

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

ANTIGUA & BARBUDA

ANUHCRA2018/0018

BETWEEN:

GEORGE THOMAS

Appellant

and

THE QUEEN

Respondent

CONSOLIDATED WITH

ANUHCRA2018/0006

BETWEEN:

JOEL KWAME SERAPHIN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Louise Esther Blenman

Justice of Appeal

The Hon. Mde. Margaret Price Findlay

Justice of Appeal [Ag.]

Appearances:

Mr. Andrew O’Kola for the Appellants

Mr. Anthony Armstrong, Director of Public Prosecutions and Mrs. Shannon Jones-Gittens for the Respondent

2021: October 19;
2022: July 4.

Criminal appeal — Appeal against conviction and sentence — Murder — Whether the witness statement of Mr. Nibbs was inadmissible and/or ought to have been excluded — Whether the learned judge erred in directing the jury on how to treat the hearsay statement of Mr. Nibbs — Whether the learned judge failed to direct the jury on how to treat evidence of bad character — Whether the learned judge failed to direct the jury properly on how to treat the interview of Mr. Seraphin — Whether there was a failure to call relevant alibi evidence — Whether the summing up on credibility was unbalanced resulting in unfairness to Mr. Thomas — Whether the sentence was excessive as the learned trial judge took too high a starting point in calculating the sentence — Whether the learned trial judge failed to state what, if any, mitigating and aggravating factors he considered in arriving at the sentence — Whether the learned trial judge, in arriving at the sentence, considered things which he ought not to have taken into account — Whether the learned trial judge did not take into account the issue of the pre-trial delay in arriving at the sentence — Whether the learned trial judge failed to take into account the conditions of detention at Her Majesty's Prison in arriving at his decision — Whether the learned trial judge failed to take into account Mr. Thomas' conduct while on remand at Her Majesty's Prison as a mitigating factor in arriving at the sentence — Whether the learned trial judge failed to take into account Mr. Thomas' time spent on remand — Whether the disparity in the sentences of the two (2) appellants warrants a reduction in Mr. Thomas' sentence — Whether the sentence of Mr. Seraphin was given on the wrong factual basis — Whether the learned judge took irrelevant matters into account in sentencing Mr. Seraphin — Whether the learned judge failed to take relevant matters into account in sentencing Mr. Seraphin — Whether the conditions of Her Majesty's Prison breached Mr. Seraphin's right to human dignity and subjected him to cruel, inhumane and degrading punishment — Whether the sentence of twenty-five (25) years imprisonment was manifestly excessive considering the circumstances as a whole — Whether the disparity of sentence between Mr. Seraphin, Mr. Nibbs and Mr. Chapman was too great and thereby disproportionate.

Mr. Clint Mannix ("Mr. Mannix") was murdered sometime on either 5th or 6th November, 2009 at Dove Trail Road in Yeptons, St. John's. He was taken to the business establishment of Mr. George Thomas ("Mr. Thomas") where he was tied up, threatened and beaten. The incident concerned a drug deal gone wrong, and being dissatisfied with Mr. Mannix's explanations, Mr. Andre Nibbs ("Mr. Nibbs") called an associate, Mr. Ean Chapman ("Mr. Chapman") with instructions for him to bring guns up to the office at the bar where Mr. Mannix was being detained. Shortly after receiving the firearms, Mr. Joel Kwame Seraphin ("Mr. Seraphin"), along with Mr. Thomas and Mr. Nibbs came out from the bar with Mr. Mannix and they left in Mr. Thomas' pick-up truck. They made their way to Yeptons where Mr. Thomas gave the order for Mr. Mannix to be killed. Mr. Seraphin shot Mr. Mannix, however, Mr. Nibbs got cold feet and Mr. Seraphin took the firearm from him and fired several more shots at the already injured man.

At around 7:30am on 6th November 2009, Mr. Mannix's body was found lying on the road with multiple gunshot wounds to the head, neck and back. The pathologist concluded that death had resulted from the gunshot injuries he had sustained. Consequently, both Mr. Thomas and Mr. Seraphin were charged for the offence of murder. Mr. Thomas' defence was an alibi; he testified that he was not present and played no role in Mr. Mannix's death.

Mr. Thomas was found guilty by the jury on 23rd March 2018. Mr. Seraphin pleaded guilty to the offence charged on 8th March 2018 prior to the close of the prosecution's case.

Being dissatisfied with the decision of the learned trial judge, Mr. Thomas appealed against both his conviction and sentence, while Mr. Seraphin appealed against his sentence only. As it concerns Mr. Thomas' appeal the issues for this Court's consideration are as follows: (i) whether the witness statement of Mr. Nibbs was inadmissible and/or ought to have been excluded; (ii) whether the learned judge erred in directing the jury on how to treat the hearsay statement of Mr. Nibbs; (iii) whether the learned judge failed to direct the jury on how to treat evidence of bad character; (iv) whether the learned judge failed to direct the jury properly on how to treat the interview of Mr. Seraphin; (v) whether there was a failure to call relevant alibi evidence; (vi) whether the summing up on credibility was unbalanced resulting in unfairness to Mr. Thomas; (vii) whether the sentence was excessive as learned trial judge took too high a starting point in calculating the sentence; (viii) whether the learned trial judge failed to state what, if any, mitigating and aggravating factors he considered in arriving at the sentence; (ix) whether the learned trial judge, in arriving at the sentence, considered things which he ought not to have taken into account; (x) whether the learned trial judge did not take into account the issue of the pre-trial delay in arriving at the sentence; (xi) whether the learned trial judge failed to take into account the conditions of detention at Her Majesty's Prison in arriving at his decision; (xii) whether the learned trial judge failed to take into account Mr. Thomas' conduct while on remand at Her Majesty's Prison as a mitigating factor in arriving at the sentence; (xiii) whether the learned trial judge failed to take into account Mr. Thomas' time spent on remand; (xiv) whether the disparity in the sentences of the two (2) appellants warrants a reduction in Mr. Thomas' sentence.

The issues concerning Mr. Seraphin's appeal against sentence may be summarised as follows: (i) whether the sentence of Mr. Seraphin was given on the wrong factual basis; (ii) whether the learned judge took irrelevant matters into account in sentencing Mr. Seraphin; (iii) whether the learned judge failed to take relevant matters into account in sentencing Mr. Seraphin; (iv) whether the conditions of Her Majesty's Prison breached Mr. Seraphin's right to human dignity and subjected him to cruel, inhumane and degrading punishment; (v) whether the sentence of twenty-five (25) years imprisonment was manifestly excessive considering the circumstances as a whole; (vi) whether the disparity of sentence between Mr. Seraphin, Mr. Nibbs and Mr. Chapman was too great and thereby disproportionate.

Held: dismissing Mr. Thomas' appeal against conviction and allowing his appeal against sentence to the extent indicated at paragraph 198, and allowing Mr. Seraphin's appeal against sentence to the extent indicated at paragraph 198, that:

Mr. Thomas:

1. It is a matter of the discretion of the learned judge as to whether a deposition or witness statement should be tendered in evidence. However, this discretion only arises after the statutory conditions have been satisfied. Given the evidence led by the prosecution prior to its application for Mr. Nibb's evidence to be read into the record being made, the learned judge was entitled to conclude that Mr. Nibbs was indeed beyond the jurisdiction of the court. Furthermore, there was sufficient evidence before the learned judge to support his ruling that the requirements of

section 37 of the Evidence (Special Provisions) Act 2009 had been satisfied. Accordingly, the learned judge did not err in the exercise of his discretion in allowing the evidence of Mr. Nibbs to be read into the record.

Section 37(c) of the **Evidence (Special Provisions) Act, 2009** Act No. 5 of 2009, Laws of Antigua & Barbuda applied; **Henriques and Carr v R** (1991) 39 WIR 253 followed; **Knights (Donnason) v R** (1998) 53 WIR 125 followed.

2. A trial judge has a duty to direct or inform the jury that they have not had the benefit of hearing the witness give their evidence nor have they had the opportunity to observe the witness give their testimony, where applicable. The jury must also be warned that the evidence has not been tested by way of cross-examination and the need to take that into consideration when assessing how much reliance can be placed on the evidence contained in the witness statement. The judge gave a truncated but proper direction as to how the jury ought to have treated with Mr. Nibb's witness statement and there was no element of unfairness with his directions in this matter.

Henriques and Carr v R (1991) 39 WIR 253 followed.

3. A jury must have an appreciation of all the relevant surrounding circumstances of a crime. A jury cannot come to a conclusion in a vacuum, that is without knowing what the prosecution alleges led to the commission of the crime. The learned judge brought to the attention of the jury the circumstances surrounding the commission of the offence, as he was required to do. He fully explained the background to the commission of the offence and placed all the evidence in context so as to ensure that the jury would have an appreciation of the circumstances in which the Crown alleged that the offence was committed. Therefore, the learned judge's directions cannot be faulted in this regard.

D. C Ormerod, David Perry, Peter Murphy, John Phillips, Brian Henry Leveson: **Blackstone's Criminal Practice 2017**, Oxford University Press, 2017 considered; **R v Pettman** [1985] Lexis Citation 1520, (2 May 1985, unreported) followed.

4. It is a well-established principle of law that where a confession of a co-defendant is admitted into evidence, it is only evidence against the maker of the statement. Where the admission of evidence which was admissible against one defendant but not against his co-defendant, resulted in the real risk of prejudice to the co-defendant, the judge should ensure that the interests of the co-defendant are protected by explicit directions to the jury to the effect that the statement of one co-defendant was not evidence against the other. The learned judge ought to have stated clearly and unequivocally that the statement of Mr. Seraphin was evidence against Mr. Seraphin alone and not against Mr. Thomas, this he failed to do. However, the summation in its entirety, the directions relative to the offence, the burden and standard of proof and other salient aspects of the summation, as well as, the strength of the prosecution's evidence against Mr. Thomas, all taken

together lead to the conclusion that there was no miscarriage of justice in this case. A jury properly directed would have inevitably arrived at the same verdict of guilty.

Lobban v R [1995] 2 All ER 602 followed; D. C Ormerod, David Perry, Peter Murphy, John Phillips, Brian Henry Leveson: **Blackstone's Criminal Practice 2017**, Oxford University Press, 2017 considered; **Roger Jelliseau et al v The Queen** Grenada Criminal Appeals 10, 6, 11 of 1995 followed; **Jevone Demming v The Queen** [2020] ECSCJ No. 1 (delivered 14th January 2020) followed.

5. There is nothing in the record to suggest that the judge deprived Mr. Thomas of the opportunity to call his alibi witness. Indeed, the judge adjourned the matter in order for the proper arrangements to be made to accommodate the witness. It is through no fault or error of the judge that the witness failed to attend court on the adjourned date to give her evidence.
6. Having regard to the judge's summation as a whole, the complaint that he failed to sum up the defence fairly cannot be sustained. All of the issues which were vital to the defence, the arguments, the evidence and the alibi were properly placed before the jury and addressed by the learned judge.

Deshawn Stoutt v The Queen BVIHCRA2009/003 (delivered 21st November 2011, unreported) followed.

7. An appeal court does not alter a sentence merely because it might have passed a different sentence. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene. In examining the facts associated with this murder, the judge was entitled to take into account all of the surrounding circumstances. Having regard to the totality of the evidence it was open to the judge to conclude that the starting point for sentencing Mr. Thomas was life imprisonment.

R v Ball (1951) 35 Cr App Rep 164 followed; **Newton Spence et al v The Queen** St. Vincent & the Grenadines Criminal Appeal No. 20 of 1998; St. Lucia Criminal Appeal. No. 20 of 1997 followed; **R v Sargeant** (1974) 60 Cr App Rep 74 followed; **Desmond Baptiste v The Queen** St. Vincent & the Grenadines Criminal Appeal No.8 of 2003 followed.

8. The learned judge, at the completion of his analysis, concluded that the aggravating factors outweighed those tendered in mitigation and concluded that a life sentence was appropriate. The learned judge also stipulated a minimum period which Mr. Thomas must serve before being eligible for review. This fulfils the objectives of punishment and deterrence but also allows for rehabilitation. No fault can be found in the reasoning of the learned judge in this regard.

Renaldo Anderson Alleyne v The Queen (2019) CCJ 06 (AJ) followed; **Nicholas et al v The State** Cr. App. Nos. 1-6 of 2013 (delivered 17th December 2013, unreported) considered; **Mervyn Moise v The Queen** [2005] ECSCJ No. 52

(delivered 15th July 2005) followed; Section 6 of the **Offences Against the Person (Amendment) Act, 2013** Act No. 13 of 2013, Laws of Antigua and Barbuda applied.

9. The learned judge had the advantage of seeing and hearing Mr. Grant Beggs testify, and was in a position to assess his credibility. Mr. Thomas has not shown this Court that the learned judge did not take advantage of having seen and heard this witness or that the finding of the learned judge that he attached little credibility to Mr. Beggs was a wrong conclusion or an erroneous exercise of his discretion.

Betteto Frett v Flagship Properties Limited BVIHCVAP2009/026 (delivered 27th September 2011, unreported) followed.

10. Disparity by itself can never be a sufficient ground for overturning a sentence. The question which has to be answered is whether the sentence given by the court is wrong in principle or manifestly excessive. In the case of Mr. Thomas, there were significant differences in the level of participation with respect to his co-defendants as well as the guilty plea of Mr. Seraphin which were factored in so as to justify a disparity in sentence.

R v Rameka [1973] 2 NZLR 592 at 594 considered; **Re: Attorney General's Reference (Nos. 62, 63 and 64 of 1995)** [1996] 2 Cr App Rep (S) 223 followed.

11. In the case of Mr. Thomas, the delay has been a considerable one, being eight plus (8+) years, and the learned judge ought to have considered the issue of delay as a material mitigating factor allowing for a reduction in sentence. This Court has the discretion to take this delay into account as this is a serious offence, and clearly a custodial sentence was appropriate. Having considered all the circumstances, a reduction of two (2) years for the delay is in order.

Violet Hodge v The Commissioner of Police BVIMCRAP2015/0005 (delivered 27th February 2018, unreported) followed.

12. Harsh conditions in a prison do not automatically give rise to a reduction in sentence and the sentencing judge would need to examine all relevant factors in determining whether in the exercise of their discretion, to reduce the sentence they intend to give. The court being fully aware of the prison and its conditions, and having considered the representations of counsel, concluded that a life sentence was appropriate in all the circumstances. No fault can be found with the learned judge's reasoning in this regard.

Darrin Roger Thomas and Haniff Hilaire v Cipriani Baptiste (Commissioner of Prisons) and others PC Appeal 60 of 1998 followed; **Regina v Elton Charles** ANUHCR2017/0025 (delivered 14th May 2019, unreported) followed; **The State of Western Australia v O'Kane** [2011] WASCA 24 considered.

13. In the absence of unusual circumstances, a judge should fully credit a prisoner for pre-sentence custody not simply by means of a form of words but by means of an

arithmetical deduction when assessing the length of the sentence. The learned judge failed to specify the period of pre-trial incarceration for Mr. Thomas. Mr. Thomas is entitled to credit for the six (6) years and eleven (11) months he spent on remand.

Shonovia Thomas v The Queen [2012] ECSCJ No. 249, (delivered 27th August 2012).

Mr. Seraphin:

14. Neither Mr. Seraphin nor his counsel at trial disputed the facts of the matter as set out by the prosecution. No rebuttal nor contrary explanation was put before the learned judge on which he could have properly called for a Newton hearing. There was no need for a Newton hearing in the circumstances.

R v Oakley [1998] 1 Cr. App. Rep (S) 100 followed; **R v Tolera** [1999] 1 Cr. App. Rep 29 followed.

15. An appellate court will not override the exercise of the discretion of a trial judge who has seen and heard a witness give evidence without more. In Mr. Seraphin's case, there is no basis for this Court to interfere with the judge's findings with respect to the witness Mr. Grant Beggs.
16. While the learned judge gave reasons as to why he did not consider delay in this case as warranting a reduction in sentence, the delay in this case was too long and in the circumstances a reduction in sentence is warranted. In this matter, even though the learned judge found that the delay was due largely to the fault of Mr. Seraphin, a reduction of two years is just in the circumstances.

Violet Hodge v The Commissioner of Police BVIMCRAP2015/0005 (delivered 27th February 2018, unreported) followed.

17. While it is accepted that the conditions of the prison fall short of the required or accepted standard, it cannot be said that they violate the constitutional rights of Mr. Seraphin to the extent that would warrant a reduction in sentence.

Darrin Roger Thomas and Haniff Hilaire v Cipriani Baptiste (Commissioner of Prisons) and others PC Appeal 60 of 1998 followed; **Alcedo Tyson v The Queen** BVIHCRAP2013/0008 (delivered 20th November 2017, unreported) followed.

18. The learned judge took into account all the necessary factors which he was obliged to take cognisance of in arriving at the appropriate sentence in this matter and no fault can be found in his approach to the sentencing of Mr. Seraphin. The sentence was therefore not manifestly excessive in the circumstances.

Mervyn Moise v The Queen [2005] ECSCJ No. 52 (delivered 15th July 2005) followed; **Steve Gurrie v The Queen** GDAHCRAP2013/0004 (delivered 5th April 2022, unreported) followed.

19. The learned judge in his remarks clearly stated and considered what role Mr. Seraphin played in the murder of Mr. Mannix and this was based on facts presented to the court. In the circumstances, this Court cannot detect any disparity of sentence in relation to Mr. Seraphin and his former co-defendant Mr. Nibbs.

R v Stroud [(1977) 65 Cr App Rep 150 followed.

20. Any time spent in custody prior to sentencing should be fully taken into account, not simply by means of a form of words, but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing. The learned judge failed to specify the time Mr. Seraphin spent on remand in arriving at the twenty-five (25)-year sentence. Mr. Seraphin's period of pre-trial custody, being five (5) years and nine (9) months is also to be deducted from his twenty-five (25)-year sentence.

Callachand and another v State [2008] UKPC 49 followed; **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ) followed.

JUDGMENT

- [1] **PRICE FINDLAY JA [AG.]:** This is an appeal against conviction and sentence for Murder. The appellant George Thomas ("Mr. Thomas") appeals against both his conviction and sentence and the appellant Joel Kwame Seraphin ("Mr. Seraphin") appeals against his sentence.

- [2] The brief facts are as follows:

The charge and subsequent trial in this matter stemmed from the death of Mr. Clint Mannix ("Mr. Mannix") who was murdered sometime on either 5th or 6th November 2009 at Dove Trail Road in Yeptons, St. John's.

- [3] Mr. Mannix was taken to the business establishment of the appellant Mr. Thomas. There he was tied up, threatened and beaten. The incident concerned a drug deal gone wrong and being dissatisfied with the explanations given by Mr. Mannix, Mr. Andre Nibbs ("Mr. Nibbs") called an associate, Mr. Ean Chapman ("Mr. Chapman") with instructions for him to bring guns up to the office at the bar where Mr. Mannix was being detained. A short while after receiving the firearms, Mr. Seraphin, along

with Mr. Thomas and Mr. Nibbs came out from the bar with Mr. Mannix and they left in a pick-up truck belonging to Mr. Thomas.

[4] They made their way to Yeptons and there Mr. Thomas gave the order for Mr. Mannix to be killed. Mr. Seraphin shot Mr. Mannix using one of the firearms which had been supplied at the bar. Mr. Nibbs apparently got cold feet and Mr. Seraphin took the other firearm from him and fired several more shots at the already injured man.

[5] At around 7:30am on 6th November 2009, Mr. Mannix's body was found lying on the road with multiple gunshot wounds to the head, neck and back. The pathologist concluded that death had resulted from the gunshot injuries he had sustained.

[6] Mr. Thomas' defence was an alibi. He testified that he was not present and played no role in the death of the deceased man. Mr. Thomas was found guilty by the jury on 23rd March 2018.

[7] Mr. Seraphin pleaded guilty to the offence charged on 8th March 2018 prior to the close of the prosecution's case.

[8] I will deal with each appellant separately.

The Appellant - George Thomas

[9] Mr. Thomas appealed against conviction on the following grounds-

(1) That the witness statement of Mr. Nibbs was inadmissible and/or ought to have been excluded;

(2) That the learned judge erred in directing the jury on how to treat the hearsay statement of Mr. Nibbs;

- (3) That the learned judge failed to direct the jury on how to treat evidence of bad character;
- (4) That the learned judge failed to direct the jury properly on how to treat the interview of Mr. Seraphin;
- (5) That there was a failure to call relevant alibi evidence; and
- (6) That the summing up on credibility was unbalanced resulting in unfairness to Mr. Thomas.

Grounds 1 and 2- Whether Mrs. Nibbs' witness statement was inadmissible and whether the judge erred in his treatment of Mr. Nibbs' hearsay statement.

[10] Mr. Thomas complained that the evidence of Mr. Nibbs ought not to have been read into the record and further that the learned judge erred in directing the jury as to how to deal with the evidence of Mr. Nibbs. The learned judge explained to the jury the circumstances under which the statement of Mr. Nibbs was being received into evidence and why in the circumstances of the case that evidence was being admitted into evidence.

[11] Section 37(c) of the **Evidence (Special Provisions) Act, 2009**¹ is the relevant provision for the admissibility of hearsay statements in criminal proceedings when a witness is not within the jurisdiction. The section provides:

“37. Admissibility of first-hand hearsay statements in criminal proceedings
Subject to sections 42 and 43, a statement made by a person in a document including a witness statement tendered in committal proceedings shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person—
a) is dead;
b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

¹ Act No. 5 of 2009, Laws of Antigua & Barbuda.

- c) is outside of Antigua and Barbuda and it is not reasonably practicable to secure his attendance;
- d) cannot be found after all reasonable steps have been taken to find him; or
- e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person.”

[12] Mr. Thomas contended that the learned judge erred when he allowed the witness statement of Mr. Nibbs to be read into the record. He contends that the evidence was inadmissible in that the statutory requirements were not met.

[13] During the course of the trial the prosecution adduced evidence from Mrs. Veronica Nibbs, the mother of Mr. Nibbs, and Corporal Lenford Forbes (“Corporal Forbes”) in support of the application to have the witness statement read into the record. Further there were testimonies from immigration officers that this witness had in fact left the jurisdiction of Antigua & Barbuda and had not returned.

[14] Evidence was given as to the efforts made by Corporal Forbes, a police officer attached to the Director of Public Prosecution’s office and charged with the responsibility of locating and informing witnesses of the need for their attendance at trial. Extensive evidence was led as to the efforts made to locate the witness, Mr. Nibbs, and the prosecution’s failure to do so.

[15] Consequent upon this evidence, an application was made by the prosecution for the evidence of Mr. Nibbs to be read into the record; this was done without objection from the defence counsel who indicated to the court that the statutory threshold had been met.

[16] The admissibility of evidence of deposition or witness statements is in the discretion of the learned judge. It is a discretion which the judge has at common law and is exercisable in the interests of justice and in ensuring a fair trial. This discretion extends not only to persons who are deceased but to persons who are no longer in the jurisdiction.

[17] In this case there was evidence from the mother of Mr. Nibbs that the last time she saw her son was on 28th December 2017 at her house and that Mr. Nibbs had left for the United Kingdom later that evening. She further testified that she had heard from him on the 1st January 2018 by way of a telephone call.

[18] She further testified that as far as she was aware Mr. Nibbs had not returned to Antigua & Barbuda and was still in the United Kingdom. Further, that upon the request of Corporal Gittens she had tried several times to contact Mr. Nibbs without success. She stated that she did not have an address for Mr. Nibbs and that she had not seen her son in Antigua and Barbuda since the 28th of December 2017. These statements were not challenged by Mr. Lawrence Daniels, counsel for Mr. Thomas in the court below, in cross examination. As stated earlier, Corporal Forbes and Corporal Gittens gave evidence of their attempts to contact and locate Mr. Nibbs. They had no success.

[19] It is a matter of the discretion of the trial judge as to whether a deposition or witness statement should be tendered in evidence- this is clear from the wording of the statutory provisions. However, this discretion only arises after the statutory conditions have been satisfied. Given the evidence led by the prosecution prior to the application being made, the learned judge was entitled to conclude from this evidence that the witness Mr. Nibbs was indeed beyond the jurisdiction of the court. The case of **Henriques and Carr v R**² states:

“A judge, faced with an application to admit the deposition of an absent witness should, weigh up all the factors relevant to its grant and refusal before reaching a decision, which should seek as far as possible to do justice between the parties and ensure a fair trial. The importance of the evidence to be given and the availability within a reasonable time of the witness to give it are clearly relevant factors...”³

² (1991) 39 WIR 253.

³ Ibid at p. 258.

[20] The complaint of Mr. Thomas is that the provisions of section 37 were not met, that it could not be said that it was not reasonably practical to secure Mr. Nibbs' attendance, and further there was no evidence of sufficient steps being taken by the prosecution to secure this attendance at court.

[21] Having regard to the evidence led by the prosecution on this issue, in my view there was sufficient evidence before the learned judge to support his ruling that the requirements of section 37 had been satisfied. There was no evidence placed before the court that the witness Mr. Nibbs could have attended within a reasonable time. I find that the learned judge did not err in the exercise of his discretion in allowing the evidence of Mr. Nibbs to be read into the record. The pronouncements in **Knights (Donnason) v R**⁴ are helpful in this regard:

“The admissibility of a deposition is very much a matter for the discretion of the trial judge... The discretion under the Code in the present case, however, only arises after the prescribed conditions have been satisfied. In the circumstances the judge was certainly entitled to conclude from the evidence that the witness was beyond the jurisdiction of the court and there is no doubt that the provisions set out [in the Code] were met.”⁵

[22] The appellant further complains that the learned judge failed to give the jury adequate directions as to how they should treat the evidence of Mr. Nibbs.

[23] The learned judge at page 218 of the transcript of proceedings directed the jury as follows: -

“You will recall that following that the statement of Andre Nibbs was read into evidence. In considering the statement of Andre Nibbs remember it was not tested by cross-examination. So you will give it the weight it – – you in your opinion what weight you think it deserves. But the Prosecution is commending it to you. You will have it when you retire, but I will refer to certain passages of it.”

⁴ (1998) 53 WIR 125

⁵ Ibid at p.128.

- [24] Here the learned judge warned the jury of the fact that the evidence of Mr. Nibbs was not subject to cross-examination and it was a matter of the weight that they attached to this evidence.
- [25] This is in keeping with the statement made in **Henriques & Carr v R**:⁶
- “When a judge allows deposition evidence to be admitted he should as a matter of course warn the jury that they have neither had the benefit of seeing the deponent nor of hearing his evidence tested in cross-examination and that they must take this into consideration when evaluating the reliability of his evidence.”
- [26] It is clear that the trial judge has a duty to direct or inform the jury that they have not had the benefit of hearing the witness give their evidence nor have they had the opportunity to observe the witness give their testimony, where applicable. The jury must also be warned that the evidence has not been tested by way of cross-examination and the need to take that into consideration when assessing how much reliance can be placed on the evidence contained in the witness statement. In each case it is for the learned trial judge to develop the warning by pointing out salient aspects of the evidence which might be in conflict with other evidence and which could have been explored in cross-examination. However, the approach taken depends on the peculiar circumstances of each case.
- [27] The appellant is challenging the adequacy of the direction given by the learned judge with respect to how the evidence of Mr. Nibbs was to be treated. In the summation the learned judge gave the necessary warning about the approach to be taken by the jury in assessing that evidence.
- [28] The learned judge quite properly compared and contrasted the evidence of Mr. Nibbs with that of Mr. Chapman who testified that the men, including Mr. Thomas, left the bar with the deceased man. The evidence of Mr. Nibbs was not the only evidence against Mr. Thomas. The prosecution relied on circumstantial evidence of

⁶ (1991) 39 WIR 253 at p. 258.

Mr. Thomas leaving the premises (his bar) with the deceased, Mr. Nibbs and Mr. Seraphin, along with Mr. Thomas' lack of credibility to ground their case.

[29] The prosecution relied on evidence of the CCTV footage of the entrance of the bar, being erased by the defendant, along with the evidence of the drug deal gone bad, along with the lies told by Mr. Thomas, to establish his guilt. To say that the evidence of Mr. Nibbs alone, by itself, was what the prosecution depended on would be inaccurate.

[30] I find that the learned judge exercised his discretion fairly and properly in admitting the witness statement of Mr. Nibbs by having it read into the record and having given a truncated but proper direction as to how the jury ought to have treated with that statement. I find that there was no element of unfairness with the learned judge's directions in this matter. Fairness did not require the judge to do more than he did in directing the jury on this issue. The direction given clearly informed the jury of the deficiency in the evidence as it was not tested nor subjected to cross-examination, and pointed out to the jury that it was for them to give it such weight as they saw fit in view of that fact. Accordingly, these grounds of appeal fail and are dismissed.

Ground 3 – The learned trial judge erred in failing to direct the jury on how to treat evidence of bad character

[31] Mr. Thomas, in his interview with the police, admitted that he had been approached by Mr. Seraphin with respect to sourcing cocaine for Mr. Seraphin and Mr. Nibbs. He indicated that he collected a payment of twenty-two thousand dollars (EC \$22,000.00) which he then passed on to the other persons for the purchase of the drugs. Mr. Thomas further admitted that he had previously been involved in illicit drugs, but stated that he was no longer engaged in that activity.

[32] The learned Director of Public Prosecutions argues that this evidence was part of the background or history relevant to the offence with which Mr. Thomas was

charged. It was presented to the jury to illustrate the context and the circumstances surrounding the commission of the offences.

[33] **Blackstone's Criminal Practice 2017**,⁷ explains the reasoning behind the admissibility of background evidence in a criminal trial;

“Where an offence is alleged it may be necessary to give evidence of the background against which the offence is committed, even though to do so will reveal facts showing the accused in a discreditable light. The necessity to admit evidence of this kind, for its explanatory as distinct from its probative value, was well accepted at common law in a line of authorities that continue to be relevant...”

[34] This principle was not set out in **R v Pettman**⁸ by Kennedy LJ;

“...where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.”

[35] A jury must have an appreciation of all the relevant surrounding circumstances of a crime. It cannot be right for a jury to come to a conclusion in a vacuum, that is without knowing what the prosecution alleges led to the commission of the crime. The fact that the defendant is charged with another offence will make no difference, the evidence led in this case was eminently relevant to show what was the motive behind the killing of the deceased man; without this background information, the evidence would not have been complete and would have left the jury in some confusion.

[36] The learned judge brought to the attention of the jury the circumstances surrounding the commission of the offence, as he was required to do, that this was ‘a drug deal gone wrong’. He fully explained the background to the commission of the offence and placed all the evidence in context so as to ensure that the jury would have an

⁷ D. C Ormerod, David Perry, Peter Murphy, John Phillips, Brian Henry Leveson: Oxford University Press, 2017 at para. F13. 29

⁸ [1985] Lexis Citation 1520, (2 May 1985, unreported).

appreciation of the circumstances in which the Crown alleged that the offence was committed. I can find no fault with the learned judge's directions.

[37] It is to be noted that this evidence came from Mr. Thomas not only in his statement to the police but also when he gave evidence on his own behalf at trial.

[38] I agree with the respondent's submission that the dealing in illicit drugs was inextricably bound up in the overall narrative of this case, as the deceased man met his death due to a drug deal gone wrong. The learned judge correctly directed the jury to consider all of the evidence led in the matter on its merits, and the judge could not and ought not to have ignored the evidence of the background circumstances as a result. Accordingly, this ground of appeal also fails.

Ground 4 – The learned trial judge failed to direct the jury properly on the interview of a co-accused

[39] Learned counsel for Mr. Thomas argued that the learned judge failed to properly direct the jury on the interview of Mr. Seraphin, his co-defendant; an interview that was read into the record during the course of the trial.

[40] Counsel argued that the statement of Mr. Seraphin was self-serving in that it was (i) exculpatory, and (ii) sought to attribute blame to Mr. Thomas.

[41] He further argued that by his guilty plea the contents of Mr. Seraphin's statement cannot be true. Further, Mr. Seraphin did not give evidence and the statement could not form any part of the evidence against Mr. Thomas.

[42] He further complained that the learned judge only gave a cursory direction with respect to the effect of the statement on the case for Mr. Thomas in his summation.

[43] The respondent submitted that even though the direction given by the learned judge fell short of what is required that it was not in this case fatal as the Crown's case

was a very strong one with both circumstantial and direct evidence against Mr. Thomas. The learned judge, when reminded by the Director of Public Prosecutions that he had omitted to give the relevant direction at the conclusion of the summation, stated:⁹

“MR. ARMSTRONG: Yes, My Lord. Before the jury retire – –

THE COURT: Uh-huh.

MR. ARMSTRONG: -- -- is Mr. Seraphin’s statement which was tendered be returned?

THE COURT: Yes.

MR. ARMSTRONG: Might I ask that that would be the jury rule.

THE COURT: Very well. Yes.

MR. ARMSTRONG: And secondly, My Lord, anything which they might have heard on this statement read at that time pertaining to Mr. Thomas cannot be used against him.

THE COURT: Uh-huh. Yes.”

[44] It is a well-established principle of law that where a confession of a co-defendant is admitted into evidence, it is only evidence against the maker of the statement. It is not admissible at common law unless it was made in the presence of that person and he acknowledged the incriminating part so as to make them in affect his own.¹⁰

[45] The gist of the statement or question and answer of Mr. Seraphin was that he knew Mr. Thomas and he went to see him on at least two (2) occasions, one when Mr. Thomas gave him a gun and a second time when he, Mr. Seraphin, went to ask Mr. Thomas for cocaine. He met the deceased man and was informed that the deceased was responsible either for stealing the money or setting it up for the money to be stolen. He indicated that Mr. Thomas, along with other men, were present at Mr. Thomas’ bar at a later date when the deceased denied knowing that the cocaine was fake, which subsequently made Mr. Thomas very angry. He saw guns at this meeting, two guns, and there was a heated argument. He went on to say that the deceased man was killed at Yepton on the night of 5th March, 2009. He stated that

⁹ See p. 247 line 23 to p. 248 line 11 of the Record of Appeal Transcript - Vol. 3.

¹⁰ D. C Ormerod, David Perry, Peter Murphy, John Phillips, Brian Henry Leveson: Blackstone’s Criminal Practice 2017, Oxford University Press, 2017 at para. F18.80.

he knew when the deceased man left the bar with Mr. Thomas and others what the outcome would be. He himself denied that he was at Yepton that night.

[46] The learned judge failed to mention to the jury how they should approach this evidence in relation to Mr. Thomas. Clearly there was an implication in the question and answer that Mr. Thomas was the person who was involved in some way with the death of the deceased man. While there were exculpatory statements in the question and answer, those statements related to Mr. Seraphin and not Mr. Thomas.

[47] In **Lobban v R**¹¹ the court clearly stated that a judge has no discretion to exclude the exculpatory portion of a mixed statement containing admissions as well as an exculpatory explanation on which a defendant intended to rely notwithstanding that the exculpatory material was prejudicial to a co-defendant.

[48] **Lobban** goes on further to state that where the admission of evidence which was admissible against one defendant but not against his co-defendant, resulted in the real risk of prejudice to the co-defendant, the judge should ensure that the interests of the co-defendant are protected by explicit directions to the jury to the effect that the statement of one co-defendant was not evidence against the other.

[49] In this case even though the prosecution was not relying on the statement of Mr. Seraphin against Mr. Thomas, there was an implication by Mr. Seraphin in the question and answer interview that Mr. Thomas was in some way involved in the death of Mr. Mannix. The learned judge had a duty to give a clear warning to the jury as to how they should treat with the question and answer of Mr. Seraphin in relation to Mr. Thomas. This he failed to do.

[50] The trial judge in a criminal trial has long had the discretion to refuse to admit evidence if in his opinion that evidence is more prejudicial than probative. This power derives from the duty of the trial judge to ensure that a defendant receives a

¹¹ [1995] 2 All ER 602.

fair trial. This power is wide enough to allow the trial judge to exclude evidence in a joint trial which is probative of the case against one co-defendant but prejudicial against another co-defendant. The trial judge must safeguard the interests of all defendants in ensuring that all defendants receive a fair trial.

[51] In **Roger Jelliseau et al v The Queen**,¹² Matthew JA (Ag) opined that: 'The Court is of the view that it is a serious misdirection not to make it abundantly clear to the jury that the statement made by one co-accused is not evidence another co-accused.'

[52] However, when looking at the case as a whole, while the direction with respect to this issue fell short of what is desired, the prosecution's case against Mr. Thomas was an extremely strong one.

[53] In **Jevone Demming v The Queen**,¹³ Pereira CJ stated at paragraph 26:

"An appellate court's examination of a summation is not concerned solely with determining whether a judge made errors in directing the jury on the law or in the summing up of the evidence. The Court is rather concerned with whether the judge's misdirection occasioned a miscarriage of justice and resulted in an unsafe conviction... If it is found that there are defects in the judge's directions to the jury, it further falls to be determined whether the defects in the judge's directions in fact occasioned a miscarriage of justice."

[54] In this matter the learned judge's directions consisted of three words, 'Uh-huh. Yes', and he said no more. The learned judge ought to have warned the jury that the statement of a co-accused was evidence with respect to that co-accused alone and not against any other co-accused in the matter. He ought to have stated clearly and unequivocally that the statement of Mr. Seraphin was evidence against Mr. Seraphin alone and not against Mr. Thomas, this he failed to do.

¹² Grenada Criminal Appeals 10,6,11 of 1995 at p. 7.

¹³ [2020] ECSCJ No. 1 (delivered 14th January 2020).

[55] Has this lack of direction amounted to a miscarriage of justice, or has it led to an unsafe conviction? In looking at the summation in its entirety and the directions relative to the offence, that is murder and its elements, the burden and standard of proof and other salient aspects of the summation as well as the strength of the prosecution's evidence against Mr. Thomas, all these things taken together leads me to the conclusion that there was no miscarriage of justice in this case.

[56] I am of the view that there was overwhelming circumstantial and direct evidence before the jury which was in support of the prosecution's case, a conviction was inevitable. The Crown's case was in no way dependent on the statement of Mr. Seraphin and was a very strong direct and circumstantial case without it.

[57] I am of the view that a jury properly directed would have inevitably arrived at the same verdict of guilty.

[58] Therefore, this ground of appeal fails and is dismissed.

Ground 5 – Failure to adjourn to allow the defence to call alibi witnesses

[59] This ground of appeal is ill-conceived. Mr. Thomas, through counsel, indicated to the court below on Thursday, 15th March 2018 that he had one witness to call; this was at the completion of Mr. Thomas' testimony.

[60] There was an exchange between defence counsel and the court with respect to interpreters and the matter was adjourned until the following Monday for arrangements to be made for an interpreter to be present as the witness was Spanish speaking. This situation arose because Mr. Thomas' counsel had failed to advise the court of the need for an interpreter and in the circumstances the court adjourned the hearing to the following Monday.

[61] When Monday came, counsel informed the court that the witness was not available as she had an appointment. Defence counsel then closed his case having indicated to the court that the defence would be pressing ahead.

[62] There is nothing in the record to suggest that the learned judge deprived Mr. Thomas of the opportunity to call his alibi witness. Indeed, the learned judge adjourned the matter in order for proper arrangements to be made to accommodate the witness. It is through no fault or error of the learned judge that the witness failed to attend court on the adjourned date to give her evidence. I find no fault with the learned judge in the handling of this aspect of the matter and accordingly this ground of appeal also fails.

Ground 6 - Court failed to sum up defence fairly

[63] Counsel has submitted that the learned judge's summation with respect to credibility was imbalanced and further that the judge failed to sum up the defence case fairly.

[64] The learned judge gave lengthy and detailed directions on the issue of credibility. At page 243 line 13 to line 24, part of Record of Appeal Transcript – Vol. 3 the learned judge stated:

“So there are differences and variations in the evidence. They have the Prosecution's account and the Accused account. These differences and variations in the evidence you will have to reconcile and resolve for yourselves. The task however is not too difficult because you are persons experienced in the way things happen, how out there in the wider world and you will no doubt apply your common sense in evaluating and weighing of the evidence. You will consider whether a witness is credible or not and whether that witness is to be believed because you are entitled to reject any evidence which you do not believe.”

[65] These directions were clear and unambiguous and the jury could have been left with no doubt as to how they were to treat with the evidence led by both the prosecution and the defence. The learned judge clearly focused the minds of the jury as to how they were to critically examine the evidence in the matter before arriving at a verdict.

[66] It is to be noted that apart from the bald assertion that the learned judge's summation was unbalanced and failed to sum up the defence fairly, Mr. Thomas did not direct this Court's attention to any example of the judge's failure to sum up the case in the approved manner.

[67] The law clearly requires that the judge's duty is to ensure fairness by properly putting to the jury the defence's case.

[68] In **Deshawn Stoutt v The Queen**,¹⁴ Baptiste JA stated:

"A judge is duty bound, in the interests of fairness of the trial process, to put squarely before the jury the nature of the defence arising at the trial. A judge has the undoubted obligation to put the defence case fully, clearly, fairly and cogently to the jury so that they would be positioned to properly consider and appreciate the issues raised on behalf of the defendant. While the judge has to summarise the arguments and evidence, he is not obliged to refer to every submission that may have been made by defence counsel."

[69] This Court has to critically examine the directions given and ascertain whether the judge sufficiently put all the relevant issues raised by the defence before the jury and further give directions as to how the jury should treat with those directions. At page 241 line 7 to line 18 Record of Appeal Transcript – Vol. 3 the learned judge stated:

"The Accused on the other hand is saying that he never went to Yeptons. At first he said he never left the bar but he later says, yes, he did leave the bar but for a moment to go to the pickup and to assist in having the pickup turned on. That's all he did. And from that he went back to the bar and from there home.

A person cannot be in two places at the same time. He is establishing an alibi saying that he remained there and he went home. He had nothing to do. As I said it is not for him to prove that he was at the bar, it's the Prosecution to disprove that he was not there."

[70] Mr. Thomas' defence was one of alibi, that he did not go to Yeptons with the deceased, he stayed at the bar and did not leave until he closed the bar for the

¹⁴ BVIHCRA2009/003 (delivered 21st November 2011, unreported).

night. He then returned later and erased the CCTV footage because he did not want to be involved in what he learnt had transpired.

[71] The judge gave appropriate directions on what an alibi was and correctly related the evidence of Mr. Thomas to those salient aspects of his defence. Further the judge carefully went through the testimony of Mr. Thomas, pointing out inconsistencies within his evidence as well as inconsistencies within the prosecution's evidence. The judge also pointed out the inconsistencies between Mr. Thomas' sworn testimony and the interview he gave to the police.

[72] The judge gave the appropriate directions and clearly instructed the jury to take into account all the evidence led both by the prosecution and the defence before arriving at a verdict. Throughout the summation the learned judge put to the jury the contrast between the evidence for the prosecution and the evidence for the defence.

[73] Looking at the summation as a whole, the complaints made on this ground of appeal cannot be sustained. All of the issues which were vital to the defence, the arguments, the evidence and the alibi were properly placed before the jury and addressed by the learned judge.

[74] Therefore, this ground also fails.

Sentence

[75] Mr. Thomas appeals against his sentence on a number of grounds:

- (1) Sentence was excessive as learned trial judge took too high a starting point in calculating the sentence.
- (2) The learned trial judge failed to state what if any mitigating and aggravating factors he considered in arriving at the sentence.

- (3) The learned trial judge in arriving at the sentence considered things which he ought not to have taken into account.
- (4) The learned trial judge did not take into account the issue of the pre-trial delay in arriving at the sentence.
- (5) The learned trial judge failed to take into account the conditions of detention at Her Majesty's Prison in arriving at his decision.
- (6) The learned trial judge failed to take into account the conduct of Mr. Thomas while on remand at Her Majesty's Prison as a mitigating factor in arriving at the sentence.
- (7) The learned trial judge failed to take into account Mr. Thomas' time spent on remand.
- (8) The disparity in the sentences of the two (2) appellants.

General approach to sentencing

[76] The main argument with respect to sentencing is that the learned judge took too high a starting point and failed to take sufficient account of the mitigating factors relevant to Mr. Thomas. It is to be noted that the Sentencing Guidelines of the Eastern Caribbean Supreme Court do not apply in the circumstances of this case.

[77] In approaching the review of any sentence this Court must be mindful of the statement in **R v Ball**: -¹⁵

"In the first place this Court does not alter a sentence which is the subject of an appeal merely because members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only

¹⁵ (1951) 35 Cr App Rep 164 at 165.

when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene.”

[78] As a first step, if a sentencer is of the view that the best sentence is a term of imprisonment, he has to make a determination of the length of the sentence as a starting point and then proceed to consider any factors that will influence the length of the sentence to be replaced, whether a mitigation or otherwise.

[79] In the case of **Newton Spence et al v The Queen**,¹⁶ Byron CJ stated:

“The factors that must be taken into account upon a plea of mitigation should include the gravity of the offence, the character and record of the offender, the subjective factors which may have influenced the offender’s conduct, the design and manner of execution of the offence and the possibility of reform and social re-adaptation of the offender.”

[80] It is to be borne in mind as well the established principles of sentencing as set out in the cases of **R v Sargeant**¹⁷ and **Desmond Baptiste v The Queen**,¹⁸ that is retribution, deterrence, prevention and rehabilitation.

[81] The court has to look at the seriousness of the offence and its combination with an offence with which it is associated to determine if it is of that exceptionally high nature so as to warrant a whole life sentence.

[82] In examining the facts associated with this murder, the court was entitled to take into account all of the surrounding circumstances. This was a drug deal gone wrong and the deceased was killed ‘execution style’ by Mr. Thomas and others. This was therefore a murder associated with another criminal activity, that of drug dealing. There was a degree of planning, the deceased man was removed from his home, brought to Mr. Thomas’ bar, tied up, questioned by Mr. Thomas and others, guns

¹⁶ St. Vincent & the Grenadines Criminal Appeal No. 20 of 1998; St. Lucia Criminal Appeal. No. 20 of 1997.

¹⁷ (1974) 60 Cr App Rep 74.

¹⁸ St. Vincent & the Grenadines Criminal Appeal No.8 of 2003.

were brought to the scene and the deceased man was removed from the bar and driven to a deserted area where he was killed by gunshots. The evidence accepted by the jury was as stated above and this offence is clearly aggravated by the manner of its execution.

[83] And while the learned judge only clearly enunciated two (2) aggravating features he must have had in his contemplation the manner and the execution of the offence. The learned judge found no mitigating factors of the offence.

[84] Having looked at the totality of the evidence it was open to the judge to conclude that the starting point was life imprisonment.

[85] Once the starting point is set the matter does not end there. The court must take into consideration whether there are aggravating factors relative to the offence which were not considered in setting the starting point. Having considered everything before the court I find that there were no additional aggravating factors which were left to be considered. I agree with the judge that there were no mitigating factors relative to the offence.

[86] The court is next required to examine the personal circumstances of the defendant. The learned judge considered Mr. Thomas' age, forty-two (42) years, his previous good character, his expression of remorse, (even though he maintained his innocence), the favourable pre-sentence report, and the judge then opined:¹⁹

"A life sen[tence] imprisonment would be appropriate where considering the matters in the round including the individual circumstances of the offender and the offence. Punishment and deterrence dictates that such a sentence is a commensurate sentence and that is stated in Desmond Baptist[e]. This is a case where such a sentence is appropriate."

[87] The court must look at the personal circumstances of the offender even if its initial view is that a life sentence is appropriate. The personal circumstances of the

¹⁹ See Vol. IV Record of Appeal p. 126 lines 2-8.

defendant might afford powerful mitigation resulting in a reduction from a life sentence to a determinate one.

[88] Saunders P J in the CCJ judgment in **Renaldo Anderson Alleyne v The Queen**²⁰ stated:

“Life sentences fall into a unique category of sentences. If, after considering all of the aggravating and mitigating circumstances of the offence (as distinct from those of the offender) a judge is initially disposed to impose a life sentence, that disposition can be softened, in appropriate cases, upon a consideration of the mitigating circumstances that relate to the offender. That would be because matters such as the offender’s early guilty plea or his age or level of remorse or social or economic circumstances, cause the judge to moderate his or her original disposition in favour of a lesser sentence measured in terms of years or months.”²¹

[89] Where there is evidence to suggest that rehabilitation of the offender is possible the court ought to be slow to render a life sentence. In **Nicholas et al v The State**²² The Trinidad & Tobago Court of Appeal carried out a survey of a number of Eastern Caribbean cases and their findings were summarised as follows:

“36. The judges of the Eastern Caribbean Supreme Court, in the aforementioned cases, in considering the imposition of a sentence of life imprisonment, have taken into account: 1) the seriousness of the conduct of the appellant; 2) the expression of genuine remorse; 3) probation reports to gauge whether the appellant is fit for social re-adaptation; 4) the antecedents of the appellant; and 5) the presence of pre-meditation. Therefore, a life sentence is inappropriate where on consideration of all these circumstances, the balance is tipped in favour of the appellant.

37. Apart from the circumstances of the offence, what must loom large in considering whether a life sentence is appropriate is the possibility or likelihood of the appellant being rehabilitated to the extent that he could be safely returned to society. Where there is evidence or information to suggest that this goal is achievable, a court must be slow to incarcerate an appellant for the rest of his natural life.”²³

[90] The learned judge had sight of the pre-sentence report in respect of Mr. Thomas from Marsha James-Pharoah, a probation officer with the Ministry of Social

²⁰ (2019) CCJ 06 (AJ).

²¹ Ibid at para. 79.

²² Cr. App. Nos. 1-6 of 2013 (delivered 17th December 2013, unreported).

²³ Ibid at paras. 36-37

Transformation, and also heard oral testimony from this witness. The learned judge also heard oral testimony at this stage from Mr. Thomas himself. The probation report relative to Mr. Thomas does not appear to have disclosed any unfavourable circumstances or particular hardship in his life. Mr. Thomas expressed remorse at the death of the deceased but did not take responsibility for causing the death of the deceased.

[91] And while the judge did not address the issue of rehabilitation directly and no oral evidence was led of his rehabilitative prospects, there have been no reports of his having been involved in violence while he has been at Her Majesty's Prison.

[92] Mr. Thomas is a mature adult aged forty-two (42) years, who has not accepted responsibility for his actions, these factors do not assist him in mitigation. That he also has no previous convictions and is therefore to be considered of good character is one mitigating factor. There was also a favourable pre-sentence report for Mr. Thomas, indicating that Mr. Thomas was not known to be a violent individual.

[93] In considering what weight to give mitigating factors, Rawlins JA [Ag.] in the criminal appeal of **Mervyn Moise v The Queen**²⁴ opined:

"[18] It is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person....

[19] ... The Judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case."

²⁴ [2005] ECSCJ No. 52 (delivered 15th July 2005) paras 18-19.

- [94] The learned judge having started at a life sentence, the question the judge had to consider was whether the mitigating factors when placed alongside the aggravating factors would result in a reduction of that life sentence.
- [95] In **Renaldo Alleyne**, Justice Saunders stated:
- “... the circumstances relating to the offence may be so ghastly that the judge is inclined to regard life imprisonment as being eminently appropriate and therefore commensurate notwithstanding the mitigating circumstances the offender put forward. In other words, the judge may consider that a particular offence and its consequences are so serious that neither an early guilty plea nor any other mitigating factor can, in that particular case, serve to reduce the life sentence.”²⁵
- [96] This does not mean the once there are mitigating factors, including prospects for rehabilitation, put forward by a defendant that a life sentence is automatically no longer in play. In order for the court to do so the mitigating factors must outweigh the aggravating factors to the degree that the balance is in favour of the defendant.
- [97] Considering the circumstances which the learned judge identified- the taking of the deceased man from his home, the fact that he was brought to Mr. Thomas’ bar and interrogated, the finding that he was taken to Yeptons and killed ‘execution style’- an appropriate starting point would be life imprisonment.
- [98] The learned judge at the completion of his analysis clearly concluded that the aggravating factors outweighed those tendered in mitigation and concluded that a life sentence was appropriate. I can find no fault in the reasoning of the learning trial judge. A life sentence is therefore appropriate and this Court will not interfere with the learned judge’s sentence.
- [99] It does not mean that because the learned judge arrived at a life sentence that Mr. Thomas’ rehabilitation prospects were ignored. In passing the life sentence the learned judge was required to take into account section 6 of the **Offences Against**

²⁵ (2019) CCJ 06 (AJ) at para 80.

the Person (Amendment) Act, 2013²⁶ which amends the principal Act by inserting section 3B and states:

“3B. Review of sentence for life or lesser term of imprisonment

(1) Where a person is convicted of any offence under Part I and Part II of this Act, and sentenced to life imprisonment or to a lesser period of imprisonment, the court may order that the sentence imposed on the convicted person be reviewed by a court of competent jurisdiction after the person has served not less than a period of —

(a) thirty years, where the sentence is for life imprisonment, and thereafter at intervals of five years; and

(b) twenty years, in the case of a lesser term of imprisonment, and thereafter at intervals of three years,

and there consider whether it is any longer necessary for the purposes of deterrence, retribution, rehabilitation and in the public interest that the convicted person should be further detained.”

[100] The learned judge stipulated a minimum period which Mr. Thomas must serve before being eligible for review. This fulfils the objectives of punishment and deterrence referenced by the judge at page 126 of the transcript (referred to earlier) but also allows for rehabilitation. In so doing the learned judge made provision as he was required to do for Mr. Thomas to apply for a review of his sentence after he had served a period of thirty (30) years.

[101] This life sentence imposed by the learned judge does not mean that Mr. Thomas' prospects for rehabilitation have been ignored since the learned judge, as he was obliged to do, has stipulated a minimum period which Mr. Thomas must serve before a court may order a review. This stipulation leaves the door open for rehabilitation. The result is a sentence of life imprisonment does not necessarily mean that a defendant will spend the rest of his natural life incarcerated. There is clear provision for Mr. Thomas to be considered for release, subject to the relevant reports being submitted, after that minimum period is served.

²⁶ Act No. 13 of 2013, Laws of Antigua and Barbuda.

[102] The learned judge, having considered all of the attendant circumstances, found that the degree of seriousness of the offence was sufficiently high to warrant a sentence of life imprisonment.

The Evidence of Grant Beggs

[103] With respect to the evidence of Mr. Grant Beggs, the learned judge saw the witness give evidence and was in the best position to form an opinion of the witness. The judge indicated that this witness did not form a good impression with the court. That being so, the learned judge was in a position to conclude as he did to give little weight to the evidence of Mr. Beggs.

[104] Edwards JA in **Betteto Frett v Flagship Properties Limited** ²⁷ stated:

“... in the case of Chiverton Construction Ltd et al v Scrub Island Group Ltd (TVI HCVAP 2009/028, unreported), an appellant who challenges findings of fact faces a serious hurdle. A Court of Appeal should attach the greatest weight to the opinion of the judge who saw the witnesses and heard the evidence, and consequently should not disturb a judgment of fact unless they are satisfied that it is unsound.”

[105] In this matter, the learned judge had the advantage of seeing and hearing this witness testify and was in a position to assess his credibility. Mr. Thomas has not shown this Court that the learned judge did not take advantage of having seen and heard this witness or that the finding of the learned judge that he attached little credibility to the witness Mr. Beggs was a wrong conclusion or an erroneous exercise of his discretion. The learned judge formed an unfavourable view of the witness and attached little if any credibility to his evidence. He was entitled to do so.

[106] The learned judge having formed that opinion of the witness was entitled to draw whatever inferences from the evidence of this witness in light of his findings on this witness' credibility.

²⁷ BVIHCVAP2009/026 (delivered 27th September 2011, unreported).

Disparity in Sentence

- [107] Mr. Thomas complains that the disparity between his sentence and that of Mr. Seraphin was too great and not justified on the facts of the case, rendering his sentence manifestly oppressive.
- [108] Whereas in this case there are multiple defendants, the court has to look and examine carefully the role each defendant played in the commission of the offence. Some persons play a lead role and others a subordinate one; therefore, it is incumbent on the sentencer to critically examine the roles played by each participant along with any mitigating or aggravating circumstances and thereafter sentence accordingly.
- [109] Disparity by itself can never be a sufficient ground for overturning a sentence. The question which has to be answered is whether the sentence given by the court is wrong in principle or manifestly excessive. The law does not require that the co-defendants should be treated alike, and it is perfectly proper for the sentencing judge to distinguish between defendants by imposing different sentences.
- [110] The trial judge must assess the degree of participation and the culpability of the offender, and examine the mitigating and aggravating factors relative to each offender in order to determine whether equal or different sentences should apply.
- [111] Where the situation arises that a co-defendant has received too long or too short a sentence, and it is shown that relevant issues which affect the defendant have been overlooked or irrelevant matters have been considered then an appellate court may interfere.
- [112] In the case of **R v Rameka**²⁸ the New Zealand Court of Appeal stated: 'The Court will in special cases have regard to disparity as a ground of appeal against sentence but only where the disparity appears unjustifiable and is gross.'

²⁸ [1973] 2 NZLR 592 at 594.

- [113] It is stated that the test as to whether an appeal court should interfere with a sentence that was otherwise appropriate on the ground of disparity is objective rather than subjective. It is not merely whether the offender believes that he has been treated unfairly but whether there is a real justification for the grievance.
- [114] Where the circumstances surrounding the incident and the personal factors of the offender are such as to warrant a difference in sentences, such an approach would be justified.
- [115] The learned judge examined the aggravating and mitigating factors of both defendants in the matter and placed emphasis on the guilty plea of Mr. Seraphin which the judge considered in light of the evidence of Mr. Seraphin that he wanted to plead guilty from the outset. As a result, the judge in the exercise of his discretion, gave the defendant, Mr. Seraphin the benefit of the full $\frac{1}{3}$ discount, an option not open to Mr. Thomas who continued to trial and verdict. The fact of his previous good character was also considered by the judge in arriving at the sentence. The judge also considered his expression of remorse and the contents of his pre-sentence report. The learned judge also looked at and examined previously decided cases and concluded that he would not impose a life sentence on Mr. Seraphin.
- [116] The learned judge, based on the evidence, was of the view that Mr. Thomas was the central figure of this matter and found that it was Mr. Thomas who ordered the shooting of the deceased man, and that although it was Mr. Seraphin who fired the shots that lead to the deceased man's death, those shots were fired on the instructions or directions of Mr. Thomas. Further, the first shots having been fired, Mr. Thomas gave further instructions that the other participants should ensure that the deceased was in fact dead.
- [117] Here there were significant differences in the level of participation with respect to the co-defendants as well as the guilty plea of Mr. Seraphin which were factored in so as to justify a disparity in sentence.

[118] This Court will not reduce a sentence unless there is such a glaring difference between the treatment of one defendant as opposed to the other so that a real sense of grievance would be engendered in the case of the defendant suffering the more serious penalty. The case **Re: Attorney General's Reference (Nos. 62, 63 and 64 of 1995)**²⁹ states:

“Where two offenders are sentenced for an offence for which they have been committed jointly, any difference in sentence should only result from differing degrees of involvement in the offence or from personal mitigating circumstances. Even if a difference cannot be so justified an appeal on the basis of disparity will only succeed in rare cases.”

This is not one of those rare cases. I find that the sentence is neither wrong in principle nor is it manifestly excessive, and further that when the Court looks at all the relevant circumstances there is good reason for the difference in sentence between the two appellants.

Delay

[119] Mr. Thomas complains that there was an eight and a half (8½) year delay in bringing this matter to trial and requests a reduction in sentence as a result. Further, he contends that there was no proper review of the records of the court so as to support a finding that was not attributable to the court and/or the Crown.

[120] It is accepted that there was a delay between Mr. Thomas' arrest and the trial of the matter. It is accepted that a lengthy delay in the hearing of a matter can have the effect of mitigating and reducing the sentence rendered by a court.

[121] In **Violet Hodge v The Commissioner of Police**,³⁰ Baptiste JA set out the principles of delay as follows:

“The principles regarding delay can be summarized as follows. In determining sentence, there is a need to have regard to any failure to proceed with a case with due expedition. Excessive delay can affect the question of the justice of the sentence. Delay in bringing an accused to justice is recognised as a mitigating factor that can be taken into account in

²⁹ [1996] 2 Cr App Rep (S) 223.

³⁰ BVIMCRAP2015/0005 (delivered 27th February 2018, unreported) at para.66.

sentencing and its effects can be recognised by a reduction in sentence. One has to examine the extent to which a defendant or appellant has been prejudiced by the delay per Lord Hope at paragraphs 53 and 54 of *Mills v Her Majesty's Advocate*. 'A judge retains the discretion to do justice on the particular facts of a case, for example in the case of excessive delay, and may therefore reduce an otherwise appropriate sentence accordingly' per Lady Hallett in *R v Kerrigan* at paragraph 56. This is very much a residual general discretion to correct any perceived injustice. Delay is undoubtedly of relevance to the broad question of what a just sentence is when eventually and belatedly conviction occurs, per Vice President Hughes LJ in *Attorney General's Reference No. 79 of 2009*. He emphasised that applications for reductions in sentence would be unusual."

[122] There was material before the learned judge with respect to the delay in this matter and there is an indication that the judge did factor in delay in arriving at his decision. While he may not have expanded on his findings, clearly it was an issue that he took into consideration and upon which he made findings, that is that the delay lay at the feet of Mr. Thomas.

[123] It cannot be said that the learned judge failed to take delay into account.

[124] As stated in **Violet Hodge**, the issue of whether a delay is excessive is fact sensitive. Here the learned judge was apprised of the factual matrix which led to delay. While there is no automatic right to a reduction in sentence due to delay in the matter coming up for trial, the judge has a discretion after making an assessment of the facts and thereafter whether a reduction in sentence is warranted.

[125] While the delay of eight plus (8+) years in this matter cannot be considered acceptable, the learned judge found that it was the defence and not the Crown at whose feet the blame lay. The learned judge was of the view that, given the totality of the evidence and that the defence was responsible for the delay, no reduction of sentence was warranted.

[126] Delay in bringing a matter to trial has long been recognised as a mitigating factor in sentencing and is reflected in a reduction in sentence where appropriate. Where it

is found that there is an excessive delay in the prosecution of a matter it can affect the question of justice of the sentence imposed. The question of delay is relevant to the wider issue of what a just sentence is when the time arrives for a sentence to be imposed.

- [127] In this case the delay has been a considerable one, the delay being eight plus (8+) years, and the learned judge ought to have considered the issue of delay as a material mitigating factor allowing for a reduction in sentence. This Court has the discretion to take this delay into account as this is a serious offence, and clearly a custodial sentence was appropriate. Having considered all the circumstances, a reduction of two (2) years for the delay is in order.

Conditions of the Prison

- [128] Mr. Thomas asserts that the High Court in sentencing persons convicted of offences ought to take judicial notice of the conditions at the prison facility as a mitigating factor in the construction of the sentence it hands down. He further contends that due to these prison conditions he was subjected to inhumane and degrading punishment.
- [129] Sentencing involves the infliction of punishment; punishment has been described as 'the infliction of pain on a person because he has done wrong'.³¹ It involves depriving a person because he or she had committed some infraction of the law in a manner which may be painful or unpleasant for that individual because he or she has done something wrong. Punishment by its nature involves the infliction of some degree of hardship on the offender.
- [130] Imprisonment is the harshest of penalties as it involves the deprivation of the liberty of the subject and the duration of the term of imprisonment imposed is determinate

³¹ McTaggart & McTaggart, *Studies in Hegelian Cosmology* (Cambridge University Press, 1901) at para 137.

of the severity of the sentence. The more serious the crime, the harsher the punishment.

[131] In **Darrin Roger Thomas and Haniff Hilaire v Cipriani Baptiste (Commissioner of Prisons) and others**³² Lord Millet stated:

“Prison conditions in third world countries often fall lamentably short of minimum standards which would be acceptable in more affluent countries. It would not serve the cause of human rights to set such demanding standards that breaches were common place. Whether or not the conditions in which the appellants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions both in and outside prison, even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the appellants constitutional rights, commutation of the sentence would not be the appropriate remedy...”

[132] In my view when one looks at the evidence led with respect to this aspect of the appeal, it consisted of one incident where ten (10) prisoners were held in one cell and were not let out for a day and that a certain prisoner was allegedly beaten. The prison conditions set out in **Regina v Elton Charles**³³ are stated as follows:

“21 Such a minimum term is to be served in the local jail in St Johns. As I have observed when passing sentence for murder on Errol Barnes on 08.06.17, on Steve Urlings on 24.07.17, and on Meryl Chiddick on 15.04.19, I have visited the prison on Antigua, having done so annually, now three times in Decembers 2016, 2017, and 2018. The prison staff do excellent work in very difficult circumstances. The prison is called ‘1735’, as that is when it was ground first used for custody. The facilities appear to date back to the 19th Century, more in keeping with 150 years ago, rather than the 21st century. Facilities are rudimentary. The prison is overcrowded. Remandees are often twelve to a cell with only six beds, allowed out often for only about six hours a day. Convicted prisoners in another sections of the prison are in small cells and allowed out only during daylight hours... In the overcrowding, there is potential for the spread of disease. There is an outside bank of toilets into a pit under corrugated iron, about 30m from the kitchens. During lockdown, urination and defecation are into plastic buckets, lacking any privacy and requiring morning slopping out. I consider these conditions to be far more difficult than in a UK prison, for which there minimum terms have been calculated, and consequently there should be a

³² PC Appeal 60 of 1998.

³³ ANUHCR2017/0025 (delivered 14th May 2019, unreported).

further reduction in the minimum term here to allow for the fact it is to be served in far harsher conditions.

22 I assess these harsher conditions merit a reduction from a UK sentence of roughly, though not mathematically precisely, one-quarter, which for the purposes of this case will mean 12 years, so that the minimum term of 48 years to be served in '1735', is to be reduced 36 years."

[133] I am not convinced that the conditions described above amount to such inhumane and degrading treatment as to be considered a mitigating factor requiring a reduction in sentence.

[134] In **Elton Charles** the conditions for remandees were in fact worse than for convicted prisoners.

[135] Harsh conditions in a prison do not automatically give rise to a reduction in sentence and the sentencing judge would need to examine all relevant factors in determining whether, in the exercise of their discretion, to reduce the sentence they intend to give.

[136] In **The State of Western Australia v O'Kane**³⁴ the Western Australia Court of Appeal stated:

"In Richards, Steytler P... said that it was settled that in determining the duration of a custodial sentence the courts will take into account features of the offence or the offender which will result in imprisonment bearing down more severely upon the offender than upon the average prisoner [44]. His Honour pointed out, however, that it is also important to bear in mind the objective seriousness of the offence and the importance of ensuring that, after due allowance has been made for subjective factors, the punishment should fit the crime [47]."³⁵

[137] In sentencing the offender the court must have due regard to the gravity of the offence, the defendant's culpability, and degree of responsibility. The sentence must be commensurate with the seriousness of the offence and must be just in all

³⁴ [2011] WASCA 24.

³⁵ Ibid at para. 67.

circumstances.

[138] In this matter the learned judge took all the relevant material into consideration and the crime being murder, which he described as an execution, warranted the highest and harshest penalty, that is life imprisonment. The court being fully aware of the prison and its conditions, and having considered the representations of counsel, concluded that a life sentence was appropriate in all the circumstances. I can find no fault with the learned judge's reasoning.

Time spent on remand

[139] Mr. Thomas spent six (6) years and eleven (11) months on remand prior to the sentencing in this matter.

[140] As stated in the case of **Shonovia Thomas v The Queen**:³⁶

“The primary rule is that in the absence of unusual circumstances a judge should fully credit a prisoner for pre-sentence custody not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing... In the absence of exceptional circumstances real credit has to be given for the time spent on remand.”³⁷

[141] In sentencing Mr. Thomas, the learned judge failed to specify his period of pre-trial incarceration. Mr. Thomas spent the period of 2nd December 2009 to 18th November 2016, a period of six (6) years and eleven (11) months on remand. He is entitled to have this time credited to him. He is also entitled to a two (2) year discount for the delay. He is therefore to be sentenced to a period of imprisonment of twenty-one (21) years and one (1) month from the date of his sentencing.

[142] For the reasons stated above I would order that the appeal against conviction be dismissed and the appeal against sentence be allowed to the extent indicated above.

³⁶ [2012] ECSCJ No. 249, (delivered 27th August 2012).

³⁷ Ibid at para. 6.

The Appellant - Joel Seraphin

- [143] Mr. Seraphin pleaded guilty on 8th March 2018 prior to the close of the case for the prosecution.
- [144] He was sentenced to a term of twenty-five (25) years to be reviewed after he had served twenty (20) years in accordance with section 16(a) of the **Offences Against the Person (Amendment) Act 2013**.
- [145] He appeals against that sentence on a number of grounds. He complains that in sentencing him to twenty-five (25) years the learned judge used a wrong factual basis for so doing.
- [146] Mr. Seraphin complains that the learned judge failed to resolve a dispute between the conflicting facts between the prosecution's and the defence's version of events, and that the learned judge ought to have held a Newton hearing.
- [147] Mr. Seraphin contends that the judge ought to have passed a sentence based on the version of events which he presented to the court as set out in the pre-sentence report. He contends that the learned judge failed to conduct a Newton hearing before proceeding to his sentencing.
- [148] A Newton hearing or enquiry is a legal procedure where both prosecution and defence put forward such conflicting evidence that it requires a judge sitting alone to try to ascertain which party is telling the truth. It is a hearing in criminal proceedings required where a defendant pleads guilty but there is a disagreement with the prosecution's case with respect to the material facts of the case upon which the defendant is to be sentenced. During this hearing a judge decides the basis upon which the defendant is to be sentenced.

- [149] Mr. Seraphin points to the explanation he gave to the probation officer of trying to help the deceased man in getting back the lost money but has proffered no scenario as to how the killing took place alternate to that led by the prosecution.
- [150] Mr. Seraphin offers no further explanation of his attempts to assist the deceased man, nor does he offer any factual information which disputes the case laid out by the prosecution against him. What he offers is clearly an explanation which goes to mitigation rather than offering a different factual scenario, and the learned judge accepted that this was an explanation rather than a different version of the events that occurred. The case of **R v Oakley**³⁸ states: 'Where there is a conflict over the version of the facts which was to be adopted, it is incumbent on the sentencer to hear evidence to resolve the conflict, whether or not the prosecution or the defence asked for a Newton hearing.'
- [151] This does not mean that a Newton hearing is required for every minor or trivial difference in the defence's version of events to that of the prosecution. A Newton hearing is required where, pursuant to a guilty plea, there appears to be substantial differences in the material facts of the case between the defence and prosecution of which differences go to the heart of the matter on which a trial judge is to base the sentence.
- [152] In this matter Mr. Seraphin spoke at length during the sentencing phase, indicating his wish to plead guilty before the commencement of the trial and his remorse, but proffered no explanation contrary to the case for the prosecution.
- [153] Mr. Seraphin pleaded guilty after the evidence of eight (8) prosecution witnesses including Mr. Chapman, which was surely an indication that he accepted the prosecution's evidence of his involvement in the murder of the deceased man.

³⁸ [1998] 1 Cr. App. Rep (S) 100.

- [154] The preferred approach is clearly set out in **R v Tolera**,³⁹ where it is stated:
- “If the defendant wishes to ask the court to pass sentence on any other basis than that disclosed in the Crown case, it is necessary for the defendant to make that quite clear. If the Crown does not accept the defence account, and if the discrepancy between the two (2) accounts is such as to have a potentially significant effect on the level of sentence, then consideration must be given to the holding of the Newton hearing to resolve the issue.”
- [155] The Court of Appeal went even further, it stated:
- “While the sentencing judge will read this part of the pre-sentence report, he will not in the ordinary way pay attention for purposes of sentence to any account of the crime given by a defendant to the probation officer where it conflicts with the Crown case. If the defendant wants to rely on such an account by asking the court to treat it as the basis of sentence, it is necessary that the defendant should expressly draw the relevant paragraphs to the attention of the court and ask that it be treated as the basis of sentence. It is very desirable that the prosecution should be forewarned of this request...”⁴⁰
- [156] In this matter neither Mr. Seraphin nor his counsel at trial disputed the facts of the matter as set out by the prosecution. No rebuttal nor contrary explanation was put before the learned judge on which he could have properly called for a Newton hearing.
- [157] Counsel did attempt to dispute the evidence of Mr. Chapman but the learned judge advised that this was a guilty plea entered after the said Mr. Chapman had given his evidence including the cross examination by counsel which clearly implicated Mr. Seraphin as the individual who shot the deceased man. Counsel did not attempt to convince the court that it ought to sentence on the facts of the probation report. There was no need for a Newton hearing in the circumstances.

³⁹ [1999] Cr. App. Rep 29.

⁴⁰ Ibid p. 32.

Whether irrelevant matters were taken into account by the learned trial judge when imposing sentence

- [158] Mr. Seraphin complained that the learned judge failed to give proper consideration to his prospects of rehabilitation in arriving at the sentence.
- [159] While the learned judge did not expressly state in his sentencing that he had considered the well-known and time-honoured principles of sentencing, he must have had them in his contemplation when he approached the sentencing exercise.
- [160] Certainly, the fact that the learned judge sentenced Mr. Seraphin to a determinate term of twenty-five (25) years, speaks to the judge being of the view that he was a candidate for rehabilitation. This determinate sentence has a built-in period for review as required by the relevant statute; this is an indication that Mr. Seraphin was seen as a candidate for rehabilitation. Further Mr. Seraphin's age was taken into account by the learned judge in a favourable light for him.
- [161] The learned judge took into account Mr. Seraphin's personal circumstances as was stated in **Mervyn Moise v The Queen** and referenced in paragraph [93] of this judgment.
- [162] Clearly the learned judge here examined carefully the facts and circumstances under which this killing occurred, that it was a drug deal gone wrong which resulted in an execution style killing, and the judge also considered the character and record of Mr. Seraphin.
- [163] The learned judge was entitled to consider that this was a murder committed in the furtherance of a drug deal gone wrong, in concluding on what weight was to be given to the circumstances surrounding the commission of this crime. He did this when he examined the aggravating factors.⁴¹ The learned judge considered that the

⁴¹ See page 117 Vol. 4 Record of Appeal.

murder occurred in furtherance of a drug deal gone bad, a relevant factor, and did not fall into error in so doing.

[164] The learned judge had the benefit of a pre-sentence report and a character witness who testified on behalf of Mr. Seraphin. The probation officer also testified at the sentencing hearing.

[165] The judge took into account aspects of the report which he found to be relevant in coming to an informed decision in this matter. At page 119 line 14 to line 24 Record of Appeal Transcript Vol. 4 the judge stated;

“From the presentence report it is gleaned that Mr. Seraphin came from a stable privileged family background. His father was a former minister, an interim prime minister of the Commonwealth of Dominica. He completed his secondary education and there are no reports of any youthful indiscretions. It depends – – presen – – presentence it was also indicated that at times he served as a mediator. He was helpful and that is what he said he was trying to do with respect to what occurred on that fateful day when Mr. Mannix met his death.”

[166] The learned judge also took into account the aggravating and mitigating factors of the offence. At page 117 line 18 to page 119 line 13 Record of Appeal Transcript – Vol. 4 the learned judge stated:

“...the Court looked at the aggravating factors and the mitigating factors as it relates to each accused. First as they relate to the accused Joel Seraphin. First the aggravating factors as they relate to the offence. This is a serious offence involving the use of a firearm, the victim was shot several times execution style. And cocaine was the basis for the execution. It was a deal gone sour. Cocaine, as we know, is an illegal activity not approved by the laws of Antigua and Barbuda. Further the victim was taken from the sanctity of his home to George’s bar and then to Dove Trail where he was later executed.

There are no mitigating factors as it relates to Mr. Seraphin with respect to him being – – with respect to the offence. With respect to him being the offender the Court finds that there are no further aggravating factors as it relates to him the offender.

With respect to the mitigating factors the Court considered the following: His age, his plea of guilty. Mr. Seraphin did point out to the Court that from the beginning notwithstanding that his plea came after eight witnesses were called by the Prosecution from the beginning he had informed his counsel Mr. Sherfield Bowen that he wanted to plead guilty.

The Court was before pondering the type of discount to give Mr. Seraphin but having heard from Mr. Seraphin himself and having not heard anything from Mr. Bowen to dispute that I will give him the full discount of 1/3 because that blame lies solely with Mr. Bowen, because his counsel said —his client said he wanted to plead guilty from the beginning.

The Court also considered the fact that he is not known to the Court. With respect to not having a record and his age and his plea of guilt, those are matters normally in the course of things taken into consideration when it comes to sentence. But the Court also has to consider the gravity of the offence and weigh it. And the Court finds that those factors do not outweigh the gravity and seriousness of this offence.

Mr. Seraphin did express remorse. He said he was very sorry for what happened. He takes responsibility. He is sorry for the life lost. He is sorry for the family of the deceased and apart apologizes to the Court, and the community and the relatives of the deceased. He went on further to say that he's prayed for the soul of the deceased."

[167] With respect to the evidence of Mr. Beggs, the learned judge, in the exercise of his discretion, concluded that this witness' evidence 'is discredited and the Court will not give any further weight to it'. It was within the discretion of the judge hearing and seeing this witness to make an assessment of him. Clearly, the witness did not make a good impression with the learned judge and thus the judge, having made this assessment, was entitled to conclude as he did, to give little or no weight to the witness' evidence.

[168] An appellate court will not override the exercise of the discretion of a trial judge who has seen and heard a witness give evidence without more. An appellate court can only disturb the exercise of a learned judge's discretion where the judge has erred in principle or has left out of account some aspect which he ought to have considered, and as a result the conclusion arrived at is erroneous. Here, there is no basis for this Court to interfere with the judge's findings with respect to Mr. Beggs.

Delay

[169] During the sentencing hearing in this matter, learned counsel appearing for Mr. Seraphin in the court below raised the issue of delay in the proceedings to mitigate the sentence imposed. The facts show that Mr. Seraphin was charged in this matter around November or December of 2009. An indictment was prepared and the matter

was before the High Court by January, 2012. The former co-defendant, Mr. Nibbs, pleaded guilty in September 2013. All that time, the appellant was represented by Mr. Marcus Foster who then resided in St. Lucia. The absence of his counsel was the reason for several adjournments in the matter.

[170] In **Violet Hodge**, on the matter of delay in proceedings being treated as a mitigating factor, Baptiste JA explained at paragraph 66:

“In determining sentence, there is a need to have regard to any failure to proceed with a case with due expedition. Excessive delay can affect the question of the justice of the sentence. Delay in bringing an accused to justice is recognised as a mitigating factor that can be taken into account in sentencing and its effects can be recognised by a reduction in sentence. One has to examine the extent to which a defendant or appellant has been prejudiced by the delay per Lord Hope at paragraphs 53 and 54 of *Mills v Her Majesty’s Advocate*. ‘A judge retains the discretion to do justice on the particular facts of a case, for example in the case of excessive delay, and may therefore reduce an otherwise appropriate sentence accordingly’ per Lady Hallett in *R v Kerrigan* at paragraph 56. This is very much a residual general discretion to correct any perceived injustice. Delay is undoubtedly of relevance to the broad question of what a just sentence is when eventually and belatedly conviction occurs, per Vice President Hughes LJ in *Attorney General’s Reference No. 79 of 2009*.”

[171] At paragraph 67 of **Violet Hodge**, Baptiste JA further noted that the question of whether delay is excessive is fact sensitive. Equally important, later in the same paragraph, he reminded that there is no automatic right to a reduction in sentence on the ground of delay and the court possesses a residual discretion in the matter.

[172] In the present case, the learned judge in explaining why he would not treat the delay in this case as mitigating said the following as set out in the Record of Appeal Vol. IV, page 123, line 4-15:

“Mr. Bowen did made (sic) a submission with respect to delay, but the Court found that the Accused was substantially the cause of his delay because in his own words he had indicated more than once two – – actually two attorneys first Mr. Ralph Francis and secondly Mr. Marcus Foster that he wanted to plead guilty to the lesser Count... With respect to the delay the Court as I said found that it’s the Accused who was substantially responsible for the cause of the delay.”

[173] While the learned judge gave reasons as to why he did not consider delay in this case as warranting a reduction in sentence I am of the view that the delay in this case was too long and in the circumstances a reduction in sentence is warranted. A lengthy delay in bringing a defendant to justice has long been a consideration as a mitigating factor in sentencing and is usually recognised by an appropriate reduction in the sentence given by the court.

[174] In this matter as indicated before, even though the learned judge found that the delay was due largely to the fault of Mr. Seraphin, I am of the view that a reduction of two years is just in the circumstances.

Breach of constitutional right to not be subjected to cruel, inhumane and degrading punishment

[175] Mr. Seraphin sought to raise a constitutional point for the first time during the hearing of this appeal by alleging that the conditions of the prison in Antigua & Barbuda breaches his constitutional right not to be subjected to cruel, inhumane and degrading punishment. Unless the constitutional challenge relates to the validity of the conviction or the lawfulness of the sentence, it cannot be raised for the first time on appeal.

[176] In **Alcedo Tyson v The Queen**,⁴² His Lordship, Gonsalves JA (Ag.) opined:

"When a constitutional point arises on a criminal appeal, once it is a challenge that goes to either the validity of the conviction when made or the lawfulness of the sentence when passed, it may be raised for the first time and dealt with on appeal."

[177] The issues raised by Mr. Seraphin deal neither with the validity of his conviction nor does it seek to challenge the lawfulness of the sentence when passed. The question of whether prison conditions breach the constitutional rights of a prisoner has been the subject of several constitutional motions. It is clear that where a breach of a

⁴² BVIHCRA2013/0008 (delivered 20th November 2017, unreported).

person's constitutional right is alleged it requires serious compelling evidence to convince a tribunal. The Privy Council decision of **Thomas and Hilaire**, the Board agreed with the conclusion of the learned Chief Justice of Trinidad and Tobago. He had ruled that the conditions which the prisoners were subjected to did not amount to cruel and unusual punishment. In that case, the appellants had been detained in cramped and foul-smelling cells and were deprived of exercise or access to the open air for long periods of time. When they were allowed to exercise in the fresh air they were handcuffed. He opined that though the conditions in which they were kept were in breach of Prison Rules and thus unlawful, it did not follow that they amounted to cruel and unusual treatment- (it is rightly accepted that they did not amount to additional punishment). The court continued at paragraph 43 of the judgment:

"The expression is a compendious one which does not gain by being broken up into its component parts. In their Lordships view, the question for consideration is whether the conditions in which the appellants were kept involved so much pain and suffering or such deprivation of the elementary necessities of life that they amounted to treatment which went beyond the harsh and could properly be described as cruel and unusual. Prison conditions in third world countries often fall lamentably short of the minimum, which would be acceptable in more affluent countries. It would not serve the cause of human rights to set such demanding standards that breaches were commonplace. Whether or not the conditions in which the appellants were kept amounted to cruel or unusual treatment is a value judgment in which it is necessary to take account of local conditions both in and outside prison. Their Lordships do not wish to seem to minimise the appalling conditions which the appellants endured. As the Court of Appeal emphasised, they were and are completely unacceptable in a civilised society."

[178] While it is accepted that the conditions of the prison fall short of the required or accepted standard, it cannot be said that they violate the constitutional rights of Mr. Seraphin to the extent that would warrant a reduction in sentence.

Sentence manifestly excessive

[179] Appeals against sentencing in the Court of Appeal are not to be viewed as a re-hearing of the original sentencing, as stated by Baptiste JA in **Steve Gurrie v The Queen**.⁴³

“On appeal, a sentence is examined to see whether there was an error in law or in principle or whether it was manifestly excessive, and those questions are determined according to the law and practice obtaining at the time the sentence was passed by the judge.”⁴⁴

[180] It was submitted on behalf of the appellant that the sentence of twenty-five years imprisonment with a review after twenty years was excessive in all the circumstances of the case.

[181] The Court of Appeal will not interfere with a sentence simply because the Court would have passed a different sentence. In **R v Gleeson**⁴⁵ the English Court of Appeal found that the case was one where judges might have passed a slightly shorter sentence. However, the court repeated that it does not interfere with sentences passed in the lower court save in wholly exceptional cases, where the sentence passed was wrong in the principle or manifestly excessive. Unless the appellate court finds that the sentence was as a result of a misdirection or is disturbingly inappropriate the appeal court will not interfere and alter the sentence.

[182] Lord Bennett C.J in **R v Chin-Charles; R v Cullen**⁴⁶ stated:

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

⁴³ GDAHCRAP2013/0004 (delivered 5th April 2022, unreported).

⁴⁴ Ibid at para. 4.

⁴⁵ [2001] EWCA Crim 2023.

⁴⁶ [2019] EWCA Crim 1140 at para 8.

[183] The fact that a judge fails to mention or to spell out every piece of evidence or a particular submission does not inevitably lead to the conclusion that it has been ignored or not considered.

[184] In Antigua and Barbuda, sentencing for the offence of murder is governed by section 6 of the **Offences Against the Person (Amendment) Act, 2013** which was recited at paragraph [99] of this judgment.

[185] The learned judge, as he was mandated to do, took into account the aggravating and mitigating factors of the offence and this offender. He found the following aggravating and mitigating factors – for the aggravating factors of the offence the judge considered:

- (i) that the case concerned a drug (cocaine) deal gone sour;
- (ii) that the deceased was taken from his home in the presence of his minor child;
- (iii) that it was an execution – killing in cold blood;
- (iv) that it involved the use of a firearm; and
- (v) the prevalence of these types of offences

The judge found no aggravating factors for the offender, but was cognisant of the following mitigating factors of Mr. Seraphin:

- (i) his age;
- (ii) his previous good character; and
- (iii) his expression of remorse.

[186] Mr. Seraphin also received the full 1/3 discount for his guilty plea even though it was not proffered at the first available opportunity. The learned judge gave him the benefit of the doubt and accepted his assertion that he wished to plead guilty from the inception but was dissuaded by his attorney. Also, to Mr. Seraphin's benefit, there was no reduction of the discount for the fact that the plea was not entered at the first available opportunity.

[187] Mr. Seraphin also complained that the learned judge failed to specifically state that certain factors went towards mitigating the sentence, but the learned judge did take into account the mitigating factors of Mr. Seraphin, including his previous good character. While the learned judge did not expressly state these mitigating factors in arriving at the sentence he imposed, it is clear that his consideration of that factor must have been in favour of Mr. Seraphin as opposed to being treated as an aggravating factor. The learned judge did set out the method he utilised in arriving at the starting point of 40 years for Mr. Seraphin.⁴⁷

[188] The learned judge took into account all the necessary factors which he was obliged to take cognisance of in arriving at the appropriate sentence in this matter and I can find no fault in his approach to the sentencing of Mr. Seraphin.

Disparity of sentence

[189] Mr. Seraphin asserts that there was disparity of sentence in relation to himself and his former co-defendant Mr. Nibbs. Mention is also made to a witness in the matter Mr. Chapman. It must be noted that Mr. Nibbs pleaded guilty many years before Mr. Seraphin and was sentenced for the offence of manslaughter, and Mr. Chapman was never charged with anything relative to this incident. It was clearly within the purview of the Director of Public Prosecutions to make plea offers to whomsoever he wished in order to prove his case. This ground of appeal is misconceived.

[190] However, the Court has stated that a sentence will not be reduced on the ground of disparity unless there was such a glaring difference between the treatment of one man compared with another, and that a real sense of grievance would be engendered in the case of the man suffering the more serious penalty. However, the pertinent question remains whether the appellant's sentence is wrong in principle or manifestly excessive in itself.⁴⁸

⁴⁷ See Record of Appeal Vol. IV, page 119, line 25 – page 120, line 20.

⁴⁸ See *R v Stroud* (1977) 65 Cr App Rep 150 at 153.

[191] The witness Mr. Chapman was never charged nor prosecuted for the murder of Mr. Mannix since he was not involved in the commission of that offence. He was therefore never in a position to receive any preferential treatment or a lenient sentence from the court. Mr. Nibbs pleaded guilty to the offence of manslaughter in 2013 and further provided a witness statement for the Crown to be used at trial against his former co-defendants. The court at the time would have considered all the foregoing and the role played by Mr. Nibbs in the matter. Therefore Mr. Nibbs would have received a sentence based on all those circumstances and personal mitigation in his case. It is not easily forgotten that while Mr. Nibbs was present at the scene and armed, that Mr. Seraphin relieved him of his firearm and 'finished off' the deceased.

[192] The learned judge in his remarks clearly stated and considered what role Mr. Seraphin played in the murder of Mr. Mannix and this was based on facts presented to the court. He considered all the relevant factors thereafter and arrived at a sentence in the matter. He further gave a minimum term of twenty years to be served to then be reviewed by the court for possible release, if not then, another review would be held three years after. In the circumstances, this Court cannot detect any disparity of sentence in relation to Mr. Seraphin and his former co-defendant Mr. Nibbs.

Time spent on remand

[193] It is accepted that in the absence of exceptional circumstances a judge must fully credit a prisoner for pre-sentence incarceration. If the judge intends to depart from this practice, then he must state the reasons for so doing. It cannot be said that this is a case where Mr. Seraphin deliberately delayed proceedings so as to ensure that a larger proportion of his sentence was spent on remand.

[194] In **Romeo Da Costa Hall v The Queen**,⁴⁹ the Court opined: ‘A sentencing judge should explain how he or she has dealt with time spent on remand in the sentencing process.’

[195] Further in **Callachand and another v State**⁵⁰ the Privy Council stated:

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

[196] The learned judge failed to specify the time Mr. Seraphin spent on remand in arriving at the twenty-five (25)-year sentence. The learned judge considered the aggravating and mitigating factors in arriving at the starting point, and he gave the full 1/3 discount for the guilty plea but made no mention of Mr. Seraphin’s pre-trial custody.

[197] Mr. Seraphin was released on bail sometime after he was incarcerated but was re-arrested on unrelated offences. Mr. Seraphin spent the period of 24th April 2011 to 6th February 2017 on remand, a period of five (5) years and nine (9) months. He too is entitled to have this time credited to him, as well as the two (2) year discount for the delay in the matter. Mr. Seraphin is therefore sentenced to a period of seventeen (17) years three (3) months from the date of his sentencing.

⁴⁹ [2011] CCJ 6 (AJ).

⁵⁰ 2008 UKPC 49.

Order

[198]

In the circumstances the appeal against conviction by Mr. George Thomas is hereby dismissed and the appeal against sentence is allowed to the extent that his sentence is reduced by two (2) years for the delay in his trial and a further six (6) years and eleven (11) months to account for his time spent on remand. The appeal against sentence of Mr. Joel Seraphin is allowed to the extent that his sentence is reduced by two (2) years for the delay in his trial and further reduced by five (5) years and nine (9) months representing his period of pre-trial custody.

I concur.

Davidson Kelvin Baptiste

Justice of Appeal

I concur.

Louise Esther Blenman

Justice of Appeal

By the Court

Chief Registrar