

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

(CRIMINAL)

CASE SKBHCR 2001/0035

REGINA

V

EVANSON MITCHAM

APPEARANCES

Mr Teshawn Vasquez and Ms Terrilynn Hunte for the Crown.

Mr Douglas Mendes SC and Ms Talibah Byron for the defendant.

2022: FEBRUARY 22

SENTENCE

Re-sentence for murder in 2001 following sentence of death passed in 2002 and 2004

- 1 **Morley J:** Evanson Mitcham, now 41 (dob 03.01.81), faces re-sentence for murder in 2001 for which he was sentenced to death in 2002 and again in 2004.
- 2 On 03.02.01, when 20, he shot dead Vernal Nisbett during an attempted robbery in Marshall Alley just after midnight with two others, Vincent Fahie (dob 07.05.78) and Patrice Matthew (dob

20.08.78), of barbeque chicken vendor Arlene Fleming of her modest takings in her apron. Nisbett was a member of the public who had intervened to protest the behavior of the three and he was shot by Mitcham at short distance in his left chest. Mitcham was arrested on 06.02.01 and has been in prison ever since.

History of proceedings

- 3 Tried by jury from 21.05.02, the three were convicted of murder on 10.06.02. On 26.06.02 Baptiste J (as he then was) sentenced Mitcham to death as the shooter and Fahie and Matthew to life imprisonment. On 03.11.03, dismissing appeal against conviction, the Court of Appeal of the Eastern Caribbean Supreme Court (ECSC) led by Byron CJ (as he then was) ordered Mitcham be re-sentenced, owing to procedural defect he had not had notice the death penalty would be sought by the Crown; and on 02.06.04 Baptiste J, Mitcham now being on notice, again passed sentence of death.
- 4 On 07.07.04, notice was given appeal against conviction was sought at the Privy Council to reverse the ECSC Court of Appeal on 03.11.03. Case progress oddly then stopped.
- 5 On 24.04.07, the Advisory Committee on the prerogative of mercy, created under **s67 St Kitts & Nevis Constitution**, met under **s68** supra, and without any representations invited from Mitcham, nor showing him their decision, recommended his sentence be carried out, the Prime Minister then writing to the Governor General to this effect on 18.05.07. On 12.06.07, in prison the death warrant was read to Mitcham, who was moved to the condemned cell by the gallows, to be hanged at dawn on 19.06.07, seeming one week shy of being under sentence of death for five years from 26.06.02. However, a stay of execution was ordered by the Privy Council on 18.06.07 at 15.25hrs, formalized later in writing on 28.06.07, so that his appeal against conviction to the Privy Council of 07.07.04 may be heard. Also, on 19.06.07, appeal to the ECSC Court of Appeal against the death sentence of 02.06.04 was filed out of time, for which leave was granted by the single judge on 01.07.08.
- 6 The Privy Council on 16.03.09 led by Lord Carswell, in **Mitcham v Regina 2009 UKPC5**, dismissed the appeal against conviction. Then on 30.04.09, it appears the St Kitts Registrar reported by phone to Mitcham's London solicitors Simons Muirhead & Burton (SMB) leave to

appeal sentence was in error, so that now there was in fact no pending sentence appeal at the ECSC Court of Appeal.

- 7 Again, case progress oddly then stopped. Yet Mitcham remained on deathrow in theory facing sentence of death. However, he was not hanged as by April 2009 he had been de facto on deathrow since June 2002, being 6 years 10 months, and under the well-known Privy Council authority of **Pratt & Morgan v AG Jamaica 1993** UKPC1, regionally there has evolved a moratorium on executing a prisoner if under sentence of death for more than five years, as to do so after so long awaiting sentence would likely be unconstitutional as inhumane and degrading treatment; so that sentence of death is instead expected after five years to be commuted to imprisonment. Applying this principle, Mitcham likely could not lawfully have been hanged after 26.06.07, being one week after the date execution had been set for 19.06.07, which on analysis may have been chosen as a date of execution to be within the five-year period.
- 8 Yet no commutation to imprisonment occurred, and remaining under sentence of death he watched as his friend Charles LaPlace was led to the gallows on 19.12.08, being to date the last hanging on St Kitts, which understandably upset him; and more, being on deathrow he has been deprived of various privileges he may have attracted if an ordinary prisoner, like being able to work, or do further education classes, or be placed in a cell with others rather than being in a cell alone.
- 9 There followed therefore a challenge under the St Kitts Constitution, initiated by neatly handwritten letter from Mitcham to the St Kitts Attorney General dated 24.10.14, to his being left interminably on deathrow, seeking various reliefs and declarations, supported by affidavit dated 04.06.15. This led in St Kitts on 22.10.18 to a judgement of Ventose J of the ECSC High Court (as he then was), in **Evanson Mitcham v AG St Kitts 2018** SKBHCV2015/0129, agreeing constitutional infringements and ordering his sentence be commuted to life imprisonment, further finding he was not entitled to a determinate sentence, meaning life imprisonment was said to be the only available sentence on commutation.
- 10 In sum, it appears Mitcham has been formally on deathrow from 26.06.02 to 03.11.03, and again from 02.06.04 to 22.10.18, being in total approximately 15 years 9 months. Of this period, there

is a persuasive argument at some time reasonably after 26.06.07, being the five year mark, his sentence ought to have been commuted so that he was no longer on deathrow. This would mean, perhaps allowing a notional month for the prison administration to adjust, his sentence ought to have been commuted and therefore he ought to have been moved to the general prison population by perhaps 22.07.07. If so, then by the judgment of Ventose J of 22.10.18 commuting to life imprisonment, Mitcham had been wrongly on deathrow for arguably 11 years 3 months, being 135 months.

The reason for the present hearing

- 11 The life sentence passed by Ventose J was challenged in the ECSC Court of Appeal, because if automatic it could not take into account the mitigating features of the Constitutional infringements he found, therefore arguably amounting to a denial of access to justice in refusing to hear mitigation. Appeal was filed on 03.12.18 by able Junior Counsel Talibah Byron, and on 25.03.21, the ECSC Court of Appeal with agreement by counsel prosecuting and defending issued a consent order in these terms:

1. The appeal is allowed.
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 [22nd] 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.
 - (c) The Appellant shall, if thought necessary, cause to be prepared a response to the Psychiatric Report and the Social Inquiry Report, a copy of which shall be filed at the Court and served on the parties on or before 14th June 2021.

(d) The matter shall be set down before a judge of the Criminal Division for Case Management on or before 21st June 2021.

- 12 The case has therefore fallen to the instant Judge as the senior criminal judge resident on St Kitts, for re-sentence, and to gather the relevant materials has been managed through nine hearings on 10.06.21, 15.07.21, 21.07.21, 21.09.21, 29.10.21, 02.12.21, 21.01.22, 27.01.22, and 04.02.22, with written submissions filed on 14 and 16.02.21, and then oral sentencing arguments on 17.02.22, and 21.02.22, adjourned finally for written remarks to today, 22.02.22.

Materials considered

- 13 Of materials gathered, concerning the facts, and per the consent order of 25.03.21, the following are before the Court, chronologically:
- a. The caution statement of Vincent Fahie of 04.02.01;
 - b. The caution statement of Patrice Matthew of 06.02.01;
 - c. The trial record of May/June 2002 (as submitted by SMB to the Privy Council in 2008);
 - d. Judgment of the ECSC Court of Appeal on 03.11.03;
 - e. Social inquiry report of 21.05.04;
 - f. Psychiatric report of 26.05.04;
 - g. Judgment of the Privy Council of 16.03.09;
 - h. Affidavit of Evanson Mitcham of 04.06.15;
 - i. Judgment of Ventose J in the St Kitts High Court on 22.10.18;
 - j. Social inquiry report of 09.06.21 (per the consent order, though delayed);
 - k. Unsigned and undated 'Summary of agreed facts' sent by the Crown to this Court on email on 01.12.21;
 - l. Psychiatric report of 31.01.22 (per the consent order, though delayed); and
 - m. Prison report of 10.02.22.
- 14 There is no longer available the court file with all the original statements and exhibits. Materials have been garnered from various sources. London solicitors SMB have been particularly helpful, led by Parvais Jabbar, Executive Director of the well-known pro bono team known as the 'Death Penalty Project', with pro-active coordinating assistance on St Kitts by Counsel Byron. The Court observes Director Jabbar has been tirelessly involved in this case since it seems at least 2007,

and it was the work of his office that pressed the Privy Council to grant the stay of execution on 18.06.07, 15 hours before the hanging was scheduled, in order to ensure the appeal to the Privy Council lodged on 07.07.04 be properly heard before sentence could be carried out. This Court acknowledges and commends such pro bono work.

The facts

15 The facts can be distilled from the document of 01.12.21 entitled 'summary of agreed facts', the previous court judgments of 03.11.03 and 16.03.09, and for further clarity from the trial record.

a. The 01.12.21 summary reads, as relied on in opening on 21.02.22, (after discussion with Counsel slightly adjusted orally at para 9 in square brackets, and deleting para 11):

1. On 2nd February 2001, Evanson Mitcham, Vincent Fahie, and Patrice Matthew agreed to rob Arlene Flemming, a BBQ chicken vendor who had a stall on the corner of Cayon Street and Marshall Alley, Basseterre.
2. Sometime after 11pm that night, the three men met at Dorset Park, Basseterre, where Fahie revealed that he had brought with him a gun. Fahie gave the gun to Matthew, who checked the gun and then put it in Matthew's pants.
3. The men then proceeded from Dorset Park to Marshall Alley. They arrived there sometime after midnight on 3rd February 2001.
4. Just before the men entered the lower end of Marshall Alley, Matthew took out the gun from his pants and re-checked it. Mitcham then asked to see the gun. Mitcham was given the gun by Matthew.
5. The three men proceeded through Marshall Alley and made their way to the top of the Alley where the stall was located.
6. There, the three men held up Ms. Flemming and demanded money from her. Mitcham revealed the gun in one hand and held on to the apron of Ms. Flemming with the other hand. Fahie and Matthew stood close behind Fleming, one on her left and one on her right.
7. Mr. Vernal Nisbett, a bystander, then intervened and began tugging on Flemming's apron so as to free it from Mitcham.
8. Mitcham let go a blow at Nisbett, and then stepped back into the drain and fired a single gunshot which struck Nisbett in the left chest.
9. Nisbett fell to the ground and [the two men ran away while Mitcham stepped further back pointing the gun at Fleming, who then ran away screaming].

10. The entire incident lasted about 20 seconds, from the time Ms. Flemming was held up, to the time the gun discharged.

b. The 03.11.03 ECSC Court of Appeal judgment reads:

5 Arlene Fleming used to sell barbecue chicken at the top of Marshall Alley in Basseterre. She was there shortly after midnight on 3rd February, 2001 when three masked men approached her. One of the men demanded money. He held on to her apron. Although he was armed with a gun she resisted. Vernal Nisbett was seated close by on a wall. Nisbett came to her assistance. The gunman stepped back and fired a shot. Nisbett was mortally wounded. The three masked men then ran off...

9 In his caution statement, Fahie admitted that on the night in question he was in the company of a group of persons. The size of the group eventually dwindled to three, including himself. One of the three declared an intention to rob Ms. Fleming. Fahie was aware that one of the three was armed with a gun. He said that he and his companions proceeded towards Ms. Fleming but he dawdled a good distance behind the others. He heard some talking, and then a "Baw". Then he saw a man fall down. He said he was shocked because he never knew that was intended. He said the persons ran and after a while he too began to run. He met up with the others by a bridge at Greenlands. One of the others gave him the gun to hide and they all then ran down the road.

10 On the Sunday following the murder, Fahie took police officers to a ghaut at College Housing. He unearthed a black Glock gun. About 20 feet further down the ghaut, Fahie showed the officers a black Glock magazine and a plastic bag containing four 9 mm. cartridges. Fahie also produced and gave to the police a long khaki pants. A black "Knicks" tam, with two eye holes cut into it, fell out of the right foot of the pants. Forensic experts later determined that a cartridge case found at the scene of the shooting had been discharged from the Glock gun that was produced by Fahie. Further, the khaki pants was found to have contained evidence of gunshot residue.

11 Matthew admitted that he was present on the night of the murder. Shortly before arriving on the scene he had been given the gun to hold. Matthew was present when it was suggested that he and others should go and stick up Ms. Fleming. According to him, he said he wasn't going. In fact, he did go. And before going he admits changing into clothing provided by a companion. He and the others proceeded to the place where Ms. Fleming was selling her barbecue chicken. While on their way, said Matthew, he was accused of being coward. The gun was taken from him. Matthew said he was present and saw when Ms. Fleming was accosted. Her assailant was the person to whom Matthew had passed the gun. This person demanded money from Ms. Fleming. Matthew claimed that at this point he suggested to his companions that they should leave. He said that he heard the gun being cranked and at that juncture he started to leave. He saw when Nisbett was fatally shot. He then ran ahead of his companions who also ran off...

16 Some of these self-serving passages from Fahie and Matthew do not quite square with the corresponding bits of evidence given by the eye witnesses. Arlene Fleming for

example testified in this vein: She saw the masked men approaching from a distance of about 30 feet. The gun man was in front. The men all came up the alley. The gun man approached her, held on to her apron and demanded money. All this time the other two men were standing behind her, one on the right, one on the left. As soon as the shot was fired these other two ran off in the Soho direction.

17 John Foster was another eye witness. Immediately before the shooting he was on the scene chatting with Arlene Fleming and the deceased. Foster's evidence was that all of a sudden three men appeared. They appeared from down the alley. He saw the gun man approach the lady and try to put his hands in her apron. Foster said that he concentrated on the gun man. But he testified that the other two guys were standing at the back of Ms. Fleming, "not far, just basically behind her. Vernal Nisbett was basically the same distance to Arlene, about six feet"...

26 The case against Mitcham was based entirely on circumstantial evidence. Very shortly before Ms. Fleming saw the arrival of the three masked men, Kayane Lake and another man were in the company of the three Appellants. Lake testified that Fahie went into a yard and came out with something wrapped in a red cloth. Fahie gave the thing to Matthew. Matthew put it in his (Matthew's) pants. The five men then proceeded to Dorset Park Court. Mitcham went off and returned with a plastic bag. From the bag, Mitcham took out and distributed, each to Fahie and Matthew, a long sleeve shirt. Mitcham then took out a black tam and a small scissors. He cut eye holes and fashioned a mask from the tam. Matthew unfolded the thing in the red cloth. It was a gun. He checked the gun and replaced it in his pants. The three Appellants then went off together. As they were going off, Mitcham turned to Lake and the other man that had been left behind. He pointed his finger at them and warned them that they had not seen him. The fatal shooting took place not far away, very shortly after the three Appellants left Lake.

27 Arlene Fleming did not recognize any of the three men who robbed her. She testified that the one with the gun had very dark skin. He was wearing a long sleeve plaid shirt, mostly red in colour and a long jeans pants, beige or khaki in colour. John Foster also witnessed the shooting. His evidence was that he was there speaking with Ms. Fleming and the deceased when the three masked men suddenly appeared. He saw the one with the gun in an altercation with Ms. Fleming. He began backing away but he kept his eyes on the gun man. He saw the gun man shoot the deceased. He then ran away faster than he had ever run in his life. He testified that the gun man was wearing a dark jean pants and a plaid shirt.

28 Around the time of the fatal shooting, Jacqueline Hendrickson saw three men "running up the road from Wendell Lawrence's house", a distance of about 600 yards from the shooting. The place where she saw the three men was consistent with the route taken by Fahie and Matthew in their respective statements. Ms. Hendrickson recognised one of the three men running. It was Mitcham. She said that he had on a jean and a dark blue shirt...

c. The 16.03.09 Privy Council judgment reads:

5 On 3 February 2001 about 12.30am three masked men approached Arlene Fleming at her barbecued chicken stall in Basseterre. One of the men, armed with a gun, held on to her apron and demanded money. Vernal Nesbitt came to her assistance, also grabbed hold of the apron and told the gunman to desist. A struggle took place, then the gunman stood back and shot Nesbitt, inflicting a fatal wound.

6 Neither Arlene Fleming nor the other eye-witness was able to identify the assailants, who were all masked. The case against them depended largely on the evidence of Dayane Lake, who stated that he saw the Appellant some time before the shooting, and Jacqueline Hendrickson, who saw him immediately after it.

7 Lake said that he had been in the company of all three Defendants from 4pm until some time later on the day of the shooting. He saw Fahie give Matthew a gun, wrapped in a red cloth. The Appellant distributed clothing to the other two and fashioned a mask by cutting eyeholes out of a black tam. Lake stated that when the three men were walking away the Appellant turned around, pointed his finger at him and said 'ah you ain't seen me'.

8 Ms Hendrickson said that when she was sitting in a bus at Shadwell she saw three men running along the road, in a direction taking them away from the scene of the shooting and some hundreds of yards from that place. She claimed to have recognised the Appellant, but not the other two, who she said were running too fast for her to identify them...

10 A statement made by the Appellant [Mitcham] to the police was put in evidence, in which he claimed to have been at home at the material time. The other Defendants in their statements admitted being present at the scene of the shooting, but each denied that he had done the shooting and claimed that he had sought to withdraw from the enterprise. None of the Defendants gave evidence or called any witnesses.

d. From the trial record:

- i. On 21.05.02, pathologist Stephen Jones gave evidence Vernal Nisbett, seeming aged about 47, had been shot with a single bullet through the left chest, and through the descending thoracic aorta, observing entry and exit wounds, leading to hemorrhage and shock, causing death.
- ii. On 22.05.01, ballistics expert John Annel gave evidence the bullet had been fired from the 9mm Glock 17 pistol, as identified to police by Fahie.
- iii. On 22.05.01, Arlene Fleming gave evidence of the approach of the three masked men, the gunman coming in front of her, the other two behind her; John Foster was about 7ft away, while Nisbett, known to her, had been 15ft from her, sitting on a wall,

and came to help her when her apron was grabbed by the masked gunman, who was demanding *'give me all you got'*; Nisbett had said *'leave the woman alone, you can't hear she ain't got nothing'*, pulling her apron from the gunman; the gunman then let go a blow, she ducked, and stepping back into a drain the gunman let go a shot, from a distance of 6ft while Fleming and Nisbett were standing close touching shoulders; after the shot was fired the gunman stepped back in the street still pointing the gun at her, and thinking he would shoot her she ran down the alley screaming.

- iv. On 30.05.01, John Foster gave evidence, realizing there was a gunman accosting Fleming, he began to back away, while he then observed Nisbett *'sitting on the side got up and said 'why don't you leave the lady alone, she don't have any money', and 'after that, that's when the guy turned from the lady and turned to the guy and that's when the shot fire'*; at the time of the shot, Nisbett was 2ft from Fleming, while the other two were just standing at the back of Fleming, *'basically just behind her'*.
- v. Police records at trial showed Mitcham, Fahie and Matthew had apparently no previous convictions.

16 Garnering these materials, I will sentence on the following basis of fact:

- a. This robbery was carefully planned, including the obtaining and preparation of masks, with Mitcham using scissors to cut eyes in a tam, and the passing of the Glock from Fahie to Matthew to Mitcham. This was not a spontaneous or opportunistic crime, but calculated.
- 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 by her male attackers, and who surrounded her, the gunman being in front and the other two behind her, the gunman laying hands on her, pulling at her apron.
- c. There was no intention to fire the gun at the time the robbery was planned, which was instead planned for use to frighten Fleming into giving her takings.

- d. Mitcham was the youngest defendant, being 20 years and 1 month, while Fahie was 23 years 3 months, and Matthew was 23 years 6 months.
- e. Vernal Nisbett was a public-spirited, generous man, giving of himself, and seeing this appalling attack, and moved by his humanity to protect Fleming and to de-escalate the confrontation, sought to release Fleming's apron from Mitcham's grip and to persuade him there was realistically no money to rob.
- f. As the robbery descended into minor altercation, Mitcham tried to strike a blow at Nisbett, Fleming ducked, he missed, he stepped back into a drain, pointing the gun at Nisbett 6ft away, standing close to Fleming, and fired a shot, the bullet passing through Nisbett's left chest, severing his aorta, and as Nisbett fell, Mitcham stepped back again continuing to point the gun, now at Fleming, who ran away in terror.
- g. At all times, Mitcham was the aggressor, Nisbett was not, and Mitcham did not lose control over the gun, instead after stepping back to assert control in the confrontation with Nisbett, deliberately pointed the gun at his upper body and pulled the trigger, then switching his aim to Fleming after, but choosing not to shoot her as she fled.
- h. On these facts, garnered from so many sources, I am sure there was an intention to kill Nisbett, formed momentarily in the heat of his intervention; there was not a lesser intent merely to cause serious bodily harm; and moreover there is case law, and much academic commentary, that a man can by a fact finder be found to intend the foreseeably virtually certain consequences of his acts, (per the **UK Law Commission report no. 304 at para 3.27** as reported in **Blackstones Criminal Practice 2020 para B1.15**), which here would be death being foreseeable as virtually certain if shooting into a man's chest from 6ft.
- i. Though Mitcham may regret killing Nisbett, nevertheless from all the materials reviewed I am satisfied it was his intent to kill, even if only in the moment, and though the youngest of the three, only just aged 20 with no previous convictions.

- j. Moreover, I go on to make the observation Vernal Nisbett is to be here publicly commended for his intervention, he was a hero, selflessly helping a vulnerable person in distress, in great danger, attempting to calm, risking all for what is right, and his like should be celebrated and remembered, with formal posthumous recognition, so that I direct his family should be given notice of these remarks, which will be published as case law in the Court annals and maintained for his posterity.

The changed attitude of Evanson Mitcham

- 17 Concerning Mitcham's attitude to having committed murder, there is a difference between how he is behaving now and how he behaved then.
 - a. Then, he denied the offence, showing no remorse.
 - i. Though he did not give evidence, his defence at trial was to pretend to have been elsewhere.
 - ii. In the social inquiry report of 21.05.04 from Eartha Williams, he was described as being the subject of various allegations to police from 1996, concerning wounding, shooting with intent, robbery, carrying an offensive weapon, house breaking, receiving, battery, and driving offences, but no formal proceedings followed. This persistent trouble with the police, though not amounting to formal findings, strongly suggests he was a delinquent character. The community described him as 'a dishonest and daring person who was constantly in trouble with the law'. His school teacher Brenda Martin described him as 'a violent child who stole from other children in the class and would deny it'. He was often truant, and was expelled for deviant behavior from form 3B3. The report further said he had a previous conviction for battery on 03.11.97, and writes 'the accused has not shown any remorse about the offence and stated, *I feel there has been some injustice in the matter*'.

- iii. In his psychiatric report of 26.05.04, Dr V. Anil reported: 'When asked about the incident he outrightly denied that he knew anything about the murder and said, *'it is a set up by CID police officer Belgove...I was at home with my girlfriend, how can I be involved, I don't know anything what you telling me about'*. Diagnosing an 'antisocial personality disorder', the report further observed he 'had no remorse or no regret for what happened, he has poor judgment and no insight'.
- b. 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 the 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 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'.

- iii. 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 coping mechanisms. That he has been able to improve himself in these two regards, and under the prevailing circumstances, is the more commendable.

- iv. 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 deathrow in 2018 has enrolled in programs concerning farming, painting and counselling, so that DCC Harris thinks he can be a productive citizen.

The difficulty being on deathrow

- 18 Turning to the effect of being overlong on deathrow, by 135 months, Mitcham was deprived ordinary prisoner privileges. In particular, he was kept in a cell alone away from mixing with others with limited opportunity to exercise.

- a. In his affidavit of 04.06.15, at the time still on deathrow, Mitcham stated:

- i. At para 19: *'At the time of preparing this affidavit, the total period of time that I have spent on deathrow is 12 years,6 months, 4 days. I have been living in the holding cell ever since the death warrant was read to me on the 12th day of June 2007. The conditions on deathrow are extremely stringent and deplorable compared to those serving a life sentence. My cell is infested with cockroaches, centipedes, rats and mosquitoes. I am deprived of proper ventilation and recreation, since I only receive recreation once per week, whereas prisoners serving life sentences have more freedom to move around within the prison. It is also more difficult for me to have visitors than prisoners serving life sentences. Anyone wishing to visit me, including my lawyer, has to go through the Prison Superintendent and he has to personally authorize me to go to the visiting room. If he is not available when a visitor comes, then that person will have to come back some other time when he is available to do the authorization. Prisoners serving life sentences can have visitors without going through this process.'*
- ii. At para 23: *'In prison, my behaviour is generally good-natured and optimistic. There are no programs offered to condemned inmates although I would have loved to attend. Life sentence inmates have the opportunity to attend academic and spiritual classes. As a condemned prisoner, one is forgotten, abandoned, and non-existent. I have had to educate myself by reading books and newspapers which I borrow from other prisoners or officers. I appreciate and value life on a much more conscious level. I have gained a deeper and more meaningful connection with God. I have learnt and practiced forgiveness, tolerance, kindness and faith - principles that govern life. Sure enough, certain circumstances can bring out the best of us. I pray that I get an opportunity to prove this.'*

- b. In his report of 31.01.22, Dr Williams observed:

Educational Rehabilitation, of which literacy improvement for those who require it is a part, is only one consideration in attempting to offer convicted offenders appropriate treatment in order to rehabilitate and return them to society so reformed that the desire to perpetrate further criminal acts is diminished and recidivism thereby reduced. In our jurisdiction, in addition to Educational Rehabilitation some of the many types of structured and affordable rehabilitation programs that could, and should, be made available to penitent offenders include: Vocational/Livelihood

and skills training; Counselling rehabilitation (individual and group); Wellness rehabilitation, with mental and physical/medical health services, tailored to specific indications; Moral, spiritual, and values formation rehabilitation; and Work or job placement and referrals.

One approach is to assemble a group of competent persons to assess and oversee the rehabilitative needs of the each offender, being careful to stay clear of a cookie-cutter approach, as inmates have varied needs.

Because Mitcham spent most (83%) of his inmate life in solitary confinement none of these rehabilitative options were available to him during that time. Yet he made the best of a dire situation. He has now been out of solitary for 39 months. During this time COVID-19 and other constraining factors have hindered intervention in his vocational rehabilitation.

Whatever the Courts decision with regard to resentencing/disposition in this matter, perhaps consideration might be given to assuring that his rehabilitative needs be properly assessed and that he receives the benefit of appropriate remedial vocational intervention whether in or out of prison. However, Mitcham is sufficiently reformed and possesses a strong enough support system that his up-to-now inadequate rehabilitative intervention need not be a hindrance to his extra-mural resocialization.

19 Reviewing Mitcham being so long on deathrow, in his judgment on 22.10.18 Ventose J determined:

(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 24.04.04.

(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.

(4) The Claimant is not entitled to a fixed term sentence of imprisonment to be determined by this court or the "criminal court" in substitution for the sentence of death.

(5) The sentence of death by hanging imposed on the Claimant on 2 June 2004 be commuted to life imprisonment.

20 The fourth and fifth findings have been successfully appealed.

The is a re-sentence

- 21 Per para 2 of the ECSC Court of Appeal consent order of 25.03.21, this hearing is ‘for the purpose of re-sentencing, 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 [22nd] October 2018’, (underline added).
- 22 As the ECSC Court of Appeal has ordered ‘re-sentence’, this is not an exercise in commuting the original death sentences to what may be expected to be life imprisonment under the analysis of Ventose J.
- 23 Instead this is a sentencing exercise *de novo*, in 2022, at a time the legal landscape has changed, uninfluenced by the two previous death sentences passed in 2002 and 2004.
- 24 Further, as part of the mitigation, this court will as directed consider the effect of the Constitution breaches arising since 2004 as declared by Ventose J, which would not have been mitigation available in 2002 or 2004.
- 25 It is of note Mitcham now faces re-sentence, rather than commutation which may be expected automatically to be ‘life imprisonment’ as observed by Ventose J, which within the ECSC would usually mean imprisonment without release. The failing in his treatment after 2004, with successful appeal, leading to re-sentence, means he will now have opportunity to be considered for a determinate sentence, which if his treatment had been more appropriate since 2004 he might otherwise not attract. In short, if he had been commuted to life imprisonment in 2007, then this re-sentence exercise contemplating a determinate sentence would likely not be occurring.

Constructing the sentence

- 26 There have been changes in sentencing practice since 2004.
- 27 Within the jurisdiction of the ECSC over nine island nations, there are now sentencing guidelines for murder, most recently updated on 26.11.21, under a project launched by the present Chief

Justice Dame Janice Pereira in September 2019. Their purpose is to bring consistency of principles and approach to sentences across the nations.

28 The effect of the guidelines has been to supersede old case law on previous sentences, so that while such cases are of interest, and where appropriate helpful and of weight, they are no longer automatically persuasive or binding; in the main, the reason for supersession is sentences have varied too widely.

29 One earlier case of great weight concerning sentencing remains **Desmond Baptiste et al v Regina No.3 of 2003**, in which Byron CJ (as her then was) observed in paras 20-25 the purpose of sentencing, being retribution, deterrence, prevention, and rehabilitation, further noting at para 21 as ‘comprehensive and useful goals of sentencing’ **s5 Sentencing Act** in Australia, which records the purpose of sentencing being:

[a] to punish the offender to an extent and in a manner which is just in all the circumstances; or

[b] to deter the offender or other persons from committing offences of the same or a similar character; or

[c] to establish conditions within which it is considered by the Court that rehabilitation of the offender may be facilitated; or

[d] to manifest a denunciation by the Court of the type of conduct in which the offender is engaged; or

[e] to protect the community from the offender, or

[f] a combination of two or more of those purposes.

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 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 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 deathrow 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.

33 Turning to the guidelines, those for murder are pronounced in **ECSC Practice Direction 8E No.3 of 2021**.

34 Concerning available sentences for murder, the guidelines state at **para 2**:

A conviction of an adult for the offence of murder may result in one of the following sentences:

- a. Sentence of death, where lawful;
- b. A whole life sentence;
- c. A determinate sentence; or
- d. Detention at the court's pleasure where an offender has been found to be insane or suffering relevant mental illness.

35 Here, insanity or relevant mental illness do not apply.

36 Concerning sentence of death, the guidelines state at **para 3**:

Sentence of death, where lawful for murder, may only be considered in cases:

- a. Where the offender was an adult when he committed the offence;
- b. Where there has been a conviction after trial;
- c. Which are 'the rarest of the rare';
- d. Which are 'the worst of the worst';
- e. Where there is no reasonable prospect of reform of the offender;
- f. Where the offender has been appropriately evaluated by a psychiatrist;

- g. Where the character of the offender and any other relevant circumstances are taken into account so far as possible as mitigation in his favour;
- h. Which are compared with other murder cases and not with ordinary civilized behavior; and
- i. Where the object of punishment cannot be achieved by any means other than sentence of death.

37 Reviewing the categories, this murder, being the shooting of an intervener during the course of a botched robbery, while appalling, cannot be said to be 'the rarest of the rare', or 'worst of the worst', and under appropriate evaluation by a psychiatrist, and others, it can be seen from reports there is a reasonable prospect of Mitcham's reform.

38 Concerning a whole life term, the guidelines state at **para 5**, such a term may arise in a case involving:

- a. the murder of two or more persons;
- b. the murder is associated with a series of serious criminal acts;
- c. a substantial degree of premeditation or planning;
- d. the abduction of the victim;
- e. a murder involving sexual or sadistic conduct;
- f. a murder involving prolonged suffering or torture;
- g. the murder of a police officer, emergency service worker, prison officer, judicial officer, prosecutor, health worker, teacher, community worker or any other public official exercising public or community functions or as a political activist, or the offence arose because of the victim's occupation or voluntary work;
- h. a murder relating to membership of a criminal gang;
- i. a murder which is an act of terrorism;
- j. a murder motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (eg people of a particular religion, race, or ethnic origin, language, or sexual orientation or age or having a particular disability);
- k. a murder involving the actual or threatened use of explosives or chemical or biological agent;
- l. a deliberate killing for payment or gain (eg a contract killing, or for inheritance, or insurance payout);
- m. where the offender is assessed as likely to commit further offences of serious violence and is therefore a substantial danger to the community;
- n. a murder by an offender previously convicted of murder; or
- o. a murder by an offender who has a record for multiple previous convictions for serious offences of violence.

39 Reviewing the categories, none apply, so that a whole-life term does not arise.

- 40 It follows then there will be a determinate sentence in this case, contemplating in **para 6** a starting point of 40 years, with a range between 30 and 50 years, where the following categories may arise under **para 7**:

Cases that could fall within paragraph 6 include:

- a. where the offender has pleaded guilty and would otherwise face a whole life term;
- b. a murder involving the use of a firearm;
- c. a murder arising unplanned in the course of a felony (eg in a robbery or burglary);
- d. a murder intended to obstruct or interfere with the course of justice;
- e. a murder involving a lesser degree of sexual or sadistic conduct than referred to above [in para 5]; or
- f. a murder in the context of a significant history of domestic violence.

- 41 Reviewing the categories, this case is clearly foreshadowed as having a starting point of 40 years, being a murder using a firearm and arising in the course of a robbery.

- 42 Having found the starting point, constructing the sentence will follow six steps, as contemplated by **ECSC Practice Direction 8B no.2 of 2019**:

1. assessing the range given the seriousness of the offence;
2. assessing the circumstances of the offender;
3. assessing if any credit arises for pleading guilty;
4. assessing any adjustment for totality and dangerousness;
5. making allowance for time served; and
6. any ancillary orders.

- 43 Turning to step 1, as to the range I look to the aggravating and mitigating features of the offence, as they appear at **paras 12 and 13**:

12 Aggravating factors pertaining to the offence...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. mental or physical suffering inflicted on the victim before death;
- d. abuse of a position of trust or authority over the victim;
- e. where the offence involved a great risk of death to another person or persons;
- f. where the offence was an organized criminal activity;

- g. where the offence occurred at the home of the victim or any other person;
- h. where the offence was committed to conceal another offence;
- i. the use of duress or threats against another person to facilitate the commission of the offence;
- j. where the victim was providing a public service or performing a public duty;
- k. where the offence is committed in the presence of children;
- l. where the offence is committed at or near a religious or educational institution;
- m. where the offence is committed in view of the public;
- n. where the offence is unprovoked; or
- o. concealment, disposal, desecration, destruction or dismemberment of the body.

- 13 Mitigating factors pertaining to the offence that may be relevant include:
- a. an intention to cause serious bodily harm rather than to kill;
 - b. where the offender was acting under duress;
 - c. where the offender offered assistance to the authorities;
 - d. where the offender was provoked;
 - e. where the victim was the aggressor; or
 - f. a belief by the offender that the murder was an act of mercy.

13 Under **para 12**, aggravating is the offending behavior 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.

16 Turning to step 2, the circumstances of the offender, while he has no relevant convictions, there being a battery in 1997 when 17 and driving without a license in 1999 when 19, nevertheless he was a well-known delinquent, often reported to the police. I will approach this sentence as arising for a first significant conviction. However, in all the circumstances, while he has no convictions to aggravate the sentence further, his delinquency even though then only 20 and younger means he cannot be treated as meriting a substantial discount of

sentence for being of exemplary character. In the circumstances, I consider a modest discount for having no relevant convictions arises so that the term can be reduced by six months, to 47.5 years.

- 17 It is clear following 2004 he has suffered wrongly: he was denied access to the Advisory Committee who wrongly recommended his death despite there being a Privy Council appeal against conviction filed, the death warrant was read when it should not, he was granted leave to appeal the death sentence which without hearing or formal explanation was said in error, and the principles of *Pratt & Morgan* were not applied so that his sentence was not commuted meaning he remained unnecessarily on deathrow a further 135 months, during which he could not mix with prisoners, do work, or education courses, and his exercise was limited to once a week, rather than daily.
- 18 I have visited the prison on 11.02.22, consistent with how judges should know the conditions to which they sentence, and observed conditions appear tidy, disciplined, with water and toilets in cells, though packed with many, yet with all seeming to have a bed, like in dormitories. While more basic than facilities on Montserrat, the cells appear better than on Antigua, which is more crowded, with slopping out, and seeming less hygienic. I have observed where the solitary cells are located, near where the gallows stand shut away in a closed room. I have no doubt 135 months wrongly separated from the prison population will have been a strain, creating a more arduous condition for serving a prison sentence. A discount should rightly follow, meriting a substantial reduction, which leading defence Counsel Mendes SC suggested should be between 5 and 10 years, and on reflection I consider should 7.5 years, being 90 months, which is apposite as exactly two-thirds of the 135 months, reducing the sentence to 40 years.
- 19 Turning to step 3, there is no credit available for plea, as Mitcham pleaded not guilty and was convicted by the jury.
- 20 Of step 4, here are no other offences to consider for totality, nor is Mitcham dangerous as assessed in January 2022 by Dr Williams.

- 21 Of step 5, time shall count, while on remand, and while otherwise at the prison under sentence of death passed by Baptiste J or life imprisonment passed by Ventose J, meaning all the time since arrest on 06.02.01 Mitcham has spent in custody shall count toward the 40 years.
- 22 Under the prison rules, Mitcham shall be eligible for remission of one-third of his sentence if he has been of good behaviour, to be adjudicated and calculated by the prison; if eligible, for a sentence of 40 years, he can expect therefore to serve 26 years 8 months, where so far he has served almost 21 years 1 month.
- 23 If this is right, then Mitcham may finally be released when aged about the same age as Vernal Nisbett when he took his life.
- 24 Of step 6, as an ancillary order, the recovered Glock pistol and any associated ammunition, and the recovered clothing, are ordered destroyed, unless in the view of the Police Commissioner they should be stored as evidence.

The Mercy committee

- 25 *Obiter*, I turn to the prerogative of mercy under **s66, s67 and s68 of the Constitution**:

66. Prerogative of mercy.

(1) The Governor-General may (a) grant a pardon, either free or subject to lawful conditions, to any person convicted of any criminal offence under a law; (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any such offence; (c) substitute a less severe form of punishment for any punishment imposed on any person for any such offence; or (d) remit the whole or any part of any punishment imposed on any person for any such offence or of any penalty or forfeiture otherwise due to the Crown on account of any such offence.

67. Committee on Prerogative of Mercy.

(1) There shall be for Saint Christopher and Nevis an Advisory Committee on the Prerogative of Mercy (hereinafter in this section referred to as the Committee) which shall consist of:
(a) the Minister for the time being designated under section 66(2), who shall be chairperson; (b) the Attorney-General; and (c) not less than three nor more than four other members appointed by the Governor-General.

68. Functions of Committee.

- (1) Where any person has been sentenced to death...the [relevant] Minister...shall cause a written report of the case...together with such other information derived from the record of the case or elsewhere...to be taken into consideration at a meeting of the Advisory Committee of the Prerogative of Mercy...; and after obtaining the advice of the Committee he or she shall decide...whether to advise the Governor-General to exercise any of his or her powers under section 66(1).
- (2) The [relevant] Minister...may consult with the Advisory Committee on the Prerogative of Mercy before tendering any advice to the Governor-General...in any case not falling within subsection (1)...

- 26 This court has been told Fahie under life sentence was released by the Governor General in November 2021 on recommendation by the Advisory Committee, though it was not clear to the court on what terms, while Matthew still has an application pending before it.
- 27 Of interest is the extent to which the work of the Committee is known to prisoners and locally, so that it is more widely appreciated it can be approached, noting there is no parole board on St Kitts. A feature of the history of this case is Mitcham did not know of its existence, and its role in recommending his execution under **s68** supra, until after the stay in 2007. Promotion of wider knowledge of its work, including the details of its recommendations, as a committee created explicitly under the Constitution, is to be encouraged lest its important function for prisoners to press for their cases to be considered may as a procedure inadvertently seem more a 'paper right' rather than a practical one.
- 28 Moreover, it is not clear under what principles the Committee might recommend release, or make other decisions, nor under what conditions release may be allowed, whether outright or under licence, all of which considerations are therefore here encouraged to be settled into writing by the Office of the Attorney General and published.

The sentence

- 29 I turn now to formal pronouncement of sentence.
- 30 *Evanson Mitcham, please stand up.* For the murder of Vernal Nisbett shortly after midnight on 03.02.01, by shooting him in the chest from 6ft when he intervened during your robbery, planned with Vincent Fahie and Patrice Matthew, of Arlene Fleming, where Vernal Nisbett attempted to help her and to calm the situation, for all the reasons I have explained,

including noting you were sentenced to death in 2002 and 2004, and where since 2004 there have been failings in your treatment as a prisoner, declared in 2018 by Ventose J to be Constitutional breaches, the sentence of this court, being a re-sentence, is of 40 years imprisonment. The gun and associated recovered materials are to be destroyed unless the police prefer them stored as evidence. Time on remand and in prison since your arrest on 06.02.01 shall count. You shall be eligible for remission of up to one-third of your sentence if you have been and continue of good behavior, to be adjudicated and calculated by the prison. I further direct my public commendation of Vernal Nisbett (in para 16j) is to be communicated by police to his family. You may go with the goaler.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

22 February 2022