BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 11 of 2012

BETWEEN:

CHARLES MATTHEW O'BRIEN FREDERICK Appellant

AND

THE QUEEN Respondent

Before: The Hon. Sir Marston C. D Gibson, K.A, Chief Justice, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2018: January 11, July 19

2019: September 27

Mr. Marlon Gordon for the Appellant

Mr. Anthony Blackman for the Respondent

DECISION

GOODRIDGE JA:

INTRODUCTION

[1] On 23 April 2012, the appellant was arraigned on a two count indictment for the murders of Gerhard Stock and Arthur Chadderton on 2 August 2011. He entered pleas of not guilty of murder, guilty to manslaughter on both counts. These pleas were accepted on behalf of the Crown by the late Mr. Charles Leacock, QC, Director of Public Prosecutions.

[2] On 30 July 2012, the appellant was sentenced by **Crane-Scott J** to imprisonment for life on each count with the sentences to run concurrently.

[3] On 2 August 2012, the appellant filed a notice of appeal against the sentences on the following grounds: "(1) sentence is excessive" and "(2) sentence inhumane and degrading in breach of section 15 of the Barbados Constitution."

FACTUAL BACKGROUND

[4] The facts in relation to the offences were outlined to the court by Mr. Leacock QC, and were accepted by Mr. Marlon Gordon, counsel for the appellant.

[5] Mr. Chadderton, who was 79 years old, lived with his wife Gwenda at Salters in the parish of St. George. One of their three adult children, Meta, was visiting the island with her husband, Gerhard Stock, an Austrian national, along with their three children. They were staying at the family home in St. George accompanied by another young girl who was an English family friend.

[6] On the evening of 2 August 2011, around 7.45 pm, the appellant and another man, who were both wearing masks, entered the home in Salters St. George through an open door. The appellant, who was carrying a loaded gun, pointed it at the occupants and demanded money. Meta ran out of the house and alerted her father to the fact that there were two

masked robbers in the house. Mr. Chadderton armed himself with a guava stick and went into his home.

[7] In the meantime, the appellant pointed the gun at Mr. Stock and demanded money. Mr. Stock tried to gather the children but the other masked man, who was carrying a knife, ordered the children and Mrs. Gwenda Chadderton into the kitchen. The children were screaming at the time. The other man told them to be quiet.

[8] On entering his home, Mr. Chadderton confronted the appellant and struck him on the head. The appellant discharged several shots at him. Mr. Stock then jumped on the appellant to seek to disarm him and to remove his mask, but the appellant also discharged shots at him, one of which struck Mr. Stock in his chest. The appellant and his cohort then ran out of the house and made their escape.

[9] The police and ambulance personnel were summoned. Mr. Stock was rushed to the Queen Elizabeth Hospital but later succumbed to his injuries. Mr. Chadderton, who was shot three times, was pronounced dead at the scene.

[10] Investigations into the matter were carried out by the police. On 30 August 2011, the appellant and his cohort were taken into custody and interviewed about the incident.

[11] On 31 August 2011, the appellant gave a written statement in which he described what occurred on the night in question. The appellant's written statement reads in part:

> " ...Just after 7 o'clock, we went in St. George to rob a man that 'X' tell me does got gold and money. He live close by Chefette...When we get out there, the man was not there, so we decide we gine look for somebody else. When we get gine back towards town, when we pass Chefette 'X' was driving and I look pon the right hand side and see a house there wid the doors wide open wid some white people and children bout dey. 'X' drive up pon an embankment on the same side as the house and park the car off the road. We get out. I put on a black ski mask and pull the hoodie I had on over my head and we leopard crawl through some bush, went to the garden by the house. I peep to make sure the people was still which part I see them. I tell 'X' when we get in, close the curtain and look for a weapon. We walk in fast and I pull my gun, a 45, and went straight to the adults and tell them don't panic, I just want the money. A brown skin girl get up and start to scream and ran. I hear a door slam. A white man and a old lady who was at the desk stand up and the children start to scream. The white man say 'the kids', I tell he don't worry, nobody ain't gine get hurt. I tell he that I is a man of my word and I call the three little children I see and tell them go in the room with the old lady. The old lady hug all three children and keep them in the room short dey. The white man tell me come. He did not sound like he no Bajan. He went down a hallway and went in the first door pon the right. The white man went to a desk. I did behind he with the gun in my hand. As the white man went

> to open de drawer, I feel a lash to the top of my head. I get dark eyes. I turn round de same time and feel another lash in my head. I see a old man with a stick. I raise the gun and beat a shot. The man give me another lash in my left shoulder then another one in my left tricep. He was coming to give me another lash and I aim at he and fire. I get a lash pon my left hand. The white man jump on pon me from behind and say mother….I gine kill you. I fire at the old man again and the white man hold on pon my mask and did trying to get it off. Me and he start to scuffle out the bedroom into the hallway. I did not see the old man no more. I swing back the gun and feel it connect to the white man head. Then he did holding me from behind and feel it connecting to he head. He pull back de mask and tried to run and he grabble me again and start to pull off de mask. I turn around and fire and he let me go. I went to run again and he grabble me again by the back of my pants. I turn around and fire at he again. He let go and I run through de door."

THE APPEAL

[12] As stated earlier, on 2 August 2012, the appellant filed a notice of appeal against the sentences of life imprisonment.

[13] Subsequently, on 12 March 2018, Mr. Gordon filed perfected grounds of appeal in which he challenged the sentences imposed on the following grounds:

> "1. The learned trial judge's sentence was wrong in principle. The court sentenced the Applicant to an indeterminate sentence. It was the duty of the sentencer to set a minimum term of years

before the court reviews the sentence. In failing to so do the sentence is likely to breach the Applicant's right under Section 15 of the Constitution not to be subjected to inhuman or degrading punishment.

2. The learned trial judge in her role as sentencer relegated from the judiciary to an executive body the sentencing court's discretion to determine the severity of the punishment to be inflicted upon an offender.

3. The sentence was manifestly excessive having regards to the Applicant's early guilty plea and the fact that there was no contested trial. The public confidence in the system of justice is undermined when the sentencing court fails to properly acknowledge the utilitarian value of an accused's early guilty plea."

[14] Before dealing with these grounds, however, it is important to state that this Court became aware that the issues of the relevance of an early guilty plea to the imposition of a life sentence and the meaning of 'life imprisonment' had been raised in an appeal to the CCJ against this Court's decision in **Renaldo Alleyne v R**, **Criminal Appeal No. 6 of 2013.** We therefore considered it prudent to await the outcome of that appeal.

[15] On 2 May 2019, the CCJ delivered its decision in **Renaldo Alleyne v R [2019] CCJ 06** (**Renaldo Alleyne**).

Ground 1

[16] On this ground, Mr. Gordon submitted that this was not the worst case of manslaughter. He contended that a term of imprisonment, which would

amount to sufficient retribution, should have been determined with certainty during the sentencing process. Counsel acknowledged that the judge did consider the psychological state of the appellant and that the judge remarked that the appellant "may continue to be a danger to the public for a period which could not be reliably estimated."

[17] However, Mr. Gordon contended that the court should have stated what would be a satisfactory length of time, after which a continuous review ought to be held to determine whether the danger posed by the appellant to the public still remained.

[18] Counsel continued that as rehabilitation is identified as an aim of sentencing by **section 41** of the **Penal System Reform Act, Cap. 139**, (**Cap. 139**), there should be a point at which it should be determined whether the appellant had been rehabilitated and no longer remains a threat to society. The review of the sentence is a function of the judiciary and any review flowing from the prerogative of mercy, according to counsel, constitutes a breach of the separation of powers. Counsel cited **August v The Queen BZ 2016 CA 1(August)**, **Makoni v Commissioner of Prisons & Minister of Justice, Legal & Parliamentary Affairs CCZ 8 of 2016** and **James, Wells and Less v United Kingdom (Appls no 25119/0, 57715/0** and **5777877/09) ECHR 18 September 2012** in support of his submissions.

[19] In response, Mr. Anthony Blackman, for the respondent, submitted that there is no statutory requirement or practice in Barbados for a sentencing judge to include as part of a sentence imposed that: (i) the convicted man's sentence be reviewed at particular intervals and (ii) a minimum term of years be served before the reviews commence.

[20] Counsel also submitted that the judge considered the classical principles of sentencing embodied in **Cap. 139**, namely retribution, deterrence, prevention and rehabilitation. Mr. Blackman noted that the judge took into account the mental state of the appellant and the likelihood of his re-offending.

[21] Mr. Blackman contended that while the cases cited by Mr. Gordon provide enlightenment generally, they are distinguishable on their facts and are therefore not relevant. He submitted that **August** was concerned with a conviction for the capital offence of murder after trial by jury. There the court discussed, inter alia, the imposition of the mandatory minimum sentence of life imprisonment without the possibility of parole and the constitutionality of the then existing Parole Act.

[22] Counsel further submitted that the focus of the sentencing court is the seriousness of the offence rather than on the categorisation of a crime as the 'worst of the worst' which is subjective and dependent on the local circumstances at the time of its occurrence.

DISCUSSION

[23] According to **section 6** of the **Offences Against the Person Act, Cap. 141**, (**Cap. 141**) any person convicted of manslaughter is liable to be sentenced to imprisonment for life.

[24] Mr. Gordon's argument on this ground is that where an offender is sentenced to imprisonment for life, the sentencing court must set a minimum term of years which the offender should serve before the court reviews that sentence. Presently, no such provision is made in **Cap. 141** for a sentencing judge to specify a minimum period to be served.

[25] In its recent decision in **Renaldo Alleyne**, the CCJ examined what is meant by 'life imprisonment' in Barbados and stated at para [52] that "prisoners sentenced to life imprisonment do not necessarily remain incarcerated for the rest of their natural lives." The court noted that the recommendation of a minimum period of sentence when imposing a life sentence had been addressed in some jurisdictions through legislation.

[26] At para [58] the CCJ spoke to this point in the following terms:

> "But judicial recommendation of a minimum period of incarceration when handing down life sentences is not fundamentally based on the authority of legislation. There are, rather, more profound considerations at stake. Sentencing is quintessentially a judicial function and is first and foremost an exercise of judicial discretion. That discretion cannot properly be exercised by non-judicial bodies. Regard to established

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

[27] Importantly, at para [65] the CCJ stated:

"…However, in discharging its judicial function to fashion an appropriate sentence we are equally sanguine in the view that the sentencing judge when imposing a life sentence (as distinct from a determinate sentence) not only has the authority but, we venture to say, the responsibility to recommend the tariff or minimum period of sentence to be served for purposes of deterrence and punishment. The judge, having within his or her purview, the detailed knowledge of the facts of the case, any instructive reports, should weigh up all the factors, aggravating

> as well as mitigating, and recommend, as a term of the sentence of life imprisonment, a tariff or minimum period to be served before there is any possibility of release. Recommending a minimum period of incarceration is consistent with the constitutional rights to a fair hearing before an independent and impartial tribunal, protection of the law and equality before the law."

[28] The decision of the CCJ in **Renaldo Alleyne** has now established that, where a person is sentenced to imprisonment for life for the offence of manslaughter pursuant to **section 6** of **Cap. 141**, the sentencing judge is required to recommend the minimum period of time before which the sentence should not be reviewed for the purpose of release.

[29] However, the CCJ acknowledged that the imposition of a tariff/ mandatory minimum term of imprisonment would conflict with **Rule 42** of the **Prison Rules**, which states that " the case of every prisoner serving a term of imprisonment exceeding 4 years shall be reviewed by the Governor-General at four-yearly intervals or shorter periods if deemed advisable." It therefore recommended that the necessary legislative changes be made to the Rules to resolve the situation as soon as possible.

Ground 2

[30] It is the contention of Mr. Gordon on this ground that the judge relegated to an executive body the sentencing court's discretion to determine the severity of the punishment to be inflicted on the offender.

[31] Counsel's submission was that the judge fell into error when, according to him, she "suggested that with the availability of the Constitution's Section 78 Prerogative of Mercy by the Local Privy Council in addition to Rule 42 of the Prison rules which facilitates a 4 yearly review by the Governor General for remission purposes and the conditional release available at Section 53 that the sentence imposed would not breach the Applicant's right under section 15 of the Constitution of Barbados not to be subjected to inhumane and degrading punishment."

[32] Mr. Gordon argued that this was an error given that a non-judicial body should not be the party to determine the severity of the sentence of an individual. Therefore, the judge's suggestion of the above options showed the unwillingness of the court to be the body to review the sentence and relegated this process to the executive arm. He concluded that the judge abdicated her role in the sentencing process, thereby relegating the function of determining the certainty of the sentence to the local Privy Council and the Prison authorities which amounted to a breach of the separation of powers.

[33] In response, Mr. Blackman submitted that the judge, having considered all the evidence adduced, imposed on the appellant sentences that were proportionate to the seriousness of the offences. The imposition of the sentences signalled the end of the judicial process.

[34] Counsel contended that the judicial role can be distinguished from that of the local Privy Council in that the judicial role is to determine what punishment an offender deserves, whereas the grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves.

[35] It was Mr. Blackman's further submission that the judge, having imposed sentence, was merely advising the appellant of the legal options available to him after the completed sentencing process.

DISCUSSION

[36] The functions carried out by the judiciary and the local Privy Council are different and distinct. The role of a sentencing judge is to determine the type of punishment which should be imposed on an individual who has contravened the laws of Barbados, paying due regard to all relevant legislation enacted by Parliament, decisions given by this Court and the CCJ and appropriate sentencing guidelines.

[37] In the case of the Privy Council, that body's function is set out in **section 78** of the **Constitution**. This function is executive in nature, not judicial. For, as was stated by this Court in **Mormon Scantlebury v R 68 WIR 88**:

> "…when the Governor-General, advised by the Mercy Committee, is exercising powers conferred by s.78 of the Constitution, he is performing executive functions. Under rule 42 of the Prison Rules, review of the sentences of prisoners serving more than 4 years' imprisonment at four yearly intervals

> (but not of those detained during the Courts' pleasure) can be equated with the powers vested in the Mercy Committee under paragraphs (c) and (d) of s. 78 of the Constitution. It is reasonable to assume, for example, that before the Mercy Committee may "remit any part of any punishment imposed on any person" in accordance with s.78 (1) (d), it must necessarily 'review' the sentence to determine its suitability for remission. But the sentences in the cases to which rule 42 applies have already been fixed by a court of competent jurisdiction. The measure of punishment has been settled judicially. The process of justice has been completed; considerations of mercy and discounting of any part of the sentence may begin after 4 years and at four-yearly intervals."

[38] In our opinion, the judge's comments informed the appellant about the available methods by which he could obtain amelioration of his sentences. However, as we have acknowledged in our discussion of ground 1, the imposition of a life sentence is predicated on a determination which is subject to change at a later date in light of the recommendation of the CCJ in **Renaldo Alleyne**. As such, as previously stated, the matter of the setting of a tariff should be firmly rooted in legislation.

Ground 3

[39] On this final ground, the appellant's complaint is that the sentences are manifestly excessive, having regard to his early guilty plea and the fact that there was no contested trial.

[40] Counsel submitted that the utilitarian value of a guilty plea to the criminal justice system should generally be assessed in the range of a 10-25 percent discount on sentence. As such, the primary consideration in determining where in the range a particular case should fall is the timing of the plea. Thus, a guilty plea ought to be categorised as a mitigating factor, thereby lessening the sentence which is imposed. In this instance, the appellant pleaded guilty at the earliest opportunity.

[41] Counsel maintained that the sentence of life imprisonment should be imposed only in those cases which on the facts of the offence are the most extreme and exceptional: **Trimmingham v R [2009] UKPC 25**. He urged this Court to find that this case does not fall into the category of **Hodgson (1967) 52 Cr App R 113**, **R v Dempster (1987), 85 Cr. App R 176**, **Chapman (2000)** or **Oral Cummins v R, Criminal Appeal No. 56 of 1995**. He contended that this matter falls within guideline 2 of the **Pierre Lorde** Guidelines.

[42] Mr. Gordon's final submission was that, in light of the appellant's co-accused being given a fixed sentence of 25 years after a contested trial, the appellant should have been given a determinate sentence, especially since he displayed remorse and did not waste the court's time by entering a guilty plea.

[43] Mr. Blackman countered Mr. Gordon's submissions on this ground in this way. Counsel submitted that the sentencing judge considered the relevant

principles of sentencing, the circumstances of the commission of the offence, the circumstances of the appellant including his remorse, the presentence report, and the mitigating and aggravating factors and then imposed sentences which were proportionate, individualised and commensurate with the seriousness of the offence. The judge also considered the psychological report, the antecedent history of the appellant, the criteria for the imposition of a life sentence and the escalation in the severity of the offences committed by the appellant.

[44] Counsel contended that the appellant had failed to show that the sentences were wrong in principle, manifestly excessive, disproportionate or that the sentencing judge made a material error of fact or law.

[45] In relation to the contention that the judge failed to properly acknowledge the appellant's guilty plea, counsel submitted that the sentences were indeterminate sentences and not determinate sentences which would normally attract a discount on the sentence imposed: **Teerath Persaud v R [2018] CCJ 10**. Therefore, consideration of the grant of a discount is incompatible with an indeterminate sentence.

DISCUSSION

[46] In **Renaldo Alleyne**, the CCJ made the following observations at para [31] on the issue of a discount in relation to an indeterminate sentence:

> "[31] …There can be no doubt that a discount for an early guilty plea is appropriate and warranted where a sentence for

> determinate number of years is contemplated and appropriate… But the situation is entirely different where an indeterminate sentence such as the sentence of death or of life imprisonment is properly imposed. A discount for an early guilty plea is wholly incompatible with such sentences."

[47] The CCJ continued at para [34]:

> "[34] …In deciding upon the appropriate sentence, the judge must consider all the aggravating and the mitigating factors, the latter of which will include, where factually relevant, an early guilty plea. But it is quite another thing to suggest that the mere fact of the early guilty plea suffices to take a life sentence off the table. To accede to such a suggestion would in effect empower an accused or a convict with a veto over possible sentencing options which would be inconsistent with the proper sentencing principles. In considering the suitability of any sentence the judge must give due consideration to any early guilty plea. For example, it could well be that in appropriate cases the fact of an early guilty plea, especially if accompanied by evidence of genuine remorse, could save a convicted person from a life sentence. But it is equally possible that a judge, having regard to the totality of the evidence may, even in the face of an early guilty plea, nevertheless properly impose a life sentence for manslaughter. As Lord Lane CJ said in the case of *Sharon Elizabeth Costen*, having examined the principle of the discount, there are certain exceptions to the general rule that discount will be allowed for a guilty plea; the first and most important exception is the protection of the public and where it is necessary

> that a long sentence should be passed in order to protect the public, a guilty plea may not result in any discount."

[48] As can be seen from the above, where an indeterminate sentence is imposed, an offender does not, as a general rule, benefit from a discount for an early guilty plea.

[49] With regard to the contention that the sentences are excessive, an examination of the record reveals the following. The trial judge determined that the offences committed by the appellant were deserving of a custodial sentence in accordance with **section 35(4)** of **Cap. 139**. She then went on to assess the evidence in light of **section 36**, to determine the length of sentence. The judge considered the **Pierre Lorde Guidelines** and found that the circumstances of the case would mostly fit into guideline 1 but did not fit squarely within that band. She considered the aggravating factors and concluded that the nature of the offences was such that a very long sentence was appropriate in the circumstances.

[50] The trial judge then went on to examine the criteria necessary to determine the appropriateness of a life sentence and found that the criteria were satisfied and that it was necessary to protect the society from the appellant. The judge stated further at p 220 of the record that she was satisfied that "given the horrendous double killing which occurred in this case, I have the flexibility within guideline one, in the exercise of my discretion, even in a case of a plea of guilty to impose life sentences for these two violent

manslaughter offences, where death was caused by firearm and where the facts are on the borderline of murder with no mitigating features; and especially where the Hodgson criteria have also been clearly shown to have been established."

[51] We are of the opinion that the judge complied with the requirements of **Cap. 139** and that she properly exercised her discretion when she determined that sentences of life imprisonment were the appropriate sentences to impose on the appellant, having regard to all the circumstances of the case.

[52] The final matter is the question of the appropriate recommendation for the minimum period of incarceration to be served by the appellant, in light of the CCJ's decision in **Renaldo Alleyne**. The aggravating factors of the offence are that the appellant used a firearm in the process of carrying out a robbery and that the firearm was used to take the lives of 2 persons who were defending their property. Two members of that family died as a result of the appellant's actions. The aggravating factors relating to the appellant are his previous convictions including one for aggravated burglary. In addition, the psychological report indicates that the appellant suffers from problematic personality features and will be a danger to society for an indeterminate period of time. The psychologist expressed the view that the appellant is a candidate for immediate psychotherapeutic intervention. As

for the mitigating factors, the appellant pleaded guilty and expressed remorse.

[53] We have taken all these factors into account, as well as the principles of sentencing and the possible rehabilitation of the appellant and we have concluded that we should recommend a minimum period of incarceration. Our recommendation is that the appellant should serve a minimum period of 20 years before any review takes place.

[54] It is hoped that the necessary legislative amendments would be made in the near future in keeping with the CCJ's recommendations.

DISPOSAL

[55] In view of the foregoing:

1. The appeal is dismissed.
2. The appellant should not be eligible for release before serving a minimum period of 20 years in prison.
3. The time spent on remand should be deducted from that minimum period.

Chief Justice

Justice of Appeal Justice of Appeal