentence is not merely a maximum sentence but was mandatory. In accordance with the section, there was no authority in the judge to impose a determinate sentence for a lesser period. However, it was open to the judge to interpret section 37(2) so as to determine that a life sentence in and of itself does automatically mean that the offender must spend the rest of his natural life in prison. The section could therefore be interpreted in a manner so as to make it compatible with the constitution. There was therefore no need to declare the section unconstitutional in order for the judge to clothe herself with the authority to set a minimum tariff. In fact, short of deciding that the mandatory nature of the sentence was unconstitutional, she was duty bound to consider the appropriate tariff as a constitutional imperative if the life sentence was being imposed. The sentence, inclusive of the tariff, remains one of life in prison and is not offensive to section 37(2) or the constitution. However, in imposing the tariff the judge is embarking on a judicial exercise which she is duty bound to perform if she is to preside over a fair trial and observe the protection of and equality before the law of the offender.

[61] However, to my mind, the question of the constitutional authority to set a minimum tariff is different from the mandate set in the legislation which prohibits consideration of whether a determinate sentence is more appropriate. **Alleyne** was not a case which addressed the issue of mandatory sentences from that perspective. It is important therefore to give separate consideration to that issue.

[62] Perhaps one of the more important recent discussions on this issue took place in the case of **August v R**,³⁴ where the CCJ came, at least initially, to consider the issue of mandatory life sentences. In that case, the CCJ had remitted the issue of mandatory life sentences back to the court of appeal of Belize to consider. The court of appeal decided that a mandatory life sentence was indeed unconstitutional. The court there found that it was inhuman and degrading and a breach of the separation of powers for the legislature to impose a sentence which takes away any discretion on the part of the judiciary to tailor a sentence which is commensurate with the crime. The reducibility of the life sentence on account of parole legislation was not enough. In those circumstances, the legislature took away the possibility of a determinate sentence if that was a more proportionate and appropriate sentence to hand down.

[63] By the time the appeal was heard by the CCJ the legislature had intervened and the CCJ decided that the changes to the legislation were appropriate in that it allowed for an interpretation that after ruling out the death penalty, the life sentence was a maximum sentence available and that the trial judge would have had a discretion to pronounce a determinate sentence where appropriate. The majority of the judges of the CCJ did not think it necessary to determine whether the court of appeal was correct in its decision that the mandatory life sentence was unconstitutional, given the recent change in the legislation. JCCJ Saunders (as he then was) however, disagreed with that approach and thought that it was important to pronounce on the issue. Though he was not in the majority, I am of the view that much of what Saunders J had to say highlights the substance of the issue with a mandatory life sentence for all cases of murder. I note the particular statement at paragraph 144 of the judgment:

“Murder is a very serious offence. Society at large and the relatives of the deceased are entitled to expect that the murderer will serve a stiff sentence befitting the seriousness of the crime and the blameworthiness of the perpetrator. Civilisation has, however, long progressed beyond a brand of

³⁴ [2018] CCJ 7.

justice that is more in keeping with Hammurabi's Legal Code. It plainly does not follow that, because in every crime of murder human life is lost, the sanction to be pronounced by the court on the offender after trial must always be the exact same. The arbitrariness of a mandatory life sentence for murder is palpably apparent when one appreciates that there are some cases of manslaughter that are more atrocious than some cases of murder. Equally, there are persons who may have been convicted only of intentional wounding but whose bad character and antecedents unequivocally suggest that they are a far greater menace to society than even some persons convicted of murder. Modern penology does not conflate the consequence to the victim with the culpability of the offender. While it should be open to a judge to pass a life sentence for non-capital murder on a deserving offender, I believe the Court of Appeal was right to find that the mandatory life sentence should be abjured."

[64] In the case of *Anguilla*, the legislation under scrutiny here does not attempt in any way to classify the offence of murder on account of severity or other circumstances. There is no capital or non-capital murder. It matters not whether the murder takes place in the course of the commission of another crime, is attached to sexual or other type of violence or committed in circumstances which can be seen as an attack on the state or the administration of justice. In all cases, without fail, the mandatory sentence is that of life imprisonment. Since the decision of the court in the case of *Harrigan*, there has been a declaration that life sentences are constitutional provided that they are reducible. However, notwithstanding this, as the law now stands, there is here no hope of arguing for a determinate sentence if that is more proportionate when the mitigating and other circumstances are taken into account. The question is whether or not the reducibility of the life sentence is sufficient to mitigate against what is offensive about section 37(2) of the **Criminal Code**. That offence lies not in the setting of a minimum tariff if the life sentence is appropriate, but in the inability to even argue for a determinate sentence in the first place.

[65] In the case of *Zuniga and Others v Attorney General of Belize*³⁵ the Caribbean Court of Justice noted that “if by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held as inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime.” In light of that, Saunders J in his own decision in *August* noted that ‘the source of the difficulty with mandatory life sentences for murder much resembles that which impelled the Eastern Caribbean Supreme Court to strike down the automatic death penalty’ in the cases of *Spence* and *Hughes*. It is not lost on this court, that 2 of the judges who pronounced on the cases of *Spence* and *Hughes*, also sat on the *August* case. Byron P, who delivered the decision of the majority in both cases, did not necessarily disagree with JCCJ Saunders’ position. He simply did not address the issue, given the changes which had already taken place in the law. For my part, though not a majority decision, I find the rationale for JCCJ Saunders’ pronouncements to be highly persuasive.

[66] One obvious distinction between mandatory death penalties and that of life imprisonment is that in the death penalty life is taken away and cannot be restored. There is no redemption here and no opportunity to consider whether the loss of life of the offender is commensurate with the nature of the crime he has committed. There is also no opportunity to review the sentence at a later date to determine whether the defendant remains a risk to society if he is provided with some measure of mercy. By that point his life would have been taken away from him. On the question of mandatory life sentences, the issues are somewhat more nuanced. Lord Bingham was of the view that Parliament had clearly decided that murder was such a crime that only a life sentence was appropriate. What has been determined by this court in the case of *Harrigan* is that the lack of discretion in mandatory nature of life sentences does render section 37(2) of the **Criminal Code** unconstitutional.

³⁵ [2014] CCJ 2 (AJ).

However, this is mitigated by the court's ability to set a minimum tariff date by which the offender may be released on license.

[67] On that specific issue Saunders J expresses disagreement in **August**, and states that "in the same way that mandatory death penalties were held to be inhumane notwithstanding the existence of a Mercy Committee that reviewed such sentences and was obliged to act with due process, the constitutional validity of mandatory life sentences should not, in my opinion, hinge on the existence or otherwise of a valid parole system." I agree with that statement.

[68] To my mind, as JCCJ Saunders points out in the **August** case, a mandatory life sentence reducible by a tariff is a completely different one from a determinate sentence³⁶. Although an offender may have some expectation that he may be released after his tariff period is expired if due process is followed by the parole board, he has no such entitlement in law. Even if he is released, he is on license with the threat of returning to prison at any time during the license period to serve out his life sentence. There is absolutely no doubt that this may be an appropriate approach to take in some, if not most, cases of murder. But it does not stand to reason that it is proportionate in all cases without any classification. One's imagination would not have to be strained to envisage reasonable hypothetical circumstances in which such a sentence would be grossly disproportionate so as to offend the constitutional rights of the offender.

[69] The inability of a defendant to even argue that a determinate sentence is more appropriate, given his mitigating circumstances, deprives him of his rights to a fair trial and to protection of and equality before the law. Despite what Lord Bingham described as society's abhorrence to the offence of murder, I agree with what Saunders J had to say when he pointed out that 'modern penology does not conflate the consequence to the victim with the culpability of the offender.' Let us take, for example, a case where there is a level of provocation not sufficient to reduce the

³⁶ See paragraph 137 of *August v R*.

offence to one of manslaughter, but high enough to prove that the offender is certainly not a danger to society. It would be disproportionate to sentence him or her to life imprisonment when there is no evidence whatsoever to show that there is any need to protect the public from him. One can contrast this with a case of grievous harm committed by a person who is not merely a nuisance but is a serious threat to society. That person is likely to receive a much lesser sentence. This is certainly disproportionate and, in my view, takes away a proper discretion from a sentencing judge to uphold the constitutional principles of proportionality in the exercise of his sentencing powers. Depriving a defendant of the right to even put forward such an argument for a determinate sentence renders the process unfair and undermines the constitutional concept of equality before the law.

[70] However, before drawing final conclusions on the matter, it is important to highlight the number of changes which have been made to the legislation in Anguilla, since the decision in *Harrigan*.

[71] Firstly, in 2021, the Legislature in Anguilla passed the **Child Justice Act**³⁷. This was designed to repeal and replace the previous **Juvenile Act**³⁸ and bring the jurisdiction into conformity with the International Convention on the Rights of the Child. What is important to note regarding this legislation is that a child is now defined as a person below the age of 18. It would therefore suffice to state at this stage, that had the first two claimants been before the court for the offence of murder at this stage, they would have been treated as children and an entirely different procedure would have applied to their trial and sentencing. A life sentence would not have been available as a form of punishment against them.

[72] Secondly, I note that the Legislature has also passed a **Parole of Prisoners Act** in 2014. In that Act section 12(1) and (2) states as follows:

³⁷ Act 13/2021.

³⁸ Chap. J20, Revised Statutes of Anguilla 2000.

- (1) When sentencing a prisoner to a term of imprisonment for life, the Court may specify the period of imprisonment the prisoner must serve before he can make an application for parole, the period being such as the Court considers appropriate to satisfy requirements of retribution and deterrence.
- (2) The Governor shall, if the Board so recommends, order the release on licence of a prisoner sentenced to a term of imprisonment for life—
 - (a) after the prisoner has served the period of imprisonment specified by the Court under subsection (1); or
 - (b) where no period of imprisonment has been specified by the Court under subsection (1), after the prisoner has served not less than 15 years of his sentence.

[73] As a result of this change in the legislation, a sentencing judge is now empowered to consider a minimum tariff when imposing a life sentence. Even where one has not been imposed, the Act provides a minimum period of 15 years. As such, had it been for the issue of the imposition of a minimum tariff alone, I would have disagreed entirely with the submissions of counsel for the claimants. On the authority of *Alleyne v R*, though decided after *Harrigan* and the sentencing of claimants, there would have been no need to declare the section void before exercising a discretion to impose a tariff. Given the changes in the legislation, it would be even more unnecessary to strike down the legislation on that ground alone at this stage.

[74] However, what has been left in place is a mandatory life sentence. There remains no discretion to impose a determinate sentence. One can make an argument that there are certainly grounds to argue that this remains the settled will of Parliament. In fact, that argument has been made by the defendant. However, notwithstanding the discretion to impose a minimum tariff, the current position, as contained in section 37(2) of the **Criminal Code** contains all the vices which were deemed unacceptable in the cases of *Spence* and *Hughes*. In my view, for the reasons espoused by JCCJ Saunders, insofar as it seeks to mandate a life sentence for all

convictions of murder, the section is unconstitutional as it undermines a right to a fair hearing and is a violation of the convicted persons' entitlement to the protection of and equality before the law. I am, however, not of the view, that the mandatory sentence with a tariff is necessarily and inherently inhuman and degrading. It would depend on the circumstances of the individual case.

[75] It is left therefore for the court to consider the specific remedies being sought by the claimants in this case, in light of this finding.

[76] There is no need for, nor is there an entitlement to the declarations sought at (a), (b), (c) and (g) of the claim. As I indicated earlier, the court did not sentence the claimants on 12th June 2009 and was not *functus* when the trial judge proceeded to sentence them on 30th June 2009. On the question of whether there is a breach of section 6 of the Constitution, it is my view that the facts do not lend themselves to a finding of inhuman or degrading treatment. It must be appreciated that the claimants have all been found guilty of a very serious offence. The trial judge was of the view that the circumstances of the crime were rather brutal and serious. I appreciate that section 37(2) of the **Criminal Code** had denied them an opportunity to argue in favour of a determinate sentence, but that does not rise to the level of inhuman and degrading treatment in the circumstances of this case.

[77] I find that section 37(2) of the **Criminal Code** is in fact unconstitutional in that it deprives a convicted person of a fair hearing and equality before the law. This is so as the sentencing judge has no opportunity to consider an argument that the imposition of a determinate sentence would be more proportionate in the circumstances. The second portion of the section where it states that 'except in the case of a sentence passed in pursuance of section 188' must therefore be struck down as it is not possible to interpret this section in a way so as to make it compatible with the constitution.

[78] I do find therefore, that the right to a fair trial and to the protection of the law, as contained in section 9 of the Constitution have been breached. Insofar as that is the case, I do declare that the sentences imposed on 30th June 2009 ought to be set

aside and the claimants are to be brought before the criminal court for a sentencing hearing at the soonest.

[79] As it relates to the issue of damages, it is my view that the claimants have all been detained for what is a serious crime. The court is not currently in a position to assess whether they are entitled to any damages until such time as the sentencing hearing is complete as, on the face of it, they must have expected significant periods of incarceration, given the nature of their offences. A determination as to the entitlement to damages and an assessment of those damages as well as costs is to be deferred until after the sentencing hearing.

Ermin Moise
High Court Judge

By the Court

Registrar