IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF
THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Application No GY/A/CR2023/002
GY Criminal Appeal Nos 20 and 21 of 2013

BETWEEN

SHERWYN HARTE
DEON GREENIDGE **APPLICANTS**

AND

THE STATE **RESPONDENT**

Before: **Mr Justice Saunders, President**
Mr Justice Wit
Mr Justice Anderson

Date of Judgment: **27 July 2023**

Appearances

Mr Douglas Mendes SC, Mr Joseph Middleton KC and Mr CA Nigel Hughes for the Applicants

Mrs Teshana Lake, Assistant Director of Public Prosecutions and Ms Dionne Mc Cammon, Assistant Director of Public Prosecutions for the Respondent

Mr Nigel Hawke, Solicitor General and Ms Raeanna Clarke for the Attorney General of Guyana

Practice and Procedure – Appeal – Special leave – Application for special leave to appeal judgment of Court of Appeal which upheld convictions and imposed life sentences with tariffs in place of death penalty – Constitutionality of death penalty – Academic nature of proposed appeal – Sentencing methodology – Criminal Law Offences Act, Cap 8:01.

SUMMARY

In 2013, the Applicants and a third person, who were all male members of the Coast Guard Division of the Guyanese Defence Force, were indicted for the murder of Dwieve Kant Ramdass under s 100 of the Criminal Law Offences Act ('CLO Act'). The prosecution's case was that the men robbed Mr Ramdass of money and threw him overboard during a stop and search exercise of boats in the Parika area and that Mr Ramdass had drowned.

Section 100 of the CLO Act provided for the mandatory sentence of death on conviction for felony murder. This section was amended in 2010 to s 100A which provides that a person convicted of murder in the course or furtherance of a robbery may be sentenced to death or to imprisonment for life.

The Applicants and the third person were tried and convicted of murder before Holder J and sentenced to the mandatory death penalty under the un-amended s 100. The three men appealed to the Court of Appeal against their convictions. They also appealed against the constitutionality of the death penalty, and the Attorney General participated as an intervener in rebuttal. The Court of Appeal unanimously upheld the convictions, but vacated the original death sentences, and replaced them with life sentences with tariffs.

Before this Court, the Applicants applied for special leave to appeal against the decision on sentence of the Court of Appeal and sought to obtain an order from this Court declaring the death penalty to be unconstitutional per se and that it cannot be lawfully imposed in Guyana. The Second Applicant also sought special leave to appeal his conviction.

Firstly, this Court held that the Second Applicant did not establish any realistic possibility that a potentially serious miscarriage of justice may have occurred by virtue of his conviction for murder. There was ample evidence in the caution statement and the circumstantial evidence on which a jury, properly directed, could have reached the conclusion that he was party to the joint enterprise to rob and murder the deceased.

Secondly, in relation to the constitutionality of the death penalty, the Court found that the Applicants faced no threat of execution, so the arguments raised on this issue were entirely

academic in nature. The Court reaffirmed its decision in *Ya'axché Conservation Trust v Sabido* that it will only hear academic appeals in specified exceptional circumstances. The current application did not fall under those exceptional circumstances.

Thirdly, as regards the Applicants' argument that the reasoning of the Court of Appeal considered the death penalty as being a 'saved law', the Court indicated that its case law had expounded clear views on the savings clause and naturally, to the extent that there is any variance between those views and the reasoning of the Court of Appeal, the views of this Court must prevail.

Fourthly, the Applicants had contended that the Court of Appeal had not adhered to the proper sentencing methodology in vacating the death penalty and imposing life sentences with tariffs. The Court considered that a normal sentencing hearing would probably not be practical 9 years after the indictment and conviction. However, the Court held that in respect of future cases, there ought, in principle, to be a re-sentencing hearing, which could be brief, in which counsel on both sides were asked to indicate factors relevant to the re-sentencing exercise. In the present case, the offenders were members of the Guyana Defence Force who had robbed and murdered an innocent citizen. There was no ground for regarding the sentence imposed as excessive or manifestly outside the mainstream of sentences. Even more pertinently on a conviction for felony murder, the unchallenged s 100A of the CLO Act only attracts two sentences: death and life imprisonment. Where the court imposes life imprisonment, as in this case, the section requires that the court *'shall'* specify a period, being *not less than 20 years*, which the convicted person should serve before becoming eligible for parole. This means that if the court imposes the minimum of 20 years, there is no space for consideration of established sentencing principles including mitigating factors. Furthermore, in this case the court had imposed *a tariff of 18 years* which appeared to conflict with the statutory minimum. However, in all the circumstances, this Court decided that it would not intervene to bring the tariff in line with the statutory minimum.

Accordingly, the Court ordered that the application for special leave would be dismissed, and that it would make no orders as to costs.

Cases referred to:

Alleyne v R [2019] CCJ 06 (AJ) (BB), (2019) 95 WIR 126; *Barbados Turf Club v Melnyk* [2011] CCJ 14 (AJ) (BB), (2011) 79 WIR 153; *Bisram v DPP* [2022] CCJ 7 (AJ) GY, (2022) 101 WIR 370; *Cadogan v R* [2006] CCJ 4 (AJ) (BB), (2006) 69 WIR 249; *Chan Wing-Siu v R* [1984] 3 WLR 677; *Doyle v R* [2011] CCJ 4 (AJ) (BB), (2011) 79 WIR 91; *Greaves v The State* [2022] CCJ 9 (AJ) BB; *Johnson v R* (2017) 91 WIR 23 (BH); *Lovell v R* [2014] CCJ 19 (AJ) (BB); *McEwan v A-G* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332; *Persaud v R* [2018] CCJ 10 (AJ) (BB), (2018) 93 WIR 132; *Pompey v DPP* [2020] CCJ 7 (AJ) GY, GY 2020 CCJ 2 (CARILAW); *R v Pinder* [2016] CCJ 13 (AJ) (BB), (2016) 89 WIR 181; *Ramcharran v DPP* [2022] CCJ 4 (AJ) GY; *Ya'axché Conservation Trust v Sabido* [2014] CCJ 14 (AJ) (BZ), (2014) 85 WIR 264.

Legislation referred to:

Guyana – Caribbean Court of Justice Act, Cap 3:07, Court of Appeal Act, Cap 3:01, Criminal Law (Offences) Act, Cap 8:01.

JUDGMENT

Anderson J (Saunders P and Wit J concurring)

ANDERSON J:

Introduction

[1] The Applicants apply for special leave to appeal to this Court against the substituted terms of life imprisonment imposed upon them by the Court of Appeal of Guyana in a ruling delivered orally on 22 December 2022. The Second Applicant also seeks special leave to appeal against his conviction.

Procedural Background

[2] The Applicants and a third person, who were all male members of the Coast Guard division of the Guyanese Defence Force, were indicted in 2013 under s 100 of the Criminal Law Offences Act[1] ('CLO Act') for the murder of Mr Dwieve Kant Ramdass who was killed on 20 August 2009. The prosecution's case was that the

[1] Cap 8:01.

three members of the Guyanese Defence Force robbed Mr Ramdass of money and threw him overboard during a stop and search exercise of boats in the area and that Mr Ramdass had drowned. At the time the three accused were indicted, s 100 of the CLO Act provided for the mandatory sentence of death in respect of persons convicted of felony murder. The section was amended in 2010; the amendment, reflected in s 100A, provides for the exercise of judicial discretion in determining sentence. A person convicted of murder in the course or furtherance of a robbery may be sentenced to death or to imprisonment for life.

[3] The Applicants and the third person were tried and convicted of murder before Holder J on 2 July 2013, and on 3 July 2013, sentenced to death on a mandatory basis, pursuant to the un-amended s 100 of the CLO Act which was applicable at the time of the indictment. The three men all appealed to the Court of Appeal against their conviction. Subsequently, the Applicants further appealed against the constitutionality of the death penalty and the Attorney General participated as an intervener. After oral argument heard before a three-judge panel of the Court of Appeal comprising the Chancellor (Acting), and Gregory and Persaud JJA, by way of virtual hearings held on 16 – 17 June, and 22 July 2021, judgment was handed down orally in a virtual hearing held on 22 December 2022. The judgment unanimously upheld the convictions, but all three Justices of Appeal agreed that the original death sentences should be vacated and replaced by life sentences with tariffs. It is against this judgment that the Applicants seek leave to appeal.

The Second Applicant's Application to Appeal Against Conviction

[4] The Second Applicant seeks special leave to appeal his conviction on two main grounds. First he alleges that the Court of Appeal erred in law when, having accepted that the evidence against him consisted solely of the contents of his caution statement which did not disclose any prior plan to murder or participate in the murder of the deceased, it nevertheless proceeded to find that the evidence of his conduct after the deceased's death in sharing in the proceeds of the stolen money, could constitute a basis upon which a jury could have arrived at a verdict

of murder. Secondly, he alleges that the Court of Appeal failed to examine the absence of any directions by the learned trial judge on the issue of accessory after the fact and to assess whether the failure of the learned trial judge to assist the jury on this issue occasioned a miscarriage of justice.

The Applicants' Application to Appeal Against the Death Penalty

[5] The Applicants seek ultimately (if their application for special leave is granted) to obtain an order from this Court declaring the death penalty to be unconstitutional *per se* and that it cannot be lawfully imposed in Guyana. They seek to argue that to the extent that the Court of Appeal decided that the death penalty could be imposed at the discretion of the sentencing judge, that decision was wrong and should be vacated. Further, they say, the Court of Appeal erred in law in finding that the death penalty under s 100 of the CLO Act was 'saved law' under the Constitution. Finally, the Applicants submit that the Court of Appeal erred in undertaking a re-sentencing exercise without inviting the parties to make submissions or provide information on mitigation contrary to binding authority, basic principles of natural justice, and the constitutional right to due process and protection of the law.

Affidavit in Opposition

[6] The Respondent opposes the grant of special leave. In relation to the conviction of the Second Applicant, the Respondent contends that the Court of Appeal found that the jury, on the combination of the evidence contained in his caution statement, and the circumstantial evidence based on the totality of his behaviour, could properly find that he was a party to the joint enterprise on the direction given by the learned trial judge in his summation. Further, under s 26 of the CLO Act, the Second Applicant could have been indicted and convicted as a principal offender as opposed to an accessory. Finally, the absence of directions by the learned trial judge on the specific offence of accessory after the fact was not prejudicial to the Second Applicant since conviction of the offence of being an accessory after the

fact to murder (in relation to which there was abundant and unchallenged evidence) carried the liability of a sentence of imprisonment for life.

[7] The Respondent argues that it was not fatal that a separate sentencing hearing was not conducted by the Court of Appeal as that court did not embark on a re-sentencing exercise but rather passed a sentence in substitution which the Court felt was appropriate given the circumstances of the case and warranted in law by the verdict which was supported by the evidence. Further, the absence of information regarding mitigating factors such as age, antecedents, etc. did not produce an inappropriate sentence as the Court of Appeal had only two options available in re-sentencing that is, to either sentence to death or life imprisonment and the court gave the less harsh sentence of life imprisonment.

Office of the Attorney General

[8] The Attorney General of Guyana was added to the proceedings in the Court of Appeal to address the issue of whether the death penalty is unconstitutional. Having regard to correspondence from the Solicitor General, this Court, by Orders dated 7 March 2023 and 11 April 2023, required the parties and the Office of the Attorney General to make written submissions on the merits of the application for special leave. By further correspondence from the Solicitor General dated 28 April 2023, the Attorney General advised that he had no objection to the grant of special leave and in consequence would not seek to put written submissions before the Court. The Office of the Attorney General was represented at the oral hearing on 31 May 2023, and repeated its support for the hearing of the appeal on the constitutionality of the death penalty given its public importance. In this, the Attorney General differed from the Director of Public Prosecutions who considered that an appeal against the constitutionality of the death penalty would be otiose and inappropriate.

Test for Special Leave in Criminal Matters

[9] This Court has the power to grant special leave to appeal to Applicants in criminal proceedings by virtue of s 8 of the Caribbean Court of Justice Act ('CCJ Act').[2] This power is discretionary; there is no right to obtain special leave to appeal. The overarching principle considered by the Court in deciding whether to grant special leave is whether it is likely that a miscarriage of justice has occurred. In respect of convictions, the applicant must satisfy the Court that there was a real risk that he or she was wrongly convicted; in respect of sentencing, the applicant must convince the Court that the sentence imposed was unduly excessive; in respect of dubious precedents, the applicant must persuade the Court that a genuinely dubious decision of the Court of Appeal should not be left undisturbed on the record. In every case, the applicant must satisfy the Court that there is an arguable case that failure to grant leave would result in a serious miscarriage of justice.

[10] These legal prescriptions have been adumbrated repeatedly in the jurisprudence of this Court. In *R v Pinder*[3] the Court held that:

> The test for special leave in criminal appeals was if there was a realistic possibility of a miscarriage of justice if leave was not given for a full hearing. The applicant had to persuade the court that a potential miscarriage of justice or a genuinely disputable point of law arose out of the decision appealed from in order to qualify for the grant of special leave.

More recently this Court drew on prior cases such as *Cadogan v R (No 2)*[4] and *Doyle v R*[5] to reformulate the current test for special leave in criminal cases as

> Whether (a) there is a realistic possibility that a (potentially) serious miscarriage of justice may have occurred, and/or (b) a point of law of general public importance is raised (that is genuinely disputable) and the court is persuaded that if it is not determined a questionable precedent might remain on the record.[6]

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[2] Cap 3:07.
[3] [2016] CCJ 13 (AJ) (BB), (2016) 89 WIR 181.
[4] [2006] CCJ 4 (AJ) (BB), (2006) 69 WIR 249.
[5] [2011] CCJ 4 (AJ) (BB), (2011) 79 WIR 91.
[6] A B v DPP [2023] CCJ 8 (AJ) GY at [13].

In *Lovell v R*[7] it was made clear that the applicant seeking special leave bears the burden of establishing the facts and law to the satisfaction of the Court; 'A person who seeks special leave in a criminal case bears the onus of demonstrating that the case merits a further appeal.'[8]

Application to Appeal Against Conviction

[11] The Second Applicant proposes to argue that as the evidence against him consisted solely of the contents of his caution statement which did not disclose any prior plan to murder or participate in the murder of the deceased, his conduct after the deceased's death in participating in the sharing of the stolen seventeen million dollars (GY$17,000,000.00), could not constitute a basis upon which a jury could have convicted him for murder.

[12] The Court of Appeal made clear that it upheld the conviction for murder based upon the contents of the Second Applicant's caution statement and the circumstantial evidence drawn from eyewitness testimony. In his caution statement, whose admissibility was upheld on *voir dire*, the Second Applicant admitted: (1) to carrying out a search of Mr Ramdass' box and reporting to the other two accused that the box contained money; (2) being aware that the deceased was pushed overboard; (3) not ascertaining whether the deceased was able to swim or not; (4) to participating in dividing up the stolen money in three shares equally; (5) to securing his share by secreting it in a grey bag which he asked his mother to keep for him.

[13] The circumstantial evidence presented to the jury included eyewitness accounts of the deceased sitting on the beach at Parika with the carton box next to him when the three accused men approached him and spoke with him for about 4 to 5 minutes. The Second Applicant was armed with a long gun. The change in the facial expression of the deceased upon entering the Coast Guard boat with the three

[7] [2014] CCJ 19 (AJ) (BB).
[8] ibid at [7].

accused men caused such concern to the eyewitness that he immediately telephoned the brother of the deceased and informed him of what he had seen. The eyewitness also testified that he had seen the Applicants speaking with the deceased about a week earlier. Another witness testified that, as was customary when the deceased was transporting money, he telephoned the deceased twice but on the third occasion the deceased did not answer the phone. Another witness made multiple telephone calls to the Applicants to enquire about the whereabouts of the deceased, most of these calls went unanswered but on one occasion the First Applicant was overheard to say that if the phone rang it should not be answered. Later that afternoon the Applicants were seen handing over bags to a taxi driver at Parika.

[14] The Court of Appeal reviewed the law on joint enterprises citing such cases as *Johnson v R*[9]*;* and *Chan Wing-Siu v R*[10]. It also reviewed the summing up in which the learned trial judge emphasised to the jury their duty to make findings of fact based on the evidence available to them. Evidently the jury decided that the Second Applicant was part of the joint enterprise and guilty of murder.

[15] This Court finds that the Second Applicant has not established any realistic possibility that a potentially serious miscarriage of justice may have occurred by virtue of his conviction for murder. There was ample evidence in the caution statement and the circumstantial evidence on which a jury, properly directed, could have reached the conclusion that the Second Applicant was party to the joint enterprise to rob and murder the deceased. The inference to be drawn from evidence was not countermanded by any attempt by the Second Applicant to assist the deceased when he was obviously in distress or otherwise to disassociate himself from the heinous crime against a citizen of the Republic whose safety he had sworn to protect.

The Appeal Against Sentence

[9] (2017) 91 WIR 23 (BH).
[10] [1984] 3 WLR 677.

[16] The proposed appeal against sentence is based on two grounds. First, the Applicants' core contention that the death penalty is unconstitutional *per se* and could not lawfully be imposed in this case (or any other) because it violates certain Articles and core principles of the Constitution of the Co-operative Republic of Guyana ('the Constitution') which are not protected by any savings law clause. Second, the Applicants argue that having found their original sentences to be unlawful on the narrower ground that the death penalty was discretionary, not mandatory, at the time of sentencing, the Court of Appeal erred in proceeding to re-sentence the Applicants without any opportunity for the parties to make submissions or provide information in mitigation, contrary to binding authority, basic principles of natural justice and the Applicants' constitutional right to due process and the protection of the law.

The Constitutionality of the Death Penalty

[17] As regards the constitutionality of the death penalty, the Applicants intend to deploy detailed and well-researched arguments showing that capital punishment is inherently arbitrary, irrational, and disproportionate, and contrary to universally accepted standards of justice upheld by civilised nations that observe the rule of law. They intend to contend that whilst adoption of 'discretionary' sentencing avoids some of the specific forms of arbitrariness associated with a mandatory regime, this alone does not lead to a system which is free from arbitrariness. Further, they plan to argue, the death penalty is not shielded from inconsistency with core constitutional principles of the rule of law or human dignity, or rights by virtue of the savings clause in the Constitution. The Applicants intend to cite leading international experts on capital punishment, important case-law of this Court and from other jurisdictions, as well as specific articles in the Guyanese Constitution supportive of their arguments.

[18] The obvious difficulty faced by the Applicants in convincing this Court to allow an appeal against the constitutionality of the death penalty is that they are not themselves exposed to the risk of the imposition of that penalty. The Court of

Appeal accepted that the mandatory penalty had been repealed by s 100A of the CLO Act and that the trial judge was wrong to have imposed it. Further, whilst accepting that under s 100A of the CLO Act, the death penalty could be imposed at the discretion of the sentencing judge, the Court of Appeal decided that it would not be appropriate to impose the sentence of death on the Applicants; instead, the Court imposed life sentences subject to tariffs. Before this Court the Office of the Director of Public Prosecutions stated that it was not seeking the enhancement of the penalties imposed and specifically, that it was not seeking the imposition of the penalty of death. Accordingly, the Applicants do not face the possibility that they could be sentenced to death.

[19] The Applicants seek to overcome the clearly academic nature of the proposed appeal by suggesting that (i) the constitutionality of the death penalty involved a question of constitutional interpretation which would qualify as an appeal of right under s 6 of the CCJ Act[11]; and (ii) the jurisprudence of this Court supported the bringing of academic appeals in circumstances such as the present.

[20] This Court is not convinced by either of these arguments. First, the issue of an appeal as of right does not strictly arise. Where an Applicant has chosen the route of seeking to obtain special leave, the Applicant must satisfy the requirements for the grant of special leave. The Applicant cannot change horses midstream to seek another route to the hearing of his appeal: *Barbados Turf Club v Melnyk.*[12] Furthermore, whether a proposed appeal in fact involves a question of constitutional interpretation is a matter for this Court. Without passing on the substantive merit of the argument in this case, it is entirely possible for this Court to hold that a proposed appeal dressed in the garb of constitutional interpretation is essentially an academic appeal or a request for an advisory opinion which the Court does not consider to be appropriate to give in the circumstances.

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[11] CCJ Act (n 2).

[12] [2011] CCJ 14 (AJ) (BB), (2011) 79 WIR 153.

[21] Second, significant reliance was placed by the Applicants on the case of *Ya'axché Conservation Trust v Sabido*[13] in which this Court accepted that the rules governing appeals to it were stated in such very broad terms that it could hear academic appeals in certain circumstances. It is therefore worthwhile quoting extensively from what was said on that occasion. Writing for the Court, Anderson J said:

> [3] … Notwithstanding this broad competence to entertain "any" appeal, it is an important feature of our judicial system that this Court decides disputes between the parties before it and does not pronounce on abstract or hypothetical questions of law where there is no dispute to be resolved. In general, there must exist between the parties a matter in actual dispute or controversy which this court can decide as a live issue.
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> [4] However, there is not an absolute rule that bars the hearing of a matter even if by the time the appeal reaches this court there is no longer a live issue between the parties... For the reasons given at [3] we agree that this court should be cautious in the exercise of its discretion to entertain an academic appeal and should in principle only do so where the question is one of public law (as distinct from private law rights disputes between parties) and where there are good reasons in the public interest to hear such an appeal. We agree with Lord Slynn of Hadley who, in delivering the judgment of the House in *Ex p Salem,* stated that an appropriate circumstance for hearing an academic appeal may be where the appeal raises a discrete point of statutory interpretation of the powers of a public authority without need for detailed consideration of the factual situation, especially where the issue is likely to arise again for resolution in the future.
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> [5] Another indication of an appropriate circumstance may be where the issue is a recurrent one that is likely to become moot before it reaches the ultimate court of appeal. A typical example is litigation that questions the legality of issuance of an annual licence or permit. In the normal course of events such an authorisation would expire before the issue of its vires reaches the ultimate court of appeal. It may be worthy of note that Article III, Section 2, Clause 1 of the American Constitution limits the jurisdiction of the US Supreme Court to deciding actual cases or controversies; that court has no competence to, and is prohibited from, issuing opinions in which no actual live issue exists between the parties. However, in *Roe v Wade* the Supreme Court held that the ban on abortion was unconstitutional even though by the time the matter reached that court the natural limitation of the human gestation period meant that the issue was no longer a live one. It was said that issues concerning pregnancy would always come to term before the appellate process was

[13] [2014] CCJ 14 (AJ) (BZ), (2014) 85 WIR 264.

> complete; to rigidly and inflexibly apply the actual controversy requirement would effectively deny review of an important issue.[14]

[22] We reaffirm these rules for the hearing of academic appeals which emphasise that the Court will only hear academic appeals in exceptional circumstances. The Court plainly stated that in any application for special leave, the Applicant must prove an arguable case on the merits but faces an 'additional hurdle'[15] if the appeal has become academic and that the Court must be 'cautious'[16] in entertaining such appeals. We are not convinced that the present academic appeal falls within either of the two categories of *Ya'axché* identified as possibly suitable for hearing. The appeal does not concern a discrete point of statutory interpretation of the powers of a public authority; rather it concerns interpretation of core constitutional provisions relating to the authority of the State to impose criminal sanctions. There is every likelihood that this question will arise in proceedings where the issue is a live one between the State and persons facing the imposition, or the risk of imposition, of the death penalty in the future.

[23] The Applicants also take issue with some of the reasoning of the Court of Appeal regarding the death penalty being a 'saved law.' This Court in cases such as *McEwan v Attorney General*[17] and *Bisram v DPP*[18] has expounded clear views on the issue of the savings clause and naturally, to the extent that there is any variance with those views, the reasoning of this Court must prevail.

The Sentencing Process

[24] The Applicants seek to argue that the Court of Appeal erred in undertaking a re-sentencing exercise without inviting the parties to make submissions or provide information on mitigation contrary to binding authority, basic principles of natural

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[14] ibid at [3]– [5].
[15] ibid at [2].
[16] ibid at [4].
[17] [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332.
[18] [2022] CCJ 7 (AJ) GY, (2022) 101 WIR 370.

justice and the constitutional right to due process and protection of the law. The Appellants intend to say that in the short re-sentencing exercise the Court of Appeal acknowledged that 'nothing is known about... other [mitigating] sentencing factors such as the Applicants' 'age, antecedents... employment details, and social factors etc'. Notwithstanding this, the court proceeded to impose minimum tariffs of 18 years on each of the Applicants. The failure of the Court of Appeal is said to have crystalised into two central flaws: the denial of the applicant's right to be heard; and the failure to seek relevant information to enable an evidence-based determination of sentence.

[25] This Court has repeatedly outlined the correct methodology to be followed when passing sentence: *Persaud v R;*[19] *Alleyne v R;*[20] *Pompey v DPP;*[21] *Ramcharran v DPP;*[22] and *Greaves v The State*.[23] In particular, Saunders P made clear in *Pompey* that:

> … [T]he practice of passing sentence immediately after verdict should generally be eschewed, especially in cases where there is a likelihood that a lengthy prison term may be imposed. In such cases, the judge should hold a separate sentencing hearing at which mitigating and aggravating factors, including mental health or psychological assessments, can better be advanced and considered.[24]

In *Ramcharran*, Barrow J stated that:

> …the idea of a separate sentencing hearing is not about form but about substance. In the end what is required is that the ingredients that constitute a proper sentencing hearing be met, whether it is separate in fact or not. And this is dependent on all the circumstances of each individual case.[25]

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[19] [2018] CCJ 10 (AJ) (BB), (2018) 93 WIR 132.
[20] [2019] CCJ 06 (AJ) (BB), (2019) 95 WIR 126.
[21] [2020] CCJ 7 (AJ) GY, GY 2020 CCJ 2 (CARILAW).
[22] [2022] CCJ 4 (AJ) GY.
[23] [2022] CCJ 9 (AJ) BB.
[24] *Pompey* at [32].
[25] *Ramcharran* at [118].

[26] It is important to note that in both *Pompey* and *Ramcharran*, the CCJ was concerned with giving guidance particularly to trial judges. However, in principle, an appropriate separate sentencing hearing is also indicated in re-sentencing by appellate judges, and this principle is not displaced by the power given to the Court of Appeal in s 13(3) of the Court of Appeal Act[26] to, 'quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe)'. We agree with Lord Hughes in *Moss v R*[27] when he said that it was "elementary" that where the sentence is not fixed by law, a criminal court has a duty to give a defendant the opportunity to be heard, however little there may appear to be available to be said on his behalf. Lord Hughes quoted Megarry J. in *John v Rees*[28] as saying:

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

[27] However, the circumstances of the individual case will determine the nature and extent of the sentencing hearing. Where the re-sentencing takes place years, sometimes decades after the conviction, it will often be impractical to expect an identical sentencing hearing or exercise as that which would have been possible or required at the conviction. After a long hiatus, the person being re-sentenced is, in many ways, a different person from the one who was convicted of committing the offence, and the relevant sentencing factors (or some of them) may be different or assume differing degrees of pertinence. For future cases, a relatively short sentencing hearing in which the court seeks from counsel any oral submission of any relevant information will generally suffice. In other words, counsel on both sides, will be expected to come prepared to assist the court in this aspect of the

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[26] Cap 3:01.
[27] [2013] UKPC 32.
[28] [1970] Ch 45, 402.

litigation and should not expect an adjournment to prepare submissions on this point.

[28] Given the likely brevity of the re-sentencing hearing by the Court of Appeal, and in past cases where even an abbreviated sentencing hearing was not held by the trial judge, an important consideration for the appellate court may be that the sentence imposed does not differ markedly from the mainstream of sentences generally considered appropriate for the type of offence and the offender, bearing in mind all the relevant information available. If there is a marked difference from the mainstream of sentences the appellate court should give reasons for the deviation.

[29] In the present case, the re-sentencing took place 9 years after the Applicants were convicted of murder. The Court of Appeal took account of the CCJ's jurisprudence on sentencing and did the best it could to identify the relevant factors which were known and on the record. The Court of Appeal then proceeded to balance these factors and imposed a life sentence with a tariff of 18 years. Having regard to the offence and the offenders, particularly bearing in mind that the offenders were members of the Defence Force who robbed and murdered an innocent citizen, we do not think there is any ground for regarding the sentence imposed as excessive or manifestly outside the mainstream of sentences.

[30] Furthermore, there is a more salient and direct reason why this ground of appeal is doomed to fail. The Applicants were convicted of a felony murder. For this offence, no one suggested other than that s 100A (1)(a) of the CLO Act provides for only two sentences: death and life imprisonment. Where the court imposes life imprisonment, as in this case, the section requires that the court 'shall' specify a period, being *not less than 20 years*, which the convicted person should serve before becoming eligible for parole. The constitutionality of this regime was not challenged. This means that if the court imposes the minimum of 20 years, there is

no space for consideration of orthodox sentencing principles including mitigating factors, since the penalty would have been fixed by law.

[31] In this case, the Court of Appeal imposed a tariff of 18 years rather than the statutory minimum of 20 years. Neither the Director of Public Prosecutions nor the Attorney General sought a correction of this error. Indeed, in the present proceedings, the Director of Public Prosecutions expressly indicated that no enhancement of the penalties imposed by the Court of Appeal was being sought. In all the circumstances of this case, this Court has decided not to intervene in the tariff imposed. However, we would wish to remind the courts below that the statutory provisions on sentencing ought to be scrupulously observed unless and until set aside by judicial decision.

Disposition

[32] The application for the grant of special leave to appeal is hereby refused and dismissed.

[33] There shall be no order as to costs.

/s/ A Saunders

Mr Justice Saunders (President)

/s/ J Wit

Mr Justice Wit

/s/ W Anderson

Mr Justice Anderson