

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE**

Criminal Case No. 22 of 2014

BETWEEN:

THE QUEEN

Applicant

And

ALBERTO ROSA DE LA ROSA

Defendant

Appearances: Mr. Valston Graham for the Crown
Mr. Patrick Thompson for the Defendant

2013: December 2nd

JUDGMENT

[1] **Ellis J.:** The Defendant was arraigned on an indictment which charged him with manslaughter contrary to Section 153 of the Criminal Code 1997 (Act 1 of 1997). On 16th October 2015, the Defendant was convicted by a unanimous jury. A sentencing hearing was held on 15th November 2015 and he is now before the Court for sentencing.

[2] Under section 153 (2) of the Criminal Code 1997, a person who is convicted of manslaughter is liable to imprisonment for life. Section 153 provides that:

(1) "Any person, who by any unlawful act or omission causes the death of another person, commits the offence manslaughter.

(2) Any person who is commits manslaughter is liable on conviction on indictment to imprisonment for life."

[3] When read together with section 23 (1) of the Criminal Code, it is clear that section 153 prescribes a discretionary life sentence. Section 23 (1) provides that:

“A person liable to imprisonment for life or any other period may be sentenced to a shorter term, except in the case of a sentence passed in pursuance of section 150.” (conviction for murder)

[4] The life sentence prescribed under s.153 (2) therefore represents an upper limit and it is judicially accepted that upper limits are reserved for the worst of the worst cases. It is therefore critical that the Court have regard to the particular factual circumstances in the case at bar.

FACTS

[5] The criminal proceedings herein stem from an incident which took place on 16th November 2012 at Maria's Bar, Sea Cow's Bay, Tortola, British Virgin Islands.

[6] Sometime during the course of the night, the Ricky Jamilia Bautista (the deceased) arrived at the bar accompanied by two friends. He met the Defendant and other persons outside the bar. There was no evidence of prior animosity between both men but on that night they exchanged words. It was accepted by the Prosecution that the verbal confrontation had been initiated by the deceased, who made certain utterances to the Defendant.

[7] Accounts of precisely what was said vary, but the Prosecution's case is that the Defendant became aggrieved by what was said to him and pulled a knife from a bag he was carrying. He then waived the knife at deceased and stated “I have this for you”. The friends of the deceased tried to prevent the altercation from escalating by trying to placate the Defendant. The friends subsequently entered the bar at which time the Defendant and the deceased remained outside in the presence of a mutual friend Garfield Anderson. Eventually, the Defendant proceeded into the bar and occupied a stationery position inside the bar.

- [8] Exactly what the Defendant did with the knife outside the bar after he pulled it from his bag was not made clear by Mr. Anderson, who was deemed a hostile witness but it became clear that the deceased soon discovered that he suffered an injury to his left cheek and he became incensed. Angered at the discovery of the injury to his left cheek, the deceased entered the bar intending to retaliate against the Defendant. He pelted a beer bottle at the Defendant which struck him in the mouth causing him to bleed. The deceased's friends intervened and restrained the deceased by each arm.
- [9] The Defendant subsequently he lunged towards the deceased with his right hand. None of the witnesses identified a knife in the hand of the Defendant, but at the time when the Defendant lunged at the deceased he was still being restrained by his friends. Following this, the deceased left the bar through the rear door and eventually collapsed in the nearby church yard.
- [10] The Defendant then left the bar through the entrance door and the door was secured locked by the patrons of the bar. Moments later he re-entered the bar by damaging the door. He was carrying a knife in his hand, which he used to confront one of the deceased's friends who ward off with a pool stick. The Defendant was later seen outside the bar with blood on his person and with the knife in his hand.
- [11] Later that evening, the deceased was pronounced dead. A post mortem examination carried out by forensic pathologist, Dr. Hyma established that the deceased sustained three injuries. These included a stab wound to the right of the chest, an incised wound of the right chest and right arm and an incised wound of the left cheek and left ear lobe. The latter two injuries were non-fatal. According to Dr. Hyma, the deceased died as a result of the stab wound to the right of the chest and death would have been instantaneous.
- [12] The Police carried out investigations and recovered a number of items from the scene. These included two knives, a pair of shades and other items identified as belonging to the Defendant. The Police also made checks to locate the Defendant at his home and other places, but these

checks were unsuccessful. The Police found no record that the Defendant left the Territory by the usual legal means. He was subsequently located in New York, United States of America. An extradition request was made for his return. The Defendant waived his right to an extradition hearing and returned to the Territory under escort on 10th July 2014.

[13] The Prosecution's case as presented to the jury was that the Defendant attacked the deceased in retaliation for the deceased striking him with the beer bottle. The Defendant did not give evidence and called no witnesses. His defence as gleaned from the cross examination by Counsel was that he was not armed with a knife and that he did not stab the deceased. However, the defence of self-defence was left to the jury as an issue which arose on the Prosecution's case. The jury's verdict would have indicated their verdict rejection of this defence.

[14] There is an acknowledged dearth of sentencing guidelines relative to the offence of manslaughter by unlawful act within the region. In the premises some courts within the region have had recourse to the English sentencing guidelines for manslaughter by reason of provocation. This approach was endorsed by Counsel for the Defendant who argued that these guidelines are particularly instructive given the factual context of this case. In advancing his argument, Counsel first referred the Court to the assumptions which a Court must apply in favour of an offender found guilty of manslaughter by provocation. At page 3 of the English sentencing guidelines the following is noted:

"The assumptions are required in order to be faithful to the verdict and should be applied equally in all cases whether conviction follows a trial or whether the Crown has accepted a plea of guilty to manslaughter by reason of provocation:

- first, that the offender had, at the time of the killing, lost self-control; mere loss of temper or jealous rage is not sufficient.
- second, that the offender was caused to lose self-control by things said or done, normally by the person killed.
- third, that the offender's loss of control was reasonable in all the circumstances, even bearing in mind that people are expected to exercise

reasonable control over their emotions and that, as society advances, it ought to call for a higher measure of self-control.

- fourth, that the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter.”

[15] Counsel for the Defendant posited that while it was open to the Director of Public Prosecutions to prefer a charge of murder against the Defendant, he did not do so. According to Counsel, the charge of manslaughter assumes that the four factors mentioned apply in favour of the Defendant because the simple fact is that he was charged with manslaughter and not murder. Counsel submitted that the fact that the Defendant was charged with the offence of manslaughter and not murder, should not deprive him of the benefit of the assumptions set out above because the facts of this case indicate that provocation properly arose.

[16] Having made the relevant assumptions, Counsel for the Defendant argued that the Court must then assess the degree of provocation. He submitted that this would involve the deceased's surprise attack on the Defendant with the beer bottle. He described the deceased's actions as extreme provocation. Thereafter, the Court would then be required to consider the time gap between the provocation and the killing. Counsel submitted that the short time gap in the case at bar makes the Defendant's response less culpable. He argued that the gravity of the Defendant's offending would therefore be reduced and this should be reflected in his sentence.

[17] Applying the sentencing ranges and the starting points prescribed in the English sentencing guidelines, Counsel for the Defendant submitted that the appropriate starting point would be 3 years (high degree of provocation) or 8 years imprisonment (substantial degree of provocation).

[18] Not surprisingly, Counsel for the Prosecution trenchantly opposed this approach. First, Counsel for the Prosecution underscored the difficulty in sourcing sentencing guidelines in cases of manslaughter. This stems from the range of factual circumstances which could underpin a verdict

of manslaughter. He referred the Court to the judgment of the Court of Appeal of Northern Ireland in **R v Magee [2007] NICA 21** where at paragraph 22 Kerr LCJ noted:

“[22] It is not surprising that there are relatively few decisions in this jurisdiction which could properly be described as guideline cases for sentencing for manslaughter. Offences of manslaughter typically cover a very wide factual spectrum. It is not easy in these circumstances to prescribe a sentencing range that will be meaningful. Certain common characteristics of many offences of violence committed by young men on other young men are readily detectable, however, and, for reasons that we will discuss, these call for a consistent sentencing approach.”

[19] Counsel then itemized different types of manslaughter, (1) manslaughter by diminished responsibility; (2) manslaughter by provocation; (3) gross negligence manslaughter; (4) unlawful act manslaughter; (5) vehicular manslaughter. Counsel submitted that the considerations which would apply in the case of manslaughter by provocation would not generally apply to the case of manslaughter by unlawful act. However, Counsel pointed out however, that this would not mean that the Court could not take this into consideration if on the facts of a particular case, some act of provocation on the part of the deceased is revealed but this is wholly different from the Court applying the guidelines for manslaughter by reason of provocation. He submitted that it would be an error to rely on these sentencing guidelines because they do not address the factors which would apply in the case of manslaughter by unlawful act.

[20] The Prosecution further submitted that although sentencing is a matter for the discretion of the Court, this discretion must be exercised in a manner which is consistent with the findings of the jury.¹ He submitted that this Court cannot sentence on the basis of the English sentencing guidelines for manslaughter by reason of provocation because provocation was not a relevant factor during the course of the trial. He suggested that if the sentencing guidelines for

¹ DPP v Wade Civil Appeal No. 24 of 2005 at paragraph 47

manslaughter by provocation were to be applied, this would in effect negative the findings of the jury.

[21] Counsel contrasted the case at bar with that of **Shonovia Thomas v R HCRAP 2010/006** where the Court of Appeal concluded that the trial judge correctly sentenced on the basis of guidelines established in cases decided by Eastern Caribbean Supreme Court and not on the basis of the English guidelines.

[22] Having reviewed the relevant authorities as well as full text of the English sentencing guidelines, the Court is satisfied that the Prosecution's arguments have significant merit. The sentencing difficulties which the offence of manslaughter presents are notorious. In **R v Blackledge unreported 12/12/95, NSWCCA**, Gleeson CJ said:

"It has long been recognised that the circumstances which may give rise to a conviction for manslaughter are so various, and the range of degrees of culpability is so wide, that it is not possible to point to any established tariff which can be applied to such cases. Of all crimes, manslaughter throws up the greatest variety of circumstances affecting culpability.

At the same time, the courts have repeatedly stressed that what is involved in every case of manslaughter is the felonious taking of a human life. That is the starting point for a consideration of the appropriate penalty, and a key element in the assessment of the gravity of the objective circumstances of the case."

[23] An assessment of the objective criminality of an offence of manslaughter will clearly depend on the factual findings of the jury. In the case of the English sentencing guidelines, the derivation is clear. The Foreword makes it clear that:

"This guideline stems from a reference from the Home Secretary for consideration of the issue of sentencing **where provocation is argued in cases of homicide, and, in particular, domestic violence homicides**. For the purpose of describing "domestic violence", the Home Secretary adopted the Crown Prosecution Service definition.¹ The guideline applies to sentencing of an adult offender for this offence in whatever circumstances it occurs. It identifies the widely varying features of both the provocation

and the act of retaliation and sets out the approach to be adopted in deciding both the sentencing range and the starting point within that range.

This guideline is for use where the conviction for manslaughter is clearly founded on provocation alone. There will be additional, different and more complicated matters to be taken into account where the other main partial defence, diminished responsibility, is a factor.” Emphasis mine

[24] In the Court’s judgment applying such guidelines in the context of the case at bar would entail an artificial reasoning and rationalization which would have very little relevance to the charge which was in fact laid by the Prosecution, and the factual matrix which was advanced during the trial and which informed the jury’s eventual verdict.

[25] Having said this, the Court is equally satisfied the deceased’s conduct could properly be weighed in assessing the seriousness of the offence and the aggravating and mitigating factors.

AGGRAVATING AND MITIGATING FACTORS

[26] Turning now to the aggravating features in this case, the Court accepts that the following aggravating factors pertain:

- i. use of a weapon.
- ii. the weapon was brought to the scene in contemplation of use (the defendant took the knife out of a bag which he had and brandished it to the Deceased saying “I have this for you”)
- iii. the stabbing was done in retaliation.
- iv. The attack took place at night and in a public place.
- v. The weapon was used on more than one occasion against the deceased who suffered more than one injury as a result.

- vi. That the Defendant evinced an indifference to the seriousness of the likely injury.
(after fatally stabbing the victim, the Defendant broke into the bar and confronted another patron with the knife).

Post Offence Conduct – Flight

[27] During the course of his submissions, Counsel for the Prosecution submitted that the Defendant's post-offence behavior – that is, his abrupt departure from the Territory was an aggravating feature which the Court is obliged to take into account. While post offence events can properly be taken into account in assessing the objective seriousness of a crime, the Court accepts that this must be done with particular care.

[28] The judgment in **DPP v England**² makes it clear that events which precede and follow the technical limits of a crime may be considered in assessing its objective seriousness. It would therefore not be “double-counting” for a sentencing judge to have regard to post-offence conduct as adding an aggravating dimension to the crime, as well as indicating a lack of remorse.³ A sentencing judge should take into account not only the conduct which actually constitutes the crime, but also such of the surrounding circumstances as are directly related to that crime, and are properly to be regarded as circumstances of aggravation or mitigation.⁴

[29] In **R v Wilkinson (No 5) [2009] NSWSC 432** the position was helpfully summarized in the following way at paragraphs 61 and 62 of the judgment:

“61.Care must be taken in considering whether post-offence events may be taken into account in assessing the objective seriousness of the crime itself. However, the circumstances of an offence are not neatly marked out by two lines, one at the technical beginning and the other at the technical end of the crime: *Director of Public Prosecutions v England* [1999] VSCA 95; [1999] 2 VR 258 at 263 [18]. Common sense and moral sense extend the circumstances of an offence which may be considered for an assessment of the

² [1999] 2 VR 258

³ Paragraph 37 of DPP v England,

⁴ R v Austin (1985) 121 LSJS 181, at 183; R v Wilkinson (No 5) at paragraph[61]

objective seriousness of a crime, to events which precede and follow the technical limits of the crime. In imposing sentence for a crime, a judge should take into account not only the conduct which actually constitutes the crime, but also such of the surrounding circumstances as are directly related to that crime, and are properly to be regarded as circumstances of aggravation or mitigation: *Director of Public Prosecutions v England* at 263-264 [18]. The dumping of a body by a murderer constitutes an aggravating circumstance of the offence itself, and such concealment of the body is not limited in its significance to the absence of remorse: *Director of Public Prosecutions v England* at 266 [27]; *Bell v R* [2003] WASCA 216 at [23]- [25]; *Colledge v State of Western Australia* [2007] WASCA 211 at [16]; *R v Cavkic (No. 2)* [2009] VSCA 43 at [134].

62. However, the Offender's subsequent false statements to police and others concerning the whereabouts of the body cannot, in my view, be taken into account in an assessment of the objective seriousness of the murder itself. Nor can his failure to reveal the true whereabouts of the body: *R v Cavkic (No. 2)* at [134]. Undoubtedly, such post-offence conduct may bear upon the Offender's lack of remorse and contrition and his prospects of rehabilitation: *Charara v Director of Public Prosecutions (NSW)* [2001] NSWCA 140; (2001) 120 A Crim R 225 at 223-224 [37]- [40]; *Douar v R* [2005] NSWCCA 455; (2005) 159 A Crim R 154 at 179 [131]; *Weininger v The Queen* [2003] HCA 14; [2003] 212 CLR 629 at 638-640 [25]- [32]."

[30] Having considered these albeit non-binding judicial authorities, the Court is satisfied that the Defendant's post offence flight cannot properly be regarded as an aggravating circumstance in assessing the objective seriousness of the offence. Instead, his precipitous departure from the Territory may speak to a lack of remorse or contrition and indeed may be a factor to be considered in assessing his prospects for rehabilitation.

[31] In looking at the matters which would lower culpability, the Court is satisfied that the following mitigating features would apply:

- i. The Defendant's previous good character.
- ii. Actual violence from the deceased victim (it is common ground that the deceased's assaulted the Defendant with a beer bottle causing injury to his mouth.

DEFENDANT'S PERSONAL CIRCUMSTANCES AND PLEA IN MITIGATION

- [32] Counsel for the Defendant submitted to the Court that the Defendant was born on 4th July 1980 in the Dominican Republic. He is one of 14 children and by all accounts he had a happy childhood. His mother is now deceased but his father is ill and continues to reside in the Dominican Republic. The Defendant is divorced and is the father of 2 young children. He also acts as father for 2 other children belonging to his sister.
- [33] He migrated to the BVI in 2001, working as a barber and singer with plans to embark on a musical career. Prior to this offence, he had no previous convictions.
- [34] The Court also had the benefit of the report from the Superintendent of Prisons which indicated that upon his remand on 11th July 2014, the Defendant was located on the high security unit but his good custodial behavior and positive response to custody led to a down-grading of security so that he now resides in the main compound. He currently works as a barber for the male prisoners and juveniles.
- [35] Because he is not fluent in English the Defendant is limited in the number of behavioural courses he can attend. Nevertheless, the Superintendent reports that the Defendant has responded well to custody and is compliant with the prison regime.
- [36] During the course of the sentencing hearing, the Defendant addressed the Court with the assistance of a court interpreter. He indicated that it was never his intention to harm anyone and that it never crossed his mind or heart to take away the life of anyone. He also stated that he felt everything that happened a lot because lives should be respected. He stated that he does not know when this incident will be deleted from his mind.
- [37] The Defendant also stated he is against seeing abuse to anyone who is weaker. He told the Court that he never showed any weapon and that he was attacked. According to the Defendant, he received a lot of blows to his head with bottles. He stated that he cannot sleep at night because of

the pain which he has in his mouth. He stated that he did not know why they wanted to harm him because he never harmed anyone.

[38] He also told the Court that he fled the BVI because he was afraid of the type of persons that were involved who were not good and because he was thinking of the daily bread of his family. However, he stated that this matter weighed on his mind and it was always his intention to return to settle the matter but there was always something preventing him from finding the way.

[39] Counsel for the Prosecution had significant reservations about the sincerity of the Defendants expression of remorse. Counsel submitted that the Defendant appeared to regard himself as the victim and expressed no remorse for the loss to the deceased's family.

[40] It is clear to the Court that if a person has remorse that is genuine and is attempting to rehabilitate themselves, that is always significant in matters of sentencing. While the Court is satisfied that this Defendant is fully seised of the import of his actions and has some genuine regret for the loss of life, the Court must also consider his conduct in the wake of the offence. It is apparent that for almost two years after the offence he remained outside of the Territory where he continued to live his life and pursue his career. In the Court's judgment there is significant equivocation arising from the Defendant's post offence conduct which reduces the weight which his statement of remorse to the Court would ordinarily carry.

VICTIM IMPACT STATEMENTS

[41] It is now widely accepted that the Court must pass sentence having regard to the circumstances of the offence and the circumstances of the offender taking into account as far as the Court thinks appropriate the consequences of the offence. In that vein, Counsel for the Prosecution provided the Court with victim impact statements from Kathleen S. Colon, written on behalf of the deceased's mother, Josefina Familia and the deceased sister, Tomiris Bautista.

[42] The statements reveal that the deceased's family members have been greatly affected by this tragedy and are still struggling to come to terms with it. There is a strong family bond and there is a deep sense of loss, shock, hurt and pain that still lingers many years after the death of their loved one. The sister's statement indicates that she suffers from nightmares and that the deceased's grandmother still has not been advised of his death because the family has determined that this knowledge may kill her.

[43] While victim impact statements provide valuable information to a sentencer, the Court accepts that they should not be viewed as a vehicle by means of which the victim is permitted to play a direct role in determining the nature or quantum of the sentence that is to be meted out. In the Canadian case of **R. v. Labbe**⁵, Bouck J, of the British Columbia Supreme Court, expressed the view that victim impact statements are essential for two purposes:

"First, so the court is more aware of the harm done by the offender to the victim so that the sentencing judge has a better understanding of the offence's gravity. Second, to assure victims that the sentencing process includes them by ensuring they are not irrelevant and forgotten."

[44] At paragraph 48 of the judgment Bouck, J went on to state;

"...the guiding principle in criminal law is that any criminal offence is not a wrong committed against the person who is harmed, rather it is a wrong against the community as a whole."

[45] And later at paragraph 52 he stated that:

"... To my mind, it matters not if the deceased is young, promising and much-loved, or old, deranged and despised by all who knew him. The law ought not to measure the value of a life taken, for to do so would diminish every person's right to live out his or her appointed span."

⁵ (2001) 159 CCC (3d) 529 (BCCA)

[46] The use to which a Court is to put a victim impact statement is appropriately stated by the English Court of Appeal in **R v Perkins and Ors.**⁶ The Court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and the offender, taking into account so far as it considers appropriate the consequences to the victim and the victim's family. The opinions of the victim's family as to what an appropriate sentence would be are irrelevant but the impact on that victim may assist in evaluating aggravating factors when determining sentence.

[47] The Court therefore accepts that the severity of the punishment imposed on an offender should not be the product of the family's subjective characterization of the degree of their suffering.

RELEVANT AUTHORITIES

[48] Counsel for the Prosecution provided several local, regional and English authorities to assist the court in determining the proper starting point and sentencing range for these offences. Counsel for the Prosecution submitted to the Court that the appropriate benchmark in the case of manslaughter should be 15 years and he commended to the Court the authorities of **Hiliary Patrick Tench v R**⁷, **R v Trudy Edward**⁸ and **Kenneth Samuel v R**⁹ and **Shonovia Thomas v R**.

[49] However, Counsel also submitted that the circumstances of a particular case may warrant a departure from the benchmark in appropriate cases. To illustrate the point, Counsel pointed to the case of **R v Queisha Geiger**.¹⁰ In that case a 15 year old offender pleaded guilty to manslaughter (although she was indicted for murder) after fatally stabbing a fellow school friend during a fight. The Court sentenced her to 5 years imprisonment. At paragraph 29 the Court had this to say:

“Our Court of Appeal has set out some very helpful guidelines for sentencing; and in order that there should be consistency, it is incumbent that a trial Court complies with those

⁶ [2013] EWCA Crim. 323

⁷ Criminal Appeal No. 1 of 1991 - St. Lucia

⁸ Criminal Case No. 56 of 2003 – St. Lucia

⁹ Criminal Case No. 7 of 2005 – St. Vincent and the Grenadines

¹⁰ Criminal Case No. 16 of 2007 – Antigua and Barbuda

guidelines, save where there are compelling reasons to depart from them. Manslaughter like other offences can arise based on different combination of facts. The Court must take care in order to ensure that its sentence is just. Unfairness can result from treating alike cases which are unlike. Our Court of Appeal has set a bench mark of 15 years in prison for the offence of manslaughter. This is guideline can be scaled up or down depending on the circumstances of the case. Byron CJ in Criminal Appeal of **Desmond Baptiste v The Queen** *ibid* said that “A sentencing range should obviate the need for the sentencer fully to consider the host of aggravating or mitigating factors that might accompany any particular crime.”

[50] Counsel also referred the Court to the following cases:

- i. In **Mark Peters v R**¹¹, the appellant had stabbed the deceased in his forehead with a knife and then fled the scene. He was charged with murder but was convicted by the jury of manslaughter. His sentence of 10 years imprisonment was upheld by the Court of Appeal.
- ii. In **R v Roy Williams**¹², the 22 year old defendant was indicted for the murder but he pleaded guilty to manslaughter. His guilty plea was accepted and he was sentenced to 8 years imprisonment.
- iii. In **R v David St. Jean** the Court of Appeal concluded that judge should have applied the 15 year bench mark and not 20 years in respect to the defendant who pleaded guilty to manslaughter. The sentence was reduced from 13 to 10 years.

[51] Counsel for the Defendant argued strongly against the application of a 15 year benchmark. He submitted that the origin of the can be traced to the case of **Brain Walters v R**. In that case the learned trial judge cited a number of regional cases, all of which involved the substitution of the conviction for manslaughter for one of murder.¹³ In fact, Counsel argued that all of the authorities

¹¹ Criminal case No. 9 of 2000 – St. Vincent and the Grenadines

¹² Criminal Case No. 13 of 2007 – Antigua Barbuda

¹³ Hillary Patrick Stench v R Criminal Appeal No 1 of 1991 St. Lucia (Unreported); James Jn Baptiste v R Criminal Appeal No. 10 of 1994 St. Lucia (Unreported); Denis Alphonse v R Criminal Appeal No. 1 of 1995 St. Lucia (Unreported); Bertrand Abraham v R Criminal Appeal No. 12 of 1995 St. Vincent and the Grenadines (Unreported); Sherwin Fahie v R Criminal Appeal No. 2 of 2002 BVI (Unreported).

which confirmed the 15 year bench mark were cases in which the conviction for murder was allowed and convictions for manslaughter substituted. He argued that the Court must distinguish this scenario from the present case where the Defendant was charged with the offence manslaughter.

[52] Counsel submitted that because the Court has a broad discretion in sentencing in manslaughter cases, the 15 year benchmark since imposed and approved by the Court of Appeal in **Shonovia Thomas** is not a fixed benchmark. In that case, the Court ultimately imposed a 10 year sentence for the offence of manslaughter.

[53] Instead, Counsel for the Defendant commended to the Court the case of **Ricardo Edgar v R**¹⁴. The Appellant in that case appealed his conviction for murder. The Court of Appeal quashed the murder conviction and substituted instead a conviction for manslaughter on the basis that the facts of that case revealed that there was strong evidence of provocation (the appellant had been smashed on the head with a bottle causing several wounds). After reviewing the sentences given for manslaughter, the Court held that the 8 year prison term already served by the Appellant was on the higher end of sentences given for similar offences, 3 – 5 years being the normal time period in similar matters. As in this case, the Appellant had no previous convictions.

[54] Counsel argued that the relevant sentencing range having applied the English sentencing guidelines should be between 4 to 9 years with a starting point of 8 years. Having regard to the particular circumstances of the case Counsel submitted that the sentence in the region of 3 – 8 years would be appropriate.

[55] In reply, Counsel for the Prosecution argued that the distinction which the Defendant seeks to have drawn (between the sentence meted out to a Defendant which has been charged with murder reduced to manslaughter and the Defendant charged with manslaughter, is misconceived and a

¹⁴ GDAHCRAP 2011/0002

fallacy. He submitted that the critical issue for the Court should be the offence for which an accused was convicted and not for which he was charged. Counsel reiterated that in **Shonovia Thomas** the Court drew no distinction in the benchmark in the case of manslaughter by provocation and manslaughter by unlawful act.

THE SENTENCE

[56] The facts of the case at bar reveal that the Defendant was charged and convicted of the offence of manslaughter - for the unlawful killing of Ricky Familia. Manslaughter by unlawful and dangerous act does not involve an intention to kill or inflict grievous bodily harm. However, the unlawful and dangerous act involved must be an intentional and voluntary one and it must be established that a reasonable person in the position of the accused would have realized that he or she was exposing the victim to an appreciable risk of serious injury.¹⁵ In returning a verdict of guilty, the Court must assume that the Jury found that the constituent elements of the offence have been made out. Having regard to the defence advanced during trial, the Court is also satisfied that the Jury did not accept that the Defendant was defending himself.

[57] Although manslaughter is a lesser offence than murder, it is nevertheless an extremely serious offence which will generally attract a custodial sentence. Although manslaughter presents the greatest variety of circumstances affecting culpability, a key element in assessing the gravity of the objective circumstances of such cases is that they involve the unlawful taking of a human life. The starting point must therefore be the fact that the Defendant's actions resulted in the death of the victim.

¹⁵ Wilson v The Queen (1992) 174 CLR 313 at 333

[58] In arriving at an appropriate sentence, a court must therefore assess the gravity of the offending. At paragraph 37 of the judgment in **R v Donald Rogers**, Hariprashad – Charles J made the following observation;

“In weighing the gravity of the offence, regard must be had to “the degree of harm to the victim...the level of culpability of the offender... and the level of risk posed by the offender to society.

[59] Although there is undisputed evidence that there was actual violence from the deceased victim which no doubt escalated the altercation and which preceded the Defendant’s unlawful act, the Court is satisfied that the wholesale application of the English sentencing guidelines for manslaughter by provocation would be inappropriate and artificial. Provocation manslaughter is a category of **voluntary** manslaughter and describes a situation where the accused intended to kill or cause the deceased serious injury but was under the influence of provocation. In such cases, the prosecution would have to establish beyond reasonable doubt that the accused was not provoked to such an extent that, having regard to his temperament, character and circumstances, he lost control of himself at the time of the wrongful act and the jury would then have to consider whether the acts or words, or both, of provocation found by them to have occurred, when related to the accused, bear a reasonable relation to the amount of force he used.

[60] This was clearly not the case advanced in the case at bar. Instead, the Defendant was put in the charge of the jury for manslaughter by unlawful act, a category of **involuntary** manslaughter and it is readily apparent that there are no relevant English sentencing guidelines.

[61] Notwithstanding the notorious difficulties associated with sentencing in manslaughter cases and notwithstanding the dearth of sentencing authorities, courts have on occasion sentenced defendants who have been convicted for manslaughter by unlawful act. The Court has had regard

to case law while acknowledging that there may be limited assistance is to be derived from sentences in other cases.¹⁶

[62] What the relevant case law demonstrates is that there are ranges of culpability in manslaughter by dangerous act. Where the unlawful and dangerous act is of high objective gravity, the offence may fall within the worst case category of manslaughter. For instance in the New South Wales case of **Clare v R [2008] NSWCCA 30**, McClellan CJ said that the “abuse of a 3 year old child for sexual gratification by anal penetration resulting in death is a crime of utmost gravity.”

[63] What is also clear is that where there was evidence that the deceased had been aggressive or violent to the defendant, this may be sufficient to place the manslaughter at the lower end of the scale of seriousness. In the case **R v MD (2005) 156 A Crim R 372** the Court observed that:

“In many cases where an offender is convicted of manslaughter there will be exculpatory matters and personal circumstances that can lead the court to significantly ameliorate the sentence which might otherwise be imposed.

[64] However, it is also open to a sentencing judge where a defendant utilizes an inappropriate or excessive response to aggression, to find that the manslaughter falls in the serious category. Therefore, offences involving a weapon will generally attract sentences at the higher end of the range. In **Moore [2002] VSCA 33**, the Court of Appeal affirmed a sentence of 9 years imprisonment with a non-parole period of 7 years for an unlawful and dangerous act manslaughter, in circumstances where an intoxicated aggressive victim was stabbed. Winneke P of the Supreme Court of Victoria found that:

“In my view, both men were affected by alcohol, but that does not excuse the use of the knife. The deceased was the bigger man and was demonstrating aggression under the influence of alcohol, but the applicant did not have to meet aggression with aggression, and, if he did, a knife was an altogether inappropriate weapon. All of these considerations were open to the sentencing judge. I am not persuaded that the sentencing judge imposed an excessive head sentence. He chose 9 years: that is less than half the maximum

¹⁶ *Taber v R* (2007) 170 A Crim. 427 at [102]

available. It was open to his Honour to find that the involuntary killing of the deceased by means of a knife was a serious example of manslaughter and not at the lower end of the scale.”

- [65] Turning to the English authorities, Counsel for the Prosecution referred the Court to case of **Attorney General's Reference No 60 of 2009**.¹⁷ In that case, the English Court of Appeal profited the opportunity to reconsider the approach to sentencing in cases of manslaughter by unlawful act. The Court of Appeal endorsed the conclusion in **R v Wood [2010] 1 Cr. App. R. (S.) 2** that "Parliament's intention it seems is clear: crimes which result in death should be treated more seriously and dealt with more severely than before." It is also critical that notwithstanding that the Court was aware that sentencing guidelines had been issued in respect of manslaughter on the grounds of provocation, in November 2005; they were not applied by the Court. Instead, the Court made it clear that sentences for unlawful act manslaughter should not equate with sentencing levels in Schedule 21 of the Criminal Justice Act 2003, but should ensure that the increased focus on the fact that the victim has died as a consequence of an unlawful act is, in accordance with legislative intention, given greater weight.
- [66] The Court of Appeal of Northern Ireland attempted to provide more practical guidance in the case of manslaughter where the charge has been preferred or a plea has been accepted on the basis that it cannot be proved that the offender intended to kill or cause really serious harm to the victim and where deliberate, substantial injury has been inflicted. The Court concluded that the range of sentence after a not guilty plea should be between 8 – 15 years imprisonment. It should be noted that in **Magee** the Court of Appeal referred to the possibility of sentences being beyond the range of 8 to 15 years “in exceptional cases”.
- [67] However, the Court recognized that this could provide only a general of guideline. Recognizing the potentially limitless variety of factual situations where manslaughter could be committed, the Court acknowledged that deviations may be necessary.

¹⁷ [2010] 2 Cr App R 46; R v Appleby and others [2010] 2 Cr App R (S.) 46 guideline case.

“...it is necessary to recognise that some deviation from this range may be required. Indeed, in some cases an indeterminate sentence will be appropriate. Notwithstanding the difficulty in arriving at a precise range for sentencing in this area, we have concluded that some guidance is now required for sentencers and, particularly because of the prevalence of this type of offence, a more substantial range of penalty than was perhaps hitherto applied is now required.

Aggravating and mitigating features will be instrumental in fixing the chosen sentence within or – in exceptional cases – beyond this range. Aggravating factors may include (i) the use of a weapon; (ii) that the attack was unprovoked; (iii) that the offender evinced an indifference to the seriousness of the likely injury; (iv) that there is a substantial criminal record for offences of violence; and (v) more than one blow or stabbing has occurred.”

[68] It follows that the particular factual matrix of the offence is critical in assessing the blameworthiness of the offender. Also critical are the personal circumstances of the offender. These factors must be considered and applied in accordance with the principles of sentencing. These principles have been correctly identified by the Prosecution. The Court has also born in mind that the main objectives of criminal sanction are as set out in the case of **Desmond Baptiste et al v R**¹⁸:

- (1) Retribution - in recognition that punishment is intended to reflect society's and the legislature's abhorrence of the offence and the offender;
- (2) Deterrence - to deter potential offenders and the offender himself from recidivism;
- (3) Prevention - aimed at preventing the offender through incarceration from offending against the law and thus protection of the society; and
- (4) Rehabilitation - aimed at assisting the offender to reform his ways so as to become a contributing member of society.

[69] In commenting on the four principles, Chief Justice Byron (as he then was) in describing the principles in **Desmond Baptiste** said *inter alia*:

"Retribution at first glance tends to reflect the Old Testament biblical concept of an eye for an eye, which is no longer tenable in the law. It is rather a reflection of society's intolerance for criminal conduct. Deterrence is general as well as specific in nature. The former is intended to be a restraint against potential criminal activity by others whereas the latter is a restraint against the particular criminal relapsing into recidivist behavior.... These

¹⁸ Crim. App. No. 8 of 2008 - St. Vincent and the Grenadines

sentences tend to lose their potency with the passage of time. Prevention - The goal here is to protect society from those who persist in high rates of criminality. ... Such sentences are more suitable for repeat offenders. Rehabilitation - Here the objective is to engage the prisoner in activities that would assist him with reintegration into society after prison."

[70] In **Attorney General's References. Nos. 19, 20 and 21 of 2001 (*R v Byrne, Field and Cuthbert*) [2002] 1 Cr. App. R (S.) 33**. The Court of Appeal highlighted the following factors:

1. The context in which death was caused; if particularly reprehensible conduct or conduct which called for deterrence, the court would be bound to impose a sentence longer than might otherwise be the case; examples were burglary and robbery; public concern and the need for deterrence must be reflected in the sentences passed by the courts; this would inevitably mean longer sentences than might have been considered appropriate some years ago.
2. Whether any violence of any kind was contemplated or intended by the offender.
3. The risk inherent in what was being done of really serious injury or death, and the extent to which this must have been apparent to those involved.

[71] Counsel for the Prosecution proposed at the sentencing hearing that the Court should apply a benchmark of 15 years. No sentencing range was advanced. Counsel for the Defendant on the other hand proposed at the sentencing hearing that an appropriate sentence in all of the circumstances would fall within the range of 3 to 8 years.

[72] The Court has also reviewed the cases cited by both counsel and the Court as noted that the "Court of Appeal has imposed sentences of 10 years in prison, for the offence of manslaughter, in the case of mature defendants. See **Frederick Jackson v The Queen**, Criminal Appeal No. 6 of 2001 Saint Lucia and **Janice Hamilton v The Queen**, Criminal Appeal No.9 of 2002 Saint Lucia.¹⁹

¹⁹ R v Queisha Geiger

- [73] Having reviewed sentencing authorities farther afield, relative to manslaughter by unlawful act, the Court is satisfied whilst sentences cases at the upper end of the spectrum attract sentences of 10 to 15 years, sentences of 6 to 8 years tend to be reserved for cases where there are strong mitigating factors, or the defendant was not a principal offender.
- [74] In determining a just sentence in any case, this court has taken into consideration the nature and gravity of the offence, the manner of execution, the subjective factors which may have influenced the Defendant's conduct and the degree of his culpability. The Court is satisfied that this case falls in the middle range of gravity and warrants a custodial sentence.
- [75] The Court has then considered the aggravating and mitigating factors in this case and has determined that although there was clear evidence of violence and aggression on the part of deceased, the aggravating factors outweigh the mitigating factors in this case. The Court has also taken into consideration the Defendant's previous good character and the Prison Report which speaks positively to the prospect for rehabilitation. No doubt the relevant authorities are fully cognizant of their obligations under a modern penal regime and will implement measures aimed at maximizing the potential for rehabilitation of inmates for whom English is not the first language. This Spanish speaking Defendant must therefore have the benefit of appropriate counseling in anger management, stress management and conflict resolution.
- [76] The Court is also mindful of the need to impose a sentence which adequately reflects the part which the law must play in upholding the protection of human life and in punishing those who take it. Having regard to all the matters outlined above, this Court considers a term of ten (10) years imprisonment to be an appropriate sentence to be imposed.
- [77] Counsel in the matter has advised the Court that the Defendant has been in custody since 20th March 2014. The Defendant is therefore entitled to be credited for the time spent on custody and

as such the Court orders that his sentence is to commence from the date when he was taken into custody on 20th March 2014.

Vicki Ann Ellis
High Court Judge