COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

CRIMINAL LAW DIVISION

INFORMATION NO. 2015/CRI/VBI/133[B]/11

REGINA

v

DEVAUGHN HALL

BEFORE:

The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES:

Mr Neil Brathwaite and Mrs Erica Kemp for the Crown

Mrs Jethlyn A Burrows for the defendant

JUDGMENT ON SENTENCING

GRAY EVANS, J

Introduction:

1. By a voluntary bill of indictment, as amended, No. 329[A]/11/2015, Devaughn Hall, was charged along with two others with two counts of murder and one count of armed robbery. The particulars being that they being concerned together and with others did murder Barry Johnson and Sheena Johnson contrary to sections 290(2)(d) and 291(1)(a) of the Penal Code, chapter 4; and, being armed with offensive weapons, to wit, firearms, did rob Barry Johnson of one set of keys and a silver 2003 GMC truck valued at $8,000.00 the property of Barry and Sheena Johnson.

2. On 7 May 2018 Devaughn Hall was found guilty and convicted of the aforesaid charges by the unanimous verdict of a 12-person jury.

The facts

3. The facts led by the Crown are that on 12 September 2015, sometime around 7 p.m., Devaughn Hall, the Convict, and three other men went to the home of Barry and Sheena Johnson in Holmes Rock for the purpose of committing armed robbery of drugs and money. While the four men, three of whom were armed with firearms, lay in wait in nearby bushes, Mrs. Sheena Johnson came home. The men continued waiting until Mr Johnson arrived home, sometime later.

4. Video surveillance footage from the Johnsons' residence shows Mr. Barry Johnson approaching the front door of his home and being rushed by four masked men approaching from the side of the house. The men accosted Mr. Johnson, who managed to open the door and get inside the apartment. The men dragged Mr Johnson back outside and held him at gunpoint on his knees on the ground near the front entrance of the home.

5. Mrs. Sheena Johnson, who was in the house at the time, was brought from a bathroom to the front room/hallway of the house by one of the men. The men then searched the Johnson's home and truck but found no drugs or money. As the men were about to leave the residence, one of them shot and killed the Johnsons.

6. Video surveillance footage of the incident shows the masked gunman who had earlier been holding Mr Johnson at gun point, shoot him in the head. At the time Mr Johnson was kneeling on the ground in front of his residence. The video also shows the gunman then turning towards the front door of the Johnson's residence, firing several shots into the doorway, then turning and running away.

7. The four men left the scene in the Johnsons' truck.

8. The following day, 13 September, 2015, sometime around 8 a.m. the Johnsons' neighbour, Ms. Gail Zamor, discovered the dead bodies of Mr. and Mrs. Johnson – Mr Johnson's was on the ground just outside the front door and Mrs Johnson's was in the hallway just inside the front door of the residence. The police were called. An investigation was launched. The Johnsons' truck was abandoned by the men and later found by the police who also recovered the Johnsons' keys and Mr Johnson's work-issued radio in bushes near the abandoned truck.

9. Devaughn Hall along with his then alleged accomplices were subsequently arrested, questioned and charged as aforesaid.

10. Autopsies were performed on the deceased. The pathologist concluded that Barry Johnson died as a result of a single gunshot wound to the head and Sheena Johnson died from multiple gunshot wounds including a gunshot wound to the head.

11. Two of the Convict's accomplices, Allan Alcime and Virgill Hall, who were originally charged with the Convict and others, entered into plea agreements with the Crown whereby they pleaded guilty to armed robbery and were convicted and sentenced to 12 years and 10 years respectively, at the Department of Corrections. They also gave evidence for the Crown. Both of them identified the Convict, Devaughn

Hall, as the shooter. Mr Alcime admitted, and Mr Virgil Hall confirmed, that the four men left the scene of the incident in the Johnsons' truck which, at the time, was driven by Mr Alcime.

The Law

12. Prior to 2011, by Bahamian law, the death penalty was the mandatory sentence for the crime of murder. However, in the case of Forrester Bowe and Trono Davis v The Queen, the Board in its decision delivered on 8 March 2006, advised Her Majesty that section 312 (now 291) aforesaid should be construed as imposing a discretionary and not mandatory sentence of death.

13. Then by a 2011 amendment to the Penal Code, section 291 of the Penal Code was amended to provide, inter alia, that "(1) Notwithstanding any other law to the contrary— (a) Every person who is convicted of murder falling within section 290(2) (a) to (f) shall be sentenced to death or to imprisonment for life."

14. Section 290(2) (a) and (f) of the Penal Code provides, inter alia, as follows:

> "(2) Every person who is convicted of murder committed in any of the following circumstances shall be sentenced in accordance with section 291(1), that is to say—
>
> (a) The murder of—
> i) …
> (b) …
> (c) Any murder committed by a person in the course of or furtherance of –
> i) Robbery
> ii) …
>
> and any other felony
>
> (d) The murder of more than one person

15. Following the decision in Forrester Bowe and Trono Davis v The Queen supra, the then Chief Justice, Sir Burton Hall, issued Practice Note No. 1 of 2006 in which he directed, inter alia, that counsel for the Crown is to inform the court no later than the date of conviction of the person affected that the Crown will seek the imposition of the death penalty and where the Crown so indicates, the trial judge will, at a later date to be fixed, convene a sentencing hearing in accordance with the provisions of Section 185 of the Criminal Procedure Code, Ch. 91.

16. The learned Chief Justice also directed that the trial judge is to conduct the sentencing hearing as the circumstances of the particular case require, and is at liberty to be guided by principles evolved by courts in other jurisdictions.

17. Those directives were subsequently incorporated in amendments to the Penal Code and the Criminal Procedure Code at section 291(3) and section 185 respectively, as guidelines for conducting sentencing hearings.

18. Section 291(3) of the Penal Code provides that before sentencing a person under subsection (1), the court shall hear submissions, representations and evidence, from the prosecution and the defence, in relation to the issue of the sentence to be passed.

19. And section 185 of the Criminal Procedure Code (Amendment) Act, 2011 provides as follows:

> (1) The court may, before handing down a sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be handed down and may receive any relevant representation from the victim or otherwise hear counsel for the defence and the prosecution on any mitigating or aggravating circumstances that may be relevant.
>
> (2) For the purposes of this action, "victim" in relation to an offence means—
>
> (a) the person to whom harm is done or who suffers physical or emotional loss as a result of the commission of the offence;
>
> (b) the spouse or any relative of that person in paragraph (a) or the guardian of that person where, as the case may be, he is dead or otherwise incapable of making a statement referred to in subsection (1).

Principles and procedures

20. The principles by which a sentencing court are to be guided when considering the death penalty as a sentencing option, as I understand them and as gleaned from the authorities cited are as follows:

1) The power to impose the death penalty is discretionary: Forrester Bowe and Trono Davis v The Queen supra; section 291 of the Penal Code;
2) The murder must fall within one of the categories/classes authorised by law for the imposition of the death penalty: Patrick Reyes v The Queen supra; Section 290(2)(a) to (f) of the Penal Code;
3) The Crown must give notice of its intention to seek the death penalty no later than the day of conviction: Practice Direction No. 1 of 2006
4) Even when the murder falls within one of the categories/classes authorised by law for the imposition of the death penalty, the death penalty should be imposed only in the most exceptional and extreme cases of murder – the worst of the worst; the rarest of the rare: Moise v The Queen supra; Pipersburgh and Anor v The Queen (Belize) supra; Trimmingham v The Queen supra; Max Tido v The Queen supra; and Ernest Lockhart v The Queen supra.
5) In considering the nature and gravity if the offence, that is, whether a particular case falls into the category of the worst of the worst and the rarest of the rare, the judge should compare it with other murder cases

and not with ordinary civilized behavior. Moise v The Queen supra; Pipersburgh and Anor v The Queen (Belize) supra; Trimmingham v The Queen supra; Max Tido v The Queen supra; and Ernest Lockhart v The Queen supra.

6) The death penalty should not be imposed without a psychiatric and a comprehensive social inquiry report: Earlin White v The Queen supra; Regina v Angelo Brennen.

7) Mitigating and aggravating factors must be taken into account. Sections 291(3) and section 185 of the Criminal Procedure Code.

8) The judge must take into account the personal and individual circumstanes of the convicted person, including the character and record of the Convict. Pipersburgh and Anor v The Queen.

9) The judge must be satisfied that there is no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death: Moise v The Queen supra; Pipersburgh and Anor v The Queen (Belize) supra; Trimmingham v The Queen supra; Max Tido v The Queen supra; and Ernest Lockhart v The Queen supra;

10) The court must give reasons for its decision. See Bachan Singh v State of Punjab [1979] INSC 104(4 May 1979); 1980 AIR 267; 1980 SCR(1) 645; 1980 SCC(1) 754.

21. As indicated, in the case of Forrester Bowe v Trono Davis, their Lordships found that section 312 (now section 291) of the Penal Code is to be construed as imposing a discretionary and not a mandatory sentence of death.

22. It is accepted that, on the evidence, this case falls within the provisions of section 290(2) sub-paragraphs (c) and (d) in that the murders of the two deceased victims, Barry Johnson and Sheena Johnson were committed during the course of an armed robbery.

23. Immediately upon Devaughn Hall's conviction, learned Counsel for the Crown, Mr. Neil Brathwaite, gave notice of the intention of the Crown, with respect to the two murder counts, to seek the death penalty pursuant to section 290(2)(d) of the Penal Code (Amendment) Act, 2011.

24. The Court directed that probation and psychiatric reports be prepared for use at the sentencing hearing, which was set for 5 July 2018. Both of those reports have been received and made available to the parties.

25. After several adjournments for varying reasons, the sentencing hearing commenced on 13 September 2018 on which date, the Court, heard from Dr John Dillett, Consultant Forensic Psychiatrist and Director of Forensic Mental Health Services, who prepared the psychiatric report with respect to the Convict; Mrs Wynelle Goodridge, Chief Probation Officer, Department of Rehabilitative/Welfare Services, who prepared the probation report with respect to the Convict; and Mrs Candy Johnson, a relative of the deceased victims.

26. Counsel's submissions were heard on 20 September 2018 and the matter adjourned to 24 September 2018 for judgment.

The psychiatric report

27. Dr Dillett reported that Devaughn Hall presented as an adult male who has been charged and convicted of murder and is presently awaiting sentencing. Prison records show that he had two previous admissions to the Bahamas Department of Corrections for causing grievous harm in 2012 and armed robbery in 2014; that hospital records show no prior admissions to Sandilands Rehabilitation Centre and Mr Hall denied any admissions to the Diah Ward in Freeport or contact with any mental health services, locally, regionally, or internationally.

28. In Dr Dillett's opinion, Devaughn Hall is able to comprehend the nature of, and to participate in, the sentencing proceedings.

29. Dr. John Dillett reported that Devaughn Hall admitted to having occasionally used marijuana between the ages of 17 and 19 years of age; and while he denies having used other illegal drugs, he also admits to, since adolescence, drinking alcoholic beverages occasionally.

30. As for Devaughn Hall's mental status, Dr Dillett reported that when he met with him Devaughn Hall was cooperative; his physical appearance, orientation to place, person and time, as well as his speech, were all normal; his thought processes were intact and thought content with no obvious psychopathology; that his perception analysis revealed no evidence of hallucinations or other phenomenon and his cognitive skills were generally intact; and his insight and judgment were satisfactory.

31. Dr Dillett said that when interviewed, Devaughn Hall described his mood as "down" and he noted that his ability to express emotions appeared to be blunted. Dr Dillett explained that it was common for persons who are incarcerated and convicted of serious crimes, because of adjustment issues, to be melancholic, exhibiting some mild signs of depression, perhaps not sleeping well, fatigued and tired.

32. Dr Dillett opined that Devaughn Hall does not meet criteria for any formal Psychiatric Disorder currently; that while he has a lifetime history of Marijuana use, which the doctor explained simply meant that Mr Hall admits to having used marijuana at some point in his life, that was not considered to be of major significance due to the length of use and quantity consumed. Further, that while Mr Hall displays some traits of antisocial personality, the evidence was insufficient to conclusively make that diagnosis; that is, that although there were certain things in Mr Hall's history that were suggestive, they were not sufficient to definitively make a diagnosis.

33. In that regard, Dr Dillett said that antisocial personality encompasses a certain level of affinity for violence; characteristics of breaking laws or boundaries within a society; showing lack of sympathy, empathy or remorse for the persons affected by their actions; that generally speaking persons develop traits and symptoms of the disorder in adolescence and it is not uncommon for them to have been either expelled or suspended from school for certain types of infractions and perhaps having an affinity for gang involvement and that such behavior carry over to early adulthood.

34. According to Dr Dillett, while Devaughn expresses sorrow that a life was taken, he is not remorseful, he maintains his innocence, he denies involvement in the crimes for which he has been convicted, and as such he takes no responsibility therefor.

35. In response to counsel for the prosecution's question as to the likelihood of a person who in the face of overwhelming evidence, including testimony of two of his accomplices, that he was the shooter yet expressing no remorse, being reformed, Dr Dillett said that while it is not uncommon for persons who have been convicted to maintain their innocence, where the evidence is overwhelming and the person is indeed guilty of the crime, a lack of remorse could be a sign of someone who is trying to evade punishment and may be a sign of potentially significant issues such as antisocial behavior or psychopathy. However, he reiterated that he did not have evidence to permit him to say definitively that Mr Hall fits any of the categories and in response to counsel for the defence's question as to whether he knew of any instance where someone who maintains his innocence to show remorse, Dr Dillett said it was not uncommon for persons who maintain their innocence not to show remorse.

36. In response to a question from the court as to whether he could say, other than remorse, what may be indicators of a person's likelihood of being reformed, Dr Dillett said that those factors include: a person's age; the type and level of family, community and social support he may have; whether or not he is insightful, both intellectually and emotionally, and actually can see inside himself and realize that he has a problem, for example, a propensity to break the law or to hurt others, and wish to do something about it; that if a person who has a problem does not realize that he does, that would be a barrier to reformation and such a person would need a lot of work and assistance to develop that insight.

37. Dr Dillett noted that other barriers to reformation include: substance abuse, serious mental illness (for which a person needs treatment), and paranoia.

38. Dr Dillett also pointed out that while a lack of remorse and lack of insight are major barriers to reformation, if a person develops insight, he can develop then empathy, in which case there is a chance of rehabilitation. So, he said, although a person may not be remorseful at a given point in time, that does not mean he would not develop remorse as times goes on. However, while he believes there is a chance of rehabilitation, in his opinion, the lack of empathy would be an obstacle.

39. According to Dr Dillett, while a propensity and history of severe violence and committing crimes at an advanced age are bad prognostic indicators, if this is the first instance of such a crime being committed, there is an opportunity for reform – perhaps better than someone who may have committed five or six crimes of serious violent impact, as the number of episodes are also important.

40. As for his views on Devaughn's emotional and intellectual insight, Dr Dillett said that Devaughn Hall presented himself as someone who generally was fine; that there were no major issues in his life; that he had been wrongly accused; that other than the fighting in school as an adolescent when he got expelled, Devaughn did not give an impression that he felt that he had any serious personal issues that required help; that he presented himself as someone who is well adjusted and did not have any problems other than this case.

41. In response to a question by counsel for the defendant as to whether someone who showed no remorse can be rehabilitated, Dr Dillett said that he believed that there is always an option for rehabilitation, provided the resources are available and the person is willing.

42. Dr Dillett noted that while it is not uncommon for convicts to maintain their innocence, there are a number of factors that go into that and it is difficult for a psychiatrist to make a judgment because one must recognize the circumstances and generally speaking persons will do what they think is in their best interest for their long-term survival. In that regard, Dr Dillett pointed out that in many of these cases, where the death penalty is on the table, and the conviction is under appeal, and as there are significant legal ramifications for something a person does or say, on the advice of counsel, a person whether innocent or guilty may maintain their innocence on the advice of counsel.

Probation Report

43. Mrs Wynelle Goodridge, reported that in preparation for the report she spoke to a number of persons, including family members of Devaughn Hall and the deceased, a former employer of Devaughn Hall and a colleague who would have interviewed him at the Department Correctional Services.

44. At the date of the report, Devaughn was 25 years old, having been born on 6 January 1993. His parents were not married to each other and he was essentially raised by a single mother. His father did not play an active role in his life. He has two older siblings ages 35 and 36 years old and two children ages 2 and 5 years old.

45. He attended school in Grand Bahama and Miami, Florida. While enrolled in the eleventh grade at Jack Hayward High School in Grand Bahama, he was expelled for fighting, with no academic certification.

46. Nevertheless, at the time of the commission of the crimes for which Devaughn Hall has been convicted he was gainfully employed as a Fire Watch at the Grand Bahama Shipyard earning approximately $550.00 per week. At the time of the incident, he had been working with the Grand Bahama Shipyard for about one year.

47. A former employer described Devaughn as a trustworthy individual with good work ethic and he expressed shock upon learning of his involvement in the crimes for which he has been convicted. He surmised that Devaughn likely “fell into bad company.”

48. Family members described Devaughn as a loving and respectable person who gets along with others; a great father who loves his children and a good provider; an outspoken individual who “gets the job done”; that while he will fight, he would not kill; that committing murder was outside his character. They express surprise that he was even accused of the crimes for which he has been convicted; and say they believe that he is innocent and that he was not given a fair trial.

49. Devaughn’s brother is recorded as having said that he was certain that Devaughn was at home when the offence was committed; and Devaughn’s mother is reported as having said that on the day of the incident he was at the foot of her bed and fell asleep around 10:30 p.m.; that several hours later (4.45 a.m.) he was still asleep.

She is convinced he is innocent and questions how someone who committed such an act would be able to sleep so sound.

50. Devaughn's father said that while he was financially supportive of Devaughn, he was not there for him physically or emotionally while he was growing up. Hence they do not share a close relationship. Devaughn's father said his attempts to offer wise counsel to him while he was still in school were not received and attempts to liaise with his mother in an effort to steer Devaughn along positive paths proved unsuccessful. He is reported as having said that Devaughn's mother always denied his involvement in inappropriate conduct, but that he is not shocked at his son's predicament. In his words: "if you don't hear you will feel".

51. Except for Devaughn's father who said that he "deserves whatever he gets" for his involvement in the offences, other persons interviewed for the report were of the view that a death sentence would not be appropriate and the court, when passing judgment, should take into consideration/bear in mind that Devaughn is the father of two young children.

52. As for the family of the deceased, Mrs Goodridge reports that while bearing no malice towards Devaughn, they were of the view that he should pay for his crimes and should suffer the consequences of his actions.

53. Mrs Goodridge reports further that prior to his arrest and incarceration, Devaughn, a member of the Church of God of Prophecy, attended divine services on a regular basis; and played the snare drums in the church's band. She said Devaughn admitted to drinking beers occasionally. And while he denied smoking cigarettes, he admitted to smoking marijuana for a two year period (2010-2012) but said he realized that the substance was not for him. He denied involvement in gang-related activity and said that his leisure time was spent relaxing with his paramour and their two children; that at the time of his arrest for the present offence he was gainfully employed at the Grand Bahama Shipyard.

54. According to Mrs Goodridge, Devaughn maintains his innocence in this matter and based on the same showed no remorse during his interview.

55. Mrs Goodridge also reported that based on the information she received from the Royal Bahamas Police Force's criminal records office, Devaughn Hall has not been convicted of any criminal offence.

Victim Impact Statement

56. The Court also received a victim impact statement from Ms Candy Johnson, the sister-in-law of the late Sheena and Barry Johnson and daughter-in-law of Althea Johnson, the mother of the late Barry Johnson.

57. Mrs Johnson spoke about the close bond the deceased had with their family members; how so many of them looked up to him and the various roles he played in so many of their lives. As regards Mrs Althea Johnson, Mr Johnson's mother, Mrs Candy Johnson said that Barry and his mother had a very special bond; that he took very good care of her and in addition to ensuring that all of her needs were met, he made it a point to spend time with her every day. Indeed the evidence is that shortly before he was killed, Barry Johnson had visited his mother. Mrs Johnson said that Barry Johnson's

death has left a void not only in their family's life, but also in the life of the Holmes' Rock Community, that cannot be filled; and while the family holds no ill will toward the Convict, they seek justice on behalf of their murdered relatives.

58. The aggravating factors noted by the learned prosecutor are as follows:

1) The convict murdered two persons, a married couple, extinguishing that entire family.
2) The victims were shot in the head.
3) The victims were unarmed.
4) Barry Johnson was tortured, humiliated and beaten.
5) Sheena Johnson was a high school teacher who lived and worked in her community. She helped young people. She was a contributing member of society; contributing to the education of young people.
6) Barry Johnson was a supervisor at the Freeport Container Port. He was a contributing member of society.
7) Barry Johnson ensured that his mother was taken care of and now that he is gone, as of 2015 he can no longer care for his mother.
8) Barry Johnson was a father figure to his nieces and nephews, they no longer have a mentor..

59. The mitigating factors noted by the learned prosecutor and accepted by counsel for the Convict are as follows:

1) The age of the Convict;
2) The fact that he was gainfully employed at the time of the incident;
3) He has no convictions;
4) He has two very young children

Submissions

60. The learned prosecution makes the following observations and or submissions:

1) This is a fit and proper case for the imposition of the death penalty in the case of the Convict, Devaughn Hall, the mastermind behind the crime - a senseless, horrendous and unimaginably callous crime;
2) The Convict showed no mercy to Barry and Sheena Johnson in the way they were executed. The offences were exceptionally diabolical;
3) Murder and armed robbery are the most serious offences against the person;
4) The Convict's insistence in denying his crime in spite of the evidence stacked against him presents a grave danger to society as one cannot be rehabilitated if one does not first admit to his wrongdoing;
5) The Convict must suffer death in the manner authorised by law because he committed two murders in the course of an armed robbery. This is among the worst types of murders;
6) There is no reasonable prospect of reform of the convict and the object of punishment could not be achieved by any means other than the ultimate sentence of death;

7) The convict's personal circumstances give insufficient reasons for imposing on him the alternative sentence of imprisonment for life;

8) The aggravating factors outweigh the mitigating factors;

9) If the court reasonably believes that it would be unduly severe to sentence the Convict to suffer death, then the Court should sentence him to imprisonment for life.

61. In support of the Crown's position, the learned prosecutor relied on/cited a number of cases including the following: Forrester Bowe and Trono Davis v The Queen, Privy Council Appeal No. 44 o 2005; Earlin White v The Queen, Privy Council Appeal No. 0101 of 2009; Regina v Angelo Brennen, SCCrimApp Side No. 9 and 10 of 2007; Patrick Reyes v The Queen, Privy Council Appeal No. 64 of 2001; Trimmingham v The Queen [2009] UKPC 25; Bachan Singh v State of Punjab [1979] INSC 104(4 May 1979); 1980 AIR 267; 1980 SCR(1) 645; 1980 SCC(1) 754 a case from the Indian Court of Appeal; Keith Jones v Regina (Court of Appeal No. 11 of 2007); Regina v Vincent Dean (Court of Appeal No. 7 of 2008); and R v Ernest Lockhart (PC No. 0050 of 2010)

62. Counsel for the Convict makes the following observations and or submissions:

1) The crown has not satisfied the court that there are special or sufficient reasons for inflicting the extreme penalty of death or life imprisonment in the case of Devaughn Hall;

2) The two murders are not among the worst types of murders and to impose a sentence of death in those circumstances would be manifestly harsh and excessive;

3) Given the probation and psychiatric reports, there is no reason to assume that Devaughn Hall is incapable of rehabilitation;

4) Not being remorseful does not mean that one is capable of rehabilitation;

5) A sentence of 30 to 40 years on each murder count and 15 years on the armed robbery charge, to run concurrently in the circumstances would be appropriate;

6) A review of local cases in which defendants were sentenced for murder revealed the clear pattern that has emerged in The Bahamas is to impose a term of years and in some instances a term of life;

7) In almost every instance where the judge imposed a terms of years for the murder, if the conviction was not quashed the sentence was affirmed;

8) However, in each case where the death penalty had been imposed, on appeal, a life sentence or a term of years was substituted therefor;

63. In support of the Convict's position, learned counsel for the Convict relied on/cited the following cases from the Court of Appeal: Rashid Dean v Regina SCCrApp No. 43 of 2014; Thaddeus Williams Jr v Regina SCCrApp No. 187 of 2017; Errol Knowles v Regina SCCrApp No. 79 of 2017; Ormond Leon v Regina SCCrpp No. 51 of 2016; Judson Mackey and Tristain Deveaux v Regina SCCrApp No. 43 of 2014; and Serrano Adderley v Regina SCCrApp No. 23 of 2014.

64. It is accepted that when considering whether or not to impose the death penalty the starting point is the presumption in favour of the unqualified right to life. See the judgment of Barrow JA in Trimmingham v The Queen [Criminal Appeal No. 32 of 2004] (13 October 2005) (Saint Vincent and The Grenadines) where he said:

> "22. The unqualified right to life that the cases affirm means that there is no mandatory death penalty. It means as well that there must be no implicit approach that a bad case of murder will attract the death penalty unless there are mitigating circumstances. The death penalty can only be

imposed if the judge is satisfied beyond reasonable doubt that the offence calls for no other sentence but the ultimate sentence of death."

65. In the same case, on appeal to the Privy Council (Trimmingham v R (St Vincent and the Grenadines [2009] UKPC 25 (22 June 2009), Privy Council Appeal No. 67 of 2007, their Lordships noted at paragraph 17 that, by the above comments Barrow, JA "meant, as he stated in succeeding paragraphs, that it will be only in the worst and most extreme cases that the death penalty should be imposed, and it has to be shown that there is no other penalty that may suffice to do justice to the case."

66. Similar sentiments had been earlier expressed by Rawlins, JA in the case of Harry Wilson v The Queen Court of Appeal St. Vincent and the Grenadines No. 30 of 2004, where, after referring to a line of previous cases dealing with the issue of sentencing in murder cases, he said at paragraphs 15 and 16:

"15. …The foregoing cases establish that the first principle by which a sentencing Judge is to be guided in these cases is that there is a presumption in favour of an unqualified right to life.

16. The second consideration is that the death penalty should be imposed only in the most exceptional and extreme cases of murder. At the hearing the convicted person must raise mitigating factors by adducing evidence unless the mitigating factors are obvious from the evidence given at the trial. The burden to rebut the presumption then shifts to the Crown. The Crown must negative the presence of mitigating factors beyond a reasonable doubt. The duty of the sentencing judge is to weigh the mitigating and aggravating circumstances that might be present, in order to determine whether to impose a sentence of death or some lesser sentence"

67. This worst or the worst or most exceptional cases refrain is reflected in a long line of cases in this jurisdiction as well as other Caribbean jurisdictions and, of course, the Privy Council in cases emanating from such jurisdictions.

68. Recently in the case of Ernest Lockhart v The Queen [2011] UKPC 33 (a case from this jurisdiction), reiterated that the death penalty should only be imposed in the most extreme and exceptional murders which are "the worst of the worst" or "the rarest of the rare" and only after determining the question of the killer's possibility of reform. Lord Kerr, in delivering the judgment of the Board, said at paragraph 6:

"What were described as "the two basic principles" that applied to the question whether the death penalty should be imposed set out by the Board in Trimmingham v The Queen [2009] UKPC 25 in the following passages from paras 20 and 21:

"20. Judges in the Caribbean courts have in the past few years set out the approach which a sentencing judge should follow in a case where the imposition of the death sentence is discretionary. This approach received the approval of the Board in *Pipersburgh v The Queen* [2008] UKPC 11, and should be regarded as established law.

> 21. It can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, 'the worst of the worst' or 'the rarest of the rare'. In considering whether a particular case falls into that category, the judge should of course compare it with other murder cases and not with ordinary civilised behaviour. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled."

69. At para 7 of the judgment, Lord Kerr continued:

> "In *Max Tido v The Queen* [2011] UKPC 16, the Board acknowledged that difficulties can arise in deciding which cases warrant the soubriquet/nickname/being called, "the worst of the worst" or "the rarest of the rare". It is quite clear, however, that only the most exceptional will qualify. Attempting to define which will come within this egregious category is not easy and one must guard against the risks that attend over-prescription in a field that defies precise classification.

Submissions

70. Counsel for the prosecution submits that this is a fit and proper case for the imposition of the death penalty in the case of the Convict, Devaughn Hall, who, she says, was the mastermind behind the crime, a senseless, horrendous and unimaginably callous crime. She argues that this case is among the worst types of murders and submits that there is no reasonable prospect of reform of the convict who continues to maintain his innocence and shows no remorse. In her submission the aggravating factors outweigh the mitigating factors and the object of punishment could not be achieved by any means other than the ultimate sentence of death. Furthermore, counsel submits, the convict's personal circumstances give insufficient reasons for imposing on him the alternative sentence of imprisonment for life. Counsel for the Crown submits further that, having regard to the brutal slaying of two innocent people, the manner of the killings, and the impact the deaths have had on loved ones, the murders of Barry and Sheena Johnson fall to be considered as among the worst of the worst and therefore fit for the death penalty.

71. However, she says, if the court reasonably believes that it would be unduly severe to sentence the Convict to suffer death, then she suggests that the Convict be sentenced to imprisonment for life with respect to each of the murder counts, such sentences to run concurrently.

72. On the other hand, counsel for the Convict pointed out, in all of the Court of Appeal cases which she has cited and or produced, where the death penalty was imposed, upon appeal the same was set aside and substituted by a sentence of life imprisonment or a term of years; and in cases where a term of years was given, those sentences were usually upheld on appeal. Consequently, counsel for the Convict submits, a sentence for a determinate period would be appropriate and in that regard she suggests a period of between 30 and 40 years for each murder, to run concurrently.

Nature and gravity of the offence/Is this the worst of the worst?

73. In the instant case, Devaughn Hall was one of four persons that accosted one of the deceased when he arrived at his home on that fateful night. Three of the men were armed with firearms, a pistol, an assault rifle and a shotgun. They were all masked. The evidence is that the Convict and his accomplices went to the Johnsons' house armed with firearms for the purpose of committing armed robbery, their intended target being drugs and money, neither of which were found. However, while the others were searching the Johnsons' home and truck, Barry Johnson was being held by the Convict, at gunpoint, on his knees on the ground outside his home. He was forced at gunpoint to give up his keys, while his wife, Sheena, was inside the house crying and praying. While no one can know for sure what was going through their minds at the time, I believe it is reasonable to assume that at a minimum they were terrified. The evidence also is that in addition to being held at gunpoint Mr Johnson was also gun butted and slapped the doctor said that he had blunt force trauma injury to his head. Furthermore, this incident happened late at night in the sanctity of the Johnsons' home where they ought to have been able to be safe and feel the safest. Instead they were violated.

74. To add insult to injury, as the masked, armed gunmen, were about to leave the premises, the Convict, seemingly for no apparent reason, after having held the deceased Barry Johnson at gunpoint for several minutes, not only shot and killed him with one shot to the head, but he turned to the doorway of the house and fired several shots, four of which, one to the head, hit the deceased, Sheena Johnson, who had been placed in the hallway by one of the accomplices, killing her as well. The evidence of the co-accused was that there was no need to shoot the people; that one of them attempted to stop the shooting, while another of them fussed the Convict afterward, asking why he shot the innocent people.

75. It therefore appears that the murders of Barry and Sheena Johnson were not only cold and callous, but also senseless and all because of a rumour. Someone heard or believed that Barry Johnson had come into some money and or drugs and they decided that he should not be allowed to keep it; that they would take it and as a result two lives were snuffed out in the precincts and sanctity of their own home – a place where people ought to be able to feel safe – safest.

76. There is no doubt in my mind, having had the opportunity to view the surveillance recording of the incident and to hear the testimony of the accomplices and eyewitnesses to the same, that it must have been a traumatizing experience for Mr and Mrs Johnson, held, as it were, hostage at the mercy of four men, three of whom were armed with firearms, including a rifle and an assault weapon, neither of whom was able to assist the other; and in the case of Mr Johnson to have been gun butted and slapped

by his assailants unable to go to the aid of his wife and not knowing what the men were likely to do.

77. However, regardless as to how horrifying an experience the Johnsons' may have had or how terrible and senseless their killing may, in my view, have been, the question for me as the sentencer is whether or not the murders of Barry and Sheena Johnson are among the "worst of the worst"; the rarest of the rare; or so exceptional that the court should impose the death penalty.

78. In making that determination, the authorities say that I am not to compare the murder with ordinary civilized behaviour, but instead I must compare it with other murder cases.

79. In that regard, I have been referred to a number of local cases in which the death penalty was considered and or imposed, but not upheld on appeal, and while counsel for the prosecution argues that they are all distinguishable from the present case, as counsel for the defendant pointed out, the prosecution has not produced or cited any local cases in which the death penalty had been imposed and upheld on appeal.

80. As indicated, counsel for the Convict referred the court to the Court of Appeal cases of Rashid Dean; Thaddeus Williams Jr; Errol Knowles; Ormond Leon; Judson Mackey and Tristain Deveaux; and Serrano Adderley v Regina where determinate sentences in varying amount of years were imposed.

81. In the case of Rashid Dean v Regina the appellant was convicted of murder and sentenced to 41 years imprisonment at hard labour. The appeal was dismissed and the conviction and sentenced upheld/affirmed.

82. In Errol Knowles v Regina the appellant's sentence "to be detained during the court's pleasure with his detention being reviewed after 20 years", was affirmed. The appellant in that case was a juvenile.

83. In Ormond Leon v Regina, the appellant was convicted of murder and sentenced to 45 years imprisonment less the time spent on remand. On appeal his conviction and sentence was affirmed. There was an element of provocation and the appellant was not the shooter.

84. In Judson Mackey and Tristain Deveaux v Regina, the appellants were convicted of murder and were each sentenced to 40 years less time spent on remand. Their appeals were dismissed and the convictions and sentences upheld.

85. However, as pointed out by counsel for the prosecution, in each of the cases relied on by the Convict, except for the case of Serrano Adderley, there was only one victim and in none of them was the appellant charged with having committed an offence under section 290(2)(a) to (f) of the Penal Code. Hence, counsel for the prosecution submits, and I accept, that each of those cases is distinguishable from the present case.

86. The case of Serrano Adderley v Regina, also cited by counsel for the Convict, and the most recent of the decisions cited by counsel, having been delivered approximately 5 weeks ago, on 17 August 2018, is a case in which the appellant was convicted of two murders and sentenced to two sentences of life to run concurrently. On appeal the life sentences were quashed and determinate sentences of 60 years less time spent on remand were substituted therefor.

87. Counsel for the prosecution submits that the case of Serrano Adderley is distinguishable from the present case for the reason that that case involved provocation and retribution, there having been an earlier altercation between the parties.

88. While I note from the evidence that there was an earlier altercation between the parties, it does not appear from the judgment that the issue of provocation factored into the judge's decision to impose the life sentence or in their Lordship's decision to substitute a determinate sentence of 60 years. Indeed, at paragraph 47 of the decision, it appears that the learned judge was influenced to some degree by the Lockhart and Kendrick decision, and she concluded that that Serrano Adderley's case was not a case that warranted the imposition of the death penalty – hence her imposing the two life sentences.

89. As for the cases referred to by the prosecution, Keith Jones v Regina and Regina v Vincent Dean, decisions handed down in 2008 and 2009 respectively, as I understood Mrs Kemp's submission, those cases were cited not for the purpose of similarity but rather for contrast with the present case.

90. In that regard, in each of those cases, there was a single victim and the sentence was imprisonment for life, which sentences were upheld by the Court of Appeal.

91. As I understand the learned prosecutor's submission, if life imprisonment was the appropriate sentence in those cases, in which there was only one murder, and the murders in those cases "were far less aggravating" than the murders in this case, then given the circumstances of this case, including the fact that there were two murders, the imposition of the death penalty could not, she submits, be "characterized as unduly severe". In her further submission, the death penalty in this case would reinforce the principle of parity as the Convict, she submits, is deserving of a more condign penalty than that meted out in the cited cases.

92. By those submissions, I understood counsel for the Crown to be saying that while she did not produce or refer the court to any local cases in which the death penalty had been imposed and upheld on appeal, given that the murders in this case are, in her view, worse than the murders in the Keith Jones and Vincent Dean cases in which the convicts were given life sentences, the death penalty would be justifiable in this case.

93. In determining whether or not the murders in this case are indeed among the worst of the worst, the authorities, starting with Trimmingham, a case from the Court of Appeal of St Vincent and the Grenadines and the Privy Council; and Ernest Lockhart, a Privy Council case from our Court of Appeal, say that the judge should compare them with other murder cases and not with ordinary civilized behaviour. See also Pipersburgh v The Queen [2008] UKPC 11; Max Tido v The Queen [2011] UKPC 16;

94. So, in Trimmingham, in the course of a robbery, the appellant struck the 68 year old deceased in his stomach causing him to fall on the bank of a rain water ditch. He then threw the deceased in the ditch, cut his throat and his head with the cutlass which he took from the deceased. He next removed the deceased's trousers from the body and wrapped the head in them. He handled the penis of the deceased and made a vulgar remark about it. He slit the deceased's belly, explaining to his accomplice that he did so to stop the body from swelling. He covered up the body and stuffed the pants containing the head into a hole under a plant in a nearby banana field. The sentencing judge held that it was an exceptional and extreme case of murder.

95. On appeal to the Court of Appeal of St Vincent and the Grenadines, Barrow JA said:

> "In the instant case, there was clear evidence that the appellant killed Mr. Browne to prevent him from reporting to the police that the appellant attempted to rob him. The decision to steal the 6 goats that belonged to the deceased was formed after the killing had occurred and so the intent cannot be relied upon as the motive for the murder. The intent to rob the deceased of his money, however, preceded the murder and the concealment of that crime was the motive for the killing. That is sufficient to bring the murder within the compass of the 'particularly reprehensible', as Lord Hope described it (see: *Evon Smith v The Queen,* Privy Council Appeal No. 44 of 2004, from Jamaica, judgment delivered on 14 November 2005). What made that reprehensible murder heinous was the manner of the killing. The old man's throat was cut while he was alive and then his head was cut off and he was eviscerated. It was not just cold-blooded; it was as inhuman as one can imagine. There can be no doubt that it was a killing that the society would condemn as the worst of the worst."

96. Barrow JA also considered the prospect of reform of the defendant. He ruled that there was none and he imposed the death penalty.

97. On appeal to the Privy Council, counsel for the appellant “readily accepted that the appellant’s crime was a brutal and disgusting murder, involving the cold-blooded killing of an elderly man in the course of a robbery. He contended however that it fell short of being in the category of the rarest of the rare. He submitted that the killing did not appear to have been planned or premediated and although the manner of the killing was gruesome and violent, there was no torture of the deceased, nor prolonged trauma or humiliation of him prior to death.”

98. The Board accepted the “correctness” of that contention; opined that it was undeniably a bad ase, even a very bad case of murder committed for gain, but in their judgment decided that it fell short of being among the worst of the worst such as to call for the ultimate penalty of capital punishment. The Board accepted that the appellant in that case behaved in a revolting fashion, but said that that case was not comparable with the worst cases of sadistic killings. They pointed out that the object of keeping the appellant out of society entirely, as had been given by the trial judge as a reason for imposing the death penalty, could be achieved without executing the appellant. The Board, therefore, set aside the death penalty and substituted a sentence of life imprisonment therefor.

99. In Maxo Tido, a Bahamian case that went to the Privy Council, the deceased was only sixteen years old. On the night of 30 April 2002, she and other family members had attended a political rally. They returned home at about 12:15 a.m. The deceased's mother went to bed, leaving the deceased sitting at the dining room table reading. The following morning, the daughter was missing. Her body was later found in a quarry pit. She had severe head injuries which could have been caused by her being struck by a hard object such as a rock or that they could have been the result of a car being driven

over her head. Her body had been set on fire and when it was discovered it was found to have been partially burnt. The trial judge found that the case fell among "the worst of the worst." She imposed the death penalty. The Board opined that whatever "the worst of the worst" or "the rarest of the rare" may mean, it was satisfied that the case did not come within that wholly exceptional category. At para 36, the Board stated:

> "...This was a dreadful crime. A young life was extinguished in brutal circumstances but it is not a case that can be placed alongside the most horrific of murders of which, sadly, human beings are capable. There is no warrant for believing that it was planned, nor is there unmistakable evidence that it was accompanied by unusual violence, beyond that required to effect Miss Conover's killing. There certainly appears to have been sexual contact (spermatozoa having been found on a vaginal swab) but there is no clear indication that she was the victim of a rape. This was, in short, an appalling murder but not one which warrants the most condign punishment of death."

100. So, while this case falls within section 290(2) paras (a) to (f) of the Penal Code, in that it meets the criteria laid down in sub-paragraph (c)(i) and (d), murders committed during the commission of a robbery and murders of more than person, having considered the facts of this case and compared them with other murder cases, and while there is no doubt in my mind that the Convict's act in committing these murders reeks of cold-bloodedness, callousness, and sense-less-ness, given the authorities, as I understand them, I am not able to say I am satisfied beyond a reasonable doubt that the circumstances under which the murders of Barry Johnson and Sheena Johnson, were committed put them in the category of the worst of the worst or the rarest of the rare or the most exceptional when compared to other murders.

101. It has been argued by the prosecutor that one reason for imposing the death penalty on this defendant is because he has shown no remorse in the face of overwhelming evidence which counsel submits is an indication that he cannot be reformed. Of course, counsel for the Convict disagrees and in her submission, lack of remorse in someone who maintains his innocence does not mean that one is incapable of rehabilitation.

102. The truth of the matter is that no one really knows whether or not a person is capable of being reformed or when and how a person may come to a point of remorse for a wrongful act. As Dr Dillett said when asked if someone who showed no remorse can be rehabilitated, there is always the opportunity for rehabilitation, given the resources and a person's willingness; and while a person may not be remorseful or willing at a particular time, those attributes may develop over time.

103. In the words of Jones, JA in the case of Edwards v Regina [2016] 2 BHS J No. 56, another case in which a life sentence was overturned and a determinate term of years substituted: "All persons who appear before these courts deserve an opportunity for redemption." Comments with which I wholly concur and respectfully adopt.

104. So, as I said, I am not persuaded that the murders of Barry and Sheena Johnson are among the worst of the worst or the rarest of the rare, and bearing in mind that that the death penalty should only be imposed in those exceptional cases where

there is no reasonable prospect of reform and the object of punishment would not be achieved by any other means, which in my judgment is not the case in this case, the imposition of the death penalty is not in my judgment, a proper sentence for the murders of Barry and Sheena Johnson, as horrific as they were, as they do not fall into the category of the most extreme and exceptional, the "worst of the worst" or the "rarest of the rare" as envisioned by the authorities.

105. In the circumstances, the Crown's application for the imposition of the death penalty as the sentence in this case with respect to the murders of Barry Johnson and Sheena Johnson is refused.

106. As an alternative to the death penalty, section 291(1)(a) of the Penal Code provides for a sentence of imprisonment for life for offences under section 290(2)(a) to (f) aforesaid and the Crown has suggested that if this court were not minded to impose the death penalty, that life sentences should be imposed instead.

107. Counsel for the defendant suggests in the alternative that given the range of sentences in murder cases over the last 15 or so years, a sentence of between 30 and 40 years would be more appropriate.

108. Section 291(6) of the Penal Code defines "imprisonment for life" as "for the whole of the remaining years of a convicted person's life."

109. However, while the Court of Appeal in cases like Serrano Adderley v Regina accepted, as it had in earlier cases, that a sentence of life imprisonment is one which may be properly imposed on a convict, that Court nevertheless substituted the concurrent life sentences to determinate sentences.

110. In doing so, Isaacs, JA, delivering the decision of the Court said:

> "51. We had regard to the decision of the Court differently constituted in Edwards v Regina [2016] 2 BHS J No. 56 where Jones, JA, writing the majority decision said at paragraph 7:
>
> > "7. In recent years in a series of decisions beginning with Angelo Poitier v Regina supra and most recently in Simeon Brown v R SCCrApp No. 222 of 2013 this court has said that there is nothing inherently wrong in principle with the sentence of life imprisonment. Notwithstanding this fact, the Court has also said that due to the indeterminate and uncertain nature of a life sentence, which may or may not endure for the rest of the appellant's life, it may, in the interest of clarity be more appropriate to give a determinate sentence. The court in doing so will of course take into account all of the aggravating and mitigating factors before giving an appropriate determinate sentence.
>
> "52. At paragraphs 16 and 17 Jones JA stated as a rationale for interfering with the sentence:
>
> > "16. We are satisfied that on the facts of this case a determinate sentence is justified for two reasons. Firstly, the appellant's argument in Lundy's case had nothing to do with the severity of the

life sentence, as advanced in this case. In any event, and importantly, this court must be sensitive to the variety and change of circumstances which may make a sentence unduly harsh. In this regard, obedience to the principles government sentencing is not the same as rigidity. Sentencing decisions should be empirical not dogmatic and we must be willing to change when the facts and circumstances change. Making the correct decision on sentencing is quintessential to the concept of justice and is therefore of the utmost importance.

~~"17. Secondly all persons who appear before these courts deserve an opportunity for redemption. Forty years ago, Lawton LJ in R v Sargeant [1974] 60 Cr.App.R 74 reminded judges of the classical principles of sentencing in the following passage:~~

~~"What ought the proper penalty to be? We have thought it necessary not only to analyse the facts but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind."~~

111. It is, in my view, clear from that dicta and the cases to which the learned Justice of Appeal referred that the trend in that court is toward determinate sentences rather than indeterminate sentences such as life imprisonment when the death penalty is not an appropriate sentence.

112. In Attorney General v Larry Raymond Jones et al SCCrApp Nos 12, 18 and 19 of 2007 the Court of Appeal set down a range of sentences for murder where the death penalty is deemed inappropriate; the range was 30 to 60 years.

113. However, while I agree with counsel for the defendant that in light of the recent cases from the Court of Appeal dealing with sentences for murder, a determinate sentence is preferable, I do not accept thata sentence in the range of 30 to 40 years in this case is appropriate.

The other counts on the information

114. In addition to the two murder counts, the Convict was also charged, tried, found guilty by the unanimous decision of the jury, and convicted of the offence of armed Robbery.

115. Section 339 of the Penal Code provides that:

> 339. (1) Whoever commits robbery shall be liable to imprisonment for fourteen years.
>
> (2) Whoever commits robbery, being armed with any offensive instrument, or having made any preparation for using force or causing harm, shall be liable to imprisonment within the range of fifteen to twenty-five years:
>
> Provided that whoever commits robbery, being armed with any offensive instrument shall, where the offensive instrument is a firearm, be liable to imprisonment for life.

116. Counsel for the crown suggests a prison term of 25 years while counsel for the Convict suggests a term of 15 years.

117. In that regard, I note that one of the Convict's co-accused, Paul Bellizaire, who was also found guilty and convicted of the offence of armed robbery, was sentenced to imprisonment for a term of 25 years.

Sentence

118. So, guided by the recent Court of Appeal decision in Serrano Adderley in which the Court noted that while there is nothing inherently wrong with the sentence of life imprisonment, it may in the interest of clarity be more appropriate to give a determinate sentence, and having regard to all of the circumstances of this case, the personal and individual circumstances of the convict as conveyed by himself, family members and friends in the psychiatric report of Dr Dillett and probation report of Ms Goodridge, the nature and gravity of the offences of which the Convict has been convicted, his character and the fact that he has no prior criminal convictions, the factors which may have influenced the conduct that caused the murder, the design and execution of the murders, and the possibility of reform and social re-adaption of the Convict Devaughn Hall, the aggravating and mitigating factors as well as the plea in mitigation of counsel, DEVAUGHN HALL, (stand)

1) On the first count of the murder of Barry Johnson I hereby sentence you to 60 years
2) On the second count of the murder of Sheena Johnson, I hereby sentence you to 60 years
3) On the third count, armed robbery of truck and keys belonging to Barry and Sheena Johnson, 25 years.

All sentences to run concurrently from the date of conviction with the time spent on remand to be deducted therefrom.

DATED this 24th day of September 2018

Estelle G Gray Evans

Justice