[2024] JMCA Crim 29

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 59/2019

ROLAND BRONSTORPH v R

Hugh Wilson for the appellant

Miss Ashtelle Steele, Janek Forbes and Miss Sharelle Smith for the Crown

13, 14 July 2022 and 31 July 2024

Criminal law – Sentencing – Murder – Whether sentencing judge has a duty to give notice before imposing a sentence of life imprisonment – Whether judge erred in imposing life imprisonment – Principles governing the imposition of life imprisonment – Principles governing the fixing of the pre-parole period (minimum term) – Whether sentence manifestly excessive – The Offences Against the Person Act, ss 2(2), 3(1)(b), 3(1E)

MCDONALD-BISHOP JA

[1] On 31 December 2014, the appellant, Roland Bronstorph, fatally stabbed the deceased, Kenroy Smith, at the Rural Metropolitan Bus Terminus on Darling Street in the parish of Kingston, following an altercation between them arising from the loading of two public passenger vehicles. The appellant was subsequently charged for murder.

[2] He was tried in the Home Circuit Court on divers days in March and April 2019 before a judge ('the learned judge') sitting with a jury. His defence was one of self-defence. The learned judge also left the defence of provocation for the jury's consideration. The jury rejected the defences and returned a unanimous guilty verdict. On 7 June 2019, the learned judge sentenced the appellant to imprisonment for life and ordered that he serve 15 years' imprisonment before becoming eligible for parole.

The case at trial

A. The prosecution's case

[3] The prosecution's case was that, on 31 July 2014, the appellant and the deceased were conductors on public passenger buses that plied the Kingston to Ocho Rios route. The bus on which the deceased was a conductor was parked inside the terminus and was almost full. The deceased's bus had been waiting in the terminus for approximately three hours. The appellant's bus drove into the terminus and the appellant started to call out for passengers. The long delay in leaving the terminus caused all the passengers seated in the deceased's bus to leave and board the appellant's bus.

[4] The deceased left his bus, which was parked over 35 feet away from the appellant's bus, and approached the appellant. Heated words were exchanged between them and the altercation became physical. The men were, however, separated by onlookers, including the Crown's sole eyewitness, Sergeant Irons, an off-duty policeman. Sergeant Irons introduced himself to the disputants as a policeman. He reprimanded the appellant and instructed him to move his bus because the bus was now full. Onlookers took the deceased away from the location where the altercation had taken place.

[5] The appellant moved away from Sergeant Irons and went to the back of his bus. Shortly after, Sergeant Irons heard a commotion coming from the location where the deceased was taken to earlier by onlookers. Sergeant Irons went to the area to investigate the cause of the commotion. He saw the appellant and the deceased in a "tussle". The appellant had a knife in his hand stabbing the deceased. Sergeant Irons saw nothing in the deceased's hands. Sergeant Irons tried to disarm the appellant but was unsuccessful because the appellant was resisting. He managed to secure the assistance of onlookers to disarm the appellant and eventually, the knife fell from the appellant's hand. Sergeant Irons retrieved the knife.

[6] Sergeant Irons observed the deceased fall to the ground with blood coming from his chest. He gave instructions for the deceased to be taken to the Kingston Public Hospital. With the assistance of onlookers, Sergeant Irons escorted the appellant to the

Darling Street Police Station where he handed the appellant over to police personnel on duty there. The knife was also handed over for safekeeping. The appellant, upon being cautioned by Sergeant Irons at the scene, responded by saying that the deceased and his friends had attacked him and that Sergeant Irons was not present when that occurred. Sergeant Irons asked him to show him where he was hit by the deceased and his friends but the appellant did not indicate. Sergeant Irons noticed no marks of violence on the appellant's body.

[7] The deceased succumbed to his injuries the same day. Subsequent post-mortem examination of his body revealed that he had three injuries, namely, (i) a stab wound to the right chest which broke or fractured the third and fourth ribs and penetrated the upper lobe of the right lung and the upper part of the heart; (ii) a stab wound to the left chest, causing the left lung to collapse; and (iii) a stab wound to the front of the right thigh, which was a superficial wound. The cause of death stated was shock and bleeding haemorrhage. The pathologist who conducted the post-mortem examination opined that a severe degree of force would have caused the injury to the right chest and a moderate to severe degree of force would have caused the injury to the left chest. He described those wounds as fatal wounds.

[8] Before the appellant was charged, he was advised that he was a suspect, and upon being cautioned, he responded, "officer a him and him friends them rush me and mi just swing mi knife". The police subsequently interviewed him in the presence of his attorney-at-law, and he did not comment on the questions asked. Following the interview, he was charged with murder, and upon caution, he remained silent.

B. The appellant's case

[9] In his defence, the appellant gave sworn evidence raising the defence of self-defence. He gave his age as 57 years old. He said while he was loading his bus, the deceased approached him and "draped" him, saying "country bwoy, yuh nah load before mi, eenu". He "draped back" the deceased because the deceased had first draped him. A fight ensued and Sergeant Irons parted them. He continued to load his bus and then

about 20 minutes later, he left to purchase a phone card and was returning to his bus, when the deceased and three other men approached him. As he was about to pass the deceased, the deceased attacked him and grabbed his throat. Due to the tight grip of the deceased's hand on his throat, he felt as if he was going to die as he could not breathe. It was then that he took out his knife and flashed it towards the deceased. He said that any stab the deceased received was a result of him (the appellant) fighting for his life.

The appeal

[10] Aggrieved by the verdict and sentence of the court below, the appellant applied to this court for permission to appeal conviction and sentence, which was granted by a single judge. At the hearing of the appeal, the appellant through his counsel, Mr Hugh Wilson, chose not to pursue the appeal against conviction. He sought the leave of the court to abandon the original grounds on which leave was granted by the single judge and to argue instead two supplemental grounds of appeal concerning sentence only. The appellant's application was granted. Therefore, the appeal is restricted to a consideration of the sentence only.

[11] The appeal against sentence proceeded on the two supplemental grounds of appeal formulated in these terms:

> "1. The sentencing judge erred in law in sentencing the appellant to an indeterminate sentence of life imprisonment without prior warning to counsel for the appellant of her intention to do so and inviting counsel to make submissions as to why life imprisonment should not be imposed on the appellant.
>
> 2. The sentencing judge erred in law in imposing on the appellant a term of life imprisonment, which was manifestly excessive having regard to the circumstances of the case."

[12] The supplemental grounds of appeal and the arguments presented in support of them raise questions as to the appropriate procedure to be adopted by a judge who contemplates imposing a life sentence for murder falling within section 2(2) of the

Offences against the Person Act ('OAPA') (which for ease of reference will be referred to as 'section 2(2) murder' in contradistinction to murder falling within section 2(1) which will be termed 'section 2(1) murder') and the circumstances in which it is appropriate to impose a sentence of life imprisonment for section 2(2) murder.

[13] There is some overlap in the arguments presented by Mr Wilson under each of the grounds of appeal. Given the overlapping arguments and this court's usual approach to appeals against sentence, as set out in **Alpha Green v R** (1969) 11 JLR 283 at 284 and **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**') at paras. [42] – [43], the arguments raised by the appellant are most conveniently dealt with under the rubric of two issues, namely:

(1) whether the learned judge erred in her approach to imposing a sentence of life imprisonment; and

(2) whether the sentence imposed was manifestly excessive in the circumstances.

[14] Resolving these issues requires an appreciation of the provisions of the OAPA, which comprise the statutory framework for sentencing in section 2(2) murder cases. Therefore, it is necessary to provide a summary of those provisions and their applicability to the instant proceedings.

The statutory framework

[15] Before 2005, the mandatory sentence for section 2(2) murder was life imprisonment. The sentencing judge was empowered, then, to stipulate a mandatory minimum term of no less than seven years before eligibility for parole (see section 3A of the OAPA, introduced into law by Statutory Instrument 14 of 1992). Under the then-section 3A, a sentencing judge had no discretion to impose any other sentence for the offence. In 2005, Parliament, through the passage of section 3(1)(b) of the OAPA, gave sentencing judges the discretion to impose a sentence for section 2(2) murder ranging from a minimum of 15 years' imprisonment to a maximum of life imprisonment.

[16] It is common ground that the appellant fell to be sentenced under section 3(1)(b) of the OAPA. Section 3(1) reads, in full, as follows:

> "3.— (1) Every person who is convicted of murder falling within–
>
> (a) section 2(1)(a) to (f) or to whom subsection (1A) applies, shall be sentenced to death or to imprisonment for life;
>
> (b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years."

Given the wording of section 3(1)(b), the issue would have arisen before the learned judge as to whether life imprisonment or a determinate sentence would have been more appropriate in the circumstances of the case.

[17] Section 3(1C) of the OAPA goes further to state that a judge who imposes a sentence of life imprisonment pursuant to section 3(1)(b) shall stipulate a period being not less than 15 years which the offender should serve before becoming eligible for parole (see section 3(1C)(b)(i)). Where a determinate sentence is imposed, the judge shall specify a period of not less than 10 years to be served by the offender before he should be eligible for parole (section 3(1C)(b)(ii)). This court has often referred to the stipulated minimum term before eligibility for parole as the pre-parole period of imprisonment. For the purposes of this judgment, reference will be made interchangeably to that period as the 'pre-parole period' or the 'minimum term', which is generally used in other jurisdictions.

[18] Therefore, by virtue of section 3(1)(b) of the OAPA, the appellant could only have been sentenced to life imprisonment or a determinate term of years of not less than 15 years, with minimum terms of no less than 15 and 10 years, respectively.

[19] The issues emanating from the grounds of appeal will now be considered.

Issue (1) – Whether the learned judge erred in principle when she imposed a sentence of life imprisonment rather than a determinate sentence

[20] Mr Wilson submitted that the learned judge erred in principle in her approach to imposing a sentence of life imprisonment, and in so doing, arrived at a sentence which was manifestly excessive in all the circumstances. He points to three bases on which he grounds his submissions, namely (a) the failure of the learned judge to warn counsel of her intention to impose a life sentence and to comply with section 3(1E); (b) the learned judge's misapprehension of her sentencing discretion; and (c) the legal requirements for imposing a sentence of life imprisonment.

[21] The court considers each aspect of these submissions *seriatim*.

A. The failure to warn counsel of the intention to impose a life sentence and to comply with section 3(1E)

[22] The first basis on which the appellant challenges the learned judge's approach to sentencing is that the learned judge was required to give prior warning to defence counsel at trial of her intention to impose a life sentence. Mr Wilson submitted that the learned judge was obligated, both at common law and under statute, to inform defence counsel that she intended to impose a term of life imprisonment. Mr Wilson submitted that by failing to forewarn the appellant that she intended to pass a sentence of life imprisonment, the learned judge deprived the appellant of the opportunity to show cause why life imprisonment should not have been imposed on him. Counsel contended that the learned judge was obliged to invite defence counsel to make submissions as to an appropriate sentence. In support of these submissions, Mr Wilson relied on the principles enunciated in the cases of **R v Paul Birch** (1987) 9 Cr App R (S) 509 and **R v Earl Simpson** (1994) 31 JLR 397 ('**Earl Simpson**') as well as section 3(1E) of the OAPA.

[23] In response, counsel for the Crown contended that the appellant had sufficient opportunity to address the court on the issue of the appropriate sentence to be imposed at the stage at which defence counsel made the plea in mitigation on the appellant's

behalf. Therefore, no prejudice arose from the judge's failure to strictly adhere to section 3(1E) and the common law principles relied on by the appellant.

[24] Mr Wilson is correct in his submission that where life imprisonment is prescribed as the maximum sentence (that is to say it is not mandatory), English common law and sentencing practice ('the common law practice') impose a duty on a judge who is minded to impose a sentence of life imprisonment to so indicate to counsel and invite submissions on the appropriateness of the sentence in the circumstances. The common law was expressed in **R v Morgan** (1987) 9 Cr App R (S) 201). The court noted that in all cases where the judge intends to impose a sentence of life imprisonment, the judge must inform counsel for the defendant that such a sentence was being considered so that counsel could make submissions on it. The court opined that there are many occasions when counsel's assistance can be invaluable to a judge in such difficult circumstances.

[25] The common law practice was recognised by this court and referred to as a "salutary approach" that should be followed in this jurisdiction in the case of **Earl Simpson** at page 402 and **R v Errol Pryce** ('**Errol Pryce**'). These cases, however, did not address the issue in respect of murder. In **Earl Simpson**, the offence was causing grievous bodily harm with intent and **Errol Pryce** was a rape case. Now that the sentence of life imprisonment is a discretionary sentence for section 2(2) murder, that offence now falls to be considered like every other offence in respect of which life imprisonment is the maximum rather than the mandatory sentence.

[26] The rationale behind the common law practice is obvious. The imposition of a life sentence is a significant restriction on the life and liberty of a convicted person. Once imposed, "the sentence of life imprisonment remains on [the convicted person] until they die" (see **R v Foy** [1962] 2 All ER 246). Therefore, even if the convicted person is released from custody on parole, they remain subject to the court's jurisdiction for the rest of their life. This far-reaching impact of a life sentence necessitates a careful approach to its imposition where other suitable sentencing options are available. If a

judge gives notice of his intention to impose a life sentence and invites submissions on the issue, the judge can have the benefit of all the relevant material necessary to arrive at a sentence that fits both the offender and the offence committed (see **Errol Pryce** at page 3).

[27] Section 3(1E) of the OAPA, which Mr Wilson prayed in aid of his submissions, is similar in purpose and effect to the common law practice. The section requires the sentencing judge, in all murder cases, to hear counsel for the defence and the prosecution regarding the sentence to be passed. The section reads:

> "(1E) **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." (Emphasis added)

[28] Against this background, a close examination of the transcript of the proceedings in the Supreme Court reveals that, before imposing the sentence, the learned judge did not give any indication that she was considering imposing a life sentence. Therefore, she did not specifically invite submissions or hear from counsel on the issue of whether she should impose life or a determinate sentence. It is not surprising, however, because the sentencing practice in this jurisdiction regarding section 2(2) murder was never to invite submissions on whether discretionary life imprisonment as distinct from a determinate sentence should be imposed. Generally, that would be left to defence counsel to make the necessary submissions.

[29] Therefore, in keeping with this long-established practice in our courts, the learned judge heard a fulsome plea in mitigation from defence counsel. She also had the benefit of pre-sentence reports that were obtained at the behest of defence counsel. However, she did not hear representations, submissions or evidence on the propriety or otherwise of the life sentence from either the defence or the prosecution. Accordingly, the sentencing procedure did not strictly comply with the common law practice established in **R v Morgan** or section 3(1E) of the OAPA.

[30] In light of these observations, the narrow question arising from Mr Wilson's submissions under this head is whether the non-observance of the common law practice and section 3(1E), amounted to an error of law sufficient to impugn the sentence of life imprisonment. In our view, the learned judge's failure to invite or hear specific representations regarding the imposition of life imprisonment is not fatal. We say so for the following reasons.

[31] None of the cases cited by the appellant supports the view that the failure of a judge to comply with the common law practice or section 3(1E) of the OAPA amounts to an error of law that warrants an interference with the sentence imposed. Indeed, the cases cited by the appellant support the contrary view. In **Errol Pryce**, this court reviewed several English cases, including **R v Morgan** and **Earl Simpson** and concluded that non-compliance with the common law practice has, at most, been referred to as "unfortunate". Non-compliance with the common law practice has not been treated as sufficient to amount to an error of law, thereby providing the basis for a sentence to be set aside in the absence of a finding that the sentence was wrong in principle or manifestly excessive.

[32] Given the similarities in purpose and effect between the common law practice and section 3(1E), the same approach taken in the cases must apply to the learned judge's non-compliance with the section 3(1E) procedure. In this case, defence counsel made a plea in mitigation on behalf of the appellant and so would have had the opportunity to urge on the court the appropriateness of a determinate sentence rather than life imprisonment. Indeed, he ought to have been aware of the sentencing options available to the court, and so make the requisite submissions based on the law as he considered necessary. We accept that he had failed to do so, and so the learned judge could have invited him to make the requisite submissions in keeping with the common law practice and the intendment of section 3(1E). However, in our view, the failure of the learned judge to specifically invite defence counsel to make those submissions is, in and of itself, not fatal to the sentence imposed.

[33] While the wisdom behind the common law practice and section 3(1E) and the practical benefits to be derived from adhering to them are not doubted, failure to comply with them is insufficient to impugn a sentence by way of appeal. This is so because for this court to interfere with the sentence imposed, it must be shown to be manifestly excessive. The question of whether the sentence is manifestly excessive is the subject of inquiry under issue 2 below.

B. The learned judge's misapprehension of her sentencing discretion

[34] The second basis urged by Mr Wilson for the court to interfere with the sentence is that the learned judge misconstrued section 3(1)(b) of the OAPA and sentenced the appellant on the basis that mandatory life imprisonment was the sentence fixed by law for that offence. He contended that, in doing so, the learned judge erred by failing to distinguish between mandatory life imprisonment under section 3(1)(a), which is the sentence for section 2(1) murder, and discretionary life imprisonment under section 3(1)(b), which is one of the sentencing options available for section 2(2) murder. Therefore, the foundation on which the learned judge passed her sentence was flawed and resulted in an inappropriate and excessive sentence.

[35] Having closely read the transcript of the proceedings, we conclude that Mr Wilson's submissions in this regard are based on a misreading of the learned judge's sentencing remarks.

[36] The learned judge explained what she understood to be the confines of her sentencing discretion. At page 348, lines 3-19 of the transcript, she explained:

> "Now, as it relates to the law concerning sentencing options that a Judge has in circumstances like this, the law imposes mandatory penalties for murder. **The first is that in circumstances such as this, which was a domestic depute [*sic*], the sentence can be life with a minimum specification for parole being fifteen years. Also the Court is allowed to impose a specified term of years not being less than fifteen years with the recommendation for parole being not less than ten years.** So those are the options that are available to the Court

> as it relates to sentence, **but at the end of the day, it is a mandatory term of imprisonment**." (Emphasis added)

[37] The learned judge's clear words were that a sentence of imprisonment was mandatory for the murder for which the appellant was convicted, not that a sentence of life imprisonment was mandatory as contended by Mr Wilson. She would have been correct so to conclude because section 3(1)(b) prescribes that the sentence for section 2(2) murder is either life imprisonment or a determinate sentence of imprisonment being no less than 15 years. There is no other statutorily prescribed penalty for section 2(2) murder under the OAPA – a term of imprisonment, whether for life or a determinate period, must be imposed. Although the learned judge did not mention section 3(1)(b), she was evidently guided by its mandate.

[38] It is evident from the learned judge's reasoning that she reminded herself of the two available sentencing options for section 2(2) murder. She chose to impose life imprisonment rather than a determinate sentence. In the circumstances, there was no need for her to distinguish between mandatory life imprisonment under section 3(1)(a) of the OAPA and discretionary life imprisonment under section 3(1)(b). Therefore, we are satisfied that the learned judge's remarks that murder attracted a mandatory term of imprisonment cannot be faulted.

C. The legal principles governing the imposition of life imprisonment

[39] Thirdly, Mr Wilson argued that a sentence of life imprisonment was not appropriate in the circumstances of the case. He contended that the maximum sentence of life imprisonment under section 3(1)(b) is reserved for the worst cases of section 2(2) murder.

[40] Mr Wilson submitted further that a murder will be grave enough to require a life sentence "if it is accompanied by unusual features of brutality or cruelty or by a very high degree of heinousness or where the offence is part of a pattern of violent behaviour, which threatens the physical safety of others so that the society's interest in retribution, deterrence, and rehabilitation can only be met through the imposition of that sentence".

[41] Counsel specifically relied on this court's decision in **Earl Simpson**, in which Downer JA adopted the guidance from the cases of **R v Hodgson** (1968) 52 Cr App R 113 ('**Hodgson**') and **Attorney General's Reference No 32 of 1996 (Steven Alan Whittaker)** [1997] 1 Cr App R (S) 261 ('**AG's Ref No 32**').

[42] The OAPA does not give any guidance on the circumstances in which a sentencing judge should impose a sentence of life imprisonment or a determinate sentence for section 2(2) murder. The Sentencing Guidelines for use by Judges of the Supreme Court and Parish Courts, 2017 ('the Sentencing Guidelines') similarly do not offer any guidance. We must, therefore, turn to the common law, which is instructive on this issue.

[43] It has long been recognised that a sentencing judge ought to exercise his or her discretion with a view to "impos[ing] a sentence to fit the offender and at the same time to fit the crime" (see **Meisha Clement** at para. [20], citing **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202 at 203). In doing so, the sentencing judge must be cognisant of the classical principles of sentencing – retribution, deterrence, prevention, rehabilitation and protection of the public and balance the circumstances of the offence and the offender to determine whether the penalty imposed is appropriate in all the circumstances (see, for example, **Patrick Green v R** [2020] JMCA Crim 17 at paras. [21] – [23]).

[44] Given that the law had changed to permit the imposition of a determinate sentence of not less than 15 years, for murder, with life imprisonment being the maximum sentence, the well-known principle stated by Hibbery J in **R v Kenneth Ball** (1951) 35 Cr App R 164 applies. The principle is that where the law does not fix the sentence for a particular crime, but fixes a maximum sentence, it is left to the court "to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of the case". Therefore, in the context of section 2(2) murder, the task of the court, following the amendments to the OAPA, is to use the settled principles and methodologies of sentencing to determine where on the scale of sentences available under section 3(1)(b), the particular offence and offender fall.

[45] In making that determination, it must first be acknowledged that life imprisonment is the maximum sentence available for section 2(2) murder. As a matter of general sentencing principle, the maximum sentence permissible under a statute should neither be the ordinary starting point in the construction of a sentence nor be imposed in the ordinary cases of the commission of an offence. As Morrison P put it in **Meisha Clement v R** at para. [27], "the maximum sentence of imprisonment provided by statute for a particular offence should be reserved for the worst examples of that offence likely to be encountered in practice" (see also **Kurt Taylor v R** [2016] JMCA Crim 23 at para. [41]). These general principles are now settled beyond debate and are, therefore, applicable to the offence of murder as they are to any other offence.

[46] In the light of these settled principles, the conclusion irresistibly follows that only the cases of section 2(2) murder deemed to be "the worst examples of [the] offence likely to be encountered in practice" should attract a sentence of life imprisonment. Applying the same general principles, the England and Wales Court of Appeal in **R v Wilkinson** [2009] EWCA Crim 1925 stated that "the sentence of life imprisonment remains the ultimate sentence, to be reserved for the most serious and grave cases".

[47] For the avoidance of doubt, it must be categorically stated that a determinate sentence does not equate to a lenient sentence. Relatedly, the law does not require a determinate sentence to be of short duration, as there are cases in which the circumstances of a section 2(2) murder are sufficiently egregious to justify the imposition of a long determinate sentence.

[48] Against the background of these general principles, the courts have developed common law rules to delineate the circumstances in which life imprisonment should be imposed where it is the maximum allowable sentence. Attention will now be turned to the English case law and the relevant principles extracted from it.

(i) The English case law

[49] At common law, the traditional conditions for the imposition of a life sentence were expressed in **Hodgson**. In that case, the English Court of Appeal authoritatively established the following three criteria necessary for a life sentence to be imposed ('the Hodgson criteria'):

> (1) where the offence or offences are in themselves grave enough to require a very long sentence;
>
> (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and
>
> (3) where if the offences are committed the consequences to others may be specifically injurious, as in the case of sexual offences or crimes of violence.

[50] Two necessary observations ought to be made about the Hodgson criteria. The first is that they were framed and applied as conjunctive requirements to be satisfied before a sentence of life imprisonment could be imposed. Thus, a failure to establish one of the conditions conclusively excluded a life sentence as a sentencing option.

[51] The second observation is that the application of the Hodgson criteria was informed by the view that a sentence of life imprisonment was a tool to protect the public from mentally unstable offenders whose mental state made them dangerous to the public. In **R v Wilkinson** (1983) 5 Cr App R (S) 105, Lord Lane CJ described the law's emphasis on mental instability in these terms:

> "It seems to us that the sentence of life imprisonment, other than where the sentence is obligatory, is really appropriate and must only be passed in the most exceptional circumstances. With few exceptions… **it is reserved broadly speaking… for offenders who for one reason or another cannot be dealt with under the provisions of the Mental Health Act, yet are in a**

> **mental state which makes them dangerous to the life or limb of members of the public**. It is sometimes impossible to say when that danger will subside, and therefore an indeterminate sentence is required, so that the prisoner's progress may be monitored by those who have him under their supervision in prison, and so that he will be kept in custody only so long as public safety may be jeopardised by his being let loose at large." (Emphasis added)

[52] The learned editors of Archbold Criminal Pleading, Evidence and Practice, 41st Edition (1982) at para. 5 – 31 summarised the approach to life imprisonment under the Hodgson criteria in this way:

> "A sentence of life imprisonment should not be imposed unless there is clear evidence of mental instability (as opposed to mental disorder) which indicates that the person is likely to be a danger to the public. Accordingly, where the Court concluded that there was no medical justification (as identified above) for the trial Judge's remark that the defendant was a potentially dangerous person, (the remark being justified only by having regard to the circumstances of the offences of which he had been convicted) a determinate sentence was substituted." (Emphasis added)

[53] This emphasis on mental instability in the application of the Hodgson criteria resulted in the development of a practice to have medical evidence presented to show the mental instability or instability of character under condition (2) of the Hodgson criteria. It was only in exceptional cases that the court would impose a life sentence without medical evidence of the offender's mental instability or a mental disorder (see, for example, **R v de Havilland** (1983) 5 Cr App R 109, CSP F3.2(b)).

[54] The upshot of these observations is that the Hodgson criteria significantly narrowed a judge's discretion to sentence an offender to life imprisonment.

[55] The Hodgson criteria were revisited in **AG's Ref No 32**. In that case, Bingham CJ distilled, from the Hodgson criteria, two broad requirements for the imposition of a life sentence. The first is that "the offender should have been convicted of a very serious offence". If the offender has not been convicted of a serious offence, then there can be no question of imposing a life sentence. The second is that there should be "good

grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence". On the specific issue of mental instability, Bingham CJ explained:

> "It is therefore plain that evidence of an offender's mental state is often highly relevant, but the crucial question is whether on all the facts it appears that an offender is likely to represent a serious danger to the public for an indeterminate time."

[56] On the footing of Bingham CJ's distillation of the principles in **AG's Ref No 32**, the English Court of Appeal in **R v Chapman** [2000] 1 Cr App R (S) 377, reframed the Hodgson criteria as follows – "[1] the gravity of the offence before the court; [2] the likelihood of further offending, and [3] the gravity of further offending should such occur". On the footing of these reformulated principles, the court applied a dynamic approach to determining whether a life sentence ought to have been imposed, as distinct from the rigid, box-ticking approach deployed in the earlier authorities, and stated that:

> "[T]here is an interrelationship between the gravity of the offence before the court, the likelihood of further offending, and the gravity of further offending should such occur. The more likely it is that an offender will offend again and the more grave such offending is likely to be if it does occur, the less emphasis the court may lay on the gravity of the original offence."

[57] In reasoning as it did, the court endorsed an evaluative approach to determining whether a sentence of life imprisonment should be imposed. Thus, sentencing judges were afforded some latitude to place variable weight on the factors to be considered, based on the particular circumstances of the offence committed and the offender. This flexible approach notwithstanding, the court in **Chapman** maintained that "[a sentence of life imprisonment] is not… one which should ever be imposed unless the circumstances are such as to call for a severe sentence based on the offence which the offender has committed".

[58] It is evident from all that is said above, that the narrow framing and rigid application of the Hodgson criteria was, over time, overtaken by a broader focus on (i)

the serious nature of the particular offence that had been committed; and (ii) the dangerousness of the offender to the wider public. Furthermore, notwithstanding the refinement of the principles and the changes in approach to their application over time, the central principle remains that it is the role of the sentencing court to determine the appropriateness of a life sentence in the particular circumstances of each case. Of course, opinions on the appropriateness of such a sentence will reasonably differ. As Butterfield CJ in **R v Wilkinson** [2009] EWCA Crim 1925 appositely stated:

> "[i]n many cases where the defendant's dangerousness is established, there nevertheless will remain room for a sensible difference between sentencing judges whether a particular offence under consideration is or is not serious enough to require the imposition of a sentence of life imprisonment…".

[59] It seems safe to conclude that according to the prevailing common law principles, whether a life sentence should be imposed in the particular circumstances of a case remains a matter for the sentencing judge's discretion to be exercised by reference to the applicable sentencing principles. However, a sentence of life imprisonment should never be imposed unless the circumstances are such as to call for a severe sentence based on the offence committed.

(ii) Development of the English common law in the Commonwealth

[60] The Hodgson criteria have been adopted, developed and modified by courts across the Commonwealth. On at least one occasion, this court has adopted and applied the Hodgson criteria as the relevant requirements to be satisfied in cases where life imprisonment is available as a sentencing option (see **Earl Simpson**).

[61] Broadly speaking, however, several cases from Commonwealth jurisdictions have confirmed that the common law has abandoned a rigid application of the Hodgson criteria in favour of a more flexible evaluation of the seriousness of the offence committed by the defendant and the dangerousness of the defendant, calibrated by the principle that sentences should be proportionate to the circumstances of the offender and the offence.

[62] To avoid considerably lengthening this judgment, we refer only to two cases that demonstrate the jurisprudential development and modification of the Hodgson criteria across the Commonwealth.

[63] The first is the decision of the Caribbean Court of Justice ('CCJ') in **Renaldo Anderson Alleyne v The Queen** [2019] CCJ 06 (AJ) ('**Alleyne**'), an appeal from the Court of Appeal of Barbados. The appeal raised points of law of public importance regarding the relevance of an early guilty plea to the imposition of a life sentence.

[64] In that case, the appellant and another man entered a boutique one evening while patrons were shopping with the intention to commit a robbery. After the robbery, the appellant threw two Molotov cocktails into the store causing a fire which resulted in the death of six women. The appellant was charged with six counts of murder. On his arraignment, he pleaded not guilty to murder but guilty to six counts of manslaughter. The pleas were accepted by the trial judge and the appellant was sentenced to six concurrent life sentences. Pre-sentence and psychological reports established that the appellant constituted a threat to public safety.

[65] The appellant appealed his sentences contending, in reliance on the Hodgson criteria, that (a) the sentence of life imprisonment was wrong in law and that the sentencing judge failed to follow established guidelines in arriving at a sentence of life imprisonment, resulting in excessive sentences; and (b) the trial judge disregarded and failed to factor into the sentence the appellant's entitlement to a discount for his guilty pleas. The Court of Appeal of Barbados dismissed the appeal and affirmed the life sentences. The court held that the life sentences were neither wrong in principle, manifestly excessive, nor disproportionate.

[66] Anderson JCCJ, who delivered the lead judgment of the CCJ, summarised the finding of the Court of Appeal in this way, at para. [13]:

> "The preponderance of authority indicated that 'the gravity of the offence remains an indispensable condition for the imposition of the life sentence' thus while medical evidence relating to the

> offender's dangerousness was important, it was not always necessary to show that the offender is suffering from a mental or medical disorder. In exceptional cases, such as the present one, a Judge may impose a life sentence without medical evidence of a mental defect."

Further, that "[c]onsidering the relevant legal principles, the sentences imposed were necessary for the safety of the public and in furtherance of the administration of justice. That being the case, the question of discount for an early guilty plea did not arise" so as to entitle the appellant to a sentence which was less than life imprisonment (para. [14]).

[67] The CCJ agreed with the trial judge and the Court of Appeal that the seriousness of the offence and considerations of deterrence and protection of the public "warranted" and "even required" the imposition of life sentences upon the appellant (para. [50]). The trial judge had concluded that the offences committed by the appellant fell within the category of the most serious offences and that only a custodial sentence could be justified and was required to protect society from serious harm by him. At para. [44], Anderson JCCJ stated that, in imposing a life sentence, the sentencing judge must have regard to the relevant statutory requirements and principles of sentencing. Rehabilitation of the offender, he indicated, is one of the aims of sentencing which must be considered in the sentencing process (this principle finds statutory expression in section 41(2) of the Penal System Reforms Act (Barbados) which was under consideration). However, Anderson JCCJ opined that while rehabilitation should be, and is, an important aim of sentencing which should be considered, it may be overridden by other aims of sentencing in some circumstances. There may be cases, he said, where "the principles of denunciation and deterrence are overriding".

[68] Anderson JCCJ cited two cases, **Kuzimski v the State of Western Australia** [2012] WASCA 202 (Australia) and **R v Horvath** (1983) 2 CCC (3d) 196 (Ont CA) (Canada), which reinforce the principle that the seriousness of an offence is a crucial consideration in the imposition of a life sentence. He then concluded at para. [49] of the judgment:

> "In Barbados, the offence of manslaughter carries a maximum penalty of life imprisonment. The imposition of such a sentence lies within the discretionary range of punishment options available to the sentencing judge. In the present case, Justice Kentish considered the relevant principles of sentencing, the circumstances surrounding the commission of the offences, the pre-sentencing report, the psychological report, the Penal System Reform Act, the aggravating and mitigating factors, the seriousness of the offence. It is evident she concluded, in light of all these considerations, that the principles of punishment and deterrence were overriding factors. There were ample grounds on which to come to this conclusion. Accordingly, there can be no reasonable basis for the contention that the judge acted improperly in imposing life sentences."

[69] We observe, parenthetically, that the emphasis by the Barbadian Court of Appeal and the CCJ on the gravity of the offence, as a sufficient basis for the imposition of a life sentence also featured in the CCJ's earlier decision in **Gregory August and Alwyn Gabb v The Queen** [2018] CCJ 7 (AJ). In that case, Byron PCCJ and Rajnauth-Lee JCCJ pragmatically opined that:

> "…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, having regard to mitigating factors, a lesser sentence is deserved".

[70] The second case of note from the Commonwealth is the decision of the Court of Appeal of Singapore in **Public Prosecutor v Aniza bte Essa** [2009] 5 LRC 336 ('**Essa**'). In that case, it was held that the Hodgson criteria are not an exclusive judicial guide to justify the sentence of life imprisonment. Therefore, offenders can be sentenced to life imprisonment even though they are not mentally unstable or likely to repeat the offence (see **Public Prosecutor v Ng Kwok Soon** [2002] 3 SLR 199). They can be sentenced to life imprisonment in appropriate cases with greater weight attributed to the principles of retribution and deterrence (see **Public Prosecutor v Muhamad Hasik bin Sahar** [2002] 3 SLR 149).

[71] The court concluded in **Essa** that the Hodgson criteria are appropriate as guidelines for sentencing mentally unstable offenders who have committed offences punishable with life imprisonment. Where the Hodgson criteria are satisfied, the sentence of life imprisonment will be justified for the protection of society.

[72] Where any of the three Hodgson criteria is not met, the offender will be sentenced in accordance with the established sentencing principles, having regard to the facts of each case and bearing in mind that deterrence has little or no effect on mentally unstable offenders.

[73] Where the offender is mentally normal, however, the Hodgson criteria are irrelevant and the offender will be sentenced in accordance with the established sentencing principles having regard to the facts of each case.

(iii) Summary of the applicable principles

[74] Having considered the above cases, it appears that a number of instructive principles can be utilised to inform the exercise of a sentencing judge's discretion in determining whether to impose a sentence of life imprisonment for section 2(2) murder. They are summarised as follows:

(1) Historically, a sentence of life imprisonment could only be imposed where all three of the Hodgson criteria were satisfied. The common law has, however, developed and the Hodgson criteria are no longer considered to be an exclusive judicial guide to imposing a sentence of life imprisonment (see **Essa** and **Alleyne**).

(2) The Hodgson criteria may be utilised by a sentencing judge to justify imposing a sentence of life imprisonment in cases where an offender is mentally unstable. However, where an offender is mentally normal, the Hodgson criteria are irrelevant and the offender should be sentenced in

accordance with the established sentencing principles and methodology having regard to the facts of the case (see **Essa**).

(3) When determining whether a sentence of life imprisonment is appropriate in any case, the following guidance is applicable:

(a) The imposition of any sentence, including a sentence of life imprisonment, is a matter of the discretion of the sentencing judge bearing in mind the classical principles of sentencing, and the need to impose a sentence that is tailored to the circumstances of the offence committed and the particular offender (see **Meisha Clement**, **R v Sydney Beckford and David Lewis** and **Patrick Green v R**)

(b) Life imprisonment is the maximum sentence permissible for section 2(2) murder. Therefore, such a sentence is reserved for "the worst examples of [section 2(2) murder] likely to be encountered in practice". Where a murder does not fall within that category, a determinate sentence should be imposed (see **R v Kenneth Ball** and **Meisha Clement**).

(c) The court should weigh in the balance (i) the gravity of the offence before the court; (ii) the likelihood of further offending; and (iii) the gravity of further offending should such occur. The crucial and overarching question to be considered, however, is whether the gravity or serious nature of the offence which was committed and/or the dangerousness of the defendant, warrants placing the defendant under the jurisdiction of the state for the remainder of his or her life through the imposition of a life sentence (see **AG's Ref No 32** and **R v Chapman**).

(d) The gravity or serious nature of the offence committed will, in some cases, provide a sufficient basis on which to impose a life sentence. There is no closed list of circumstances in which the seriousness of the offence committed will justify the imposition of a life sentence (see **Alleyne** and **Gregory August and Alwyn Gabb v The Queen**)

(e) The dangerousness of a defendant may be established with the use of medical evidence to show the defendant's mental instability or instability in character. Such evidence is, however, not required for the imposition of a life sentence. In assessing the dangerousness of the offender the court should consider whether, on all the facts, it appears that the defendant is likely to present a serious danger to the public for an indeterminate time (see **AG's Ref No 32**).

(f) A plea of guilty, of itself, does not exclude the imposition of a life sentence if the seriousness of the offence, the dangerousness of the offender and the interests of the administration of justice warrant its imposition (see **Alleyne**).

[75] In summary, there are no statutory provisions or sentencing guidelines in our jurisdiction to guide a sentencing judge in determining the circumstances in which life imprisonment should be imposed instead of a determinate sentence. Therefore, in sentencing an offender for section 2(2) murder, it is for the sentencing judge to determine whether a particular murder falls within that category that would justify a life sentence, bearing in mind the facts and circumstances of the case, the accepted principles discussed above, the general sentencing principles, any applicable principles contained in sentencing guidelines and, ultimately, the interests of justice.

[76] Before concluding this review of the relevant principles, we consider it useful to refer to the Eastern Caribbean Supreme Court Practice Direction No 3 of 2021 ('ECSC PD No 3'), which proves rather instructive. Para. 4 of ECSC PD No 3 sets out a non-exhaustive list of circumstances that may be considered so serious as to warrant the imposition of a life sentence. Although not a part of Jamaican law, para. 4 of the ECSC PD No 3 can be of invaluable assistance to our courts, as an appropriate starting point for determining when the seriousness of an offence may result in the imposition of a life sentence. The list is as follows:

> "a. the murder of two or more persons;
>
> b. the murder is associated with a series of serious criminal acts;
>
> c. a substantial degree of premeditation or planning;
>
> d. the abduction of the victim;
>
> e. a murder involving sexual or sadistic conduct;
>
> f. a murder involving prolonged suffering or torture;
>
> g. the murder of a police officer, emergency service worker, prison officer, judicial officer, prosecutor, health worker, teacher, community worker or any other public official exercising public or community functions or as a political activist,[…];
>
> h. a murder relating to membership of a criminal gang;
>
> i. a murder which is an act of terrorism;
>
> j. a murder motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (eg people of a particular religion, race, or ethnic origin, language, or sexual orientation or age or having a particular disability);
>
> k. a murder involving the actual or threatened use of explosives or chemical or biological agent;
>
> l. a deliberate killing for payment or gain (eg a contract killing, or for inheritance, or insurance payout);

m. where the offender is assessed as likely to commit further offences of serious violence and is therefore a substantial danger to the community;

n. a murder by an offender previously convicted of murder; or

o. a murder by an offender who has a record for multiple previous convictions for serious offences of violence."

[77] As is seen from the list above, some of the circumstances of murder that would attract life imprisonment in the ECSC are those which would fall to be categorised as section 2(1) murders in this jurisdiction and which would attract a mandatory life sentence or the death penalty under section 3(1)(a). It should be noted that oftentimes within our jurisdiction, the prosecution would indict a murder with the features of a section 2(1) murder under section 2(2). In such circumstances, the seriousness or gravity of the offence itself could possibly justify a life sentence even though that sentence is discretionary under section 3(1)(b).

[78] ECSC PD No 3 also provides useful guidance regarding the circumstances when a determinate sentence may be invoked. Simply put, those circumstances involve cases falling outside the preceding list of circumstances that would attract life imprisonment.

[79] Lastly, in **Alleyne**, Anderson JCCJ at para. [49] approved the trial judge's approach to determining whether life imprisonment should be imposed in the circumstances of that case. That approach included considering (a) the relevant principles of sentencing; (b) the circumstances surrounding the commission of the offence; (c) the seriousness of the offence; (d) pre-sentence reports; (e) psychological reports; (f) the aggravating and mitigating factors; (g) any relevant statutory provisions impacting the sentence; and (h) a determination of which aims of sentencing should be the overriding ones in the circumstances of the case.

[80] We would also commend this approach to sentencing judges for their consideration, albeit without any intention to lay down a hard and fast or universal rule

regarding the approach that should be employed in determining when a life sentence should be imposed.

[81] However, we would require that, in keeping with established sentencing practice and procedure, sentencing judges demonstrate in their sentencing remarks that they have considered the relevant law, sentencing principles and guidelines applicable to the particular offence and indicate the reasons for electing to impose the sentence they feel is more appropriate in the circumstances. Where sentencing guidelines are not adhered to, reasons for deviation from them should also be advanced as they should only be ignored in exceptional circumstances and when the interests of justice demand it.

(iv) The application of the legal principles to the facts

[82] Having considered all the principles of law distilled from the relevant authorities, we refuse to consider ourselves bound by the pronouncements of this court in **Earl Simpson** (which adopted the Hodgson criteria) as a basis on which to disturb the sentence imposed. This is because the rigid application of the Hodgson criteria has been overtaken by the passage of time with resultant evolving considerations. Furthermore, there is no evidence in this case that the appellant is a mentally unstable offender. Therefore, it would not have been necessary to apply the Hodgson criteria. Accordingly, Mr Wilson does not stand on good ground in his contention that the learned judge could or should not have imposed a sentence of life imprisonment without first applying the Hodgson criteria.

[83] As the learned judge's failure to apply the Hodgson criteria is not determinative of the propriety of the imposition of the life sentence, the court must examine whether the learned judge erred in her approach to imposing a life sentence in this case. The court has had regard to the circumstances of the commission of this offence, the appellant's character, the objectives of sentencing and the relevant statements of principle derived from the decided cases reviewed above.

[84] In arriving at the sentence she imposed, the learned judge paid close attention to the pre-sentence information placed before her and to the submissions made by defence counsel in mitigation. The learned judge identified what she regarded as two aggravating factors: the disparity in age between the appellant and the deceased and that the deceased met his death violently with the use of a knife.

[85] The learned judge noted that all information from the appellant's antecedent and social enquiry reports were mitigatory. The reports spoke to his upbringing, education and employment. She noted that he was always employed, did not suffer from any physical or mental illness, was exposed to proper values and shared a good relationship with his family. Comments from the appellant's sister, colleagues and employer represented the appellant as a jovial, calm and non-aggressive person. Other mitigating factors that the learned judge said she took into account were the appellant's age, expression of remorse, and that the offence was not premeditated but emanated from a dispute that arose between the appellant and the deceased.

[86] The learned judge also treated the appellant as having no previous convictions because his previous offending was dated (over 38 years prior) and also not relevant.

[87] Having identified the relevant factors, the learned judge said (at page 355, lines 5-20 of the transcript):

> "So in all the circumstances of the case, I am prepared to consider imposing a sentence of life imprisonment and I am prepared to consider the lower end of the period for which he will be paroled and I believe that is the appropriate sentence in all the circumstances.
>
> So, Mr. Bronstorph, please stand. The sentence of the Court, in light of the aggravating and mitigating circumstances and the three months you have spent in custody, is that you are to be imprisoned and kept at hard labour for life and I will recommend with the stipulation that you serve fifteen years before being considered eligible for parole."

[88] The learned judge did not identify the specific features in the circumstances of the case which had informed her decision to sentence the appellant to life imprisonment instead of a determinate sentence. In fairness to the learned judge, she did not have the assistance of the authorities and statements of principles examined in this case, as none were cited to her by counsel. In fact, in the past, this court has established that it was within the exercise of the judge's discretion to elect which sentence option is more appropriate without an insistence on any requirement for the judge to demonstrate the principles of law applied to the evaluation exercise. No effort had ever been made to comprehensively establish the applicable principles for the guidance of sentencing judges in the manner now attempted. Therefore, those cases that have not frontally explored the question raised in this appeal regarding the circumstances that warrant a life sentence as distinct from a determinate sentence for murder should be followed with caution. The better position is that sentencing judges must demonstrate the basis for imposing the sentence they believe is appropriate be it life imprisonment or a determinate sentence. This accords with the established sentencing methodology that sentencing judges must give reasons for the sentence imposed.

[89] In the premises, it could not be said, in the light of the authorities reviewed, that the learned judge had demonstrated that she had considered the factors and principles relevant to the imposition of a life sentence where the option of a determinate sentence was also available.

[90] In employing the approach she did, the learned judge would have also failed to follow the sentencing principle stipulated in **Meisha Clement**, that:

> "[62] … once provision is made for a range of sentencing options, it is equally the duty of the court in each case to determine the appropriate sentence range to be applied to the particular offender in accordance with accepted sentencing doctrine, as laid down by Parliament itself in other legislation, such as the [Criminal Justice (Administration) Act], or in previous decisions of the court."

[91] In this case, the learned judge had a range of sentencing options from a fixed term of 15 years imprisonment (minimum sentence) to a maximum of life imprisonment. It is an extremely wide range. The learned judge would have erred in principle in imposing the maximum sentence of life imprisonment rather than a determinate sentence without indicating her reasons for doing so. This aspect of the ground of appeal succeeds.

Issue (2) – Whether the sentence is manifestly excessive

[92] Having concluded that the learned judge erred in her approach to the imposition of the life sentence, this court is entitled to consider whether the learned judge's approach resulted in a manifestly excessive sentence as contended by the appellant.

[93] Mr Wilson submitted that the murder in this case "required a long term of imprisonment, but not life imprisonment". He submitted that "the stabbing death of the deceased cannot reasonably be regarded as grave or exceptional in its brutality, callousness and heinousness". Counsel pointed out that the deceased was stabbed in a spontaneous altercation initiated, at least in part, by the deceased. The stabbing was without any planning or premeditation. Further, the mitigating factors identified by the learned judge outweighed the aggravating factors, and there were no good grounds for believing that the appellant posed a continued substantial risk of danger to the public, or was a dangerous person because of mental illness. There was, instead, ample evidence in the social enquiry report to suggest that the applicant was usually a non-violent person. In the premises, Mr Wilson submitted that the learned judge ought to have imposed a sentence of 15 years' imprisonment with a minimum term of 10 years before eligibility for parole.

[94] In response, counsel for the Crown submitted that the sentence imposed by the judge was "overly generous" in the circumstances. According to counsel, the learned judge heard the evidence, saw the demeanour of the witnesses and the accused, and had the opportunity to assess the evidence and other material before her, including the appellant's social enquiry and antecedent reports. Given the sentences imposed in cases

based on similar facts, the learned judge's sentence cannot be deemed manifestly excessive.

[95] The approach to be taken by this court in determining an appropriate sentence was set out in **Meisha Clement**, and refined in **Daniel Roulston** [2018] JMCA Crim 20 ('**Daniel Roulston**'). In keeping with those authorities, we are required to consider the following to arrive at the appropriate sentence:

(a) identify the sentence range;

(b) identify the appropriate starting point within the range;

(c) consider any relevant aggravating factors;

(d) consider any relevant mitigating features (including personal mitigation);

(e) consider, where appropriate, any reduction for a guilty plea;

(f) decide on the appropriate sentence (giving reasons); and

(g) give credit for time spent in custody, awaiting trial for the offence (where applicable).

[96] In **Meisha Clement** at para. [29], this court stated that in arriving at an appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence. Morrison P referenced section 143(1) of the United Kingdom Criminal Justice Act 2003 as providing an apt summary of the factors which will ordinarily inform the assessment of the seriousness of an offence. These are the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused.

[97] Against this background, each of the steps stipulated by **Meisha Clement** and **Daniel Roulston** and the general principles of law distilled from the other authorities reviewed in this case have been followed in determining the most appropriate sentencing option and the sentence to be imposed.

A. The appropriate sentencing option – life imprisonment or a determinate sentence?

[98] As earlier stated, the learned judge did not indicate the basis for electing life imprisonment as the more appropriate option. Therefore, this court is required to first determine whether a sentence of life imprisonment or a determinate sentence is warranted, applying the correct principles.

[99] Mr Wilson pointed us to **Horace Kirby v R** [2012] JMCA Crim 10, **Kevin Balfour v R** [2012] JMCA Crim 23 and **Delroy Barron v R** [2016] JMCA Crim 32, wherein the defendants had been respectively sentenced to 18, 15 and 20 years' imprisonment for murders committed by stabbings of various degrees.

[100] The Crown relied on the cases of **OP v R** [2022] JMCA Crim 19, **Howard Jones v R** [2010] and **Bernard Ballentyne v R** [2017] JMCA Crim 23. In all three of those cases, a sentence of life imprisonment was imposed for murders involving stabbings of various degrees.

[101] Additionally, the court notes that, at para. [34] of the recent judgment of **Vanessa Cameron v R** [2023] JMCA Crim 56 ('**Vanessa Cameron**'), P Williams JA reviewed eight cases treating with sentences flowing from a conviction for murder committed by stabbing. The review included six cases in which sentences of life imprisonment were imposed with variable minimum terms before eligibility for parole and two cases in which determinate sentences of 18 and 20 years imprisonment were imposed. At para. [35] of the judgment, P Williams JA stated, "[i]t is evident that a sentence of life imprisonment is more often than not imposed for murder committed in these circumstances". Based on the authorities cited, the court upheld the sentence of life imprisonment which was imposed by the trial judge.

[102] It is worth noting that two of the cases cited in **Vanessa Cameron** were relied on by the prosecution in this appeal. However, of special note is that none of the cases cited by Mr Wilson addressing the considerations applicable to the imposition of a life sentence, featured in the court's review. It means then that the court did not consider the authorities examined in this case, and the approach employed in this case was not engaged. Therefore, we would treat the authorities relied on by the prosecution with decided caution, as the circumstances in which a sentence of life imprisonment rather than a determinate sentence may be imposed for section 2(2) murder were not the subject of detailed argument and specific judicial consideration in any of the cases. This caution, notwithstanding, it appears that the cases are relevant to the extent that they have established the range of sentences imposed for murders of a similar nature as being between 18 years and life imprisonment. This is a relevant consideration for present purposes.

[103] Having employed the recommended approach from the cases considered in this judgment, we note the following features. The case involved an unnecessary loss of life, and the value of the life lost cannot, in any way, be discounted. Given the inherent seriousness of the offence of murder, we have considered the circumstances of the commission of the offence. The murder did not involve significant premeditation or brutality. While the seriousness of the two fatal injuries inflicted to the chest of the deceased cannot be downplayed, this case cannot be said to be the worst or gravest kind of section 2(2) murder likely to be encountered in practice.

[104] As it relates to the offender, his mature age and the positive pre-sentence reports show the appellant's non-violent nature and favourable antecedents.

[105] Against the background of all the applicable sentencing principles, including the aims of sentencing, and upon specifically considering the seriousness of the offence which was committed and the evidence of the appellant's character, we conclude that there is nothing identified by the learned judge or this court, which would reasonably suggest that a sentence of life imprisonment was warranted in the circumstances.

Nothing indicates that the appellant, who had no relevant previous convictions and was gainfully employed, at age 57, was dangerous to public safety and could not be returned to society after a reasonably lengthy determinate sentence.

[106] We believe a long, determinate sentence could achieve the overriding objectives of retribution, deterrence, and denunciation. It is more appropriate in this case than a sentence of life imprisonment.

B. The sentence range and starting point

[107] Having determined the appropriate sentencing option, the court must now indicate an appropriate sentence range and starting point. Based on all the cases cited to us, the cases referred to in **Vanessa Cameron**, and using the minimum sentence prescribed in the OAPA for section 2(2) murder, it seems that the sentence range of 18 to 35 years would be appropriate in a case of this nature which arose from a dispute in which the deceased was the initial aggressor, involving two fatal wounds inflicted with moderate to severe force to the chest.

[108] The Sentencing Guidelines do not indicate a usual starting point for murder. However, a starting point of 30 years seems reasonable having regard to the minimum sentence of 15 years, the weapon of choice, the nature and seriousness of the injuries inflicted and the fact that the deceased was unarmed.

C. Aggravating and mitigating factors

[109] Having taken into account the circumstances of the stabbing and the nature of the injuries in setting the starting point, those features have not been counted again as aggravating factors. The learned judge had used the disparity in age between the appellant and the deceased as an aggravating factor. That is accepted as the appellant should have shown more restraint as the more mature of the two disputants. As the learned judge remarked, the appellant was old enough to be the deceased's father. This is also an incident which occurred within the vicinity of a member of the security forces who identified himself as a policeman, separated the appellant and the deceased and

told the appellant to leave the terminus as his bus was loaded. The appellant did not comply with those orders. The incident also occurred during the day on New Year's Eve in the presence of others at a bus terminus, thereby being of such a nature as to drive fear in the minds of the commuting public. The court also must take judicial notice of the prevalence of murders in our society as the learned judge did. The aggravating factors have shifted the starting point upwards.

[110] Regarding mitigating factors, the appellant was correctly recognised by the learned judge as a mature middle-aged man with no relevant previous convictions, who was gainfully employed at the time of the commission of the offence. He received a favourable social enquiry report including commendations from his colleagues and employers. There was, however, no report from the wider community which (perhaps) could have offered greater insight into his background. The learned judge accepted that he expressed remorse, which she treated as a mitigating factor. This court will not interfere with the learned judge's consideration of that factor as she had the advantage of seeing him during the sentencing proceedings, a benefit this court does not enjoy. Also, he was not the initial aggressor, although it is not overlooked in setting the starting point that the deceased was unarmed. The starting point is, therefore, adjusted downwards by the operation of the mitigating factors.

D. The sentence

[111] Having balanced the mitigating and aggravating factors, we conclude that the mitigating factors slightly outweighed the aggravating factors resulting in a downward adjustment to the starting point to 28 years' imprisonment. Given the age of the appellant at 57 years old at the time of sentencing, he would be 85 years old at the end of his sentence. That is an age at which he would hardly likely be a risk to the public or a menace to society. It would also be long enough for the sentence to serve the aims of retribution, deterrence and denunciation, which are the overriding considerations in this case

[112] The appellant did not plead guilty, and so there is no discount for a guilty plea.

[113] The learned judge also considered the three months the appellant spent on pre-sentence remand. Therefore, in keeping with the relevant sentencing principles and methodology, the appellant is also entitled to have that deducted from his sentence. This results in a sentence of 27 years and nine months imprisonment.

[114] We conclude that a determinate sentence of 27 years and nine months (three months having been credited for pre-sentence custody) in the case of a 57-year-old man not shown to be a danger to society is proportionate and just.

E. The minimum term before eligibility for parole

[115] The learned judge stipulated a minimum term of 15 years before eligibility for parole on the basis that life imprisonment was imposed in keeping with section 3(1C) of the OAPA. Given that a determinate sentence is now proposed, the prescribed minimum term would be no less than 10 years in accordance with the same section. Although Mr Wilson has asked for the minimum term to be reduced to 10 years, he advanced no legal arguments in support of this proposition. It is also noticed that the learned judge had conflated her sentencing of the appellant to life imprisonment and fixing the minimum term without any indication of what had informed the fixing of the minimum term.

[116] This court in **Stephen Blake v R** JMCA [2023] Crim 45, following **Sanjay Splatt v R** [2022] JMCA Crim 39, had sought to draw a distinction between the sentence and the minimum term (as well as parole) in determining the minimum term in that case (see paras. [18] – [25] of the judgment). Brooks P, after a detailed discussion of the purpose of parole, ended with drawing a distinction between the pre-parole period and the sentence. Then at para. [25], he opined:

> "It is undoubtedly true that the imposition of a pre-parole period is often referred to 'as the sentence' or at least, a part of the sentence. For example, there have been appeals against sentence, such as the present case, when the sole complaint is that the pre-parole period is manifestly excessive. The distinction, however, must be borne in mind for the purposes of this assessment."

He also cited **R v Keith Carnegie and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 40/2000, 43/2001 and 64/2001, judgment delivered 20 November 2003 in support of his distinction between the sentence and the pre-parole period.

[117] Regrettably, the distinction made in **Stephen Blake** between parole, the pre-parole period and the sentence for murder was not only unnecessary but was not accurate within the context of setting the pre-parole period. The court was not concerned with parole but with the minimum term of imprisonment that the offender should serve before any question of release on parole may be considered by the Parole Board under the statutory scheme governing the exercise of their power (the Parole Act). Even more specifically, drawing a distinction between the minimum term and the sentence for murder, as the court sought to do, is not consistent with established authorities from the House of Lords, the Privy Council and the Caribbean Court of Justice. Various authorities from these apex courts have established, without controversy, that there is no need to make a distinction between the sentence and the minimum term as they both fall within the sentencing process and are to be determined by having regard to the same principles of sentencing.

[118] In **Selassie v The Queen; Pearman v The Queen** [2013] UKPC 29, an appeal from the Court of Appeal of Bermuda, the Privy Council put it this way at para. 8:

> "It also noted that the fixing of the period prior to eligibility for release on licence was part of the sentencing process. This was uncontroversial: in *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, the House of Lords had held, in the words of Lord Bingham at paras 20 and 24, that 'the fixing of the tariff of a convicted murderer is legally indistinguishable from the imposition of sentence'." (Emphasis added)

[119] Similarly, in **Alleyne**, the CCJ made the point even more forcefully following a comprehensive review of the English authorities. It recognised that the recommendation of a minimum period of sentence when imposing a life sentence has been addressed

through legislation in some jurisdictions such as Jamaica. The court reiterated what was stated in **R (Anderson) v Secretary of State for the Home Department** [2002] UKHL 46, [2003] 1 AC 837, that the fixing of the minimum term "was legally indistinguishable from the imposition of sentence". The CCJ, through Anderson JCCJ, then stated at para. [62] of the judgment:

> "The proposition from the case of *R (Anderson)* that tariff-fixing is a sentencing exercise which should be carried out by a judge or judicial tribunal, has been followed in several subsequent cases, including the following: *R v Selassie and another [[2013] UKPC 29]*; *Regina v Bell (Martin) [[2015] EWCA Crim 1426]*; and *Ludawane v R [[2018] 1 LRC 598]]*. **Notwithstanding the existence in these cases of a statutory regime providing for parole after a specified amount of years served, the courts reiterated that the minimum sentence is to be set by the judicial officer as part of the sentencing process at trial**." (Emphasis added)

[120] The CCJ cited the case of **Ludawane v R** [2018] 1 LRC 598 in which the Solomon Islands Court of Appeal accepted that sentencing includes setting the minimum term of imprisonment, which was part of the trial and thus a function reserved for the judiciary (see para. [63] of **Alleyne**). Reference was also made to the decision of the European Court of Human Rights in **Stafford v United Kingdom** Application No 46295/99 (delivered 28 May 2002) (see para. [61] of **Alleyne**), in which the European Court, speaking of the imposition of life imprisonment, stated at para. [17], that:

> "The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and offender represents the element of punishment." (Emphasis added)

[121] Therefore, it is the minimum term that represents the 'element of punishment' and through which the individualisation of sentencing for the particular offence and offender, is attained. It is the period of imprisonment (or part of the sentence) that the judiciary imposes in order to achieve the aims of sentencing. It is a judicial act and has nothing to do with the parole granted by the executive after the minimum term has been served.

It follows that the minimum term stipulated for life imprisonment serves the same purpose as the minimum term stipulated for a determinate sentence.

[122] Unfortunately, the court, in its reasoning in **Stephen Blake** (following **Sanjay Splatt**) regarding fixing the minimum term in a murder case, did not have the benefit of the learning from the authorities cited above. Therefore, the pronouncements of Brooks P, in seeking to draw a distinction between the minimum term and the sentence imposed on the offender are, regrettably, unsustainable in the light of the authoritative pronouncements of the apex courts in the United Kingdom and the Caribbean. For the foregoing reasons, the pronouncements of the court that the minimum term is not part of the sentence and should be distinguished from the sentence must, regrettably, be viewed as having been made *per incuriam.*

[123] With that said, it must be re-emphasised that because the sentence and the minimum term are "legally indistinguishable", the principles, doctrine and methodology of sentencing, whether laid down by the Sentencing Guidelines or statute, are applicable to the setting of the minimum term as they are to the determination of the sentence to be imposed. The sentencing judge is required to choose a range of minimum terms by reference to previous cases, select a starting point within that range, weigh up all the factors aggravating and mitigating, consider any appropriate discount for guilty pleas and to allow credit for time spent on remand (see **Alleyne** at para. [65] and **Quacie Hart v R** [2022] JMCA Crim 70 at para. [28]).

[124] In Schedule 21 of the UK Sentencing Act 2020 ('the UK Guidelines'), the following are considered some of the aggravating factors to which regard may be had in fixing the minimum term:

(i) a significant degree of planning or premeditation;

(ii) the fact that the victim was particularly vulnerable because of age or disability;

(iii) mental or physical suffering inflicted on the victim before death;

(iv) the abuse of a position of trust;

(v) the use of duress or threats to enable the offence to take place; and

(vi) concealing, destroying or dismembering the body.

[125] In the same guidelines, some mitigating factors are listed, including:

(i) an intention to cause serious bodily harm rather than to kill;

(ii) lack of premeditation;

(iii) the offender suffering from a mental disorder or mental disability which lowered his degree of blame;

(iv) the fact that the offender was provoked (for example by prolonged stress);

(v) the fact that the offender acted to any extent in self-defence or in fear of violence; and

(vi) the age of the offender.

[126] Even more progressively, in Belize, Parliament has intervened to prescribe the considerations for the fixing of the minimum term for murder in that jurisdiction. In this regard, section 106(4) of the Criminal Code, Cap. 101 (as amended in 2017) provided:

> "(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."

[127] The foregoing guidelines and legislative provisions, albeit not applicable to Jamaica, provide useful guides as to the principles and approach that could be applied to the determination of the minimum term in our jurisdiction. One thing that is clear beyond debate from the highlighted approach in the United Kingdom and Belize is that the minimum term is part of the sentence and must be treated accordingly. This is consistent with this court's position in previous cases such as **Quacie Hart v R**, from which we would not depart. In the premises, in fixing the minimum term, the court must have regard to all relevant considerations in the interests of transparency, consistency, proportionality, parity and justice as would be required in fixing the sentence to be imposed.

[128] Having applied the relevant sentencing principles and methodology, we are satisfied that the minimum term in this case would fall within a range between 15 and 25 years with a starting point of 20 years. Taking into account the relevant mitigating and aggravating factors considered in setting the determinate sentence, and making allowance for the time spent on pre-trial remand, as the learned judge had done, we find that the appellant would have been entitled to more than 15 years' imprisonment as a minimum term before eligibility for parole. Accordingly, the 15 years imposed by the learned judge was not manifestly excessive in all the circumstances.

Conclusion

[129] This court will only interfere with a sentence imposed by a lower court where it is satisfied that the sentencing judge appears to err in principle, or the sentence is excessive or inadequate to such an extent as to satisfy the court that when it was passed

there was a failure to apply the right principles (see **Alpha Green v R** at 284 and **Meisha Clement** at paras. [42] – [43]).

[130] We are satisfied that the life sentence imposed by the learned judge was not in accordance with the applicable principles. Therefore, this court is entitled to interfere with it. Having regard to the applicable principles examined in this judgment regarding the imposition of a discretionary life sentence and the aggravating and mitigating features relating to the offence and offender, we are satisfied that the appropriate sentence to be imposed in this case was a determinate term of imprisonment rather than life imprisonment.

[131] We see no justifiable basis to interfere with the minimum term of 15 years specified by the learned judge.

[132] Accordingly, we make the following orders:

1. The appeal against sentence is allowed, in part.

2. The sentence of life imprisonment imposed by the learned judge is set aside and substituted therefor is a sentence of 27 years and nine months' imprisonment.

3. The learned judge's stipulation that the appellant shall serve 15 years before eligibility for parole is affirmed.

4. The sentence is to be reckoned as having commenced on 7 June 2019, the date on which it was imposed.