IN THE COURT OF APPEAL OF BELIZE A.D. 2024

CRIMINAL APPEAL NO. 20 OF 2019

WAYNE MARTINEZ **APPELLANT**

AND

THE KING **RESPONDENT**

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CRIMINAL APPEAL NO 21 OF 2019

PHILLIP TILLETT **APPELLANT**

AND

THE KING **RESPONDENT**

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CRIMINAL APPEAL NO. 22 OF 2019

MIGUEL HERRERA **APPELLANT**

AND

THE KING **RESPONDENT**

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BEFORE:

The Hon. Madam Justice Hafiz Bertram	President
The Hon. Mr. Justice Foster	Justice of Appeal
The Hon. Madam Justice Arana	Justice of Appeal

Ms. Peta-Gay Bradley for the 1st appellant
Ms. Leslie Mendez for the 2nd & 3rd appellants
Mrs Cheryl-Lynn Vidal, SC, Director of Public Prosecutions, for the respondent

……
2024: June 17
November 28
……..

JUDGMENT

[1] **HAFIZ BERTRAM, P**: The appellants, Wayne Martinez ('Martinez'), Phillip Tillett ('Tillett') and Miguel Herrera ('Herrera') appealed against their sentences after they were re-sentenced for murder convictions.

[2] Pursuant to the **Criminal Code (Amendment)** Act No. 22 of 2017[1] and the judgment of the Caribbean Court of Justice (CCJ) in the conjoined appeals of **Gregory August and Alwyn Gabb v The Queen**[2], the three Appellants were re-sentenced in the court below to life imprisonment with a minimum term to serve before becoming eligible for parole.

[3] The three appellants appealed on the ground that their sentences were manifestly excessive. This Court heard the appeals on 17 June 2024 and reserved the decisions.

[4] The Court now dismisses the three appeals for reasons to follow. In the case of Herrera he is given three months credit to his sentence which is now set to commence on 28 September 2007.

The powers of the Court of Appeal to interfere with sentence

[5] Section 216(3) of the Senior Courts Act 2022[3] empowers this Court to interfere with a sentence. It states:

> "On an appeal against sentence, the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed and in any other case shall dismiss the appeal."

[6] We are mindful that sentences imposed by a sentencing judge in the exercise of his discretion should not be be interfered with lightly. The CCJ in **Linton Pompey v DPP**[4] gives guidance in determining whether a different sentence should be passed by the Court in keeping with its statutory obligation. Saunders PCCJ explained the functions

[1] Amendment to section 106 of the Criminal Code, Chapter 101 of the Substantive Laws of Belize
[2] [2018] CCJ 7 (AJ)
[3] Act No 7 of 2022
[4] [2020] CCJ 7 (AJ) GY

of a reviewing court is to step in to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law.[5] But an appellate court will not alter a sentence merely because members of the court might have passed a different sentence. Further, the Court will not lightly interfere with the exercise of a sentencing judge's discretion on sentences imposed unless it is manifestly excessive or wrong in principle.

Sentencing Principles

[7] The classical principles of sentencing which have to be considered by a sentencing judge in arriving at an appropriate sentence includes retribution, deterrence, prevention and rehabilitation as stated by Lawton J in **R v Sargeant**[6]. These principles were also discussed by Chief Justice Sir Dennis Bryon in **Desmond Baptiste v The Queen**.[7]

[8] More recently, in **Pompey**, Jamadar JCCJ referring to the case of **Lashley v Singh**[8] stated that the CCJ explained the aims of sentencing and he summarised the objectives as being:

> "(i) the public interest, in not only punishing, but also in preventing crime ("as first and foremost" and as overarching),
> (ii) the retributive or denunciatory (punitive),
> (iii) the deterrent, in relation to both potential offenders and the particular offender being sentenced,
> (iv) the preventative, aimed at the particular offender, and
> (v) the rehabilitative, aimed at rehabilitation of the particular offender with a view to re-integration as a law-abiding member of society."[9]

[9] **Sentence for murder**

The sentences appealed against by the appellants are convictions for the offence of murder. Section 106 of the *Criminal Code*, Cap. 101, as amended (22 of 2017) provides for the sentence to be imposed in the case of murder:

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[5] Ibid [2]
[6] 60 Cr. App. R. 74 at 77
[7] No. 8 of 2003 (St. Vincent and the Grenadines)
[8] [2014] CCJ 11 (AJ), [30]
[9] Pompey [52]

"106.-(1) Subject to sub-section (2), a person who commits murder shall be liable, having regard to the circumstances of the case, to–
(a) suffer death; or (b) imprisonment for life.

(2) A person who commits murder who was, at the time of the commission of the offence, under the age of eighteen years, shall be sentenced to detention at the court's pleasure.

(3) Where a court sentences a person to imprisonment for life in accordance with sub-section (1), the court shall specify a minimum term, which the offender shall serve before he can become eligible to be released on parole in accordance with the statutory provisions for parole.

(4) In determining the appropriate minimum term under subsection (3), the court shall have regard to–

(a) the circumstances of the offender and the offence;
(b) any aggravating or mitigating factors of the case;
(c) any period that the offender has spent on remand awaiting trial;
(d) any relevant sentencing guidelines issued by the Chief Justice; and
(e) any other factor that the court considers to be relevant."

THE APPEAL OF WAYNE MARTINEZ

Introduction

[10] On 24 of May 2007, Martinez, was convicted of the offence of murder. The offence was committed around 9 October 2005. He was firstly sentenced to life imprisonment, and later re-sentenced, post-**August**, to life imprisonment with a minimum term of 20 years, upon the expiration of which he becomes eligible for parole. This is an appeal against the re-sentence on the ground that the sentence is manifestly excessive.

[11] The case for the prosecution was that Martinez had stabbed the victim at least four times in the face with a knife. One of the stab wounds was to the area where the top of the nose meets the ridge of the forehead. That wound caused traumatic asphyxia, which led to the victim's death. Martinez had joined an altercation which his brother Norris had with the victim over a cap and sunglasses which Norris had taken. He had been tried along with the appellant but was acquitted.

Re-sentencing in the court below

[12] In a judgment dated 3 October 2019, the sentencing judge sentenced Martinez to life imprisonment with a minimum of 20 years before eligibility for parole. This sentence was to take effect from 11 October 2005.

[13] The factual circumstances considered by the sentencing judge were that Martinez, together with the deceased and others were drinking on the night of the incident. An issue arose and a struggle ensued over a cap and a pair of sunglasses. During the struggle, the appellant stabbed the deceased four times with a knife in the region of his face which resulted in his death. At the hearing, the sentencing judge considered a social inquiry report, psychiatric report and a report from Kolbe Foundation in relation to the conduct of Martinez.

[14] The sentencing judge applied section 106(1) and (4) of the *Criminal Code* and the principles of sentencing as laid down by Lawson J in **Sargeant,** in considering a sentence that fits the crime. The aims of these principles being retribution, deterrence, prevention and rehabilitation. In relation to retribution**,** the sentencing judge noted that this is one of those cases of homicide for which there seemed to be no ascertainable cause or reason for the taking of a human life. That the fight which resulted in a loss of life of the deceased, originated from a dispute over a cap and a pair of sunglasses. The sentencing judge also noted that prior to the altercation Martinez and others were engaged in drinking alcoholic beverages but, notwithstanding that, the court had to show its abhorrence for the wanton taking of a human life over trivial issues by the sentence it imposed.

[15] As for the principle of deterrence, the sentencing judge noted that Martinez has a clean criminal record and the infractions at the Kolbe Foundation were minor offences and as such, concluded that it seemed unlikely that Martinez will reoffend in like or similar manner upon his release from prison. Likewise, in the view of the sentencing judge, the principle of prevention did not apply to Martinez because he would not be considered a danger to society upon his release from prison. Further, there were favourable statements from members of his family which showed that he did not fall into this category.

[16] As for rehabilitation, the sentencing judge noted that this was essential for his re-integration to the society. Further, the social inquiry report disclosed that the appellant had participated and completed "many different programs including the Ashcroft Rehabilitation Centre ("ARC") program, work ethics, and rehabilitation programs." He noted that the Kolbe Foundation report showed that Martinez had not engaged himself in the 32nd generation of interns at the ARC. The court also noted that Martinez has strong family support that awaits him upon his release from prison. Further, he expressed remorse for his actions. The sentencing judge concluded that he is a prime candidate for rehabilitation.

[17] In the application of section 106(4) of the *Criminal Code*, the sentencing judge identified the following aggravating and mitigating factors:

Aggravating Factors

(i) The seriousness of the offence;
(ii) The use of a dangerous weapon, a knife, to inflict four stab wounds to the face of the deceased;
(iii) The prevalence of the offence of homicide.

Mitigating factors

(i) The violations of the appellant's constitutional rights;
(ii) The remorse expressed;
(iii) The programs pursued by the appellant in aid of his rehabilitation;
(iv) The appellant is a first offender.

[18] The sentencing judge was guided by the approach outlined in **Harry Wilson v The Queen**[10] which embraced section 106 of the *Criminal Code*. The sentencing judge found that the seriousness of the offence committed by Martinez militates against him benefitting from being a first time offender. Further, that the loss of life occurred for trivial reasons and the court could not trivialize this heinous offence. In his view, however, the homicide could not be classified as being the worst of the worst.

[19] Having done a balancing exercise with the aggravating factors and the mitigating factors, the sentencing judge found that the aggravating factors outweighed the mitigating ones. The court also considered the breach of the appellant's constitutional rights. In arriving at an appropriate sentence the sentencing judge

[10] Criminal Appeal No. 30 of 2004, ECCA

considered the decision of **Kenneth Samuel v R**,[11] where Barrow JA said, "… the Court must vindicate the community's abhorrence for this killing by imposing a deserved rather than an extreme sentence."

[20] The sentencing judge found the deserved sentence to be life imprisonment with a minimum of 20 years before Martinez can be released on parole. The sentence took effect from 11 October 2005.

Sentence manifestly excessive

[21] Martinez appealed against his sentence on the ground that it is manifestly excessive. The underlying complaint is that the learned sentencing judge did not consider whether a fixed-term sentence was appropriate.

[22] Learned counsel, Ms. Bradley argued that the sentencing judge failed to place sufficient weight on the mitigating factors in favour of Martinez and thus he was deprived of a fixed term sentence. She referred the Court to the mitigating factors which were taken into consideration by the sentencing judge, being the violation of the convicted man's constitutional rights, remorse expressed, the programs pursued by the convicted man in aid of his rehabilitation and the convicted man is a first offender.[12]

[23] Counsel submitted that Martinez is fit for rehabilitation, had 8 minor infractions unrelated to violence, had no previous conviction and expressed remorse and therefore consideration should have been given to the imposition of a fixed term sentence. She also pointed out that the appellant showed no premeditation in the committal of the offence and the killing resulted in a struggle.

[24] Madam Director, on behalf of the Crown, contended that the mitigating factors as existed did not warrant the imposition of a fixed term sentence. Further, that imprisonment for life with a minimum term of 20 years was not only appropriate in the circumstances but was in fact below the lower end of the range of minimum terms

[11] Criminal Appeal No. 7 of 2005
[12] Page 36 of the record at [1]

imposed since **August**, and that the sentence was therefore not manifestly excessive as argued by the appellant.

[25] Further, she relied on **Faux and Others v The King**[13] to show that a fixed term would have been justified only if there were mitigating factors warranting it and that there were none in the instant case. Madam Director also relied on the concurring judgment of President Saunders in the case of **Alleyne v The Queen**[14] where he spoke generally on the issue of mitigating circumstances being outweighed by aggravating factors, when considering life imprisonment as a possibility, at paragraphs 79 and 80:

> "**Sentencing where life imprisonment is a possibility**
>
> [79] 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 sentencing 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 sentencing judge to moderate his or her original disposition in favour of a lesser sentence measured in terms of years or months.
>
> [80] Alternatively, however, a) the circumstances relating to the offence may be so ghastly that the sentencing 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 sentencing 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. Or, having found that the circumstances of the offence initially suggest that life imprisonment might be appropriate, in considering next the aggravating and mitigating factors relating to the offender, the sentencing judge may b) conclude that the mitigating factors put forward are outweighed by aggravating ones. In this regard, the sentencing judge may find that, despite the existence of some mitigating factors, the offender has, for example, such an appalling record that it cancels out the mitigating circumstances. In either of these two situations, that is a) or b), the sentence of life imprisonment is "commensurate"."

[13] Criminal Appeals Nos 24, 25 and 26 of 2019
[14] [2019] CCJ 06 (AJ)

[26] Madam Director pointed out that the expression of remorse came post-conviction. Further, that his age, 24 years, (which was not raised as a mitigating factor) can be displaced by serious aggravating factors as opined by this Court in **Deon Cadle v The Queen**[15] and **The Queen v Hilberto Hernandez**.[16]

Fixed term or life imprisonment?

[27] The issue that arises for this Court is whether life imprisonment or a fixed term is appropriate under the circumstances of this case. The possibility of a life sentence and circumstances when it can be reduced to a fixed term as addressed by President Saunders in **Alleyne**, at [79] and [80], is helpful. Where a sentencing judge is initially disposed to impose a life sentence after considering the circumstances of the offence, that disposition can be softened, in appropriate cases, upon a consideration of the mitigating circumstances that relate to the offender, such as, early guilty plea, or age or level of remorse or social or economic circumstances. However, despite mitigating circumstances of the offender, a sentencing judge may consider that life sentence is warranted where the offence is ghastly or heinous or the mitigating factors of the offender are outweighed by the aggravating ones.

[28] In the consolidated appeals of **Faux and Others** this Court addressed fixed term sentences, life sentence with a minimum term and range of sentences, upon a conviction of murder, at [15], [16] and [17]:

> "[15].....The Court notes that these fixed term sentences have only been imposed where there have been mitigating circumstances warranting a lesser sentence. It is at the discretion of the sentencing judge to determine whether to impose a sentence of life imprisonment or a fixed term sentence upon a conviction for murder.
>
> [16] For a conviction of murder a custodial sentence is warranted as shown by the imposition of past sentences. The sentencing trend for murder since the amended section 106 and the case of *August* has been the imposition of a life sentence with a minimum term of 25-37 years after which the convicted person becomes eligible to be released on parole.

[15] Criminal Appeal No 23 of 2001
[16] Criminal Application No 16 of 2010

> [17] Where a sentence of fixed term is imposed, the range is 25-35 years unless there are circumstances, when individualizing a sentence, which warrant a lesser sentence."

[29] Fixed term sentences as shown by the above authorities are justified only where there are mitigating factors warranting it. The experienced sentencing judge in the instant case who sits in the Criminal Division, often imposes sentences for murder and is aware of the local precedents. The sentencing judge imposed a life sentence with a minimum term of 20 years by considering the seriousness of the offence committed by Martinez which he stated militates against him benefitting from being a first time offender. He also considered the harm caused by the offence which is the loss of life for trivial reasons and the court could not trivialize this heinous offence. It can be seen from the aggravating factors of the offence, (there being no mitigating factors of the offence) as identified by the sentencing judge, that the stabbing in the face of the deceased, four times, was indeed a very serious offence for trivial reasons causing the death of the victim who was only trying to get back his cap and sunglasses from Martinez's brother. He was armed with a knife and had it available for use as a weapon. All the stab wounds were directed to the victim's face. The injuries were so serious that he was killed.

[30] Could this life sentence have been softened by the mitigating factors of the offender? We are guided by **Alleyne** and the consolidated appeals of ***Faux.*** See also **August** at [125] where the CCJ said:

> "[125] ….. Bearing in mind the utter abhorrence of society towards the crime of murder, the sentencing judge may well take the view that the fit sentence is one of life imprisonment unless, <u>having regard to mitigating factors, a lesser sentence is deserved."</u>

[31] The mitigating factors of the offender, Martinez (no aggravating factors of the offender identified) which the sentencing judge identified and considered were the violations of the appellant's constitutional rights, the remorse expressed by him, the programs pursued in aid of his rehabilitation and that he is a first time offender. The sentencing judge was guided by section 106(4) of the *Criminal Code*. He concluded the that the aggravating factors of the offence outweighed the mitigating factors of the offender. The offence was so serious that the sentencing judge did not place heavy weight on Martinez being a first time offender.

[32] The remorse by Martinez as noted by Madam Director was given post-conviction and therefore it cannot be said that this was genuine or deserve heavy reliance. We do not consider that this mitigating factor (which the sentencing judge considered in Martinez's favour) warrants a fixed term sentence.

[33] Madam Director drew to the Court's attention that the age of Martinez, 24 years, had not been raised as a mitigating factor. In **August** and **Faux,** one of the considerations in imposing a fixed term sentence was the age. August was 19 years of age at the time of the offence, and Faux was just over 18. In the instant case, the appellant was a young adult, but 6 years over 18 and as such we are of the view, that his age should not be considered as a mitigating factor, being far older than August and Faux. Even if, we were inclined to consider him as a young adult, this is displaced by the circumstances of the offence itself, the serious aggravating factors. (See the authorities of **Cadle** and **Hernandez)**. It was a senseless and heinous killing. Four stabs were inflicted in the face of the deceased by Martinez, one of which was so serious it caused death. Martinez had no quarrel with the deceased and he killed him for trivial reasons. His brother had taken the deceased hat and sunglasses and he was merely trying to get it back.

[34] Mrs. Bradley submitted that the appellant showed no premeditation in the committal of the offence and the killing resulted in a struggle. We agree with the Director that lack of pre-meditation on these facts is not a mitigating factor. The appellant saw what was happening, got into the fray and killed the victim for no reason other than the fight with his brother who was acquitted. Martinez obviously had a knife on the scene, a very dangerous weapon, and used it to kill the victim by stabbing him four times, without any provocation. The sentencing judge had to vindicate the community's abhorrence for this killing by imposing a deserved sentence, a life sentence. We see no mitigating circumstances which warrants a lesser sentence. The imposition of the life sentence was warranted.

The minimum term of 20 years

[35] In **August**, the CCJ expounded on the amended section 106 as to the sentences to be imposed for conviction of murder at [82] and [83]:

> "[82] We have concluded that under the amended section 106, where a person is convicted of murder, that person can be sentenced to death or to a maximum term of imprisonment for life. Accordingly, any life sentence imposed following a conviction for the offence of murder will be discretionary and not mandatory. Wherever on the scale the term is fixed, the term of imprisonment must necessarily be such that it is befitting of the circumstances of the offence and the offender.
>
> [83] Where a term of life imprisonment is imposed by the sentencing judge, the judicial tailoring function is preserved by subsections (3) and (4) which allow for the prescription of a minimum term that must be served by the offender before being eligible for release on parole. In individualizing that minimum period, the sentencing judge's exercise of his or her sentencing discretion is guided by the consideration of the key factors set out in subsection (4)."

[36] In individualizing the minimum period, the sentencing judge was guided by section 106(4) and he imposed a minimum term of 20 years' imprisonment for Martinez to serve, with effect from 11 October 2005, before being eligible for parole. Martinez has served almost 19 years and will soon become eligible for parole.

[37] The range of sentences for murder post **August,** was stated in **Faux & Others** after considering some 50 cases (appended to that sentencing judgement) as 25 – 37 years. In our view, the 20 years minimum term was not a standard sentence as it is below the range of sentences of minimum terms imposed since the amendment to section 106 of the *Criminal Code* and **August**. In individualising that minimum period, the sentencing judge's exercise of his sentencing discretion was guided by the consideration of the mitigating factors: the breach of Martinez's constitutional rights (supposedly the unconstitutional sentence), the remorse expressed though it was post-conviction, the programs pursued by the appellant in aid of his rehabilitation and that Martinez is a first time offender.

[38] In our view, Martinez's remorse, as stated above, which was given post-conviction cannot be considered as genuine. Further, the minimum term of 20 years, is below

the average range of sentences considered in **Faux.** It is obvious that when the sentencing judge individualized the sentence, he gave substantial weight to the mitigating factors of the offender. Nevertheless, this Court will not interfere with the considered sentence of 20 years minimum term, since the cumulative weight of the mitigating factors were considered by the sentencing judge along with his view that the principle of prevention did not apply to Martinez, and he is fit for rehabilitation.

Conclusion and order

[39] For the reasons discussed, the sentence of life imprisonment with a minimum term of 20 years is not manifestly excessive and is commensurate with the criminal conduct of Martinez. As such, the order of the Court is that Martinez's appeal against his sentence is dismissed and the decision of the sentencing judge in the court below is affirmed.

THE APPEAL OF PHILLIP TILLETT

Introduction

[40] On the 12 October 1997, Tillett was convicted of the offence of manslaughter and sentenced to serve a term of imprisonment of 20 years. On the 17 of June, 2003, and 6 years into the sentence he was serving, he committed the offence of murder. He stabbed one Kirk Lee Gentle, a fellow inmate at the Belize Central Prison in his chest using a knife with a 7" blade. He was convicted of murder and sentenced to imprisonment for life on the 11 March 2005.

[41] Tillett was re-sentenced, *post-August*, to a sentence of imprisonment for life with a minimum term of 25 years before eligibility for parole. The sentence for conviction of murder was set to commence on the 11 March 2005, when he would have served 8 years of the original 20 years sentence that had been imposed on him. Therefore, twelve (12) years of the punitive part of the life sentence was made to run concurrently with the first sentence for manslaughter despite he having been found culpable of two separate homicides.

Re-sentencing in the court below

[42] The sentencing judge stated in his judgment that he extracted the facts of this case from the judgment of Lord Dyson who delivered the judgment of the Board on 18 July 2011. (Case was appealed to the Privy Council). This is stated at [5] – [8] of his judgment which we quote in full:

> "[6] The prisoner who delivered the blow then walked towards the stairs where another prison officer was standing. That prison officer confronted him and discovered that he was holding a knife. He pointed his gun at him and told him to drop the knife which he did. The second officer identified the convicted man as the prisoner holding the knife.
>
> [7] The convicted man at his trial admitted that he was stopped with the knife, but, he contends that he had noticed the knife on the floor in the vicinity of cell 12 where he saw two inmates struggling. And that he picked it up to prevent other inmates from getting hold of it.
>
> [8] The blade of the knife was seven inches long and was bloodstained. When the convicted man was asked, "Why he got involved in this incident? **He replied, uttering words to the effect that the Deceased had disrespected his mother**." (emphasis ours).

[43] He did not refer to [16] to [20], where the Privy Council dealt with the issue of the confession at [8] above, which allegedly had been given to a prison guard and whose evidence was materially different at the trial. The result being that the evidence of the prison guard could not stand. Further, the Prosecution did not rely on it to prove its case.

[44] The sentencing judge was guided by the principles of sentencing as stated in **Baptiste** and **Sargeant**. He discussed the principles of retribution, deterrence, prevention and rehabilitation. In relation to retribution, the sentencing judge referred to the seriousness of the offence, the stabbing and the consequences, the loss of a human life for trivial reasons for which the court must show its abhorrence by the sentence it imposes.

[45] As for deterrence, whilst the sentencing judge acknowledged that Tillett took a life whilst serving a sentence for unlawfully taking another life, he noted that Tillett made remarkable progress over the years to rehabilitate himself. And went on to state:

"Thus, it appears unlikely that this principle is applicable to him. However, the Court is aware of the prevalence of the offence of homicide within the jurisdiction and as such an appropriate sentence should be imposed to deter others from committing this heinous offence for trivial reasons."

[46] In relation to the principle of prevention, he found that "though the convicted man is a repeat offender for an offence as serious as homicide he ought not to be considered a danger to the society. Indeed, by virtue of the progressive steps taken by him to redeem and rehabilitate himself, he may be considered an asset to the society upon his release from prison. Thus this principle is not applicable to him."

[47] As for rehabilitation, he quoted from the report of Kolbe foundation as follows:

> "Over the years his records show that he has engaged himself in programs: Introduction to Computers 2004; Inmate Education Program April 2004; HIV & STD Peer Educators Project September 2009; Peer Counselling Skills and Techniques August 2009; Medical First Responder course August – September 2011; alternative to violence project. In June 2015, the convicted man became a member of the Inmate Advisory Committee."

[48] From the above report, the sentencing judge found that Tillett has taken positive steps to turn his life around and eschew the temptation to be further involved in criminal activity. He referred to the efforts made by Tillett to speak to youths on the issue of violence.

[49] The sentencing judge identified the following aggravating and mitigating factors at [23] and [24] of his judgment:

"[23] **Aggravating Factors**

i. The gravity of the offence of homicide;
ii. The convicted man's previous conviction for homicide;
iii. The convicted man's unlawful acquisition of a knife to enable the commission of this offence;
iv. The offence was planned and premeditated.

[24] **Mitigating Factors**

i. The remorse expressed by the convicted man;
ii. The violations of the convicted man's constitutional rights;
iii. The programs pursued by the convicted man in aid of his rehabilitation."

[50] He found that the aggravating factors outweighed the mitigating factors. However, the sentencing judge considered the mitigating factors in Tillett's favour and focused on his rehabilitation and the social inquiry report which disclosed he was in a children's home because of indiscipline and running away from home which continued until he was imprisoned at age 18. He also gave Tillett credit for breach for his constitutional rights as he was the recipient of an unconstitutional sentence. (We note the aggravating factors of the offence at [23] of the judgment, except (ii) "The convicted man's previous conviction for homicide," is an aggravated factor of the offender).

[51] The sentencing judge having taken all those circumstances and the aggravating factors and mitigating ones, into consideration including the unacceptability of Tillett's conduct, sentenced him to life imprisonment with a minimum term of 25 years, set to commence on the 11 March 2005, when he would have served only 8 years of the original 20 years sentence.

Is the sentence excessive and disproportionate?

[52] Ms. Mendez identified three circumstances where she contended that the sentencing judge failed in the imposition of the sentence. The first being that the sentencing judge failed to identify a starting point or a range of sentences to inform the sentencing process. Secondly, the decision had some internal inconsistencies since the sentencing judge indicated that he considered that a determinate sentence would suffice, but yet imposed a sentence of life imprisonment. Thirdly, the mitigating factors in this case warranted a lesser sentence as per the **August**[17] guidelines. The Court will address each of the issues identified.

The point of failure to identify a starting point

[53] Ms. Mendez submitted that the sentencing judge erred in that he failed to identify a starting point in order to ensure consistency and proportionality. In our view, the starting point for the sentencing judge was the life sentence after considering the circumstances of the offence and the harm caused to the victim which resulted in his death.

[17] August at [125]

Minimum term - starting point approach

[54] The sentencing judge having imposed a life sentence was required to fix a minimum term sentence pursuant to section 106(3) and apply the conditions under section 106(4) of the *Criminal Code*. The sentencing judge complied with that requirement in so far as possible. There are no sentencing guidelines issued by the Chief Justice as yet, which is presently in draft and is being finalised. However, the range of sentences for murder is fixed in **Faux & Others,** the minimum term and the fixed term.

[55] When the sentencing judge fixed the minimum term, he did not show the construction of the sentence, by using the starting point approach as shown in **Teerath Persaud**.[18] Nevertheless, that does not mean that there was a failure by the sentencing judge in fixing the minimum sentence. The sentencing judge applied the statutory provisions in *section 106(4)* of the *Criminal Code* and considered the circumstances of the offence and the offender. He individualised the sentence by considering the aggravating and mitigating factors. Whilst there was no starting point and adjustments shown to determine a notional sentence, it is clear that the sentencing judge considered the circumstances of the offence and the offender. All the relevant factors were considered together and the sentence imposed reflected everything, including the aims of sentencing as shown by his judgment. This approach though not wrong, is not as transparent as the modern approach to sentencing which shows the construction of the sentence and the accused would be able to understand how the sentencing judge arrived at a particular sentence.

Methodology recommended in Teerath Persaud

[56] This Court has addressed the starting point approach in recent judgments, but for completeness will repeat in this judgment. The sentencing methodology is well established in **Calvin Ramcharran v DPP**[19] where Barrow JCCJ noted that in the re-exercise of the sentencing discretion, the reviewing Court must identify a starting point or range of sentence which **Pompey** endorsed following the CCJ's earlier determination in **Teerath Persaud**. Anderson JCCJ sets out the methodology for applying the sentencing principles to arrive at an appropriate sentence. He opined:

[18] [2018] CCJ 10 (AJ)
[19] [2022] CCJ 4 (AJ) GY

> "Fixing the starting point is not a mathematical exercise; it is rather an exercise aimed at seeking consistency in sentencing and avoidance of the imposition of arbitrary sentences. Arbitrary sentences undermine the integrity of the justice system. In striving for consistency, there is much merit in determining the starting point with reference to the particular offence which is under consideration, bearing in mind the comparison with other types of offending, taking into account the mitigating and aggravating factors that are relevant to the offence but excluding the mitigating and aggravating factors that relate to the offender. Instead of considering all possible aggravating and mitigating factors only those concerned with the objective seriousness and characteristics of the offence are factored into calculating the starting point. Once the starting point has been so identified the principle of individualized sentencing and proportionality ….. is upheld by taking into account the aggravating and mitigating circumstances particular (or peculiar) to the offender and the appropriate adjustment upwards or downwards can thus be made to the starting point. Where appropriate there should then be a discount for a guilty plea. In accordance with the decision of this Court in *Romeo da Costa Hall v The Queen* full credit for the period spent in pre-trial custody is then to be made and the resulting sentenced imposed."[20]

[57] This Court recommends the starting point approach as this would assist sentencing judges in the difficult task of sentencing and consistency in the approach to sentencing. In **Teerath Persaud,** Hon Justice Anderson, noted that the starting approach was followed by the Trinidad, Court of Appeal in **Aguillera et al v The State**,[21] which was influenced by the New Zealand decision of **R v Taueki Ridley and Roberts**.[22]

[20] Ibid [46]
[21] Crim. App. Nos. 5, 6, 7, 8 of 2015
[22] [2005] NZLR 372.

Step-by- step approach

[58] For convenience, the step-by-step approach in determining an appropriate sentence, using the starting point approach, is listed below:

> **Step 1**
> Determine the starting point within the range of sentence for the particular offence, by taking into account the mitigating and aggravating factors that are relevant to the **offence only**.
>
> **Step 2**
> Individualize the sentence by taking into account the aggravating and mitigating circumstances particular **to the offender**. An upwards or downwards adjustment can then be made to the starting point, within the range of sentences for the offence. Depending on the circumstances, there may be no adjustment or a cancelling out.
>
> **Step 3**
> Adjust the figure with discount given for guilty plea, if applicable.
>
> **Step 4**
> Where appropriate, if sentencing for more than one offence, apply the totality principle to ensure sentence is proportionate and not excessive.
>
> **Step 5**
> Give credit for time spent in pre-trial custody as shown in *Romeo Da Costa Hall.*
>
> **Step 6**
> Where appropriate, consider ancillary orders, confiscation, compensation, etc, if applicable.

[59] The court can then proceed to pass sentence on the accused with reasons, explaining how the particular sentence was constructed. If there is a departure from the range of sentences for any particular offence, the court must explain the reasons for so doing.

The complaint of the internal inconsistencies

[60] Ms. Mendez at paragraph 14 of her submissions pointed out that the sentencing judge stated that a determinate sentence is warranted in this case. However, when

this Court read the Order made by the sentencing judge, a life sentence with parole, it seemed that this may have been a typographical error and the sentencing judge meant "indeterminate" as shown at paragraph 26 of his judgment. Further, though the sentencing judge was also aware that a whole life sentence was not applicable post-August as shown at para 3 of his judgment, he did express that "…*a sentence of life imprisonment without parole may be required for his successive homicide offences*." He did not pursue this any further as shown by his order.

Life Imprisonment or fixed term?

[61] Ms. Mendez argued that the mitigating factors in this case warranted a lesser sentence as per the **August** guideline. She argued that in applying the established sentencing principles, this was a proper case for the imposition of a determinate sentence of 32 years.

[62] The mitigating factors which counsel argued warrant a lesser sentence are stated at [15] and [16] of her submissions:

> 15. "…the appellant had been institutionalized since he was 13 years old when he was placed in a children's home. He was neglected by his mother and had to constantly change homes. He had no sense of security or support. At 18 years old, he was remanded to prison and eventually convicted of the offence of manslaughter. From the evidence of the case, the offence he committed while at prison was triggered by the deceased disrespecting his mother. While not an excuse, the factor provides some context into the incident and his background helps to explain further his reaction.
>
> 16. Nonetheless, as the social inquiry report shows, the Appellant has made significant changes in his life. The sentencing judge himself found that "*though the convicted man is a repeat offender for an offence as serious as homicide, he ought not to be considered a danger to the society."* In this respect, courts have also found that an indeterminate sentence, such as life imprisonment, is more appropriate where there is an imponderable factor that signals a continuing risk to the public. Where a person, however, shows the likelihood of rehabilitation, a determinate sentence is more apt, and courts should generally refrain from imposing a sentence of life imprisonment."

[63] For those reasons Ms. Mendez contended that a determinate sentence and not life imprisonment should have been imposed on Tillett. She referred the Court to a list of cases which shows the range of sentences for murder. From those cases, counsel

contended that the range of 25-35 years would be appropriate with a starting point of 30 years for a fixed term sentenced. For the aggravating factors an upward adjustment of 5 years and for the mitigating factors a downward adjustment of 3 years. Thus, the appropriate sentence urged upon the Court by counsel is a fixed term of 32 years.

[64] Learned senior counsel Vidal, Madam Director, contended that the sentence of life imprisonment with a minimum term of 25 years is commensurate with the criminal conduct of Tillett and it is within the range of sentences imposed for murder since the change in the law and meets the objectives of sentencing. In support of her argument, counsel relied on the recent authorities of this Court, **Faux & Others, Giovanni Villanueva v The King**[23] and **Tyrone Reid v The Queen**[24]**.**

Application of section 106 of the Criminal Code by sentencing judge

[65] The sentencing judge in the exercise of his discretion imposed a life sentence on Tillett pursuant to section 106(1). The circumstances of the offence which he noted was that the victim lost his life for trivial reasons at the hands of Tillett in the prison with a knife which had a blade seven inches long. He noted that there was no reason for Tillett to walk around with a knife other than to do unlawful harm. As such, the court had to show its abhorrence for Tillett's conduct by the sentence it imposed. The sentencing judge was guided by **Harry Wilson's** case and he considered the circumstances of the commission of the offence and the circumstances of the offender. He stated that an indeterminate sentence (life sentence) would be appropriate when the place (in prison) and manner of the offence are considered.

[66] In imposing the life sentence with a minimum term of 25 years, the sentencing judge considered the aggravating factors of the offence and the offender, and the mitigating factors of the offender. (section 106 (4). The sentencing judge had regard to (i) The gravity of the offence of homicide which was committed by Tillett whilst serving a sentence for another killing (ii) the offence was committed with a knife which had a blade 7 inches long, a dangerous weapon and obviously unlawfully held in the prison;

[23] Criminal Appeal No 1 of 2020
[24] Criminal Appeal No. 3 of 2022

and (iii) the offence was planned and premeditated as he was armed with a weapon which he used to plunge in the chest of the deceased. We note that Tillett's previous conviction for homicide, is an aggravated factor of the offender.

[67] This Court having looked at the seriousness of the offence and the harm caused resulting in death finds that the sentencing judge properly exercised his discretion in imposing a sentence of life imprisonment. This was a pre-meditated offence and with a great deal of planning as he was armed with a knife in the prison where he was serving a prior sentence for an unlawful killing. He stabbed the victim in the chest with the 7" blade knife in full view of prison officers.

[68] The appellant is seeking a fixed term sentence, which as stated in **Faux & Others** would have been justified only if there were mitigating factors warranting it. It is at the discretion of the sentencing judge to determine whether to impose a sentence of life imprisonment or a fixed term sentence upon a conviction for murder. The question that arises is whether the sentencing judge wrongly exercised his discretion when he considered the mitigating factors and not impose a fixed term sentence.

[69] The mitigating factors present in **August** and **Faux and Others** were not present in the instant case. When Tillett committed his second offence of murder, he was 24 years old, far from being a young adult. The first offence was committed when he was a teenager but that cannot be a mitigating factor in the second killing which was committed 6 years later, when he was 24 years old.

[70] The mitigating factors as identified by the sentencing judge in relation to the offender in our view, cannot be a reason to soften the life sentence. Further, we note the prevalence of murder in Belize and as pointed out by Madam Director, the specific need, in the circumstances of this case, to deter other inmates from committing acts of violence within prison walls. The steps taken by Tillett's towards his rehabilitation, which is a mitigating factor is not sufficient to warrant a fixed term sentence, though it is relevant for a downward adjustment of the minimum sentence.

[71] The childhood background which was taken into account by the sentencing judge, though a significant mitigating factor, is not as significant to the second killing in

the instant case. It was more significant to the first killing when he was 18 years old and found guilty of manslaughter. This factor of his upbringing has been reflected in the minimum sentence of 25 years imposed on Tillett by the sentencing judge (range as shown in Faux - 25 – 37 years). This is not sufficient to impose a fixed term sentence. He received a sentence on the lowest end of the range.

[72] Further, the Court is not convinced by the argument for Tillett that the offence he committed while at prison was triggered by the deceased disrespecting his mother. As mentioned above, in his appeal to the Privy Council in this matter, **Phillip Tillett v The Queen** at [16] to [20], the Court dealt with the issue of a confession (cause for stabbing was disrespect of Tillett's mother) which had been given to a prison guard whose evidence was materially different at the trial. The result being that the evidence of the prison guard could not stand. Further, the Prosecution did not rely on it to prove its case.

[73] Even further, as noted by Madam Director in her submissions, in Tillet's interview with the Rehabilitation Officer, he did not mention anything about disrespect to his mother. Instead he said: "*it was not his fault that he murdered Mr Gentle in prison*". The reason being he felt that his life was in danger in prison and he had to defend himself. Yet, he had not raised self-defence at his trial. For these reasons, the Court rejects this trigger for the murder.

[74] In our view, the mitigating factors considered above which are outweighed by the aggravating ones does not warrant a lesser sentence.

[75] Further, the Court must be concerned about public confidence in the criminal justice system. Madam Director referred the Court to [89] to [91] of **Alleyne**, which we find useful. Justice Barrow in his concurring judgment addressed the issue of public confidence. He stated:

> **"Public confidence**
> [89] In this case, an acceptance of the sentencing court's decision as justified by the principles of retribution and deterrence is strengthened by a recognition of the importance of the society's sense of justice. While a court must not abdicate its decision making in favour of popular opinion, or be dictated to by this undoubted pressure, courts must be sensitive to the community's sense of

justice. A court must be concerned about public confidence in the administration of justice and the rule of law.

[90] R v Sargeant is an early English case in which the classical principles of sentencing were stated, as being retribution, deterrence, prevention and rehabilitation. It contains a helpful statement on the impact of public opinion on the sentencing decision:

"The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that **society through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentence they pass.** The courts do not have to reflect public opinion. On the other hand, courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.

Anyone who surveys the criminal scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence.

[91] The stake that the society has in the sentencing process was pithily captured by the Supreme Court of Canada in R v M. (C.A.)105 in their discussion of denunciation, which is regarded as an element of retribution and deterrence. The court stated:

> "[81] ... The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law ..." (emphasis added)

[76] In the view of this Court, the life sentence imposed by the sentencing judge would inspire confidence in the justice system. Tillett was in prison for killing someone and behind those prison walls he intentionally murdered an inmate with a knife, a dangerous weapon, which he unlawfully had in his possession. There is no reason for our interference of the sentencing judge's discretion as we have expanded on in [79] below. A fixed term sentence under such circumstances is therefore not warranted.

Whether the minimum term of 25 years appropriate

[77] Tillett's minimum sentence imposed by the sentencing judge was 25 years which he must serve before he can be considered for parole. The range for the minimum term for murder was established by this Court in **Faux and Others** to be 25 to 37 years.

He received the minimum on the range although the aggravating factors of the offence were very serious.

[78] In individualizing the sentence, the aggravating factor in relation to the offender was Tillett's previous conviction and the Prison Report showed some prison infractions. The mitigating factors considered by the sentencing judge in relation to Tillett were: (i) the remorse expressed by him; (ii) the violations of his constitutional rights as he had received an unconstitutional sentence; and (iii) the programs pursued by him in aid of his rehabilitation.

[79] The sentencing judge found that the aggravating factors (in relation to the offence and the offender) outweighed the mitigating factors, but he was unduly favourable to Tillett, when he considered the mitigating factors of the offender and imposed a minimum sentence of 25 years, the lowest on the range. In our view, the aggravating factors of the offence warranted a starting point in the middle of the range of 25 – 37 years with adjustments for the mitigating factors. The sentencing judge must have given Tillett a significant downward adjustment for the mitigating factors. In any event, the Court has no reason to interfere with the sentencing judge's discretion as the minimum sentence resulted from the cumulative weight of all the mitigating factors in relation to the offender, including his rehabilitation, remorse, the background of Tillett as shown in the social inquiry report and the other aims of sentencing.

[80] The Court wishes to point out that in the application of the sentencing principles by the sentencing judge, there was an unwarranted praise for Mr. Tillett when he dealt with deterrence and said that he "*noted the remarkable progress made by the convicted man over the years to rehabilitate himself. Thus, it appears unlikely that this principle is applicable to him"*. We share the view of the Director that the principle of deterrence is applicable to Tillett. He is in prison for two heinous crimes, the taking of two lives, he has two prison infractions for assaulting another inmate and he threatened to harm another inmate.

[81] Likewise, we do not agree with the sentencing judge's view that Tillett should not be considered a danger to society and therefore, the principle of prevention does not apply to him, although he unlawfully killed twice. Again, the sentencing judge seemed

to place great emphasis on the steps taken by Tillett to rehabilitate himself although he acknowledged the heinous offence for trivial reasons. In the circumstances of this case, it is our view that the principle of prevention is applicable to him.

[82] Nevertheless, we accept the progress made by Tillett towards his rehabilitation and recognise that after he serves the 25 years minimum sentence there is a possibility for his rehabilitation and reintegration into society. The sentencing judge has given him an early opportunity for his rehabilitation by placing him on the lowest end of the range. Further, the sentencing judge set his sentence to commence on the 11 March 2005, when he would have served only 8 years of the original 20 years sentence which is very favourable to him.

Conclusion and order

[83] For the reasons discussed, the sentence of life imprisonment with a minimum term of 25 years is commensurate with the criminal conduct of the appellant, Tillett. As such, the order of the Court is that Tillett's appeal against his sentence is dismissed and the decision of the sentencing judge in the court below is affirmed.

THE APPEAL OF MIGUEL HERRERA

Introduction

[84] The appellant, Herrera was convicted on the 18 February 2009, of the offence of murder. He was first sentenced to life imprisonment, and later re-sentenced, post-**August**, to life imprisonment with eligibility for parole after the expiration of 35 years. This is an appeal against the 35 years minimum term on the ground that it is 'excessive and disproportionate'.

[85] The victim, died by strangulation at the hands of Herrera. Prior to the victim's death, she was kidnapped along with her 3 year old son and taken in a secluded area, where was sexually assaulted by Herrera and another person. Herrera disposed of her naked body in the bushes which was found after decomposition and identified by her

husband. Herrera concedes that the nature and circumstances of this murder is more heinous than the "ordinary case of murder" and took into account the victim impact statements, from the victims' son, her mother and her sister. As such there is no appeal on the imposition of the life sentence. However, he seeks a reduction of the minimum term from 35 years to 20 years, the period he must serve before which he becomes eligible for parole.

Re-sentence in the court below

[86] The facts as stated by the sentencing judge in his judgment dated 3 October 2019, were that Herrera and one Delmy Figueroa, ('Delmy') the sister of the deceased, had prior to the commission of the offence lived and cohabited in a common-law union. After an incident which occurred on the 24 August, 2007, at a bar in the Silk Grass area, Herrera beat and threatened her that he would kill one of her sisters if she left him. One week later on the 31 August, 2007, he repeated the threat to Delmy but she nevertheless left him on 2 September, 2007, and never went back to live with him.

[87] On or around 11 September 2007, the deceased and her son were reported missing. The evidence revealed that the deceased and her three year old son were kidnapped by Herrera and another person. He took the deceased and her son with his truck and drove them to a secluded spot. Whilst at the spot Herrera questioned the deceased about the whereabouts of her sister, Delmy, who was his common-law wife. The other person along with Herrera then observed the deceased lying nude on the tailgate of Herrera's truck and observed that he was having sex with her. That other person was then forced by Herrera to have sex with the victim.

[88] Herrera's truck had run out of fuel at some point and the other person was sent by him to fetch some fuel. That person testified that when he left to do so, it was Herrera, the deceased, and her three year old son who were left in his truck. On his return with the fuel, he observed that the deceased was no longer in the truck but her clothes were in the back of the truck. Herrera told the other person that the deceased had gone to Honduras. He later ordered the person to throw the deceased's son over the side of the Kendall Bridge but he refused to do so and instead laid him on a bench in a bus shelter.

[89] On 16 September 2007, five days after the deceased and her three year old son were reported missing, the police discovered her decomposing body in a wooded area in the Stan Creek District. Her clothes were found some 60 to 70 feet away from the body. Herrera in his statement under caution admitted placing the clothes where they were found by the police. There is evidence that he directed the police to the place where the clothing of the deceased was found. Dr Estrada Bran who conducted a post mortem examination on the body of the deceased revealed the cause of death to be as a result of ligature strangulation.

The application of the sentencing principles by the sentencing judge

[90] The sentencing judge applied the classical principles of sentencing, namely, retribution, deterrence, prevention, and rehabilitation to the facts and circumstances of the case. In relation to retribution he observed the manner in which Herrera and the other person, humiliated and abused the deceased, before she was strangled by Herrera. He noted the court must demonstrate its abhorrence for such viciousness by the sentence it imposes.

[91] In relation to deterrence, the sentencing judge noted its application to both the public and Herrera as well. The sentencing judge was concerned about part of the victim impact statement produced by Delmy, in which she alleged that Herrera used to call her from prison threatening her life when he gets out of prison and blamed her for her sister's death. She has since changed her mobile telephone number.

[92] In the application of the principle of prevention, the sentencing judge noted that Herrera had demonstrated a capacity for taking an innocent human life in most bizarre circumstances. That fact taken together with the threats allegedly made by him to Delmy, since his incarceration, were sufficient to cause the sentencing judge to seriously consider him as a danger to the society.

[93] When the sentencing judge looked at the application of the principle of rehabilitation, he noted that it is of paramount importance and that punishment of the offender must go hand in hand with his rehabilitation to ensure a smooth reintegration to the society. He noted Herrera had not expressed remorse for the offence. Further, the report from the Kolbe Foundation disclosed that there is no evidence that Herrera has completed

any rehabilitative programs whilst an inmate at that institution. However, his defence counsel has, submitted that Herrera has since his incarceration been respectful, helpful, and has served as a librarian and gardener at that institution. The sentencing judge noted that whilst that is commendable, the underlying cause of the commission of this offence and the manner in which it was done had not been addressed by way of any programs of rehabilitation.

Aggravating and mitigating factors identified by the sentencing judge

[94] The sentencing judge identified the following as aggravating and mitigation factors as shown by his judgment at [23] and [24]:

> "[23] **Aggravating factors**
> i. The gravity of this offence;
> ii. The offence was planned and premeditated;
> iii. The convicted man had threatened to kill the Deceased prior to the homicide;
> iv. The ordeal suffered by the Deceased who was raped and otherwise abused prior to her death;
> v. The convicted man is not a first offender and has a previous conviction for grievous harm;
> vi. The convicted man is unremorseful and continues to maintain his innocence.
>
> [24] **Mitigating factors**
> i. The constitutional violations experienced by the convicted man;
> ii. he favourable remarks made of him in the character affidavits."

[95] In arriving at the sentence, the sentencing judge considered the nature and gravity of the offence. At para 33, he said:

> "[33] The circumstances surrounding the commission of this offence together with the manner in which it was committed is indicative of its gravity. I find that this case is serious enough to be considered as one of the worst cases of homicide. This factor ought not to be trivialised, hence, I will attach more importance to the gravity of this offence than to the personal circumstances of the convicted man."

[96] The sentencing judge analysed the aggravating and mitigating factors in light of the circumstances of the case. He found the aggravating factors outweighed the mitigating ones. However, he took into consideration Herrera's breach of

constitutional rights. He considered (i) Herrera has not participated in any rehabilitative programs to prepare him for reintegration into society. That he needs to undergo appropriate programs of rehabilitation to address his misguided sense of entitlement and his failure to appreciate and accept the rights of women in modern society before he should be considered for release into society. The victim impact statements from Delmy showed that he made threats to her which is indicative of his sense of entitlement; (ii) Herrera still considers himself innocent as shown in the social inquiry report; (iii) character statements from his witness; and (iv) maintaining public confidence in the sentencing system.

[97] For all those reasons, the sentencing judge sentenced Herrera to life imprisonment with a minimum term of 35 years which he must serve before eligibility for parole.

Is the minimum term excessive?

[98] The ground of appeal is that the minimum term of 35 years is excessive and disproportionate. Herrera has a right of appeal pursuant to section 106(5) of the Criminal Code.

[99] Ms. Mendez submitted that the sentencing judge erred in that he failed to identify a starting point in order to ensure consistency and proportionality. The Court has addressed this issue at paragraphs [53] to [58] above in the previous appeal above. That applies to this appeal as well.

[100] Herrera conceded that this was a heinous murder, but submitted that the sentencing judge placed undue weight on that factor and did not consider the mitigating factors or the sentences imposed for similar offences. Counsel relied on 15 cases from this jurisdiction and the cases appended to **Faux & Others** case. She contended that the precedents revealed that a sentencing range of 20 years at the lower end, and life imprisonment with the possibility of parole at the upper end of the offence of murder.

[101] In relation to the precedents which counsel provided, it should be pointed out that it is the average which should be considered and not the lowest sentence. At times, sentences imposed are for considered reasons or exceptional circumstances and the standard sentence is not imposed. Each case, has to be determined on its own factual

circumstances and properly individualized. In any event, whilst we are grateful for the research done by counsel, the case of **Faux & Others** sets the range at 25 to 37 years and Herrera's sentence, 35 years, is within this range.

[102] Ms. Mendez submitted that Herrera's case has similar characteristics to the case of **Orlando Wade,** which also involved strangulation and sexual assault against a female victim. In that case a sentence of life imprisonment with **25** years minimum was imposed before eligibility for parole. She contended that the imposition of 35 years on Herrera fell out of line with the comparable case of **Orlando Wade**.

[103] Madam Director contended that while there are similarities, Herrera's actions in this case are far more egregious and militate against a similar sentence. We agree. The distinguishing features in this case are by far more heinous. Herrera kidnapped the victim and her son and took them to a secluded area; She was raped by Herrera and the other person; strangled by ligature; her naked body disposed in the woods and left to decompose; Herrera gave instructions to the other person to throw the victim's 3 year old son over the Kendall bridge; He made calls from prison to Delmy and threatened to kill her when he is released; He continues to claim innocence which shows no remorse; and recent infractions in prison. For those reasons, **Orlando Wade's** case is not comparable to Herrera's case.

Application of section 106(4) in fixing the minimum term

[104] The sentencing judge sought guidance from section 106 (4) of the *Criminal Code* to individualise the sentence and fixed the minimum term at 35 years. He considered the circumstances of the offence and the offender. There were no mitigating factors in relation to the offence committed by Herrera. In individualising the sentence, he considered the mitigating and aggravating factors that he identified and found that the aggravating factors outweighed the mitigating factors. Further, the sentencing judge addressed the aims of sentencing in detail.

[105] Madam Director helpfully identified additional aggravating factors (including those identified by the sentencing judge) and mitigating factors in this case which is quoted in its entirety:

"**Aggravating factors**

14. (1) the killing was premeditated;
(2) the victim, still a teenager, was taken from her home by force, as was her three year old son;
(3) the victim was raped twice, once by the appellant and once under his direction, in the open, while her son was in the pickup;
(4) the manner of her death, being strangled with a ligature, which would have caused suffering and anguish;
(5) the concealment of the body;
(6) the maturity of the offender – as stated above, the appellant was 45 at the time of the offence - he was of the age to fully appreciate the consequences of his actions.
(7) absence of remorse – the appellant maintains his innocence. The Community Rehabilitation Officer who prepared the Social Inquiry Report stated, "Mr. Herrera appears to be remorseful towards the family's [loss] but in the same [breath] he claims that he is innocent. …."

Mitigating factors

15. (1) He has only one previous conviction, dating back 23 years.
(2) He has made some steps towards rehabilitation."

[106] In considering the aggravating and mitigating factors listed by Madam Director, she had regard to the Sentencing Guidelines 2016 (Trinidad and Tobago) and the Sentencing Guidelines for Use by Sentencing judges of the Supreme Court of Jamaica and the Parish Courts. We find these guidelines helpful.

[107] The aggravating factors in this case by far outweighs the mitigating factors. In the view of this Court, a starting point on the upper end of the range was warranted. That had to be adjusted upwards for the aggravating factors and hence we are of the view that the sentencing judge did not err when he imposed 35 years minimum term on Herrera.

[108] Ms. Mendez argued that the minimum period of 35 years is excessive. Also, it would be oppressive as it would mean that the first time that Herrera could be considered for parole would be at 80 years old. This, she contended does not further the aims of rehabilitation. She supported her argument by addressing the aims of sentencing as discussed in **Pompey** and submitted that the sentencing principles require courts to impose sentences that reflect society's abhorrence to particular types of crimes, deter others and the offender from committing similar offences in the future, while also giving room for the offender's rehabilitation. She further relied on the case **Jarvis**

Small & Bibi Gopaul v The Director of Public Prosecutions[25] where the CCJ found that a sentence which exceeds the life expectancy of any human being effectively undermines the penological objective of rehabilitation. Thus, the age of the offender is a relevant factor to take into account in the sentencing process.

[109] In Herrera's case we are of the view that the focus should be on punishment and deterrence because of the gravity of the offence. Also, the threats made to Delmy from prison is very concerning. The sentencing judge was not convinced of Herrera's rehabilitation and as such that principle was not given much weight. In the case of **Alleyne** Justice Anderson, delivering the judgment of the Court said:

> "[45]….Rehabilitation is one of the aims of sentencing and a very important aim, but not the only one and in some circumstances, not the overriding one. The classical principles of sentencing reference three others: retribution, punishment, deterrence; a more modern formulation would be content only to reference punishment, deterrence and rehabilitation. Further, the Penal System Reform Act does not state the weight to be accorded by the sentencing judge to any of the proper objectives of sentencing.

[110] The Court is of the view that based on the circumstances of this case, which we need not repeat, rehabilitation though an important aim of sentencing, is not the overriding one. The sentencing judge imposed a sentence that reflected society's abhorrence to such heinous crime.

[111] The case of **Jarvis Small and Bibi Gopaul** is distinguishable from **Herrera's** case as Gopaul who was found guilty was not given a life sentence. At paragraph 78 of the judgment, the Court said,

> "In this case there is the paradoxical (if not legally absurd) situation, where the sentence imposed was not a life sentence and therefore the limitation on eligibility for parole is the lesser period of ten years, but the term of imprisonment is way beyond what could in pragmatic terms amount to a life sentence."

[112] Madam Director helpfully provided the court with a summary of what transpired in that case. The sentence imposed on Gopaul was not a life sentence. The Court of Appeal of Guyana imposed a fixed term sentence of 45 years on Gopaul who was 50 years

[25] [2022] CCJ 14 (AJ) GY at [75]

old at the time of her conviction. The concern of the Court , as expressed in paragraph 86 of the judgment, was whether the sentence actually imposed was greater than a sentence of life imprisonment, which is the maximum penalty for the category of murder committed. Further, she was statutorily ineligible for parole before the expiration of 10 years. This figure (10 years) was uplifted to 15 years by the Court.

[113] In the instant case, the offence committed by Herrera is very grave and warrants a lengthy sentence. A lengthy sentence as submitted by Madam Director is deserving in this case and we agree. See **Roy Jacobs v The State**.[26]

Are there additional mitigating factors not considered by the sentencing judge?

[114] Ms. Mendez contended that the sentencing judge did not consider the following mitigating factors disclosed in the social inquiry report:

> "…the social inquiry report discloses that the Appellant *has participated in rehabilitative activities, such as working at the library, tutoring gardening and is a trustee at the prison working at the prison gift shop. The report indicates that the Appellant has "learned about himself and Jesus in prison". He has learned to love, and has discontinued drinking and smoking.* He has participated in some programs and assisted other inmates. In addition, the report commented that, though the Appellant maintains his innocence, he does appear to be remorseful.

The point on rehabilitative activities

[115] The gardening, working at the library, and gift shop whilst commendable are not rehabilitative programmes. We note that he participated in two rehabilitative programmes, one six month's course in 2022 and in 2023 a drug addiction therapy program. The sentencing judge was not impressed and expressed serious reservations about Herrera's prospects of rehabilitation and for good reasons. The Victim Impact Statement from Delmy shed light on Herrera's actions, threatening to kill her from prison. In 2023, after Herrera completed the first rehab programme, he was found with 2 boras (sharpened instruments) and two homemade knives. Further, it is not expected that drinking and smoking is allowed in the prison.

[26] [2024] CCL 9 (AJ) 9 GY, at para 14.

Remorse point

[116] We are not persuaded that Herrera is remorseful. He continues to maintain his innocence and his threats to kill Delmy shows he has no remorse. The claim by the Rehabilitation Officer who prepared the Social Inquiry Report stated, "*Mr. Herrera appears to be remorseful towards the family's [loss] but in the same [breath] he claims that he is innocent*." Madam Director submitted this is clearly not remorse. She relied on the judgment of this Court in **Edwin Castillo v The Queen**[27] at [23] and [28] where it is shown that the appellant mouth an expression of remorse early on in his statement at the sentencing phase but insisted he was not the deceased killer. The court said, " Implicit in a feeling of remorse is an acceptance of one's guilt. A false claim of remorse made before a sentencing court is a most reprehensible display of utter disrespect for that court." Under such circumstances it could not be considered as a mitigating factor. Senior Counsel also relied on **The Queen v Pedro Moran**[28], where this Court addressed remorse at paragraphs 34 and 35. The remorse came after the appellant was found guilty and he continued to maintain his innocence. The Court said, " In the circumstances of the instant case, the accused expression of remorse, would have a minimum discount attached."

[117] Madam Director also relied on **The Queen v Wilbert Cuellar**[29] at paragraph 35, where this Court went further in the appeal against sentence to state that it is an aggravating factor when there is silence on the matter of remorse. See also **Shawn Pinder v The Queen**[30] at paragraph 29.

[118] In the instant case, the Court agrees with Madam Director that an expression of sympathy for the loss suffered by the victim's family does not amount to remorse when Herrera continues to deny that he caused that loss. We agree with the sentencing judge that Herrera is unremorseful and continues to maintain his innocence.

[27] Criminal Appeal No. 11 of 2017
[28] Criminal Application No. 1 of 2017
[29] Criminal Application No. 13 of 2014
[30] [2016] CCJ 13 (AJ)

Back pain

[119] Ms. Mendez submitted that the report also shows that Herrera suffers from back pain for which he has to receive an injection every four months. Madam Director submitted that his back pain, as described, does not weigh the balance in his favour either. We note that Herrera is getting medical treatment, an injection, every four months. This in our view cannot be a mitigating factor that warrants a lesser sentence.

Conclusion on minimum term

[120] In our view, 35 years minimum term imposed by the sentencing judge is warranted under the circumstances of the case.

Remand period not considered by sentencing judge

[121] Madam Director drew to the Court's attention that the sentencing judge set the sentence of Herrera to run from the 28 December 2007, in his judgment, at paragraph 35 which she noted is 3 months less than the actual time spent on remand. In accordance with *Romeo Da Costa Hall*, the sentencing judge should have given Herrera full credit for time spent in pre-trial custody. The sentencing judge erred by not given him that credit. There is no explanation in his judgment as to the reason for not doing so. This Court therefore, varies his sentence to commence on 28 September 2007 (three months prior).

Order

[122] In accordance with our foregoing conclusions we order that:

(i) Herrera's appeal against the minimum term of his sentence is dismissed and the decision of the sentencing judge in the court below is affirmed.

(ii) Herrera's sentence is varied to commence on 28 September 2007.

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Hafiz Bertram P

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Foster JA

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Arana JA