[2011] JMCA Crim 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 135/2007

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE COOKE JA
THE HON. MR JUSTICE HARRISON JA
THE HON. MR JUSTICE MORRISON JA
THE HON. MISS JUSTICE PHILLIPS JA

PETER DOUGAL v R

Dr Randolph Williams for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions, Miss Kathy-Ann Pyke, Greg Walcolm and Miss Cadeen Barnett for the Crown

7 & 8 December 2009; 20 December 2010 and 1 April 2011

PANTON P

[1] On 20 December 2010, we allowed the appeal against sentence in this matter and promised to give written reasons for this decision. This we now do. The facts of this case are contained in the judgment written by my learned brother Harrison JA. Consequently, I do not propose to repeat them here. It is sufficient, I think, to say that the appellant murdered the two deceased persons while they slept in their bed at their home in the early morning of 5 June 2005. Norma McIntosh J sentenced him to suffer death in the manner authorized by

law. Dr Randolph Williams conceded that there is no ground on which the conviction may be properly challenged, but has argued that the sentence of death was wrongly imposed and is manifestly excessive.

[2] Dr Williams submitted that the case of ***Trimmingham v The Queen*** [2009] UKPC 25 provides the necessary guidance in respect of a sentence for the offence of murder where the death penalty is an option. Therein, the Privy Council said in paragraph 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."

[3] To see the approach that the Board approved and said should be regarded as established law, one necessarily has to look at the judgment in ***Pipersburgh***. In paragraph [33] thereof, the Privy Council said:

> "The approach to be adopted by a judge when considering whether to impose a death sentence was further discussed in the Eastern Caribbean Court of Appeal by Rawlins JA Ag in ***Moise v The Queen*** 15 July 2005. He referred to a number of previous decisions where the proper approach had been discussed and continued, at para 17:
>
> '17. The cases mentioned in the foregoing paragraph 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. 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 facts 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 circumstances 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.

18. It is a mandatory requirement in murder cases for a judge to take into account the personal and individual circumstances of the convicted person. The judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person. The death sentence 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. The sentencing judge is fixed with a very onerous duty to pay due regard to all of these factors.

19. In summary, the sentencing judge is required to consider, fully, two fundamental factors. On the one hand, the judge must consider the facts and circumstances that surround the commission of the offence. On the other hand, the judge must consider the character and record of the convicted person. The judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case.'

It is the need to consider the personal and individual circumstances of the convicted person and, in particular,

> the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings."

[4] So, from the above, it is seen that the Privy Council has endorsed what Rawlins JA said: that the sentencing judge should consider the circumstances of the commission of the offence as well as the character and record of the convicted person. Having endorsed what was said in ***Pipersburgh,*** the Privy Council in paragraph [21] of **T*rimmingham*** said, with reference to the approval it gave in ***Pipersburgh****:*

> "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' ."

[5] Dr Williams has urged on us that the Privy Council has herein said that matters of character that are adverse to the convicted person must not be

considered; only matters in his favour may be considered. I do not accept that interpretation. One has only to look back at what was stated as approved in ***Pipersburgh*** to conclude that the Privy Council did not intend any such construction to be placed on its statement. Surely, if a convicted murderer has a record of convictions for other murders committed on other occasions, it would be necessary to consider same in determining whether there is scope for the rehabilitation of such a person. In my view, to think otherwise defies commonsense and makes a mockery of the legislation.

[6] It is interesting to note that since the hearing of the arguments in this appeal, a three-person panel of the Privy Council (Lord Rodger, Lady Hale and Sir John Dyson) handed down a judgment in ***White v The Queen*** [2010] UKPC 22, an appeal from Belize. In the judgment delivered by Sir John Dyson on 29 July 2010, a qualification to the basic principles referred to above was offered. After quoting paragraph [21] of ***Trimmingham***, Sir John Dyson said the following at paragraph [14]:

> "With one qualification, the Board repeats and wishes to emphasise the importance of applying these two principles. The qualification is as to the apparently absolute prohibition on taking into account *against* the offender his bad character and any other relevant circumstances that may weigh *against* him. There may be cases where an offender's previous offending is so bad and the previous offences are so similar to the index offence that they are relevant to its gravity. An example might be where the index offence is the latest in a series of sadistic murders. There is the further point that the second basic principle is that there must

> be no reasonable prospect of reform of the offender and that the object of punishment cannot be achieved by any means other than the death penalty. There may be cases where an offender's previous offending is so persistent and his previous offences so grave that they may properly lead the sentencing judge to conclude that there is no reasonable prospect of reform and that the object of punishment can only be achieved by means of the death penalty."

[7] This extract quoted from ***White*** confirms my view that Dr Williams' submission that previous convictions ought not to be considered is flawed, and unacceptable. At the same time, it is not to be thought that every conviction of whatever kind is to be considered. It is my view that the court ought to consider previous offences that involved killings or other very serious offences against the person, as well as any other that might reasonably impact on the question of likelihood of reform.

[8] In ***Trimmingham***, the circumstances of the killing were in my view horrendous. Their Lordships of the Privy Council described the case as "undeniably a bad case, even a very bad case, of murder committed for gain". The following facts are set out in the judgment of the Privy Council. The appellant had a firearm. He decided to rob the deceased. He held the deceased on the ground at gunpoint, and demanded money. The deceased said he had given whatever money he had had to his daughter, and offered the appellant his goats as a substitute. The appellant struck the deceased in his stomach, causing him to fall on the bank of a rain water ditch. The appellant threw the deceased

into the ditch, then proceeded to cut his throat with a cutlass which he had taken from the deceased. He went further – he cut off the head of the deceased and wrapped it in the trousers of the deceased which he had removed from the body. He handled the penis of the deceased and made what the Privy Council described as "a ribald remark" about it. He then slit the belly of the deceased, covered the body and stuffed the trousers containing the head into a hole under a plant in a nearby banana field. To my mind, these facts display uncommon, unspeakable cruelty and inhumanity. However, their Lordships of the Privy Council accepted the submission of Mr Fitzgerald QC, that this killing fell short of being in the category of the rarest of the rare, and their Lordships went on to hold that in their judgment the killing fell short of being among the worst of the worst. Miss Paula Llewellyn QC, DPP, describes the decision as "strange and curious". She said that the decision means that trial judges are being asked to become judicial computers. Incidentally, the murder in the ***Trimmingham*** case took place in 2003 in the Caribbean paradise of St Vincent and the Grenadines where murders are rare.

[9] In the instant case, the learned trial judge at the sentencing hearing had the benefit of a social enquiry report on the appellant, as well as a medical report. The latter report was after an examination by a consultant psychiatrist, Dr Frank Knight. The appellant has no family history or personal history of psychiatric illness, and at the time of his evaluation there were no features of any form of active or residual psychiatric disorder. The social enquiry report did

not paint a pretty picture of him in the communities in which he has lived. The antecedents presented by the police to the court revealed that he had eight previous convictions. These were for attempted house breaking and larceny (1986), robbery with aggravation (1992 and 1996), possession of ganja (1995), burglary, housebreaking and larceny (2 counts) and indecent assault (29 March 2001). The appellant disputed most of the convictions, but these were proved by agents of the Crown who gave oral evidence.

[10] Dr Williams made a plea in mitigation. He said that the sentence of death should be reserved for the worst possible cases and that "it should not be, so to speak, another 'run of the mill' sentence. If it were made a routine sentence, I submit, it would cheapen life". Dr Williams continued:

> "It would remove the sense of awe which is involved in imposing a sentence of death. M'Lady, the fact that two persons were murdered, I submit does not of itself raise the case into the worst possible category. It is not a numerical counting matter. Each case ought to be considered on its own facts as well as the characteristics, the individual characteristics of the convicted person."

Dr Williams referred to the appellant's previous convictions, contending that the appellant should not be considered in the category of a hardened criminal, and submitted that the probation officer had used that term erroneously in reference to the appellant. In concluding his plea before McIntosh J, Dr Williams urged her to find that there was still hope for the appellant, and that he was amenable to reform.

[11] The then Director of Public Prosecutions, Mr Kent Pantry QC who appeared at the trial, was called on. He pointed to what he described as the aggravating features of the case and quoted passages from judgments of Campbell J of the Jamaican Supreme Court and Lord Bingham of Cornhill of the Privy Council in respect of the use of firearms to commit murders. Added to this, he said, was the fact that the appellant had been previously convicted of offences of violence, burglary and housebreaking which he said "would be of a grievous nature similarly to the facts of the offence of which he is now convicted".

[12] In making a determination of the appropriate sentence, the learned trial judge referred to the contents of the social enquiry report and the assessment of the doctor concerning the mental and physical status of the appellant. She then turned her attention to the facts of the case and said this:

> "Here are these two persons in bed asleep, and here you are taking the kind of action that you took in a premeditated, much planned way because the jury would have accepted the evidence of Mr. Foster as to what you told him. The very nonchalant, matter of fact way that you told him about your plan as though you were talking about going to spend sometime with your good friend and having some good experience, …" (p.1360 line 19 – 1361 line 2)

[13] The learned trial judge addressed the circumstances of the murders and the question of the appellant's attitude to the crime. She said that nowhere in all

of the proceedings had she heard any expression of remorse by the appellant for the murders he had committed. She said:

> "…nothing that shows that you are in any way sorry for the wicked act that was perpetrated on the innocent persons on the early morning of the 5th of June, 2005, instead, you continue to deny the part you played. You even challenged the record of your previous convictions…" (p. 1361 lines 6-12)

She said further:

> "Your actions were cold and calculated and sheer evil. Your actions were nothing short of wicked and evil and you are not in the least bit sorry about it. When I reflect, from Vineyard Town to the residence of Mrs. Campbell, the long and winded ascend of that hill and the location of that bedroom, with all the difficulty to gain access, it shows such determination to effect your evil purposes … you are a heartless, cold-blooded killer. Anywhere along the journey you could have had second thoughts about carrying out your deed but you were determined, you even revealed it to your confidant."

[14] In the end, the judge said that the use of a gun, the manner of the planning and execution of the murders while the deceased were "defenceless", "in their bed sleeping", the determination showed by the appellant to commit the crime, and the previous convictions indicating the appellant's intention not to conform to the laws of the society led her to conclude that the ultimate penalty was warranted.

[15] Having considered the facts, the learned trial judge's reasoning and the submissions, I agree with the learned trial judge that the death sentence is warranted in a case of this nature. The deceased persons were in their house asleep in the comfort of their bed. They would have been forgiven for having retired thinking that this was the safest place to be, after presumably a hard day's work. For a considerable time in history, it has been thought that a man's house is his castle. Being in their bed, the deceased persons were a threat to no one. They were not even on a ground floor. They were on an upper floor which could only be reached with the help of a ladder. The appellant violated the sanctity of the house of the deceased, in the dead of night, and proceeded to deprive them of their constitutional right to life while they were in a helpless mode. In my judgment, in Jamaica, these murders rank among the worst of the worst. In making that judgment, I am guided by a consideration of, and comparison with, other murders that take place in Jamaica. The lack of remorse on the part of the appellant as well as his propensity to invade other people's houses at nights thereby posing a threat to the lives of persons in those houses, indicate a revulsion on his part as regards reform.

[16] Having concluded that this murder was among the worst of the worst, I have one reservation however and that is in respect of Dr Williams' complaint that there was no indication that the death penalty would have been considered as an option as there was no notice given. He said that had he been notified to that effect, he would have attended the sentencing hearing with a different

approach in mind. In ***White v The Queen*** at para. [22], the Privy Council gave strong endorsement of the guidelines set out by Conteh, CJ in ***The Queen v Reyes*** at para. [26]. The first of those guidelines reads:

> "(i) As from the time of committal, the prosecution should give notice as to whether they propose to submit that the death penalty is appropriate."

These guidelines by Conteh, CJ, it should not be forgotten, were meant for the courts in Belize. As far as Jamaica is concerned, I accept that it is critical that notice be given. However, it is not practical for such notice to be given at the time of committal as at that stage in Jamaica, the Director of Public Prosecutions may not yet have had sight of the file in the case as the evidence at committal proceedings is not usually presented or marshalled by the Director of Public Prosecutions or staff under the control of that office. So soon, however, as the accused has been indicted, the Director of Public Prosecutions should inform the accused and the attorney-at-law on the record. By the time the accused comes to be pleaded, and definitely before the leading of the evidence has commenced at the Circuit Court, the prosecution should ensure that the accused, his attorney-at-law and the trial judge are informed of the intention.

[17] As said earlier, Dr Williams has said that he had received no indication that the death penalty was an option being pursued. Miss Llewellyn QC, DPP, has not contradicted that statement. In any event, the record does not disclose the giving of any such notice. In the circumstances, given the gravity of the

situation, notwithstanding my firm view that these murders are among the worst of the worst in this country, I would withhold my affirmation of the death penalty, and agree with my colleagues to the substitution of a sentence of life imprisonment with a specification that the appellant serve a minimum of 45 years before being eligible for parole.

COOKE JA

[18] I have read in draft the judgment of Morrison JA. His comprehensive treatment of the issues pertinent to this appeal embodies my views.

HARRISON JA

Introduction

[19] Peter Dougal was convicted on 26 July 2007, before Norma McIntosh J and a jury in the Circuit Court Division of the Gun Court on an indictment containing two counts of murder. The particulars allege that Peter Dougal, Donald Whyte and Sandra Watt murdered Mr L.G. Brown and Mrs Sandra Campbell on 5 June 2005. He was sentenced to death on 2 November 2007.

[20] Dougal has not sought to challenge his conviction but has appealed against sentence. He contends that the learned trial judge in imposing the death sentence erred in the exercise of her discretion and in the circumstances the sentence was manifestly excessive.

[21] A five member panel heard the appeal on 7 and 8 December 2009, and reserved judgment.

The Offence of Murder

[22] Murder is considered the most serious offence affecting the human body. Amongst murders certain types have been deemed to be of a higher degree on the basis of greater blameworthiness as in the cases of extreme brutality and exceptional depravity. Contract killings can easily be identified as one such category. What ought to be the philosophy of punishment to guide the court in matters of sentencing, particularly in cases involving a choice of the death penalty, has been shown in a number of jurisdictions to be an issue of serious conflict between the different Benches and even the Judges within the same Bench. Judges seem to rely on diverse justifications to arrive at their death sentence decisions. In the majority of cases which I have read deterrence seems to emerge as the major reason for justifying the death sentence.

[23] The debate about the deterrent effect of death penalty is dominated mainly by two viewpoints: the first holds that the death penalty has a deterrent effect, and the second holds the opposite of it. The first viewpoint is best propounded by Sir James Fitzjames Stephen in his work: Stephen "Capital Punishment", Fraser's Magazine, Vol. LXIX, 1864 at page 753 cited in Royal Commission Report on Capital Punishment, page 19, para 57. He stated:

> "No other punishment deters man so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result ... No one goes to certain inevitable death except by compulsion. Put the matter the other way. Was there ever yet a criminal, who when sentenced to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because 'All that a man has he will give for his life.' In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly."

[24] The second viewpoint, which denies the deterrent effect of the death penalty, has been summed up in the Report of the Royal Commission on Capital Punishment (1953) as follows:

> "First, prima facie, the death penalty is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment. Secondly, there is some evidence that this is so. Thirdly, there is no convincing statistical evidence that the penalty of death has a stronger effect as a deterrent than any other form of punishment. Fourthly, this effect (that is to say, stronger effect as deterrent) does not operate universally or uniformly. Fifthly, the deterrent force of capital punishment operates not only by affecting the conscious thought of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder. Sixthly, it is impossible to arrive confidently at a firm conclusion about the deterrent effect of death penalty or indeed

> of any form of punishment. Seventhly, it is important to view the question in a just perspective, and not to base a penal policy in relation to murder on exaggerated estimates of uniquely deterrent force of the death penalty."

[25] The death sentence is still a part of the laws of Jamaica but it is a fact that the last execution was carried out on 18 February 1988. I must add that this in itself does not make the death sentence inapplicable. At that time, there were more than 190 prisoners under sentence of death but there has been a reduction of prisoners on death row. This is principally attributable to three events:

1. In 1992 the Jamaican Parliament amended the Offences against the Person Act to classify some murders as non-capital. The amendment applied retroactively and resulted in the commutation of sentences to life imprisonment of a number of murder convicts who had previously been mandatorily sentenced to death.

2. In 1993 the Judicial Committee of the Privy Council decided, in the case of ***Pratt and Morgan v the Attorney General of Jamaica and Another*** (1993) 43 WIR 340, that executing a person who has spent a prolonged period on death row violates Section 17 of the Constitution of Jamaica, which prohibits "inhuman or degrading punishment or other treatment". In compliance with the guidance set out in ***Pratt and Morgan,*** death sentences of convicted persons who had served five years on death row in Jamaica were commuted to life imprisonment.

3. As a result of the 2004 decision of the Privy Council in ***Lambert Watson v R,*** (2004) 64 WIR 241, mandatory death sentences are no

> longer allowed in Jamaica. Following this decision, new sentencing hearings are held and many death row prisoners had their sentences commuted.

[26] As the law now stands, imposition of the death penalty is discretionary but it should be noted that the discretion given to the court assumes onerous importance and its exercise becomes extremely difficult because of the irrevocable character of the death penalty. The authorities have made it abundantly clear that the sentencing court or the appellate court, for that matter, has to reach a finding of a rational and objective connection between capital punishment and the purpose for which it is prescribed. It is also clear that where there is no other option and it is shown that reformation is not possible, the death sentence may be imposed. It is against this background that I now turn to consider the issues that have been raised in this appeal.

The Brief Facts

[27] The prosecution's version of the case in a nutshell is as follows: Sometime in the early morning of 5 June 2005 Peter Dougal, a 41 year old farmer and construction worker, and one Donald Whyte went to premises 29A Stilwell Road in the parish of St. Andrew, entered the bedroom of Mrs Sandra Campbell and shot and killed both Mr Brown and Mrs Campbell as they lay asleep in bed. Mr Brown's Smith and Wesson revolver was taken from the bedroom leaving the empty holster behind.

[28] The Crown's case depended to a great extent on the evidence of one Gregory Lee-Foster. Foster testified at the trial that Dougal, whom he knew, came to his house in Vineyard Town on Saturday 4 June 2005 enquiring of him whether he had a pair of black water boots and any black pants. He told him he had none and he left. Dougal returned to Foster's house an hour later and was wearing a pair of black jeans, water boots and black merino. Dougal told him that he and "Short man" (the accused Donald Whyte) were going on a work later that night. He took a firearm from his waist (a .357 Magnum) and showed it to Foster and then left. Foster said he understood him to mean that he was going on a robbery.

[29] On Sunday 5 June 2005 at about 6:00 am Foster was at his home when he saw Dougal on the outside of the premises. Dougal called to him and when he went on the verandah, Dougal told him he had something he wanted him to check for him. He took a black leather wallet from his pocket and took out a number of credit cards from it. He said to Foster: "look how mi have to left (sic) the money". Dougal then showed Foster the credit cards and other documents and told him that he "suppose to can make some money out a dis". He also showed Foster an automatic firearm and told him that he had gone through a window at a house where he saw a gentleman and lady. She touched the man, the man shuffled and he fired a shot in the direction of the man who "folded up". The woman then screamed out and he Dougal fired a shot in her direction. He

heard nothing more from them. He then picked up the man's firearm and left. On leaving Foster's home Dougal left the wallet with Foster.

[30] Foster telephoned 811 (Operation King Fish) and spoke to a lady. He said he observed that one of the credit cards had the name L.G. Brown written on it as well as a photograph. There was also a receipt among the documents in the wallet which bore the name L.G. Brown. Foster scanned the credit cards and documents on his computer and printed them.

[31] The police visited the murder scene and commenced investigations into two cases of murder. A ladder was seen leaning in an upright position below the window of Mrs Campbell's bedroom. It rested on some 6" building blocks on the ground.

[32] On 5 June 2005 Corporal Malachi Rodney and a group of policemen went to 5 Grafton Road in Vineyard Town. A group of about three men were seen in the yard. On the approach of the police Dougal, who was one of the men, pointed a hand gun in the direction of the police and Corporal Rodney opened fire. The men ran. Dougal was pursued by Corporal Rodney but he jumped over a wall. While he was jumping over the wall the gun fell from his hand and was retrieved by the Corporal. Dougal continued running and jumped over a gate and fell on the roadway. Corporal Rodney noticed that Dougal was bleeding from his head and right thigh. He took from his waist a green camouflage wallet and pulled from it a wallet which contained a black ID casing. In that casing he

saw a photo imprint of L.G. Brown as well as the imprint of a driver's licence bearing the name L.G. Brown. The firearm which Dougal dropped was a .357 Magnum. It was handed over for ballistics' examination which revealed that it was the firearm used in the murder of Mrs Campbell and Mr Brown. This was also the firearm which he had shown to Foster on 9 June 2005 and told him that he was going on a "work".

[33] The medical evidence revealed that there was one gunshot wound to the body of Sandra Campbell on the left upper anterior chest without gunpowder deposition. In the doctor's opinion death could have been instantaneous or between two to three minutes. Death was due to the gunshot wound to the chest involving the abdomen. A postmortem examination was also done on the body of Lloyd Brown and one gunshot injury was found on the left frontal region of the head without gunshot deposition. Death was due to the gunshot wound to the head.

[34] Dougal raised the defence of alibi. He said he was on his way from Hanover at the time of the incident and was nowhere in St. Andrew or at premises 29A Stilwell Road at the material time.

[35] Dougal and Whyte were both found guilty of murder. Dougal, as I have said before, was sentenced to death. Whyte was successful eventually in an appeal against both his conviction and sentence and was accordingly acquitted of

the charge. The jury was unable to arrive at a verdict in respect of Watt so a re-trial has been ordered.

[36] The single ground of appeal by Dougal reads as follows:

> "In imposing the death sentence the learned trial judge erred in the exercise of her discretion. In the circumstances the sentence is manifestly excessive."

The Law

[37] Arising from the decision of ***Lambert Watson*** (supra), Parliament in Jamaica, in February 2005 amended the Offences Against the Person Act (the Act) by deleting the terminology "capital" and "non capital". The amendment sets out minimum sentences for the offence of murder and although the death sentence has been retained it is no longer mandatory.

[38] Section 3(1E) of the Act provides inter alia, that before sentencing a person pursuant to section 3(1), of the Act, the court must hear submissions, representations and evidence from the prosecution and the defence in relation to the issue of the sentence to be passed.

[39] In ***Daniel Dick Trimmingham v The Queen*** [2009] UKPC 25 Privy Council Appeal No. 67 of 2007 delivered 22 June 2009, the Judicial Committee of the Privy Council has laid down two basic principles which the court should observe if the death sentence is to be imposed. Lord Carswell stated as follows:

> "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." (Emphasis supplied)

[40] The facts in ***Trimmingham*** (supra) reveal that after the appellant robbed the deceased he had used a machete to behead him. The body was pushed into a ditch and the head was wrapped in the deceased's pants. The stomach was cut open and according to the appellant, this would prevent the "belly from swelling". 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 premeditated 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. Their Lordships accepted that it was a brutal murder but in their judgment it fell short of being among the worst of the worst, such as to call for the ultimate penalty of capital punishment.

[41] Prashant Pandey, in an article, "Matter of life & death", stated that the concept of the "rarest of the rare" came into being in 1983 when the Supreme Court of India gave its decision in the case of ***Bachan Singh and Another v The State of Punjab*** (1980) 2 SCC 684. Both men had committed multiple murders and were sentenced to death. The following propositions emerge from ***Bachan Singh***:

> (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided and only provided, the option to impose sentence of

> imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In ***Santosh Kuman Satishbhushan Bariyar v State of Maharashtra*** [2009 (7) SCALE 341] delivered 13 May 2009 Sinhu J, delivering the judgment of the Supreme Court of India said:

> "To translate the principle in sentencing terms, firstly, it may be necessary to establish general (sic) pool of rare capital cases. Once this general pool is established, a smaller pool of rare cases may have to be established to compare and arrive at a finding of Rarest of rare case."

[42] It is quite obvious that the ***Trimmingham, Bachan Singh*** and ***Santosh Kuman*** cases have laid down precise principles when the death sentence should be imposed. There are differences in the approach of their Lordships in the Supreme Court of India with those expressed by their Lordships in the Privy Council. It is clear however, that the courts within this jurisdiction are bound by the decision of ***Trimmingham***.

The Submissions

[43] Dr Williams argued five grounds in support of this appeal. He contended that the learned judge had erroneously exercised her discretion in imposing the

death sentence. I will now turn to his submissions and the responses made by Miss Llewellyn QC for the Crown.

(a) ***Failure to make comparisons with other murders***

[44] Dr Williams submitted that in determining whether the facts of the murder placed the case in the class of "the most extreme and exceptional", a comparison should not be made with the norms of ordinary civilized behaviour but with the facts of other murders (***Trimmingham*** para. 21). He submitted that the learned judge failed in this regard to make the comparison. He argued that in the instant case, there was no humiliating act; no torture prior to the death and that the offence was not of an exceptionally depraved and heinous character as to constitute a source of danger to the society at large.

[45] Miss Llewellyn QC submitted that implicit in the use of comparisons is the expectation that the sentencing tribunal will examine the circumstances of the case and that of other murders, contrasting and comparing in order to assess its severity. She says that if one were to follow ***Trimmingham*** this would involve ranking the case on a scale of other murders to determine whether the offence falls within the category of exceptional cases for which the death sentence would be appropriate. She submitted that this position should be treated very carefully because their Lordships in ***Trimmingham*** did not explain or give any guidelines which explain the methodology to be used in facilitating this comparison.

[46] Miss Llewellyn QC argued that the sentencing tribunal has to pay careful attention to the particular circumstances of the offender in weighing the mitigating and aggravating factors. She submitted that the determination of the severity of a murder by way of comparisons results in a sentencing process that falls short of the requirement for individualization of sentencing as it takes focus from the particular circumstances and issues in the case to be decided. Such an approach she said, may introduce a degree of arbitrariness and irrationality that was a feature of the mandatory procedure.

[47] Finally Miss Llewellyn QC submitted that in the instant case the learned trial judge's reasoning on sentencing demonstrated that she had exercised her discretion with due regard to all relevant principles of law and did not err in failing to compare the case with that of other murders in view of the requirements that the discretion of the judge be exercised in a reasonable and proper manner, focusing on the character and record of the individual being sentenced and the circumstances of the crime.

(b) ***The appellant's previous convictions and bad character***

[48] Dr Williams further submitted that the learned judge erred when in the exercise of her discretion she considered the applicant's previous convictions and bad character as aggravating factors to support her decision that the maximum penalty was warranted (page 1363 line 19 - page 1364 line 18 of the transcript). He submitted that the good character and the record of the applicant are

mitigating factors in his sentencing but bad character, if so found, is not to be put in the scales against the applicant (see ***Trimmingham*** paras. 18 and 21 affirming the decision of the Eastern Caribbean Court of Appeal).

[49] Miss Llewellyn QC submitted that the learned judge did not place undue emphasis on the appellant's previous convictions and his bad character in arriving at her sentence. She submitted that on reading the transcript the judge's attention was "riveted" to the preponderant aggravating factors surrounding the actual manner of the execution of the offence by the appellant. She submitted that in the instant case the aggravating factors far outweighed any mitigating circumstance in favour of the appellant.

(c) ***The prospects of reform***

[50] Dr Williams also submitted that the learned trial judge erred in sentencing the applicant to death without showing in her reasons that she had considered and was satisfied beyond reasonable doubt that there was no reasonable prospect of reform.

[51] Miss Llewellyn QC dealt with grounds (c) and (d) together and submitted that the learned judge had considered carefully whether there was any reasonable prospect of social re-adaptation and reform with respect to the appellant. She also submitted that it would be impossible for a judge to properly consider a reasonable prospect of reform without considering all evidence of the

appellant's lifestyle prior to the commission of the offence for which he was convicted including his previous convictions.

(d) ***Alternate punishment other than death***

[52] Further, Dr Williams submitted, that the learned judge erred in failing to consider whether or not the object of punishment could be achieved by any means other than death. He submitted that having regard to the facts of the case the character evidence on behalf of the applicant and parts of the social enquiry report (excluding the highly prejudicial parts) it cannot be said beyond reasonable doubt that death is the only punishment appropriate in this case.

(e) ***Requirement for formal notice***

[53] Dr Williams submitted that it was incumbent on the prosecution to have given formal notice of its intention to seek the death penalty.

[54] Miss Llewellyn QC submitted that there was no requirement on the Crown to give formal notice of its intention to seek the death penalty as in this case the trial was in relation to two counts of murder committed on the same occasion. She referred to ***Devon Simpson et al v Regina*** Privy Council Appeal Nos. 35, 37 and 38/1998 delivered 7 March 1996.

[55] Finally, Miss Llewellyn QC submitted that this court should decline to follow the decision of the Privy Council in ***Trimmingham*** for the reasons outlined above.

The sentencing exercise

[56] The Court below heard evidence from probation officers, Paul Whyte and Yvonne Peart. According to Whyte, the people in the appellant's community of Santoy, Hanover, portrayed the appellant as a bad man and a robber. They also thought of him as being a wicked and cruel person. He had moved to Dorset Avenue in Kingston but Whyte said that the residents in that community did not socialize with him. The appellant, he said, had denied knowing anything of the offence with which he was charged. In Whyte's opinion, the appellant was a hardened criminal and a threat to society.

[57] Yvonne Peart on the other hand said members of the community spoke of him as being a quiet, kind and helpful individual. She disagreed with Counsel however, that these sentiments spoke to his good character.

[58] Barbara McKenzie was a witness called by the appellant. She was friendly with the appellant's brother and has known the appellant since 1998. She found him a reliable person and one who plays a father model to her children. She would usually leave the children under his care whenever she goes out. She also found him to be an honest person. She was shocked when she heard that he was charged with murder because she did not know him to be that kind of person.

[59] Inspector Lopez Segree, a finger print expert, was called to prove the previous convictions of Dougal. He has eight previous convictions ranging between 1986 and 2001. The convictions were related to housebreaking and larceny, attempted housebreaking and larceny, robbery with aggravation, possession of ganja, burglary and indecent assault. The maximum term of imprisonment was one year in respect of burglary, housebreaking and larceny and indecent assault which were ordered to run concurrently.

[60] The medical report of Dr Frank Knight was tendered and admitted in evidence. The report revealed that the appellant was illiterate and his intellectual endowment was average. He had no past history of psychiatric illness and at the time of evaluation he had no feature of active or residual psychiatric disorder. There was no family history or past history of psychiatric disorder. He also had no evidence of physical disability.

[61] Counsel for Dougal (Dr Randolph Williams), made a plea in mitigation of sentence as well as submissions on behalf of Dougal. The stand taken by counsel before McIntosh J was more or less re-iterated in this appeal. He stated inter alia, at pages 1338 - 1340 of the transcript:

> "M'Lady, I make this submission on the grounds, firstly, there is finality about the death sentence and for that reason alone, it should be reserved for the worst possible cases. If I may put it another way, the death sentence should be an exception and it should not be, so to speak, another 'run of the mill' sentence. If it were made a routine sentence, I submit, it would cheapen life. It would remove the

> sense of awe which is involved in imposing a sentence of death. M'Lady, the fact that two persons were murdered, I submit, does not of itself raise the case into the worst possible category. It is not a numerical counting matter. Each case ought to be considered on its own facts as well as the characteristics, the individual characteristics of the convicted person.
> ….
>
> M'Lady the second reason why I should say the death penalty ought to be an exception and limited to the worst cases is that there is recognized in the Jamaican Constitution a fundamental right. A fundamental right to life, a right which is shared by all persons, not only victims of crime but also those to be sentenced. It would not be in keeping with our sense of civilization to say 'a life for a life or an eye for an eye'. The fundamental right in the Constitution is limited or restricted by certain restrictions, including the exception of the sentence imposed by a Court, but bearing in mind, it is an exception in a Constitution which lays down fundamental rights. The interpretation and scope of that exception, I submit m'Lady should be restricted or kept within a narrow scope. Basing myself on those two principles, I ask your Ladyship to consider that Mr. Dougal's case does not require the death sentence."

[62] Dr Williams had also referred to the appellant's previous convictions for possession of ganja, attempted housebreaking and larceny, robbery with aggravation, burglary and indecent assault. He submitted that the appellant was not the type of individual who ought to be removed from society forever. He argued that there is still hope for him and that he was amenable to reform.

[63] Dr Williams referred to the social enquiry report and the views expressed by some members of the community that the appellant should be locked away for a very long time.

[64] Finally, Dr Williams asked the learned judge to consider that the appellant is the father of a one year old son and beseeched the court to temper justice with mercy.

[65] In handing down the sentence of the Court, the learned judge said she had taken the following into consideration:

(i) findings of the social enquiry report;

(ii) assessment of the doctor concerning the appellant's physical and mental status; and

(iii) the plea in mitigation of sentence.

[66] The learned judge found:

(a) that Dougal had made no expression of remorse for his actions;

(b) that there were no signs of psychosis, mental disorder; and

(c) no evidence of organic impairment of memory or intellect or immediate disorder.

[67] The judge considered the appellant's previous convictions and said at page 1363 lines 22-23 of the transcript:

> "he has no intention of conforming to the laws of the society".

[68] The judge then assigned the following reasons for imposing the death penalty on the appellant:

> "Your actions were cold and calculated and sheer evil. Your actions were nothing short of wicked and evil and you are not in the least bit sorry about it. When I reflect, from Vineyard Town to the residence of Mrs. Campbell, the long and winded ascent of that hill and the location of that bedroom, with all the difficulty to gain access, it shows such determination to effect your evil purposes, that's coupled with the matter of fact way you described the killing, "if the lady did just keep quiet", or words to that effect, you are a heartless, cold-bloodied killer" (page 1362)
>
> "…you really are within the contemplation of the [legislature] when they included section 1(A) of the Amendment Act, to impose the death penalty for this kind of offence under these circumstances. These circumstances involving the use of a gun, not just the killing of two innocent persons who were defenceless as they stayed in their bed sleeping but because of the way in which it was executed, planned with all the opportunity to change those plans but you went ahead with that determination that you showed." (page 1363)
>
> "Your attorney spoke about an antecedent showing that you are a father and the Court should consider the presence of a father in the life of a child as playing an important part. You think so casually, you who regard human life so cheap, I wonder what point your presence would be in the life of your child, I can't see that. I believe, sir, that you are that kind of person, the circumstances of this case, the use of the gun, the way in which it was executed, the determination that you showed, the premeditation, all of these go towards making these circumstances such that taking it out of your, what your lawyer called 'the run of the mill' sentence and that, in my view, warrants the death penalty…" (pages 1364-1365)

Discussion

[69] It is beyond dispute that the comparative approach, mitigating circumstances, the question of the character of the appellant and the reasonable prospect of his reform are all matters that must be considered when the court comes to consider the appropriate sentence in this case.

[70] In ***Lambert Watson*** (supra), Lord Hope of Craighead referred to the high incidence of murder in this country and stated at paragraph 64:

> "[64] We mention one last matter. In the Court of Appeal and in argument much emphasis was laid on the very high incidence of murder and the widespread use of firearms in Jamaica. These facts are well known to the Board and are, regrettably, notorious. Criminal conduct of the kind described is not unknown in the United Kingdom. So long as those conditions prevail, and so long as a discretionary death sentence is retained, it may well be that judges in Jamaica will find it necessary, on orthodox sentencing principles, to impose the death sentence in a proportion of cases which is, by international standards, unusually high. But prevailing levels of crime and violence, however great the anxiety and alarm they understandably cause, cannot affect the underlying legal principle at stake, which is that no-one, whatever his crime, should be condemned to death without an opportunity to try to persuade the sentencing judge that he does not deserve to die."

[71] In ***Prajeet Kumar Singh v State of Bihar*** [2008 (4) SCALE 442], the appellant had murdered children of one family while they were asleep. He thereafter proceeded to attack the adult members of the family who, on hearing

the screams of their children, had come to their rescue. The Supreme Court of India, noting the brutality of the manner of killing, considered it a fit case for the imposition of the death sentence.

[72] At para. 21 of its judgment in ***Trimmingham***, the Board distilled the approach that should be followed in discretionary death penalty cases into 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."

[73] When one examines the circumstances of the killing in the instant case it seems clear to me that it was a very cruel murder. The victims were helpless and undefended and were put to death while they were asleep. Clearly, the manner of execution and the design in the killing would put it at the level of extreme

cruelty to the extent where it could be described as cold-blooded. But, we have been guided by their Lordships in ***Trimmingham*** (a case decided subsequently to the trial of this appellant) that in considering whether a particular case falls into the category of "the worst of the worst" or "the rarest of the rare" the court must compare it with other murder cases and not with ordinary civilized behaviour.

[74] In ***White v The Queen*** (Belize) [2010] UKPC 22, delivered 23 July 2010, the deceased was killed with "two swift shots". Sir John Dyson delivering the opinion of the Board stated inter alia:

> "16 …In fact, callous and serious though it undoubtedly was, the murder came nowhere near meeting the criteria specified in *Trimmingham.* The deceased was killed with two swift shots. There was no element of sadism, torture or humiliation. In *Trimmingham's* case, counsel for the appellant accepted that the crime was a 'brutal and disgusting' murder, involving the cold-blooded killing of an elderly man in the course of a robbery. But although the manner of the killing was 'gruesome and violent', there was no torture of the deceased, prolonged trauma or humiliation of him prior to his death and the killing did not appear to have been planned or premeditated. The Board described this as 'a bad case, even a very bad case of murder committed for gain'. But in its judgment, the case fell short of being 'the worst of the worst', such as to call for the ultimate penalty of capital punishment. The appellant had behaved in a 'revolting fashion', but the case was not comparable with the worst cases involving sadistic killings. The facts of the present case

> were considerably less appalling than those in *Trimmingham's case*."

[75] The learned judge, in the instant case, failed to consider the appellant's prospects of reform in the sentencing process. The judge said that the appellant "has no intention of conforming to the laws of the society" (page 1363 – lines 22-23) but in my view, this statement was not in compliance with the principle laid down in ***Trimmingham***. The learned judge had also fallen into error when she placed both mitigating and aggravating circumstances in the scales and balanced them. In doing this she had taken into consideration the appellant's bad character and previous convictions. Their Lordships did say in ***Trimmingham*** at para. 21 that:

> "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."

[76] In ***White*** their Lordships once more emphasized and repeated the importance of applying the two principles outlined in ***Trimmingham***. Sir John Dyson delivering the opinion of the Board stated inter alia:

> "14. With one qualification, the Board repeats and wishes to emphasise the importance of applying these two principles. The qualification is as to the apparently absolute prohibition on taking into account *against* the offender his bad character and any other relevant

> circumstances that may weigh *against* him. There may be cases where an offender's previous offending is so bad and the previous offences are so similar to the index offence that they are relevant to its gravity. An example might be where the index offence is the latest in a series of sadistic murders. There is the further point that the second basic principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment cannot be achieved by any means other than the death penalty. There may be cases where an offender's previous offending is so persistent and his previous offences so grave that they may properly lead the sentencing judge to conclude that there is no reasonable prospect of reform and that the object of punishment can only be achieved by means of the death penalty. But no judge should reach such a conclusion without the benefit of appropriate reports …"

[77] Perhaps, it would be useful if this court were to set out the proposed sentencing guidelines pronounced by Conteh, C.J. in ***Regina v Reyes*** [2003] 2 LRC 688 with respect to murder cases where the death sentence is likely to be imposed. These guidelines were expected to be followed by the prosecution "in order to introduce some measure of consistency and rationality and in keeping with the provisions of the Constitution of Belize". Their Lordships in ***White*** (supra) stated inter alia, at paragraph 22:

> "These excellent guidelines which the Board strongly endorses are:
>
> (i) As from the time of committal, the prosecution should give notice as to whether they propose to submit that the death penalty is appropriate.

(ii) The prosecution's notice should contain the grounds on which they submit the death penalty is appropriate.

(iii) In the event of the prosecution so indicating, and the trial judge considering that the death penalty may be appropriate, the judge should, at the time of the allocutus, specify the date of the sentence hearing which provides reasonable time for the defence to prepare.

(iv) Trial judge should give directions in relation to the conduct of the sentence hearing, as well as indicating the materials that should be made available, so that the accused may have reasonable materials for the preparation and presentation of his case on sentence.

(v) At the same time the judge should specify a time for the defence to provide notice of any points or evidence it proposes to rely on in relation to the sentence.

(vi) The judge should give reasons for his decision including the statement as to the grounds on which he finds that the death penalty must be imposed in the event that he so conclude. He should also specify the reasons for rejecting any mitigating circumstances."

And at para. 25, their Lordships continued:

> "25. The Board cannot stress enough the importance of following the carefully drafted sentencing guidelines of Conteh CJ."

Conclusion

[78] In ***Reyes (Patrick) v R*** [2002] UKPC 11; (2002) 60 WIR 42, Lord Bingham of Cornhill, stated inter alia, at para. 43 of the judgment:

> "[43] …The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, **so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty.** But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect." (emphasis supplied)

[79] There is no doubt that the killings in this case were reprehensible and cold-blooded. For the appellant to say "if the lady did just keep quiet", is clearly callous. In my judgment, based on the authorities of ***Trimmingham, Pipersburgh*** and ***White***, it could not be said that the present case falls within the categories of "worst of the worst" or "rarest of the rare." It does appear to me that the learned judge had considered the ***Bachan Singh*** approach referred to in para. 23 (iv) (supra) but, as I have said before, our courts are bound by decisions of the Privy Council and must follow the principles laid down in cases decided by that court.

[80] I would therefore, accept the submissions of Dr Williams that the learned judge erroneously exercised her discretion in imposing the death sentence. In my judgment, the death sentence cannot be allowed to stand and should be set aside. I consider that it would be appropriate that the appellant should be sentenced to life imprisonment with a stipulation that he should not become eligible for parole until he has served a period of 45 years.

MORRISON JA

Introduction

[81] In this matter, all members of the court are in agreement that this appeal should be allowed and a sentence of imprisonment for life substituted for the sentence of death which had been pronounced in the court below by McIntosh J (as she then was). It is also agreed by all that the court should stipulate that the appellant should not be eligible for parole until he has served a period of 45 years in prison. However, there is a sharp divergence of views between Panton P and Harrison JA as regards the reasons for this result, which each of them has arrived at by a distinctly different route. It is because of this difference of opinion that I have thought it desirable to indicate, regrettably not as briefly as I had hoped to do, my own reasons for concurring with the result, for the reasons given by Harrison JA.

[82] The facts of the case have already been fully stated in the judgments of my brethren and I do not therefore propose to rehearse them, beyond the barest outline, in this judgment. On 19 October 2007, the appellant was sentenced to suffer death in the manner prescribed by law. This sentence followed his conviction for the murder of Lloyd George Brown and Sandra Campbell. They were murdered in the bedroom of the latter, in her home at 29A Stilwell Road, in the parish of Saint Andrew. Both deceased had retired to bed and were asleep when each received a fatal injury. In respect of Mr Brown, it was a gunshot wound to the left frontal region of the head. As for Ms Campbell, it was a gunshot wound to the left anterior chest. Death in both cases was instantaneous. The appellant fired the fatal shots. There seems to be no debate that these were murders in the furtherance of robbery and that they can be properly classified as premeditated.

[83] Put squarely, the primary issue which arises on this appeal is whether, in the light of the fact that the death penalty is no longer the mandatory sentence for the offence of murder in Jamaica, the learned trial judge was correct in sentencing the appellant to death on the facts adduced by the prosecution and accepted by the jury at the trial. Other issues, such as whether the judge adopted the appropriate procedure in conducting the sentencing exercise, which has an obvious bearing on the outcome of the exercise, also arise for consideration.

Some background

[84] But first, a little bit of (relatively recent) history may be helpful in providing some context for the discussion. In ***Matthew v The State*** (2004) 64 WIR 412, Lord Nicholls of Birkenhead said this (at paras [65] and [66]):

> "Years ago no one thought mandatory death sentences were an unusual or inhumane form of punishment. They existed in the United Kingdom until 1965. As recently as 1980 Lord Diplock was able to say there was nothing unusual in a capital sentence being mandatory: Ong Ah Chuan v Public Prosecutor [1981] AC 648, 674.
>
> Times have changed. Human rights values set higher standards today. The common endeavour, to rid the world of man's inhumanity to man, has not ceased. Conduct, once tolerated, is no longer acceptable. Murder can be committed in all manner of circumstances. In some the death penalty will plainly be excessive and disproportionate. As Lord Lane noted, there is "probably no offence in the criminal calendar that varies so widely both in character and in degree of moral guilt as that which falls within the legal definition of murder": see the report of the Prison Reform Trust (1993), page 21. To condemn every person convicted of murder to death regardless of the circumstances is a form of inhumane punishment. A sentence of death which lacks proportionality lacks humanity."

[85] Although that was a case in which Lord Nicholls actually dissented in the result, there was no disagreement on the principle that "the mandatory death penalty is a cruel and unusual punishment and therefore inconsistent with sections 4 (a) and 5 (2) (b) of the Constitution" (per Lord Hoffmann, delivering the majority judgment for a nine member panel, at para. [12]). ***Matthew*** was a

case from Trinidad & Tobago, but by the time it was decided the Privy Council had already come to the same conclusion in relation to the Constitutions of Belize (***Reyes v R*** (2001) 60 WIR 42), St Lucia (***R v Hughes*** (2002) 60 WIR 156) and St Christopher & Nevis (***Fox v R (No 2)*** (2002) 61 WIR 169). The result in ***Reyes***, ***Hughes*** and ***Fox*** was that the mandatory death penalty was declared by the Board to be in breach of the constitutions and all three cases were accordingly remitted to the courts below for the determination of the appropriate sentence in the circumstances of each. In ***Matthew***, however, as in the companion case of ***Boyce & Joseph v R*** (2004) 64 WIR 37, the Board by a bare majority decided that in both Trinidad & Tobago and Barbados respectively the mandatory death penalty, although in breach of the constitutional prohibition against cruel and inhuman punishment, was saved by specific clauses in both constitutions protecting laws already in place at the time when the constitutions came into force from challenge for inconsistency with their provisions.

[86] In ***Lambert Watson v R*** (2004) 64 WIR 241, decided on the same day as ***Matthew*** and ***Boyce & Joseph***, it was Jamaica's turn, Lord Hope of Craighead observing (at para. [34]) that, just as in ***Reyes***, ***Hughes*** and ***Fox***, "basic humanity requires that the appellant should be given an opportunity to show why the sentence of death should not be passed on him". Thus –

> "If he is to have that opportunity, it must be open to the judge to take into account the facts of the case and the appellant's background and personal circumstances. The judge must also be in a position

> to mitigate the sentence by imposing, as an alternative, a sentence of life imprisonment."

[87] In the result, section 3(1A) of the Offences Against the Person Act (as amended) ('the OAPA'), pursuant to which the appellant had been sentenced to death, was declared to be unconstitutional, because it infringed the prohibition in section 17 (2) of the Constitution of Jamaica against "inhuman or degrading punishment". The argument which had prevailed in ***Matthew*** and in ***Boyce & Joseph*** as to the effect of the savings clause in the Constitutions of Trinidad & Tobago and Barbados respectively, was also advanced in ***Lambert Watson***, but failed for reasons which it is not now relevant to consider. Times had indeed changed, and in ***Lambert Watson*** Lord Diplock's remark, made not quite a generation before in ***Ong Ah Chuan v Public Prosecutor*** [1981] AC 648, 674, to the effect that there was nothing unusual in a death sentence being mandatory, was dismissed by Lord Hope (at para. [29]), with the terse comment that it was "no longer acceptable".

[88] Compelling accounts of all that had happened to bring about this sea change in judicial attitudes in a relatively short span of time are to be found in the judgments of Lord Bingham of Cornhill in ***Reyes*** and Lord Hope in ***Lambert Watson***. Thus in ***Reyes***, Lord Bingham adverted (at para. [14]) to the "differential culpability" in relation to the variety of circumstances in which the offence of murder can be committed and located the modern impetus towards change within the context of two important developments in the preceding half

century. The first was what Lord Hope was to describe memorably in ***Lambert Watson*** (at para. [30]) as "The march of international jurisprudence", beginning with the Universal Declaration of Human Rights in 1948, articles 3 and 5 of which proclaimed respectively that "Everyone has the right to life, liberty and security of person" and "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", and including the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), the International Covenant on Civil and Political Rights (1966) and the American Convention on Human Rights (1969). The second important development was the independence movement in most of the former British colonies, many of which (including Jamaica, the first in the Caribbean) adopted entrenched constitutions, expressed to be the supreme law of the state, which articulated a series of fundamental rights and freedoms entitled to constitutional protection (see generally Lord Bingham's judgment in ***Reyes***, at paras [17] – [24] and Lord Hope's judgment in ***Lambert Watson***, at para. [30]).

Legislative intervention

[89] In the wake of these far-reaching developments, the law in Jamaica has not stood still. As long ago as 1992, following on from a recommendation of a joint select committee of the House of Representatives and the Senate, Parliament had taken steps to address the disquieting problem of differences in

culpability for different murders by amending the OAPA to distinguish between capital murder (punishable by death) and non capital murder (punishable by life imprisonment) (see the Offences Against the Person (Amendment) Act 1992). In 2005, as a direct consequence of the decision in ***Lambert Watson***, Parliament next directed its attention to the question of the mandatory sentence of death, which had remained on the books as the sentence for capital murder. The result of this further consideration is that section 3 (1)(a) of the OAPA (as amended by the Offences Against the Person (Amendment) Act 2005 and the Offences Against the Person (Amendment) Act 2006), now provides for the imposition of a sentence of death **or** imprisonment for life in certain specified cases (including any murder committed in the course or furtherance of burglary or housebreaking, or robbery - see section 2 (1)(a)(i) and (ii) and section 2 (1A)(a) and (c)), while section 3 (1)(b) provides for a sentence of imprisonment for life, "or such other term as the court considers appropriate, not being less than fifteen years". Importantly, section 3 (1E) of the OAPA, as amended, provides that, before it sentences a person under section 3 (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".

A new dispensation

[90] The upshot of all of this judicial and legislative activity is that the sentence of death is no longer mandatory in Jamaica (with the consequential

result that the distinction between 'capital' and 'non capital' murders has been rendered superfluous). In ***Downer and Tracey v Jamaica*** (13 April 2000, Report No. 41/2000, para. 212), the Inter-American Commission had said (against the backdrop of the American Convention) that "the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of individual offenders and offenses is considered to be a condition sine qua non to the rational, humane and fair imposition of capital punishment". The mandatory death penalty was described by the concurring minority in ***Lambert Watson*** (at para. [63]) as a relic of "the medieval common law of England" (see also ***Mithu et al v State of Punjab et al*** [1983] 2 S.C.R. 690, 704, a decision of the Supreme Court of India, in which Chandrachud CJ described it as "a relic of ancient history…that is the lawless law of military regimes"). Its abolition therefore had the effect of bringing the law of Jamaica in this regard into closer alignment with contemporary international standards of fairness. As a result, as Campbell J said in one of the early sentencing hearings in the Supreme Court after the 2005 amendment of the OAPA (***R v Ian Gordon***, unreported, heard 22 and 29 August 2005, at page 7), the law "now recognizes that to treat murder as a single category and to inflict an automatic sentence, wherever in the range [of possible murders] the convict falls, is a denial of his fundamental rights and an assault on his basic humanity". This was an entirely new dispensation.

[91] The main result of these developments as a practical matter has been that the sentencing process, once perfunctory in murder (and, between 1992 and 2005, capital murder) cases, has taken on an importance second only to that of the trial itself. The desired outcome of the process is to achieve proportionality and individualisation in sentencing. Judges charged with the responsibility of sentencing, who under the now discarded regime had no choice in the matter, therefore now, literally, are called upon to exercise the awesome power of decision over life or death, particularly so in these still early days (at any rate, in this jurisdiction) of discretionary sentencing for certain types of murder, when new and developing norms have not yet hardened into accepted doctrine. In approaching this onerous task, it seems to me that it will always be of critical importance to have in mind that the journey from the days of the mandatory death penalty to today's reality has been this society's response, as expressed in the will of Parliament, to what Lord Bingham described in ***Reyes*** (at para. [26]) as the "evolving standards of decency that mark the progress of a maturing society". In other words, the sentencing judge must always be guided by the fact that the successive amendments to the OAPA (in 1992, 2005 and 2006) were clearly intended by Parliament to have an ameliorative effect with respect to persons who were previously liable upon conviction to the mandatory sentence of death.

Judicial application of the new provisions

[92] Happily, by the time Jamaican judges came to the task in 2005, there was already a body of previous experience in other places that provided some guide-posts to the way forward in the new dispensation. So in ***Downer & Tracey v Jamaica***, for instance, the Inter-American Commission had indicated that the experience of other international human rights authorities, as well as the courts of various common law jurisdictions that had retained the death penalty, suggested that mitigating circumstances requiring consideration in determining the appropriate sentence for murder might include "the character and record of the offender, the subjective factors that might have influenced the offender's conduct, the design and manner of execution of the particular offense, and the possibility of reform and social re-adaptation of the offender".

[93] Even closer home, a number of decisions of the Eastern Caribbean Court of Appeal (some of which were subsequently referred to with express approval by the Board in ***Pipersburgh & Robateau v R*** (2008) 72 WIR 108, paras. [32] and [33]) also provide valuable guidance as to the correct approach to the sentence hearing in a capital case. Thus in ***Mitcham et al v DPP*** (St Christopher & Nevis Criminal Appeals Nos. 10, 11 and 12 of 2002, judgment delivered 3 November 2003), Sir Dennis Byron CJ said this (at para. [2]):

> "When fixing the date of a sentencing hearing, the trial judge should direct that social welfare and psychiatric reports be prepared in relation to the prisoner.

> The burden of proof at the sentencing hearing lies on the prosecution and the standard of proof shall be proof beyond reasonable doubt."

[94] In the subsequent decision of the same court in ***Moise v The Queen*** (St Lucia Criminal Appeal No. 8/2003, judgment delivered 15 July 2005), Rawlins JA (Ag) (as he then was), after a review of a number of previous decisions of the court in which the proper approach to sentencing in death penalty cases had been discussed, concluded as follows (at paras [17] –[19]):

> "17. The cases mentioned in the foregoing paragraph 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. 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 facts 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 circumstances 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.
>
> 18. It is a mandatory requirement in murder cases for a judge to take into account the personal and individual circumstances of the convicted person. The judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and

> execution of the offence, and the possibility of reform and social re-adaptation of the convicted person. The death sentence 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. The sentencing judge is fixed with a very onerous duty to pay due regard to all of these factors.
>
> 19. In summary, the sentencing judge is required to consider, fully, two fundamental factors. On the one hand, the judge must consider the facts and circumstances that surround the commission of the offence. On the other hand, the judge must consider the character and record of the convicted person. The judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case."

[95] In ***Pipersburgh***, the Board considered that it was the relevance of the personal and individual circumstances of the convicted person and, in particular, "the possibility of his reform and social re-adaptation" which underscored the necessity for social inquiry and psychiatric reports at all sentence hearings. Speaking for the Board, Lord Rodger of Earlsferry concluded his judgment by commending the judgments in ***Mitcham v DPP*** and ***Moise v The Queen*** "as providing a useful indication of the approach which requires to be taken in order to give effect to the underlying principles of the law on the subject".

Trimmingham v R

[96] This is the background to the decision of the Board in ***Trimmingham v R*** [2009] UKPC 25, the interpretation and application of which lie at the heart of the difference of opinion between Panton P and Harrison JA in the instant appeal. In order to appreciate the issues, it is regrettably necessary to refer again to some of the relevant facts of the case.

[97] On 23 November 2004, the appellant was convicted of murder after a trial before Blenham J and a jury in the High Court of St Vincent and The Grenadines. On 8 December 2004, after a sentencing hearing, he was sentenced to death by hanging. The evidence which the jury by its verdict accepted was that, on the day of the murder, the appellant, who was armed with a firearm, went to certain land where the deceased, who was 68 years of age, kept his goats. Having resolved at some point to rob the deceased, it appears that the appellant then forced him to the ground and demanded money, to which the deceased responded he had none, but that the appellant "could take his goats if he left him alone". The ghastly sequel is set out in the account given by Lord Carswell in his judgment (at para. [3]) as follows:

> "[The appellant] then took the deceased some little distance away and struck him in the stomach, causing him to fall on the bank of a "contour" or rain water ditch. He threw the deceased down into the contour and cut his throat with a cutlass which he had taken from the deceased, then cut off his head with the same implement. He removed the trousers from the body and wrapped the head in them. He handled the penis of the deceased and made a ribald remark

> about it. He positioned the body in the contour and slit the belly, explaining to [his accomplice] that he did so to stop the body from swelling. He covered up the body and stuffed the trousers containing the head into a hole under a plant in a nearby banana field."

[98] In determining that the appellant should be sentenced to death, the trial judge described this as a most "exceptional and extreme case of murder" and concluded that the appellant "should be kept out of society by the imposition of the ultimate sanction".

[99] In dismissing the appellant's appeal against conviction and sentence (St Vincent and The Grenadines Criminal Appeal No. 32/2004, judgment delivered 13 October 2005), the Eastern Caribbean Court of Appeal agreed, Barrow JA describing the murder for which the appellant had been convicted (at para. [26]) as "not just cold blooded… [but]…as inhuman as one can imagine". In coming to its decision to dismiss the appeal against sentence, the court adhered faithfully to the guidance provided by the previous decisions of that court and to the approach which had received the approbation of the Board in ***Pipersburgh***. In his characteristically careful judgment, Barrow JA concluded (at para. [35]) that it was "the criminal culpability, the degree of moral guilt, present in this specific murder that made it appropriate to consider it as one of the 'rarest of the rare' cases in which the death penalty may be appropriate".

[100] In the judgment of the Board, Lord Carswell referred (at para. [20]) to the approach to discretionary sentencing in capital cases which was approved in

Pipersburgh, with the observation that that approach "should be regarded as settled law". He then went on to state (at para. [21]), in the passage to which reference has already been made by both Panton P and Harrison JA, the "two basic principles" which encapsulate the correct approach:

> "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."

[101] Turning to the facts of the case, Lord Carswell noted (at para. [22]) that counsel for the appellant had "readily accepted that the…crime was a brutal and disgusting murder, involving the cold-blooded killing of an elderly man in the course of a robbery". Further, (at para. [23]), that it was "undeniably a bad case, even a very bad case, of murder committed for gain". However, despite this assessment, the Board concluded (at para. [23]) that the imposition of the death penalty was not warranted in this case:

> "…it falls short of being among the worst of the worst, such as to call for the ultimate penalty of capital punishment. The appellant behaved in a revolting fashion, but this case is not comparable with the worst cases of sadistic killings. Their Lordships would also point out that the object of keeping the appellant out of society entirely, which the judge considered necessary, can be achieved without executing him."

[102] It is therefore clear that the Board's disagreement with the Court of Appeal was not as to the principles which that court had sought to apply, but rather with regard to its conclusion on the facts of the particular case.

[103] I am grateful to Harrison JA for very helpfully drawing attention (at para. [41] of his judgment) to the Indian experience with regard to discretionary sentencing in capital cases, which long predates the Caribbean experience. As Harrison JA has pointed out, the Supreme Court of India had as long ago as 1980 upheld the constitutionality of the death penalty, provided only that it was prescribed as an alternative sentence for the offence of murder where the normal sentence prescribed by law for murder was imprisonment for life (***Bachan Singh v State of Punjab*** (1980) 2 S.C.C. 684). It was as a direct result of this landmark decision that the Indian courts were therefore concerned to develop and to articulate criteria for the application of the death penalty in exceptional cases and it is in this context that the notion that the death penalty should only be imposed in 'the rarest of rare cases' assumed importance (see, in addition to the material referred to by Harrison JA, the subsequent judgment of

the Supreme Court of India, delivered by Thakkar J, in ***Machhi Singh and others v State of Punjab*** (1983) 3 S.C.C. 470).

[104] ***Trimmingham*** was revisited by the Board in ***White v R*** [2010] UKPC 22, an appeal from a decision of the Court of Appeal of Belize, the judgment in which was handed down after we had concluded the hearing of this appeal. In ***White***, the deceased was murdered during the course of what appeared to have been an attempted robbery. The prosecution's case at trial, which the jury accepted, was that the appellant had entered the building in which the deceased worked and, in response to the deceased's enquiry what he wanted, the appellant asked him for "one quarter", then immediately produced a handgun from which he fired three shots at the deceased, who was struck by two of them. The appellant was 30 years of age at the time of sentence and he had a number of previous convictions. These included a conviction in 1994 for manslaughter, for which he was sentenced to four years imprisonment; two drug offences in 1995, for which he was sentenced to 18 and three months' imprisonment respectively; offences of burglary and possession of ammunition without a licence in 1999, for which he was fined; and a single offence for dangerous harm in 2003, for which he was sentenced to one year's imprisonment. No psychiatric, psychological or social enquiry reports were placed before the judge for the purposes of sentencing.

[105] Under the scheme of the relevant Belize legislation, and in the light of the decision of the Board in ***Reyes***, this was a discretionary death penalty case. In imposing the sentence of death on the appellant, the trial judge said that he had not been able to find any mitigating factors in the case "which would cause me to exercise my discretion and impose a life sentence" on the appellant. The judge explicitly took into account the manner in which the offence was committed, the prevalence of the offence and offences of a similar nature, "together with the fact that the prisoner has the propensity for the commission of offences of this nature", as evidenced by the manslaughter conviction in 1994 and the conviction for dangerous harm in 2003.

[106] His appeal to the Court of Appeal having been dismissed, the appellant pursued a further appeal to the Privy Council on the question of sentence only. On his behalf, it was submitted that the trial judge had failed to adopt the correct approach to the imposition of a discretionary sentence of death; that he had failed to adhere to the sentencing guidelines propounded by Conteh CJ in ***The Queen v Reyes*** (a decision on the sentencing hearing conducted by the Chief Justice in the Supreme Court on 25 October 2002, as a result of the appeal in ***Reyes*** having been allowed by the Board and the matter of sentence remitted to that court); and that the prosecution had failed to obtain a psychiatric report.

[107] At the outset of his consideration of the appellant's complaint that the trial judge had failed to adopt the correct approach to the sentencing exercise in

a discretionary death penalty case, Sir John Dyson referred to the earlier judgment of the Board in ***Trimmingham*** and said (at para. [13]) that in it the Board had "distilled the approach that should be followed" in such cases into the two basic principles to which I have already made reference in this judgment (see para. [100] above). Sir John then went on to say this (at para. [14]):

> "With one qualification, the Board repeats and wishes to emphasise the importance of applying these two principles. The qualification is as to the apparently absolute prohibition on taking into account *against* the offender his bad character and any other relevant circumstances that may weigh *against* him. There may be cases where an offender's previous offending is so bad and the previous offences are so similar to the index offence that they are relevant to its gravity. An example might be where the index offence is the latest in a series of sadistic murders. There is the further point that the second basic principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment cannot be achieved by any means other than the death penalty. There may be cases where an offender's previous offending is so persistent and his previous offences so grave that they may properly lead the sentencing judge to conclude that there is no reasonable prospect of reform and that the object of punishment can only be achieved by means of the death penalty. But no judge should reach such a conclusion without the benefit of appropriate reports: see the discussion on the third ground of appeal at paras 27 to 29 below."

[108] On the basis of the qualification expressed by Sir John in the passage quoted in the preceding paragraph, it therefore seems to me that the position with regard to the use to which the defendant's previous bad character and any other relevant circumstances may weigh against him in the sentencing exercise

in capital cases remains, generally speaking, as stated by Lord Carswell in ***Trimmingham***, which is to say that it should not ordinarily weigh against him. There may, however, be exceptional cases, in which the defendant's previous offending is, by reason of its similarity to the offence for which he is now to be sentenced, particularly relevant to the court's assessment of its gravity. The actual example given by the Board in ***White*** ("…where the index offence is the latest in a series of sadistic murders"), serves, it seems to me, to emphasise the highly exceptional nature of the cases that might fall within this category. Further, and again, exceptionally, the gravity and persistence of the defendant's previous offending may also be such as to have a bearing on the judge's consideration of the second ***Trimmingham*** principle, that is, whether there is any reasonable prospect of reform and whether the object of punishment can only be achieved by resort to the ultimate sanction.

[109] This view of how the principles of sentencing in death penalty cases laid down in ***Trimmingham*** and the qualification expressed in ***White*** are intended to work together is, it seems to me, amply confirmed by the actual outcome in ***White***. It will be recalled that, in sentencing the appellant to death, the trial judge had expressly taken into account his convictions, some nine years before, for manslaughter and, a few months before, for dangerous harm ("…the prisoner has the propensity for the commission of offences of this nature…"). The Board held that he had been wrong to do so, Sir John Dyson stating as follows (at para. [18]):

> "…the judge was wrong to regard the appellant's previous convictions as a relevant factor to be taken into account. He had not been previously convicted of murder. He had only one previous conviction for manslaughter. There is no information about the manslaughter conviction in 1994. But the fact that the appellant was only sentenced to four years' imprisonment shows that the offence could not have been of the utmost gravity. In these circumstances, his previous convictions were irrelevant to the gravity of the murder and did not even arguably show that there was no reasonable prospect of reform."

[110] In his submissions on behalf of the appellant, Dr Randolph Williams (to whom I would express my gratitude for his careful and realistic advocacy in this matter) submitted that what the Board had said in ***Trimmingham*** was that for the purposes of sentencing matters of character were only to weigh in the defendant's favour, but not against him. In his judgment in this appeal, Panton P has declined to accept Dr Williams' submission on this point, stating that (at para. [5]) "…if a convicted murderer has a record of convictions for other murders committed on other occasions it would be necessary to consider same in determining whether there is scope for the rehabilitation of such a person". To do otherwise, in the learned President's view, "defies commonsense and makes a mockery of the legislation". Panton P then goes on to refer to ***White***, quoting in full the passage which I have set out at para. [106] above and says this (at para. [7]):

> "This extract quoted from ***White*** confirms my view that Dr Williams' submission that previous

> convictions ought not to be considered is flawed and unacceptable. At the same time, it is not to be thought that every conviction of whatever kind is to be considered. It is my view that the court ought to consider previous offences that involved killings or other very serious offences against the person, as well as any other that might reasonably impact on the question of likelihood of reform."

[111] I regret that, with the greatest of respect, I am unable to agree with the views of the learned President on this aspect of the matter. In the first place, it seems to me that the submission made by Dr Williams was a perfectly accurate and as such a completely unexceptionable reflection of what was said by the Board in ***Trimmingham*** on the relevance of the defendant's character to sentencing in a capital case. But secondly and perhaps of greater moment, it appears to me that, even taking into account the ***White*** qualification, Panton P's broad and barely qualified statement of the role of previous convictions in the sentencing process cannot be justified in the light of the authorities. For the reasons I have attempted to state, I consider the true position to be as I have expressed it in paras [108] and [109] above.

[112] ***White*** is of further interest for what it decides in at least four other respects. Firstly, it confirms that the starting point in the sentencing exercise in capital cases should be life imprisonment (see the earlier discussion and the Eastern Caribbean authorities cited at paras. [93] and [94] above, which referred to the presumption of an unqualified right to life, from which it follows that the

burden of proof is on the prosecution). In the instant case, the judge was therefore wrong to start from the position that it was for the appellant to persuade him to impose a sentence of life imprisonment rather than the death penalty (para. [15]).

[113] Secondly, it confirms the primary principle established in ***Trimmingham***, which is that, for the murder under consideration by the sentencing judge to attract the death penalty, there must be features of the "manner in which this particular offence was committed" which make the case the "most extreme and exceptional", the "worst of the worst" or the "rarest of the rare". In concluding that the judge was accordingly wrong to impose the death penalty in ***White***, Sir John Dyson said this (at para. [16]):

> "In fact, callous and serious though it undoubtedly was, the murder came nowhere near meeting the criteria specified in *Trimmingham.* The deceased was killed with two swift shots. There was no element of sadism, torture or humiliation. In *Trimmingham's* case, counsel for the appellant accepted that the crime was a "brutal and disgusting" murder, involving the cold-blooded killing of an elderly man in the course of a robbery. But although the manner of the killing was "gruesome and violent", there was no torture of the deceased, prolonged trauma or humiliation of him prior to his death and the killing did not appear to have been planned or premeditated. The Board described this as "a bad case, even a very bad case of murder committed for gain". But in its judgment, the case fell short of being "the worst of the worst", such as to call for the ultimate penalty of capital punishment." The appellant had behaved in a "revolting fashion", but the case was not comparable with the worst cases involving sadistic killings. The

> facts of the present case were considerably less appalling than those in ***Trimmingham's*** *case.*"

[114] Thirdly, ***White*** makes it clear that "the death penalty cannot be justified by the prevalence of murder or other similar offences", given that neither of the two principles articulated in ***Trimmingham*** mentioned prevalence as a relevant factor. The judge had accordingly been wrong to take this factor into account (para. [17]).

[115] Fourthly, the Board reiterated the importance of judicial adherence to the sentencing guidelines formulated by Conteh CJ in ***The Queen v Reyes***, a point which it had previously made in ***Pipersburgh*** (at para. [31]). These guidelines are set out in full by Harrison JA in his judgment in this appeal (at para. [59]) and there is therefore no need for me to repeat them here, save to draw attention to the first of them, which is that as from "the time of committal, the prosecution should give notice as to whether they propose to submit that the death penalty is appropriate". Although I accept, as Panton P has pointed out in his judgment (at para. [16]), that these guidelines were initially formulated by Conteh CJ for use in the courts of Belize, I can see no reason why, mutatis mutandis, they should not apply with equal force to the death penalty sentencing process in Jamaica, particularly given the unqualified terms in which the Board has endorsed them in ***White***. Thus, Sir John Dyson described them (at para. [22]) as "excellent guidelines which the Board strongly endorses…", and

concluded on the point by stating (at para. [25]) "The Board cannot stress enough the importance of following the carefully drafted sentencing guidelines of Conteh CJ".

[116] Lastly, the Board reiterated the oft stated importance in capital cases of obtaining relevant reports, such as psychiatric and social enquiry reports ("To sentence the appellant to death without a psychiatric report and a comprehensive social enquiry report was plainly wrong" – para. [28]).

[117] The foregoing discussion makes it clear, in my view, that the sentencing judge must start from the position that there is, as Rawlins JA (Ag) concluded from the decided cases in ***Moise v The Queen*** (at para. [17] – see para. [94] above), "that there is a presumption in favour of an unqualified right to life". This also means, as Barrow JA added in the Court of Appeal in ***Trimmingham*** (at para. [22]), "that there must be no implicit approach that a bad case of murder will attract the death penalty unless there are mitigating circumstances" (this passage was also referred to without demur by Lord Carswell in his judgment in the Privy Council – see para. [17]). The starting point is life imprisonment and the burden of proof lies on the prosecution to establish beyond reasonable doubt that the case is a fit one for the imposition of the death penalty.

[118] Against this backdrop, the judge is required to determine as a first task whether, on its facts, the murder in question is "most extreme and exceptional".

In this regard, phrases such as 'the worst of the worst' and 'the rarest of the rare' provide critical guidance to the focus which the judge is required to sustain in this enquiry. In making this determination, the judge must compare the facts of the case before him with "other murder cases and not with ordinary civilised behaviour". Relevant factors in this regard might include whether the killing was planned or premeditated, whether the deceased was subjected to torture, prolonged trauma or humiliation, or other types of sadistic treatment prior to death. It is important to emphasise, however, that these are examples only and do not in any way constitute an exclusive or exhaustive list of the kinds of killings that might in the future be regarded as falling within the category of the worst of the worst or the rarest of the rare. If the murder cannot be so categorised, then the death penalty should not be imposed. However, even where the murder does fall within this exceptional category of case, the death penalty should still not be imposed unless the judge considers, secondly, after taking into account factors relevant to the defendant himself, that there is no reasonable prospect of reform and that the object of punishment cannot be achieved by any other means than the ultimate sentence of death. These two criteria are cumulative and not alternative. Other factors, such as the prevalence of the offence in question, which play no part in either of the ***Trimmingham*** principles, are not to be taken into account.

[119] The character of the defendant, as well as any other relevant circumstances should, as a general rule, be taken into account only in so far as

they may operate in his favour by way of mitigation, and are not to weigh in the scales against him. However, in exceptional cases, it may be permissible to take into account the previous criminal record of the defendant as a factor relevant to either the gravity of the offence for which he is to be sentenced or to a proper consideration of the question whether there is any reasonable prospect for reform of the defendant or whether the object of punishment can only be achieved by means of the death penalty.

The approach of the trial judge in the instant case

[120] At the end of a lengthy sentencing hearing, in which evidence was given as to the antecedents of the appellant (who was then 41 years of age), a social enquiry report (prepared at the request of the court) was tendered, character witnesses were called on the appellant's behalf and submissions were made on behalf of the prosecution and the defence, the learned trial judge imposed the sentence of death on the appellant for reasons which may be summarised as follows:

> (i) At a time when there was such a high incidence of violent crimes in Jamaica, the deceased couple must have thought that their bedroom was a haven of safety.
>
> (ii) The murders were wicked acts perpetrated against innocent persons.
>
> (iii) The murders in their execution demonstrated calculated and sheer evil. They were premeditated murders.

(iv) There was absolutely no remorse on the part of the appellant.

(v) Based on his eight previous convictions and "type of activities you have been engaged in, that is the kind of person you project." The appellant had "no intention of conforming to the laws of society".

(vi) The learned trial judge took into consideration the fact that in the opinion of the psychiatrist, the appellant had:
(a) No mental or physical defects;

(b) no signs of psychosis or other mental disorder;

(c) no organic impairment of memory or intelligence.

(vii) These considerations warranted the imposition of the death sentence on the appellant, who she described as a "heartless cold blooded killer".

[121] The grounds of appeal filed on behalf of the appellant and so ably argued by Dr Williams are as follows:

1. The learned trial judge erred in that she failed to compare the facts of the instant case with those of extreme and exceptional murders before imposing the ultimate sentence of death. In this case there was no humiliating act. There was no torture prior to the death. The offence was not of an exceptionally depraved and heinous character as to constitute a source of danger to the society at large.

2. The learned judge erred when in the exercise of her discretion she considered the applicant's previous convictions and bad character as aggravating factors and to support her decision that the maximum penalty was warranted.

3. The good character and the record of the applicant are mitigating factors in his sentencing but bad character, if so found, is not to be put in the scales against the applicant. (See Trimmingham paras. [18] and [21] affirming the decision of the Eastern Caribbean Court of Appeal.)

4. The learned trial judge erred in sentencing the applicant to death without showing in her reasons that she had considered and was satisfied beyond reasonable doubt that there was no reasonable prospect of reform.

5. Further, the learned judge erred in failing to consider whether or not the object of punishment could be achieved by any means other than death.

6. In considering the import of the statement "If the lady did just keep quiet" (p.1362 lines 12-13) spoken by the applicant a short time after the killings, the learned judge failed to see in these words an expression of regret and remorse for the murder of the female companion of the male deceased.

7. Having regard to the facts of the case, the character evidence on behalf of the applicant and parts of the social enquiry report (excluding the highly prejudicial parts), it cannot be said beyond reasonable doubt that death is the only punishment appropriate in this case.

[122] To these grounds, which reflect in large part the guidance given by the Board in ***Trimmingham***, Dr Williams in his submissions before us added another, which was that the prosecution had failed to give formal notice of its intention to argue that the death penalty should be imposed on the appellant.

[123] I think that it is right to say immediately, in fairness to the trial judge, that she was called upon to deal with this matter almost two years before the

judgment of the Board in ***Trimmingham*** was delivered. Thus, while the appellant is obviously fully entitled to rely on that decision in this appeal, it is really no criticism of the learned judge to say that she "failed" to follow the guidelines which it laid down. It is clear that she sought to apply her best judgment to what was equally obviously a difficult case in a still developing milieu, at any rate in this jurisdiction. (The identical comment can also be made in respect of the articulate and thoughtful judgment on sentencing by Campbell J in ***R v Gordon***, a matter which was concluded on 29 August 2005, just a few months after the amendment to the OAPA earlier that year had abolished the mandatory sentence of death for capital murder.)

[124] The main area of difference between Panton P and Harrison JA surrounds the appellant's complaint in ground 1, which is that the trial judge had "failed to compare the facts of the instant case with those of extreme and exceptional murders before imposing the ultimate sentence of death". Had she done so, Dr Williams submitted, it would have been seen that the case did not fall within the category of "the most extreme and exceptional" and did not therefore warrant the imposition of the death penalty. For her part, the learned director counselled caution in applying the decision in ***Trimmingham*** on this point, particularly as the Board had not given any guidelines which might elucidate the methodology to be used to facilitate the comparison which it seemed to invite. She submitted further that the comparative approach to determining whether a particular case fell within the "worst of the worst"

category was inconsistent with the manner in which determination of the appropriate sentence usually falls to be made, that is, by an assessment of "the circumstances of the crime and the personal character and record of the offender". In order to demonstrate the difficulties to which the decision in ***Trimmingham*** has given rise, the director helpfully referred us to a recent judgment on sentencing by Belle J in the Eastern Caribbean Supreme Court (St Christopher Circuit) in ***Director of Public Prosecutions v Liburd*** (Suit No. SKBHCR 2009/0007, judgment delivered on 22 October 2009) and accordingly invited us to "respectfully decline to follow…***Trimmingham***".

[125] On this point Harrison JA regards what he describes [at para. [69]) as "the comparative approach" as a key element in considering the appropriate sentence in a case such as this, citing in support a 2008 decision of the Supreme Court of India (***Prajeet Kumar Singh v State of Bihar*** [2008 (4) SCALE 442]), and ***Trimmingham***. On this basis, he concludes (at para. [61]) that, while the killings in the instant case "were reprehensible and cold-blooded", it cannot be said, based on the authorities, that the case falls within the categories of "worst of the worst" or "rarest of the rare". It is primarily on this basis that Harrison JA would allow the appeal and set aside the death sentence imposed by the judge.

[126] Panton P disagrees. In his view, all things considered, the trial judge was correct in her conclusion that the death penalty was amply justified in a case

of this nature. This is how the learned President concludes on this point (at para. [15]):

> "Having considered the facts, the judge's reasoning and submissions, I agree with the learned trial judge that the death sentence is warranted in a case of this nature. The deceased persons were in their house asleep in the comfort of their bed. They would have been forgiven for having retired thinking that this was the safest place to be, after presumably a hard day's work. For a considerable time in history, it has been thought that a man's house is his castle. Being in their bed, the deceased persons were a threat to no one. They were not even on a ground floor. They were on an upper floor which could only be reached with the help of a ladder. The appellant violated the sanctity of the house of the deceased, in the dead of the night, and proceeded to deprive them of their constitutional right to life while they were in a helpless mode. In my judgment, in Jamaica, these murders rank among the worst of the worst. In making that judgment, I am guided by a consideration of, and comparison with other murders that take place in Jamaica. The lack of remorse on the part of the appellant as well as his propensity to invade other people's houses at nights thereby posing a threat to the lives of persons in those houses, indicate a revulsion on his part as regards reform."

[127] I regret that, ever respectfully, I cannot agree with the learned President on this point. It seems to me to be patently clear from ***Trimmingham*** that the sentencing judge in a capital case is required to adopt the comparative approach in determining whether the murder under consideration falls within the category of the most extreme and exceptional case ("…the judge should of course compare it with other murder cases and not with ordinary civilized behaviour" – per Lord Carswell at para. [21]). Even if it can for

some reason be maintained that this does not appear plainly from ***Trimmingham*** to be the required approach, it is surely emphatically confirmed by ***White***, in which the failure by the trial judge to carry out such an exercise was the first of the appellant's three successful grounds of appeal. Applying that approach to the matter itself, the Board's conclusion was that, "callous and serious though it undoubtedly was, the murder came nowhere near meeting the criteria specified in *Trimmingham*…[t]here was no element of sadism, torture or humiliation". Indeed, the facts of ***White*** "were considerably less appalling than those in *Trimmingham's case*" (para. [16]). The recent decision in ***Liburd*** is another example of a case in which, although the learned judge's view was that the murder with which the court was there concerned was "cold-blooded, brutal and brazen" (per Belle J at para. [27]), it could nevertheless not attract the death penalty, since "If **Trimmingham's** case is not the worst of the worst neither can Liburd's" (para. [24]).

[128] In his judgment, Panton P does state that, in arriving at the conclusion that the murders in the instant case do "rank among the worst of the worst", he has been guided by a "consideration of, and comparison with, other murders that take place in Jamaica" (para. [15]). However, in the absence of any evidence or other material having been placed either before the trial judge or this court to provide the basis for such a comparison, I cannot, again with respect, regard this as a satisfactory approach. In any event, the facts of the instant case, when measured against the touchstone of ***Trimmingham*** (as the Board did in

White), cold, heartless and evil as they undoubtedly revealed the appellant to be, are in my view "considerably less appalling" than were the facts in ***Trimmingham***, lacking in particular any permissible aggravating elements, such as, for example, sadism, torture or humiliation.

[129] While murder committed in any circumstances, is justifiably regarded by the accepted norms of our society as contrary to the standards of ordinary civilised behaviour, the test for the imposition of the death penalty for the offence is, in the new dispensation brought about by the 2005 amendment to the OAPA, as the cases show, considerably higher than that. It accordingly seems to me to be the clear duty of sentencing judges to recognise this fundamental shift in the law by the application of strict and known criteria for the imposition of the death penalty. In any event, and perhaps less controversially, if there are yet lingering doubts on the matter, an even more compelling consideration for this court is that we are bound by decisions of the Privy Council. It is therefore not open to us to do as Miss Llewellyn QC (no doubt recognising that the prosecution might be faced with an insurmountable hurdle in this appeal) urged us to do, which is to decline to follow ***Trimmingham***.

[130] This is the basis on which I would therefore prefer the reasoning of Harrison JA to that of the trial judge and the learned President on this point. Panton P did, however, go on to deal with Dr Williams' submission that there had been no indication from the prosecution that it intended to contend at the

sentencing hearing that the death penalty should be imposed on the appellant, no notice to this effect having been given (in breach of guideline (i) of the guidelines in ***The Queen v Reyes*** – see para. [114] above). In answer to this submission, the director submitted that there was no requirement on the prosecution to give formal notice in this regard in a case concerning two counts of murder committed on the same occasion and she cited in support the decision of the Board in ***Devon Simpson et al v R*** (Privy Council Appeals Nos. 35, 37 and 38 of 1995, judgment delivered 7 March 1996).

[131] The learned President considered (at para. [16] of his judgment) that "it is critical that notice be given", and went on to say this:

> "These guidelines by Conteh, CJ it should not be forgotten, were meant for the courts in Belize. As far as Jamaica is concerned, I accept that it is critical that notice be given. However, it is not practical for such notice to be given at the time of committal as at that stage in Jamaica, the Director of Public Prosecutions may not yet have had sight of the file in the case as the evidence at committal proceedings is not usually presented or marshalled by the Director of Public Prosecutions or staff under the control of that office. So soon, however, as the accused has been indicted, the Director of Public Prosecutions should inform he accused and the attorney-at-law on the record. By the time the accused comes to be pleaded, and definitely before the leading of the evidence has commenced at the Circuit Court, the prosecution should ensure that the accused, his attorney-at-law and the trial judge are informed of the intention.
> As said earlier, Dr Williams has said that he had received no indication that the death penalty was an option being pursued. Miss Llewellyn QC, DPP, has not contradicted that statement. In any event, the record does not disclose the giving of any such

> notice. In the circumstances, given the gravity of the situation, notwithstanding my firm view that these murders are among the worst of the worst in this country, I would withhold my affirmation of the death penalty, and agree with my colleagues to the substitution of a sentence of life imprisonment with a specification that the appellant serve a minimum of forty five years before being eligible for parole."

[132] I entirely agree with Panton P with regard to the need for notice of its intention to seek the death penalty to be given by the prosecution. ***Devon Simpson***, upon which the learned director placed reliance on this point, is in my view clearly distinguishable. That was a case concerned in particular with the (now repealed) stipulation in section 3B (5) of the OAPA as it then stood that a defendant convicted of multiple murders could not be liable to the sentence of death without prior notice having been given by the prosecution. I also agree that the failure of the prosecution to give the required notice in this case should by itself result in the death penalty being set aside.

[133] I should also indicate that in my view the appellant is further entitled to succeed on at least two other bases, which I am happily now able to deal with quite briefly. Firstly, the learned trial judge, in deciding that the death penalty was warranted in this case, took into account the appellant's previous criminal record, referring to his eight previous convictions (between 1996 and 2001) for offences of burglary, housebreaking, possession of ganja, robbery with aggravation and indecent assault, all of which had been tried in the Resident Magistrate's Courts and none of which had attracted a term of imprisonment

exceeding 12 months at hard labour. In the judge's view, these convictions demonstrated that the appellant had "no intention of conforming to the laws of society". While not casting the net anywhere near as widely as this, Panton P nevertheless also considers (see para. [126] above) that the appellant's "propensity to invade other people's houses at nights thereby posing a threat to the lives of persons in those houses, indicate a revulsion on his part as regards reform".

[134] In the light of my earlier discussion on the permissible role in the sentencing exercise in capital cases of the previous bad character of the defendant (see paras. [107] to [109] above), I find myself again respectfully unable to agree with both learned judges that there is anything in the appellant's criminal record in this case to justify taking it out of the general rule laid down by the Board in ***Trimmingham***, which is that it is not to weigh against him for this purpose. As in ***White***, he had not previously been convicted of murder (in fact, unlike in ***White***, he had not even been previously convicted of homicide or any serious offence against the person of any kind), and it is clear from the sentences which his previous convictions had attracted that the offences could not have been of the utmost gravity. In these circumstances, again as in ***White***, it appears to me that the appellant's previous convictions were therefore "irrelevant to the gravity of the murder[s] and did not even arguably show that there was no reasonable prospect of reform".

[135] Secondly, the trial judge also appears to have taken into account the high incidence of violent crime in this country, a factor which, as I have already suggested based on ***White*** (see para. [114] above), forms no part of the ***Trimmingham*** guidance and is accordingly irrelevant to the issue of whether the death penalty should be imposed in a particular case.

Conclusion

[136] These are my reasons, which I fear that I have attempted to express at far too great length, for concurring with the decision of the court to allow this appeal to the extent indicated at the outset of this judgment.

PHILLIPS JA

[137] This is an appeal by the appellant Peter Dougal from the decision of McIntosh J (as she then was) on 2 November 2007, imposing the sentence, after conviction by the jury of two counts of murder by the appellant in the course or furtherance of a robbery, that he should suffer death in the manner authorized by law. This sentence was imposed after a sentencing hearing held on 19 October 2007 and is the subject of the appeal, the appellant having conceded that there was no arguable ground of appeal in respect of conviction.

[138] I have had the benefit of reading the draft judgments of my brothers and as my brother Harrison JA has comprehensively set out the facts of the case and its chronological history and path through the courts, there is no need to repeat them here, save to say that the appellant was charged and found guilty of murdering Lloyd G Brown and Sandra Campbell who were at the time asleep in bed at about 4:00 a.m in Miss Campbell's home at 29A Stillwell Road in the parish of Saint Andrew. Mr Brown died from a gunshot wound to the head, and Miss Campbell from a gunshot wound to the chest.

[139] At the sentencing hearing the learned trial judge had the following documents at her disposal:

(i) A social enquiry report which was prepared by probation officer Paul Whyte which gave details of the appellant's background with regard to his education, employment, early life and family situation.

(ii) A medical record submitted by Dr Frank Knight, consultant psychiatrist of the Southeast Regional Health Authority, Bellevue Hospital

(iii) Character evidence given by Barbara M^{c}Kenzie the appellant's sister-in-law.

(iv) A report from the Criminal Records Office with fingerprint impressions adduced through Detective Inspector Lopez Segree confirming previous convictions.

[140] The learned trial judge also had the benefit of a plea in mitigation made by counsel for the appellant who reminded the judge that she had a discretion whether to impose the sentence of death or one of life imprisonment specifying a

period after which the appellant would become entitled to parole, and urged the court to pursue the latter course. Counsel asked the court to recognize the finality of the death sentence and pleaded that for that reason alone it should only be reserved for the worst possible cases, and should, he said, be an exception rather than a "run of the mill" sentence. If it were a routine sentence, he submitted, "it would cheapen life. It would remove the sense of awe which is involved in imposing a sentence of death…the fact that two persons were murdered… does not of itself raise the case into the worst possible category. It is not a numerical counting matter. Each case ought to be considered on its own facts as well as the characteristics, the individual characteristics of the convicted person…" He added that, "there is recognized in the Jamaican Constitution a fundamental right - a fundamental right to life, a right which is shared by all persons, not only victims of crime but also those to be sentenced. It would not be in keeping with our sense of civilization to say 'a life for a life or an eye for an eye'."

[141] At the hearing, the then Director of Public Prosecutions Kent Pantry, QC in endeavouring to persuade the learned trial judge to impose the death penalty spoke about the aggravating features of the case, namely the use of a firearm to effect the double murders. He relied on the dicta of Campbell J in ***R v Ian Gordon***, unreported, heard 22 and 29 August 2005, where he stated at page [10]:

> "The gun features in most murders, and range from the most sophisticated of weapons to not very efficient homemade guns. The gunman and fear of him permeates every level of society. There is a special division of the Supreme Court for the trial of gun offences… The offender, who uses an illegal firearm, may be presumed, to be among a category of men, who is undeterred by the sanction the law imposes. To my mind this is a most aggravating feature."

Counsel also referred to the case of ***Reyes v R*** (2002) 60 WIR 42; [2002] UKPC 11 and relied on the judgment of Lord Bingham of Cornhill addressing the issue of illegal guns in the hands of criminals, at para. [43], when he said:

> "…The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate…"

[142] At the trial, the learned director pointed out that the appellant had used an illegal firearm to commit not only one but two murders at the same time, and coupled with his previous record of convictions for violent crimes, and the fact that within hours he had been apprehended in possession of the firearm, which the ballistics expert had opined was the firearm from which the deadly bullets were fired, and this not being a domestic situation whatsoever, the case would

have fallen he said, within the exceptional circumstances in which the death penalty could be imposed.

[143] Having reviewed the documents itemized at (i)- (iv) above and having heard the impassioned plea of counsel for the appellant and the observations made by the learned director, the learned trial judge in sentencing the appellant indicated that she recognized that she had the discretion under the statute to impose either the death penalty, or life imprisonment with a minimum of 20 years before being eligible for parole. The judge referred to what she described as the premeditated, much planned way in which the offence had occurred, and the nonchalant manner of the appellant when describing his plan. She mentioned his failure to show any remorse for the "wicked act that was perpetrated on the innocent persons on the early morning of the 5 June 2005", but remarked that he continued to deny the part that he played. She took note of the fact that he had no physical or mental defects, save for a minor hearing problem. The medical opinion indicated that he showed "no sign of psychosis, no mental disorder, no evidence of organic impairment of memory or intellect, no immediate disorder". Her conclusions therefore at page 1362 of the transcript were as follows:

> "Your actions were cold and calculated and sheer evil. Your actions were nothing short of wicked and evil and you are not in the least bit sorry about it. When I reflect, from Vineyard Town to the residence of Mrs. Campbell, the long and winded ascend (sic) of that hill and the location of that bedroom, with all the difficulty to gain access, it shows such a

> determination to effect your evil purposes, that's coupled with the matter of fact way you described the killing, "If the lady did just keep quiet", or some words to that effect, you are a heartless, coldblooded killer. Anywhere along the journey you could have had second thoughts about carrying out your deed but you were determined, you even revealed it to your confidant. As I said, in the circumstances these two persons were retired to bed. They were not roaming the streets where they could be easy targets for robbers and murderers; they were closeted in their bedroom. They were killed for thinking they were safe…"

She commented on his previous convictions and the kind of lifestyle he was pursuing, as after executing the plan of burglary and these killings he had still engaged in a shootout with the police, and so later the learned trial judge had this to say:

> "It's certainly the kind of, those are the kind of circumstances I do believe that the ultimate penalty, the maximum penalty is warranted."

She then concluded at page 1365:

> "I believe, sir, that you are that kind of person, the circumstances of this case, the use of the gun, the way in which it was executed, the determination that you showed, the premeditation, all of these go towards making these circumstances such that taking it out of your, what your lawyer called 'the run of the mill' sentence and that, in my view, warrants the death penalty and so it is, therefore, the sentence of this Court is that you should suffer death in the manner authorized by law in relation to the counts of this indictment…"

The appeal

The appellant relied on one main ground of appeal; with submissions in support thereof:

> "1. In imposing the death sentence the learned trial judge erred in the exercise of her discretion. In the circumstances the sentence is manifestly excessive."

He later added an additional ground that "the prosecution failed to give notice of its intention to urge that the death penalty should be imposed on the appellant".

[144] Counsel referred to the relevant provisions of the Offences Against the Person Act (section 3 (1) (a), and in particular section 3 (1E)) requiring a sentencing hearing before sentence is passed, the procedure to be adopted when carrying out the same, and the principles the court should utilize when considering whether the death penalty should be imposed. He referred to ***R v Ian Gordon*** and the recent Privy Council cases of ***Trimmingham v The Queen*** [2009] UKPC 25 and ***Pipersburgh and Robateau v The Queen*** (2008) 72 WIR 108, and stated that two principles could be distilled from the cases to wit:

> (i) 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".
>
> (ii) Before imposing the death penalty the court must be properly 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. (***Trimmingham*** para. [21])

[145] Counsel also submitted that in determining the facts which can be described as, "the most extreme and exceptional" one must compare the facts of other murders and not the norms of ordinary civilized behaviour. Additionally, the burden of proof in respect of any findings adverse to the appellant at the sentencing hearing is beyond reasonable doubt.

[146] Counsel challenged the reasoning of the learned trial judge in imposing the death penalty in that there was no comparison with the facts of other murders. Counsel also said that the judge took into consideration previous convictions of the appellant which she ought not to have done, and she did not show that she was satisfied beyond a reasonable doubt that there was no prospect of reform, or that the object of punishment could not have been achieved by any means other than death. Counsel then submitted that the words, "if the lady did just keep quiet" could have been interpreted to show regret and remorse for the murder of the female companion of the male deceased. He concluded that it cannot be said that it had been shown beyond reasonable doubt that death was the only punishment appropriate in the case. Additionally, he submitted that the absence of any notice of intention to seek the death penalty prior to the sentencing hearing caused "potential prejudice" to the appellant.

[147] The prosecution in response provided very detailed and thorough written submissions with several authorities relevant to the development of the law in this area, for which I commend the learned director and her colleagues in the department. These authorities have been masterfully canvassed in the judgment of my learned brother Harrison JA. Later in this judgment I will refer to just a few of them which in my view perforce, and maybe regrettably so, direct the outcome of this appeal.

[148] The learned director made the bold suggestion that perhaps the court should hesitate to make this comparison of the facts of other murder cases as it would require the court to assess the severity of the same and produce a ranking on a scale, without any specific guidelines from the Privy Council with regard to that process. This could ultimately have the effect of undermining the certainty required for the imposition of the death sentence. Established law, it was submitted, requires that the exercise of the discretion of the judge should depend on his assessment of the circumstances of the crime and the personal character and record of the offender. The discretion should take into account the fact that there are varying degrees of culpability in murder cases and the death sentence should only be reserved for the most serious crimes. The court must also consider the mitigating circumstances, and other than the character and record of the offender there are "the subjective factors that might have influenced the offender's conduct, the design and manner of execution of the particular offence and the possibility of reform and social adaptation".

[149] The director submitted further that the court must always in endeavouring to assess whether a particular set of facts in a murder case are exceptional or fall within the category of the "rarest of the rare", examine the aggravating and mitigating factors in order to weigh their respective significance. ***Bachan Singh v State of Punjab*** (1980) 2 S.C.C 684, was referred to in great detail as the "origin and determination" of the "rarest of the rare" terminology. Certain general guidelines were set out in that case to assist the court in its deliberations on the issue of the imposition of the death penalty. Counsel referred to and relied on the judgment, particularly paragraph [214] where the court made this statement: "Pre-planned, calculated, cold - blooded murder has always been regarded as one of an aggravated kind. In Jagmohan, it was reiterated by this Court that if a murder is 'diabolically conceived and cruelly executed', it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V.R. Krishna Iyer J speaking for the Bench, in Ediga Anamma, in these terms:

> 'The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence'."

In ***Bachan Singh*** it was made clear that the court must always pay due regard to both the crime and the criminal, and assess the relative weight to be given to both the aggravating and the mitigating factors.

[150] In the instant case, with regard to the appellant's complaint of the consideration by the learned trial judge of the bad character of the appellant, it was the prosecution's contention that she had not done so unduly, and that the relevant aggravating and mitigating factors were identified and itemized, with a submission that the former far outweighed the latter. It was submitted, that it was a gun crime, and a premeditated, and cold - blooded killing of two persons who were asleep. The appellant showed no remorse, but on the other hand, he was said to be a kind hearted person who would help around the house, and assisted with the children of his brother's companion. Additionally, it was reported that he was the father of a one year old child, and was illiterate.

[151] It was also submitted by the Crown that the learned trial judge had considered social re-adaptation and reform, and felt that it was inapplicable. Finally, it was further submitted that no notice was required from the prosecution of its intention to request the imposition of the death penalty as pursuant to the Privy Council case ***Devon Simpson et al v The Queen*** (Privy Council Appeal Nos 35, 37 and 38 of 1995, delivered 7 March 1996). Prior notice is only required where the death sentence was based on conviction for murder at a previous trial.

[152] The director commented on what she described as the "strange and curious" view adopted by the Privy Council in their conclusion that given the facts of ***Trimmingham***, the death penalty was not appropriate, and suggested that

the court adopt the approach as set out in paragraph [33] of ***Pipersburgh*** and in so doing she urged, the court should refuse the appeal against sentence and dismiss the appeal.

Analysis

[153] Section 3 (1) (a) of the Offences Against the Person (Amendment) Act, 2005, states as follows:

> "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."

Section 3 (1E) provides:

> "(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."

[154] On 8 June 2005 the then Chief Justice Wolfe, with the concurrence of the Puisne Judges of the Supreme Court, issued certain guidelines with regard to sentencing hearings in respect of persons, convicted of offences punishable by death, indicating that the hearing would be in open court before a single judge, who would have the social enquiry report and all other reports deemed necessary in assisting to determine the proper sentence. The prosecution and the defence should file and serve copies of all reports of any witnesses intended

to be called at the hearing seven days prior to the hearing. The hearing should be held within three weeks of the date of conviction.

[155] In August 2005, in ***R v Ian Gordon***, Campbell J outlined the history of the legislation and its amendment, when the imposition of the death penalty was mandatory once murder had been committed, and then when only in respect of "capital murders" to when the death sentence became no longer mandatory. He referred to ***Lambert Watson v The Queen*** (2004) 64 WIR 241, and Lord Hope's seminal speech dealing with the constitutionality of the death sentence, and the international treaties which focused on and recognized the fundamental rights of the individual, inclusive of the right to life and to be protected from "cruel, inhuman or degrading treatment or punishment" and stated specifically that "To condemn a man to die without giving him the opportunity to persuade the court that this would, in his case, be disproportionate and inappropriate is to treat him in a way that no human being should be treated".

[156] Campbell J then examined the facts of the case which are disturbingly similar to the instant case in that two persons, who he said were at their most defenceless as they had retired to bed, were shot and killed in cold blood. There was in that case no evidence as to the reason for the attack. He also said, with which I entirely agree, "the victims were at their most vulnerable as they were asleep". He found the several spent shells and the manner in which they were fired an aggravating factor. He reviewed the mitigating circumstances and all the

relevant reports pertaining to the appellant and stated that he recognised his role and obligation thus:

> "The objectives of punishment, have not been laid to rest, deterrence, prevention, reformation and retribution are still relevant. The sentence of death is to be reserved for the most heinous of cases. The sentencer should approach the task dispassionately not taking into consideration any extraneous or irrelevant considerations, should disabuse his mind of sympathy and prejudice. It is a legal process."

He found in all the circumstances, and as the law stood then, that Mr Gordon was to suffer death in the manner prescribed by law. As is clear however, there has been much development in the law since then.

[157] In the Privy Council case of ***Pipersburgh,*** an appeal from the Court of Appeal of Belize, the appellants were convicted of four counts of murder, two of those counts related to the deaths of two security guards. They were sentenced to death. In the Court of Appeal, the convictions and sentences were upheld, but at the hearing before the Board, the convictions were found to be unsafe on the issues of, inter alia, dock identifications and the directions in relation thereto, and on the failure to hold a **voir dire** with regard to the admissibility of certain evidence, and were quashed. As a consequence the Board did not have to deal with the points raised before them on sentence but nonetheless indicated that it may be of some assistance if the principles which ought to be followed in the sentencing process were reiterated. The Board endorsed the guidelines set out by Conteh CJ in ***The Queen v Reyes*** (Supreme Court of Belize, delivered 25

October 2002) and also the judgment of Sir Dennis Byron CJ which confirmed the same, in an appeal to the Eastern Caribbean Court of Appeal from Saint Christopher and Nevis in ***Mitcham et. al. v DPP*** (Appeal Nos 10, 11 and 12 of 2002, judgment delivered 3 November 2003). Sir Dennis Byron made it clear that the court should ensure that it had available to it at the sentencing hearing all social welfare and psychiatric reports relating to the prisoner and restated the law that the burden of proof at the sentencing hearing is on the prosecution and the standard of proof is beyond reasonable doubt. The Board referred to other decisions relating to the approach to be adopted at the sentencing hearings but made specific reference to and affirmed the dicta of Rawlins JA in ***Moise v The Queen*** (St Lucia Criminal Appeal No. 8 of 2003, judgment delivered 15 July 2005) at paras 17, 18 & 19, which encompass the discussions in earlier cases and are best set out in their entirety for clarity and guidance:

> "17. The cases mentioned in the foregoing paragraph 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. 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 circumstances 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.

18. It is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person. The death sentence 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. The sentencing Judge is fixed with a very onerous duty to pay due regard to all of these factors.

19. In summary, the sentencing Judge is required to consider, fully, two fundamental factors. On the one hand, the Judge must consider the facts and circumstances that surround the commission of the offence. On the other hand, the Judge must consider the character and record of the convicted person. The Judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case."

[158] The Board made the point that "It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings".

[159] The Board also commented that at first instance the judge seemed to think that the death sentence should be imposed unless the defendants had shown a reason for it not to be imposed, but indicated that this approach had been adopted without the court having the benefit of the guidelines mentioned above. The Board commended the judgments in **Mitcham** and **Moise** as providing the required approach to give effect to the underlying principles of the law relative to the sentencing hearings when the imposition of the death sentence is under consideration. The case was sent back to the Court of Appeal for that court to decide whether there should be a retrial.

[160] In ***Trimmingham*** the facts were that the appellant had held up the deceased with a gun, demanded money of him which was not forthcoming as the deceased said that he had given the money to his daughter but offered his goats to the appellant instead. The appellant used a cutlass which he took from the deceased to cut his throat. He removed the trousers from the deceased, beheaded him using the said cutlass and then wrapped his head in the trousers. He handled the penis of the deceased while making a derogatory comment about it. He then slit the deceased's belly which he told one "Ding" was to stop the body from swelling, and then covered up the body and stuffed the trousers containing the head into a hole under a plant in a banana field.

[161] At the trial the appellant was convicted of the murder and at the end of the sentencing hearing for which notice had been given by the prosecution of

their intention to seek the death penalty, the appellant was sentenced to death by hanging. The judge took into consideration the probation report, the evidence of a psychiatrist and submissions of counsel, and concluded:

> "…I have no doubt that no useful purpose would be served by the continued presence of the prisoner in the community in Saint Vincent and the Grenadines. And I am fortified in my view, having examined the nature of the offence, his antecedents, his character, the circumstances, and also I have to look at the interest of the community and the safety of the community [and] the sanctity of life also. It is my view that a case like this justifies a retention of the death penalty as the ultimate sanction. There is nothing before me to persuade me that Mr. Trimmingham is deserving of my leniency. I am not convinced that any lesser penalty would do justice to this matter despite the able submission of his lawyer. I am convinced that the prisoner dehumanised Mr. Albert Browne in the manner in which he executed his murder."

[162] In the Court of Appeal, although they found that the court at first instance had given more weight than it ought to have to the appellant's bad character, nonetheless after analyzing the information before the court, and weighing the aggravating and mitigating factors, and after due consideration, the court was satisfied, beyond a reasonable doubt, that, "there was no basis upon which we could say that the object of punishment could be achieved by a sentence other than death", and dismissed the appeal against the death penalty.

[163] On appeal to the Privy Council, the Board took the opportunity to once again reiterate the principles to be followed and the approach to be adopted

when the judge is considering the imposition of the death sentence. Lord Carswell in delivering the judgment of the Board and referring to ***Pipersburgh,*** said this at paragraph [21]:

> "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 civilized behavior. 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."

[164] Counsel before the Board then, argued that the circumstances of the ***Trimmingham*** case although the crime was a "brutal and disgusting murder, involving the cold-blooded killing of an elderly man in the course of a robbery", it was not the "rarest of the rare" as "the killing did not appear to have been planned or premeditated 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".

[165] The Board accepted this contention of counsel as correct, and although also accepting the facts of the murder as being a very bad case committed for gain, still stated that it fell short of the worst of the worst so as not to warrant the death penalty. The Board indicated that "The appellant behaved in a revolting fashion, but this case is not comparable with the worst cases of sadistic killings. Their Lordships would also point out that the object of keeping the appellant out of society entirely, which the judge considered necessary, can be achieved without executing him". The appeal against conviction was dismissed, the appeal against sentence was allowed, the sentence of death set aside and the sentence of life imprisonment substituted.

[166] Belle J in ***The Director of Public Prosecutions v Wycliffe Liburd*** (ECSC Suit No. SKBHCR 2009/0007, delivered 22 October 2009) in a sentencing hearing in the Eastern Caribbean Supreme Court, from the Federation of Saint Christopher and Nevis (Criminal Circuit) indicated how, in his view, the position taken by the Board in ***Trimmingham*** was to be implemented. The facts of this case were that the appellant asked the deceased for his money and when the deceased said that he did not have it, he shot him three times, and when the deceased attempted to run away he fired two more shots which fatally wounded him.

[167] The court on sentencing reviewed the authorities and weighed the aggravating and mitigating factors. In respect of the former, the appellant had

shot the deceased in broad daylight by pumping five bullets into him when he was not armed and not resisting or fighting with the appellant. The court considered the murder as cold blooded and brutal and the circumstances of the killing were such that the deceased did not stand a chance of survival. His death was the result of the said gunshot wounds to the chest and abdomen with haemorrhage and shock. According to the pathologist, death would have occurred in less than five minutes. It was also brought to the court's attention that the deceased had a teenage daughter and an 83 year old grandmother who depended on him. In respect of the latter, the detailed circumstances of the appellant's childhood life, being treated as a pawn between two parents who were at war with each other, and the fact that he suffered as a result and bore the brunt of that conflict, were set out. There were favourable reports from some family members. The report from the psychiatrist however indicated a normal individual, or that he had no abnormality to prevent him from being sentenced.

[168] The court looked at the facts of the ***Trimmingham*** case and the statement made by the Board as set out at paras. [164] and [165] above and stated that its task was not made any easier by that decision, and indicated that the only difference between the two cases could be the issue of premeditation. However on a comparison of the facts of the two cases, the judge concluded that neither was more premeditated than the other but that the facts of the ***Trimmingham*** case were "more revolting than Liburd's". He referred to the issue of remorse, the seriousness of the crime, the possibility of recurrence and

the need of the punishment to reflect the community's disgust of the same, and also for retribution for the crime which had been committed. He however felt impelled by the facts and the decision in the ***Trimmingham*** case to conclude as follows:

> "…I have to admit that this murder was not the worst of the worst although cold-blooded, brutal and brazen in the form of execution. However it is true that this kind of murder has in recent times become commonplace in St Kitts and Nevis. I have accorded great significance to facts surrounding the commission of the crime. I have also concluded that Wycliffe Liburd has to be excluded from society for a very long time. But the law now requires that I do not pronounce the death penalty on Wycliffe Liburd. I therefore sentence Wycliffe Liburd to life imprisonment with a recommendation that he should spend the maximum amount of time in prison before any consideration is given to extending to him the mercy of release unless he earlier demonstrates that he has made significant progress in his character."

[169] Finally, in the most recent Privy Council decision on this area of the law, again from the Court of Appeal of Belize, namely ***Earlin White v The Queen*** [2010] UKPC 22, the Board again reviewed the earlier decisions on the approach to the imposition of the death penalty, and confirmed the principles laid down in ***Reyes v The Queen*** and ***Trimmingham***. The facts of that case were that the appellant having demanded "one quarter" from one "Hamilton" by pointing a gun at him, then followed him into the building where the deceased was, who asked him what he wanted, whereupon the demand for "one quarter" was repeated and then the appellant produced a handgun and fired three shots at the

deceased. The appellant was convicted for the murder of the deceased and sentenced to death by hanging. The judge at his sentencing hearing took into consideration the fact that the death penalty was discretionary, that the prosecution was seeking the death penalty and that the appellant had a number of previous convictions relating to violent crimes. This sentence was not overturned in the Court of Appeal, as, though appealed, no arguments were advanced in support of it. However, the sentence was the subject of three grounds of appeal to the Privy Council; namely that the judge (i) failed to adopt the correct approach to the imposition of a discretionary sentence of death; (ii) failed to adhere to the sentencing guidelines propounded by Conteh CJ in ***The Queen v Reyes;*** and (iii) failed to obtain a psychiatric report.

[170] The Board found merit in the first ground of appeal and the sentence of death was set aside and a sentence of life imprisonment substituted. The appeal was allowed as:

(a) The court had proceeded on the basis that the appellant had to persuade the court to pass a life sentence and not the death penalty; (but this was clearly the wrong approach as ***Trimmingham*** made it clear that the starting point was life imprisonment);

(b) The court took account of the prevalence of murder and other offences (this cannot pursuant to ***Trimmingham*** justify the death penalty);

(c) The court took into consideration previous convictions (this was not warranted in that case as the previous offences were not similar or of the utmost gravity and so were irrelevant as they did not and could not show "no reasonable prospect of reform". However, the court did indicate that the statement in ***Trimmingham*** that the character of the offender and other relevant circumstances were only to be taken into account in so far as they operated in his favour was somewhat qualified, as not being an absolute prohibition, as it was stated by the Board that "there may be cases where an offender's previous offending is so bad and the previous offences are so similar to the index offence that they are relevant to its gravity",…and "so may properly lead the sentencing judge to conclude that there is no reasonable prospect of reform and that the object of the punishment can only be achieved by means of the death penalty");

(d) Six years had passed since the death penalty had been imposed (pursuant to the decision of ***Pratt v Morgan*** [1994] 2 AC 1, to carry out such an execution would be cruel and inhuman punishment contrary to the provisions of the Constitution).

[171] The most compelling basis, in my view, however, on which the appeal was allowed, and which is of significant relevance to the instant appeal, was, as the Board stated, the fact that "the judge did not indicate which features of the

'manner in which this particular offence was committed' he considered made the case the 'most extreme and exceptional', the 'worst of the worst' or the 'rarest of the rare'". The Board went on to say that:

> "In fact, callous and serious though it undoubtedly was, the murder came nowhere near meeting the criteria specified in ***Trimmingham***. The deceased was killed with two swift shots. There was no element of sadism, torture or humiliation. In ***Trimmingham's*** case, counsel for the appellant accepted that the crime was a "brutal and disgusting" murder, involving the cold-blooded killing of an elderly man in the course of a robbery. But although the manner of the killing was "gruesome and violent", there was no torture of the deceased, prolonged trauma or humiliation of him prior to his death and the killing did not appear to have been planned or premeditated. The Board described this as "a bad case, even a very bad case of murder committed for gain". But in its judgment, the case fell short of being the "worst of the worst", such as to call for the ultimate penalty of capital punishment. The appellant had behaved in a "revolving fashion", but the case was not comparable with the worst cases involving sadistic killings. The facts of the present case were considerably less appalling than those in ***Trimmingham's*** case."

[172] Although it was not necessary, the appeal having been allowed on ground (i), the Board nonetheless expressed its view on the importance of complying with the excellent guidelines set out in ***The Queen v Reyes*** and the fact that to sentence the appellant to death without a psychiatric report and comprehensive social inquiry report was plainly wrong. Indeed it was stated that the Board found it difficult "to conceive of circumstances in which it would be right to impose the death penalty without such reports".

[173] In the instant case the social inquiry reports disclosed inter alia, that the appellant was illiterate at 41 years old, having lost his father at a tender age and was therefore unable to afford proper education due to financial problems. He entered the working world at 17 years old as a gardener, and was working as a labourer at the time of his arrest. He had a one year old son. His sister-in-law gave character evidence on his behalf stating that he was a reliable person and played the role of a father figure in the lives of her children aged three months to four years old, was not a violent or rude person and always tried to quell fights.

The report from Dr Frank Knight, consultant psychiatrist at the Southeast Regional Health Authority, Bellevue Hospital, found the appellant's intellectual endowment to be average, and at the time of his evaluation of him indicated that there were no features of any form of active or residual psychiatric disorder. There was also no family history or past history of any psychiatric disorder.

[174] Having reviewed the authorities above, the facts of the different cases and the application of the law to the facts of this case, it is my view that the appeal must be allowed. The learned trial judge had the necessary reports before her, as set out in para. [139] herein. It is also clear from the transcript and the plea in mitigation from counsel, that he had had sight of the reports prior to the hearing and so was prepared to advance the appellant's case in respect of the same. I accept the submission from the learned director that the

statute does not require in the circumstances of this case that the prosecution give notice of its intention to seek the death penalty, but paragraphs (i), (ii) and (iii) of the guidelines proposed by Conteh CJ in ***The Queen v Reyes*** which have been endorsed and approved by the Privy Council in several judgments since, recommend that notice be given. Paragraphs (i), (ii) and (iii) of the guidelines read thus:

> "(i) As from the time of committal, the prosecution should give notice as to whether they propose to submit that the death penalty is appropriate.
>
> (ii) The prosecution's notice should contain the grounds on which they submit the death penalty is appropriate.
>
> (iii) In the event of the prosecution so indicating, and the trial judge considering that the death penalty may be appropriate, the judge should, at the time of the allocutus, specify the date of the sentence hearing which provides reasonable time for the defence to prepare."

In this case there was no indication from the Crown until at the sentencing hearing that the death penalty was being sought, which could have resulted in prejudice to the appellant.

[175] The appellant in this case was convicted in July 2007 and sentenced in November 2007. The learned trial judge would not therefore at the sentencing hearing have had the benefit of the judgments of the Privy Council in ***Pipersburgh, Trimmingham***, and ***White***, nor would she have had sight of

Liburd. In sentencing the appellant the learned trial judge referred to his previous convictions and considered them as aggravating factors in this way:

> "When I look at your convictions for the type of activities that you have been engaged in, this is the kind of person you project, the kind of person, Mr Dougal, who really has no intention of conforming to the laws of the society. You intend to keep this kind of lifestyle because you didn't have any qualms the day or hour after you were still there with this gun and engaging the police in a shooting. You are the kind of person, as I said, Mr Dougal that the Legislator had in their contemplation when they amend (sic) this Act. The jury must have accepted that you told Mr. Foster even about the murders, that is, you burglarize the home because you did get into their home and you did execute the plan and you shot them. Of course, it might be that we have not heard all that was behind your actions in this trial, maybe there was much more that could have come out but it didn't, but it really didn't matter what your motive was, it was a cruel act."

[176] Pursuant to the dicta of the Board in ***Trimmingham,*** and as qualified in ***White,*** unless the offences which were of a similar nature and/or were of the utmost gravity, they were irrelevant to the considerations of the judge and only those matters relevant to the appellant's character which can avail him favourably ought to have been taken into account. The evidence of the offences ranged from attempted housebreaking and larceny in 1986, robbery with aggravation in 1992 and 1996, possession of ganja and burglary in 2001, and housebreaking and larceny, burglary and larceny and indecent assault in 2001 in respect of which he was sentenced to at most 12 months imprisonment at hard labour, to run concurrently. The circumstances and the facts relating to these

convictions were not before the court. I accept the submissions of the learned director, however, that the learned trial judge did not consider his bad character "unduly" but on the basis of ***Trimmingham*** and ***White***, it seems clear she ought not to have done so at all.

[177] The learned trial judge found that the appellant showed no remorse. From the social inquiry reports he continued to claim his innocence and it is hard to accept, as counsel tried to persuade the court, that his words "if the lady did just keep quiet" spoken before his execution of the gunshot wound to her chest which killed her instantly, could have been an expression of regret. The learned trial judge did not indicate specifically that in her view she was satisfied beyond all reasonable doubt that he was incapable of reform and that the object of punishment could not be achieved by any means other than death. She appeared to have been persuaded by the manner of the killings and the fact that the murders were premeditated. The outcome of this appeal though in my view, ultimately turns on the specific facts relative to the killings. The learned trial judge took into consideration the aggravated factors and the mitigating factors and found that the former outweighed the latter. I agree with Campbell J when he said in ***R v Gordon***, in a similar fact situation that "the victims were at their most vulnerable as they were asleep". The learned President has viewed the violation of the home and the killing of the two victims in their sleep as most egregious and severe. However in light of the dicta in ***Trimmingham***, can these killings be equated with torture or prolonged trauma or humiliation prior to death

or sadism? I think not. In fact, the victims were killed with two "swift shots". Although the facts of this case are brutal and gruesome, I feel compelled to say as said by the Board in ***White*** that "the facts of the present case were considerably less appalling than those in ***Trimmingham's*** case". They are not therefore the "worst of the worst" or the "rarest of the rare" and the trial judge has not shown how she has considered the facts of this case to be the "most extreme and exceptional" to warrant the death penalty. There has also been no other comparison with the facts of this case, with other extreme and exceptional murders in the region or elsewhere, to indicate that the death penalty is warranted. As indicated in ***White***, it is not the prevalence of murders that is relevant but the gruesome facts relative to their execution.

[178] As a consequence, I find that the appeal must be allowed and the sentence of death set aside and the sentence of life imprisonment substituted therefor. The appellant should also not be eligible for parole until he has served 45 years in prison.

[179] I must comment however that as we are bound by the Privy Council, it was clear to me on the facts, what the outcome of this appeal would be, but I must admit to having serious reservations about the categories of murders which fall within the description of the "worst of the worst" and the "rarest of the rare". The inclusion of killings by terrorism, sadism, after prolonged humiliation, or torture or the like, may be reflective of the opprobrium with which those are

regarded. However, the incidence of those types of murders may be fairly insignificant in the Caribbean, and perhaps using those examples as the measure may be inappropriate for the region. I would suspect that the facts of the ***Trimmingham*** case and the non imposition of the death penalty in that case may well be considered startling to the ordinary man in the Caribbean.