[2023] JMCA Crim 49

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00068

ALBERT WILLIS v R

Mr Keith Bishop and Mr Janoi Pinnock for the applicant

Miss Debra Bryan for the Crown

26, 31 July and 3 November 2023

Criminal Law – Sentence – Applicable principles - Determining the starting point – mitigating and aggravating factors – Sections 2(1), 2(2), 3(1C)(a) of the Offences Against the Person Act – Sentencing Guidelines - Section 42F of the Criminal Justice Administration Act

BROWN JA

[1] The applicant was convicted on 31 May 2019, before Shelly-Williams J ('the learned judge') and a jury, for the offences of murder and wounding with intent, after a trial lasting five days, in the Home Circuit Court. On 12 July 2019, the learned judge sentenced the applicant to imprisonment for life at hard labour, with the stipulation that he serve 33 years' imprisonment before becoming eligible for parole and 15 years' imprisonment, respectively. The sentences were ordered to run concurrently.

[2] On 24 July 2019, the applicant applied for leave to appeal his convictions and sentences. A single judge considered, and refused, the application for permission to appeal his convictions and sentences. The applicant renewed his application for leave to appeal before us. However, the applicant has confined the renewed application to

permission to appeal the sentence imposed in respect of the term of imprisonment ordered to be served before becoming eligible for parole.

[3] Oral submissions were made on 26 July 2023 and we adjourned the matter until 31 July 2023 when we made the following orders:

> "1. The application for leave to appeal against convictions is refused.
>
> 2. The application for leave to appeal against sentence is granted. The hearing of the application is treated as the hearing of the appeal.
>
> 3. The appeal against sentence is allowed in part. The sentence of life imprisonment is affirmed. The term of 33 years stipulated to be served before becoming eligible for parole is set aside, substituted therefor is a term of 30 years and nine months' imprisonment to be served before becoming eligible for parole.
>
> 4. The sentence of 15 years' imprisonment for wounding with intent is affirmed.
>
> 5. The sentences are to be reckoned as having commenced on 12 July 2019, the date they were imposed."

At the time of making the above orders, we promised that our written reasons would become available subsequently. Before setting out our reasons, the background against which the orders were made is summarized below.

Background

[4] A summary of the case upon which the learned judge imposed the sentences, especially for murder, will provide an instructive context. The offences arose out of an incident at or in the vicinity of the Digicel cell site on the Guardsman Serenity Park farm in Gutters in the parish of Saint Catherine, on 10 April 2015, at or about 10:30 pm. The complainant, Jason Edwards, and the deceased, Kezon Thompson ('Mr Thompson'), travelled to a section, along a section of the Spring Village Road, which was not far from the cell site, in a pick-up owned and driven by Mr Thompson to meet up with the applicant and one Keniel in order to steal gas oil from the Digicel cell site. In the back of the pick-up were a number of five-gallon jugs.

[5] The applicant and another, known to Jason Edwards as Keniel, awaited Jason Edwards and Mr Thompson at the spot. Both Jason Edwards and Mr Thompson unloaded the jugs at this spot and Mr Thompson drove away, parked the pick-up and returned to the spot on foot. Upon Mr Thompson's return, he and Jason Edwards left with one five-gallon jug, leaving the applicant and Keniel there with the remaining jugs, and walked to the Digicel cell site. At the cell site, Mr Thompson set about the task of stealing fuel from the generator at the cell site. Having filled one five-gallon jug, Jason Edwards left to retrieve the other five-gallon jugs.

[6] When Jason Edwards reached the spot where the other five-gallon jugs were, the applicant and Keniel were still there. Jason Edwards stood about one arm's length from the applicant. The applicant had a loaded revolver in his hand, which he had earlier received from Mr Thompson, according to Jason Edwards. There was a short verbal exchange between Jason Edwards and the applicant. Jason Edwards was picking up one of the five-gallon jugs when he heard a round being chambered (selected) in the firearm; following that, he received a gunshot to the left side of his head. Jason Edwards collapsed, apparently unconscious.

[7] When he regained consciousness, he found himself alone. He managed to walk to the main road where he was later assisted to the Spanish Town Hospital. From there he was transferred to the Kingston Public Hospital ('KPH').

[8] The body of Mr Thompson was discovered inside the perimeter fencing of the Digicel cell site at Guardsman Serenity Park, the following day. Mr Thompson's body had two gunshot wounds to the head. The pick-up belonging to Mr Thompson was found parked about 400m away.

[9] On 13 April 2015, Jason Edwards gave a statement to the police while he remained a patient at the KPH. That statement led to the issue of a warrant for the arrest of the applicant. On 14 April 2015, the applicant was told of the investigations and that Jason Edwards said it was he, the applicant, who had shot him and also killed the deceased.

The applicant denied the allegations. Jason Edwards never witnessed the shooting of Mr Thompson.

[10] The applicant gave evidence at the trial. His testimony disclosed that at the material time, he was employed at the farm as a watchman. He agreed he was at the scene and that he was the lookout man while Mr Thompson, Jason Edwards and Gilly (who Jason Edwards disputed was there) were inside the perimeter fence of the Digicel cell site. From where the applicant was he could hear but not see Mr Thompson and Jason Edwards. Five minutes later, the applicant said he heard explosions and Gilly saying, "Jason yuh shot the man". That was followed by sounds of wrestling and another explosion. That set the applicant to flight. He ran home, but not before calling the police. The applicant denied shooting Jason Edwards and killing Mr Thompson, whom he had known for about one month before the incident.

[11] Although the applicant placed himself at the scene, the case against him was based substantially on circumstantial evidence. The case appears to have turned on Jason Edwards' evidence that prior to the incident, Mr Thompson had lent the applicant his firearm, described as a revolver (barrel gun). Ballistics evidence (a bullet) recovered from Mr Thompson's body confirmed that he had been shot by a revolver, and this accorded with Jason Edwards descriptive auditory evidence of hearing the 'shot' being 'chambered' before he was shot. Additionally, there was evidence from Jason Edwards that the applicant had previously expressed a desire to gain ownership of Mr Thompson's firearm which, if accepted, was capable of supplying a motive for Mr Thompson's killing.

The sentencing hearing

[12] In sentencing the applicant, the learned judge approached her task as follows. A starting point of 40 years was adopted. The applicant was next given full credit for three years and three months he had spent on remand, resulting in a notional sentence of 35 years and nine months' imprisonment. A further reduction of one year and three months was made for the good social enquiry report ('SER') that the applicant got, resulting in 34 years and six months. Yet another reduction of one year was made for the fact of the

applicant's good antecedent report. That ought to have resulted in a figure of 33 years and six months. However, the learned judge apparently rounded the figure downwards to 33 years. In the end, the learned judge pronounced that the sentence for murder was life imprisonment and the applicant is to serve 33 years' imprisonment before the possibility of being paroled.

[13] Insofar as specific matters were taken into the learned judge's consideration in fixing the pre-parole term of imprisonment, the adventure the men were on was isolated for special mention. At page 436 lines 1-4 of the transcript, the learned judge said:

> "… At the time when this murder was committed it was in the process of the stealing of gas oil from Digicel cell site and I bear that in mind …"

The learned judge then repeated that her starting point was 40 years, having first declared it immediately before making the quoted remark. On the other hand, the learned judge expressly did not take into her consideration whatever negative material was contained in the SER and the applicant's previous convictions which, she opined, could have been expunged had the applicant made the relevant application.

The appeal

[14] The applicant sought and obtained permission to argue the following supplemental ground:

> "That the learned trial judge erred in law when she stipulated that the applicant should serve a minimum period of 33 years, having given credit for time spent in pre-trial custody."

Submissions on behalf of the applicant

[15] As telegraphed by the supplemental ground of appeal, Mr Bishop, who appears for the applicant, took no issue with the sentence of imprisonment for life. The brunt of his criticism of the learned judge centred on her starting point. Mr Bishop submitted that it is not clear how the learned judge arrived at her starting point. Learned counsel cited sections of the judgment of Morrison P, in the watershed case of **Meisha Clement v R**

[2016] JMCA Crim 26, in which guidance in fixing the starting point is given. From that springboard, Mr Bishop labelled the learned judge's approach to setting a starting point, together with her omission of the words 'aggravating' and 'mitigating' from her sentencing remarks, an abandonment of the methodology in **Meisha Clement v R**.

[16] Following on that, Mr Bishop next cited **Daniel Roulston v R** [2018] JMCA Crim 20, in which the methodology to fixing a term of imprisonment were sequentially set out by McDonald-Bishop JA. Learned counsel went on to criticise the learned judge for a failure to identify a range. In his submission, the learned judge could have benefitted from cases decided by this court, such as: **Linford McIntosh v R** [2015] JMCA Crim 26; **Jimmy Murray v R** [2015] JMCA Crim 19; and **Oneil Murray v R** [2014 JMCA Crim 25.

[17] Returning to the kernel of his criticism of the learned judge's starting point, Mr Bishop submitted, in essence, that the learned judge's choice of starting point was improperly influenced by a factor not particularised in the indictment. That is, the learned judge treated the murder of Mr Thompson as having been committed in the course or furtherance of larceny. By that token, the learned judge chose a starting point that was appropriate for murder committed under section 2(1)(a) to (f) of the Offences Against the Person Act ('OAPA'), instead of under section 2(2) of the OAPA, as the indictment charging the applicant alleged. Learned counsel cited copious passages from the judgment of **Quacie Hart v R** [2022] JMCA Crim 70, in support of his arguments. Mr Bishop concluded by adopting/advancing the starting point of 25 years, used by the court in **Quacie Hart v R**, as appropriate for this case.

Submissions on behalf of the respondent

[18] The Crown, in its written submissions, adverted to the sections of the OAPA under which the applicant was charged and sentenced then argued that the learned judge had the discretion to impose the sentence of life imprisonment and stipulate a minimum parole period of not less than 15 years. It was also argued that a sentence should not be disturbed unless there was an error in principle in its imposition. **R v Ball** (1951) 35 Cr App Rep 164, was cited in support of this proposition. Learned counsel also referred the

court to **Adrian Forrester v R** [2020] JMCA Crim 39 in which the absence of an established starting point for the offence of murder was acknowledged; leaving the matter to the judge's discretion. That discretion, however, should be exercised judicially. When so exercised, it will be a manifestation of the judge's considered view of the imperatives of the case before him.

[19] Miss Bryan, who made oral submissions on behalf of the Crown, urged that the learned judge did not err in her calculations. Addressing the comment which Mr Bishop sought to impugn, Miss Bryan argued that the learned judge treated the criminal enterprise out of which the murder arose as an aggravating factor. Accordingly, the learned judge, in making the comment, was not sentencing the applicant as though he had been indicted for murder committed in the course or furtherance of robbery. Building on references in the written submissions to the methodology in **Meisha Clement v R** and **Daniel Roulston v R**, Miss Bryan argued that the learned judge applied the relevant principles.

[20] While Miss Bryan conceded that the term of imprisonment to be served before parole eligibility is at the high end, she maintained that it was not excessive but falls within the range of sentences for murder. To that end, **Massinissa Adams and Others v R** [2013] JMCA Crim 59 in which the parole ineligibility period was 30 years, **Adrian Forrester v R** which attracted a pre-parole stipulation of 34 years and eight months and **Jason Palmer v R** [2018] JMCA Crim 6 where this court substituted a period of 25 years for the 30 years previously imposed, were referenced.

[21] Miss Bryan was invited by the court to address the passage in **Quacie Hart v R** in which this court regarded a starting point of 40 years was/as being without justification for a murder committed under section 2(2) of the OAPA, which resulted from one stab wound during a fight. Counsel responded that whereas the appellant in **Quacie Hart v R** inflicted one stab wound and pleaded guilty, the applicant in the present case went through a full trial and used a firearm to shoot the victim in the head more than once.

Discussion

[22] As counsel for the Crown correctly submitted, when this court is called upon to review a sentence, it will not lightly disturb that sentence unless there was a failure to apply the relevant principles when it was imposed. In **R v Alpha Green** (1969) 11 JLR 283, at page 284, this court accepted and applied the principles, as summarised by Hilbery J in **R v Ball** at page 165:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene".

There is, therefore, a presumption of failure to apply the correct principles when a sentence is either unduly harsh or so low that it trivialises the seriousness of the offence.

[23] In **Meisha Clement v R**, in which there was a similar complaint that the sentence was manifestly excessive, Morrison P, recalled the general principles referred to in **R v Alpha Green** above, then said, at para. [43]:

> "On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

It is, therefore, clear that when this court is asked to review a sentence of imprisonment, it will be scrupulous to (i) determine whether the relevant principles were applied; and (ii) assess the sentence for its proportionality and parity by reference to the normal range of sentences the court is competent to, and ordinarily imposes, for like offences in

comparable circumstances. What the review does not necessarily contemplate, is a combing through of the sentencing remarks to see if the learned judge slavishly adhered to the now accepted methodology postulated in **Meisha Clement v R** and **Daniel Roulston v R**, and employed the jargon such as aggravation and mitigation.

[24] The ink had long dried on **Meisha Clement v R**, **Daniel Roulston v R** and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), when the learned judge considered the sentence to be imposed on the applicant. While the learned judge's departure from the now well-established methodology to calculate pre-parole terms of imprisonment, which is manifestly evident from the transcript and did not escape Mr Bishop's notice, his focus was on the choice of starting point. There was no challenge to the appropriateness of the sentence of imprisonment for life. Therefore, the discussion will be confined to the term of imprisonment stipulated before parole eligibility, to which the accepted/established methodology should have been deployed. For present purposes, we may safely elide the normal range of 15 years to life imprisonment, and move to the starting point.

[25] The note in Appendix A of the Sentencing Guidelines, in so far as a usual starting point for the offence of murder is concerned is, "[n]ot applicable". The starting point is therefore within the sole discretion of the learned sentencing judge. This does not mean that the discretion is to be exercised arbitrarily, as Mr Bishop charged it was, but judiciously, as this court has decided (see **Adrian Forrester v R**, at para. [223]). A starting point that is undergirded by reason(s) is perhaps the best indication that it was chosen judiciously and not irrationally. A challenge to a starting point chosen without stating reasons will be regarded as a justifiable challenge (see **Quacie Hart v R**, at para. [30]).

[26] The starting point is the sentence which accounts for, and reflects, the intrinsic seriousness of the offence (see **Meisha Clement v R**, at para. [29]). In that same paragraph, Morrison P provides a summary of the factors that are apt to inform the

seriousness of the offence: (a) the offender's culpability in committing the offence; and (b) any harm which the offence (i) caused, (ii) was intended to cause, and (iii) might foreseeably have caused. In short, the starting point is declarative of the trial judge's rumination, compendiously stated, of what the p.eculiar circumstances of the case demand. In the expression of Edwards JA in **Adrian Forrester v R**, at para. [223], "[t]he starting point, therefore, ought to be the trial judge's considered view of what the circumstances of the particular case before him requires". A judge's considered view, however, must not remain locked in his intellectual bosom but must be laid bare, if the announced starting point is to withstand the searchlight of appellate scrutiny.

[27] The learned judge cannot be said not to have given a reason for her choice of 40 years in this case. Re-stated, the learned judge considered that the murder was committed while Mr Thompson, the appellant, and others were engaged in the commission of another felony, namely larceny. This reason became Mr Bishop's springboard to argue that the learned judge committed the equivalent error of the trial judge in **Quacie Hart v R**, in sentencing the appellant on material which did not form part of the particulars of the indictment upon which he was tried. If Mr Bishop is correct, that approach is to be roundly deprecated, as it was by this court in **Quacie Hart v R**.

[28] However, we disagree with the meaning Mr Bishop ascribed to the learned judge's comment. Firstly, as Mr Bishop himself submitted, murder during the course or furtherance of larceny is notoriously an offence that is unknown to the laws of Jamaica. In as much as the aphorism, "the judge is assumed to know the law", holds true, we think it fair to the learned judge, who is no fledgling jurist, to resolve any question of her knowledge of that notoriety in her favour. Secondly, in our considered view, the learned judge's reference to what was the factual matrix of the offence of murder was no more than an acknowledgement that the applicant was engaged in another act of criminality when he committed the murder and, an attempt to have regard to the circumstances of its commission. Thirdly, nothing in the evidence or the learned judge's comment, could

fairly lead to the interpretation that the commission of the murder was precipitated by the joint involvement in stealing gas oil.

[29] In our view, counsel for the Crown came closer to the mark in interpreting the learned judge's comment. Counsel for the Crown urged, even if with some difficulty, that the learned judge meant to convey that the circumstances of the theft was an aggravating factor. The question is whether that was permissible. As we intimated earlier, counsel for the Crown was hard-pressed to demonstrate how the fact of simultaneous engagement in larceny aggravated the commission of the murder. We think the job of counsel for the Crown would have been made manageable if, for example, Mr Thompson was engaged in protecting and not pilfering the gas oil at the time of his death. Aside from circumstances akin to that instantiated in the example, we do not see how the countervailing criminal conduct, of which Mr Thompson appeared the ringleader, could be elevated to an aggravating factor. The use of larceny as an aggravating factor was therefore flawed. Therefore, although the learned judge sought to give a reason for the choice of starting point, in so far as that reason was flawed, it amounted to no reason. The learned judge would have, by that token, erred in principle.

[30] While on the subject of aggravating factors, it appears nothing short of remarkable that the learned judge made no attempt to adjust the starting point upwards by identifying and weighting the aggravating factors. The inscrutable silence on the aggravating factors is not counterbalanced by the learned judge's over emphasis of what may be characterised as the mitigating factors. In the light of that imbalance, it appears the learned judge assayed the aggravating factors in computing the starting point but that would be speculation on our part, especially in light of the hopscotch approach the learned judge employed.

[31] The upshot of the foregoing is to compel a closer examination of the 40-year starting point. In seeking to demonstrate that the starting point was inordinately high, Mr Bishop placed great stress on the judgment of this court in **Quacie Hart v R**. In that case, the applicant inflicted two stab wounds on the victim, one, non-fatal, to his hand

and the other fatal to his chest, during a fight subsequent to the applicant's foiled attempt to steal the victim's watch. The learned sentencing judge misperceived the circumstances as murder committed during the course of a robbery. That misperception seemed to have influenced the learned sentencing judge's 40-year starting point.

[32] The 40-year starting point was struck down for three main reasons. Firstly, the basic proposition is that the prescribed statutory minimum pre-parole term of imprisonment is generally used as a guide to specify both the range and starting point of the parole ineligibility period of imprisonment. Secondly, it was wrong to sentence the applicant as though he had been indicted for murder committed in the furtherance of a robbery. If the applicant had been properly indicted for that offence under section 2(1) of the OAPA, it would have attracted a mandatory 20-years pre-parole incarceration, under section 3(1C) (a) of the OAPA. That led the court to observe that the 40-year starting point would have been double the statutory minimum and therefore nigh indefensible. Thirdly, the applicant in that case had pleaded guilty, triggering section 42F of the Criminal Justice (Administration) Act ('CJAA'). Under section 42F of the CJAA, life imprisonment is deemed to be 30 years for the purpose of calculating the discount to be awarded as a result of the guilty plea. Since the judge kept the sentence of life imprisonment she was required to apply that deeming provision to the pre-parole term of imprisonment, the starting point of which, by sheer logic, could not exceed 30 years.

[33] It was against the background of the above summary that McDonald-Bishop JA, at para. [36], opined:

> "There is no justification, in law, for a starting point of over 40 years for a murder falling within section 2 (2) of the OAPA, which involved a knife and one fatal stab wound inflicted during a fight. The starting point of 40 years is demonstrably disproportionate and so cannot stand. Consequently, the learned sentencing judge would have erred by selecting a starting point of 40 years as contended by the applicant. In this case, the starting point for a minimum pre-parole period should not have exceeded 25 years."

In short, a starting point of 40 years for a murder indicted under section 2(2) of the OAPA must be demonstrably justified by its proportionality to the circumstances of the case and, can scarcely be justified where the defendant pleaded guilty and the deeming provisions of section 42F of the CJAA come into play.

[34] Therefore, we do not understand the court in **Quacie Hart v R** to have laid down as a general proposition that 40 years can never be a starting point for a murder committed under section 2(2) of the OAPA. In **Adrian Forrester v R**, the deceased, an Australian tourist, was brutally murdered in his hotel room. He received multiple stab wounds, some of which were severe enough to have resulted in immediate death. At the end of the trial, the applicant was sentenced to imprisonment for life and ordered to serve 35 years before becoming eligible for parole. Save for his reference to the applicant's four years and four months on remand, the learned sentencing judge did not otherwise demonstrate how he arrived at the figure of 35 years. In reviewing the sentence, this court accepted the learned sentencing judge's implicit signal that 40 years was an appropriate sentence. Having regard to the circumstances of the case, 40 years was accepted as the "notional starting point". From that figure, two years were deducted for the mitigating factors, one year added for the aggravating factors and four years credited for the four years and four months spent on remand; resulting in a pre-parole period of 34 years and eight months' imprisonment.

[35] The reasons advanced by the court for the 40-years starting point are summed up by Edwards JA, at para. [228], as follows:

> "The trial judge indicated that he took into account the brutal nature of the crime. There is no indication of the point at which he started. The appropriate starting point in this case must be determined by the circumstances of the case and its intrinsic seriousness, which included factors such as the manner in which the deceased was killed, the fact that he was a visitor to the island, and the fact that he was targeted in his hotel room. Following from that is also the consideration not only of the loss of life and the irreplaceable loss to the family, but the foreseeable consequence of a possible fall out in a vital sector of the economy

> which is largely dependent on the guarantee of the safety of tourists visiting the island."

The expected safety of the victim's hotel room was transformed into a scene of a massive and violent struggle during which he received stab wounds, one of which resulted in the collapse of his right lung. In the view of the court, the abnormal and unusual nature of the murder (of a tourist in his hotel room) provided justification for a higher starting point.

[36] The other cases cited by the prosecution did not discuss the starting point. In **Jason Palmer v R**, the applicant was convicted for what was described as the "gruesome murder" of an elderly pensioner. He was sentenced to imprisonment for life with the stipulation that he not be eligible for parole before 30 years had elapsed. Although the 30 years was accepted as being within the normal range, it was varied on appeal to 25 years to give full credit for the five years spent in custody before he was sentenced. Likewise, **Massinissa Adams and Ors v R** merely demonstrates that a pre-parole incarceration of 30 years falls within the range and is, therefore, not manifestly excessive.

[37] We accept as a correct declaration of the law, the proposition that the prescribed statutory minimum sentence is an appropriate guide to fixing the starting point for offences attracting a mandatory minimum sentence (see **Linford McIntosh v R**, at para. [16]; and **Quacie Hart v R**, at para. [28]). How far above the mandatory minimum pre-parole period the starting point lands, is determined not only by the circumstances of the case and the intrinsic seriousness of the offence but also by any abnormal or unusual feature inherent in the commission of the offence (see **Adrian Forrester v R**, at para. [230]).

[38] In the present case, we considered the reason advanced by the learned judge for her starting point, to be flawed, even viewing it through the benign lenses of aggravation urged by counsel for the Crown. Putting aside the circumstances and intrinsic seriousness of the offence of murder, the evidence did not reveal anything that could fairly be

characterised as abnormal or unusual. Consequently, we found ourselves unable to justify the higher starting point adopted by the learned judge.

[39] After a review of the authorities and the relevant principles, we have selected 25 years as a starting point. Taking into our consideration the intrinsic seriousness of the offence; that the applicant bore sole responsibility for the taking of a life and, although he was sentenced separately for wounding with intent, cumulatively, the applicant intended more harm than actually resulted.

[40] We have isolated the following aggravating factors: (i) the applicant's maturity (he was a man of 42 years at the time of the preparation of his SER and antecedents); (ii) there was an element of premeditation, to be gleaned from the applicant's previously expressed desire to assume ownership of Mr Thompson's illegal firearm; (iii) the fact that a firearm was used in the commission of the offence; (iv) the use of gratuitous and extreme violence (Mr Thompson was shot twice in the head and the witness himself was shot in the head); (v) the prevalence of the offence of murder, and in particular, murder committed with a gun. All these factors increase the sentence by 15 years to 40 years.

[41] On the question of mitigation, the learned judge treated the applicant as a person of previous good character, in refusing to take account of his two previous convictions. We see no reason to adopt a different posture. In any event, quite apart from being stale-dated, the convictions were not for kindred offences. We also credited the applicant with being the head of a stable family unit. He was married with three children between the age of 20 and 11 years. As the learned judge noted, his SER and antecedent report were generally good. Whatever was not favourable to the applicant, the learned judge declined to take into her consideration. We will not depart from her stance. The mitigating factors, we think, are deserving of a reduction of five years.

[42] That leaves us with a sentence of 35 years' imprisonment. The applicant must now be given full credit for the four years and three months he spent on remand. The result is a pre-parole term of imprisonment of 30 years and nine months.

[43] It was in light of the foregoing that we made the orders which appear at para. [3].