[2024] CCJ 9 (AJ) GY

IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

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

CCJ Appeal No GYCR2023/001
GY Criminal Appeal No 48 of 2015

BETWEEN

ROY JACOBS	**APPELLANT**
AND	
THE STATE	**RESPONDENT**

Before: **Mr Justice Saunders, President**
Mr Justice Anderson
Mr Justice Barrow
Mr Justice Burgess
Mr Justice Jamadar

Date of Reasons: **11 April 2024**

Appearances

Mr Arudranauth Gossai for the Appellant

Mrs Teshana Lake and Mrs Mercedes Glasford for the Respondent

Criminal law – Sentencing – Appeal against sentence – Joint criminal enterprise – Murder for pay – Parity principle in criminal law – Power of DPP to appeal against sentence – Needham's Point Declaration on Criminal Justice Reform – Criminal Law (Offences) Act, Cap 8:01.

SUMMARY

The appellant and his co-accused, Orwin Hinds, Cleon Hinds and Kevin October, were found guilty by a jury of murdering for pay a 72-year-old woman, Clementine Fiedtkou-Parris, contrary to s 100(1)(d) of the Criminal Law (Offences) Act, Cap 8:01, ('the Act').

Murder for pay is classified by the Act as constituting one of the worst types of murder and the Act requires that a person convicted of such an offence be sanctioned either by the imposition of a sentence of death or life imprisonment. It is required by the Act that when imposing a life sentence, the Court must specify the period to be served before becoming eligible for parole, with the minimum period of such service being 20 years.

For the murder of Clementine Fiedtkou-Parris, the appellant and his co-accused were sentenced by the High Court to 81 years' imprisonment, with eligibility for parole after 45 years. Their appeal against sentence was allowed by the Court of Appeal which, on 1 February 2022, imposed a sentence of 50 years' imprisonment without specifying any particular period for eligibility for parole.

Orwin and Cleon Hinds appealed the Court of Appeal's decision to this Court. On 17 January 2023, this Court in the case *Hinds v The State*, allowed the appeals of Orwin and Cleon Hinds and imposed a sentence upon them of imprisonment for life, with eligibility for parole after serving a period of 20 years' imprisonment.

On 5 October 2023, this Court granted the appellant special leave to appeal the Court of Appeal's sentence. In the appellant's grounds of appeal before this Court, he placed strong reliance on the decision of this Court in *Hinds v The State* and argued that the sentence imposed by the Court of Appeal was: (i) excessive, (ii) wrong in law as it failed to specify when he would be eligible for parole, and (iii) that a fit and proper sentence would be life imprisonment with eligibility for parole after 20 years given that this was the sentence this Court had imposed on his co-accused. The Director of Public Prosecutions ('DPP') agreed with these arguments and conceded the appeal. Accordingly, on 29 February 2024, this Court allowed the appeal with reasons to follow.

Writing for the majority, Saunders P expressed the view that the DPP was entitled and right to concede the appeal for three principal reasons. Firstly, the sentence imposed by the lower courts did not take account of the legislative regime governing persons convicted of murder for pay. The regime required that the appellant be sentenced to death or to life

imprisonment. Secondly, Saunders P relied on the parity principle for the proposition that, having committed similar offences as the co-accused, under similar circumstances, it was right that the appellant should receive similar punishment. Lastly, Saunders P pointed out that since the Office of the DPP is established under the Guyanese Constitution as a public office, it followed that barring formal challenge to the exercise of discretion on the part of the DPP by way of judicial review, the DPP's decision to concede an appeal was not to be questioned.

In a separate opinion, Anderson J, agreed that the sentences imposed in the lower courts did not conform with the Act. He also accepted the concession of the appeal by the Office of the DPP. However, in light of conflicting statements attending the concession, Anderson J made the point that it is the duty of the Office of the DPP, where the DPP genuinely and for good cause considers a sentence to be too lenient, to make this known and to advocate for the type or range of sentence that it considers just in the circumstances of the case. The learned judge remarked that justice for those for whom the Office of the DPP speaks, especially those who cannot now speak for themselves, demands no less.

Cases referred to:

Alleyne v R [2019] CCJ 6 (AJ) (BB), (2019) 95 WIR 126; *August v R* [2018] CCJ 7 (AJ) (BZ), [2018] 3 LRC 552; *DPP v Wells* KN 2020 HC 40 (CARILAW), (6 November 2020); *Edwards v R* [2017] CCJ 10 (AJ) (BB), (2017) 90 WIR 115; *Faux v R* (BZ CA, 19 June 2023); *Greaves v The State* [2022] CCJ 9 (AJ) BB; *Hinds v The State* [2023] CCJ 1 (AJ) GY; *Nicholas v The State* (TT CA, 17 December 2013); *Persaud v R* [2018] CCJ 10 (AJ) (BB), (2018) 93 WIR 132; *Pitman v The State* TT 2013 CA 65 (CARILAW), (18 December 2013); *Pompey v DPP* [2020] CCJ 7 (AJ) GY, GY 2020 CCJ 2 (CARILAW); *R v Banks* [1916] 2 KB 621; *R v Hernandez* (BZ CA, 14 March 2014); *R v Jogee* [2016] UKPC 7, (2016) 87 WIR 439 (JM); *R v Powell* [2022] JMCA Crim 53, JM 2022 CA 106 (CARILAW); *R v Puddick* (1865) 4 F & F 497, 176 ER 662; *R v Rahman* [2009] AC 129; *R v Shol* BZ 2022 CA 30 (CARILAW), (28 September 2022); *Sealy v R* [2016] CCJ 1 (AJ) (BB), (2016) 88 WIR 70.

Legislation referred to:

Antigua and Barbuda - Criminal Procedure (Amendment) Act 2004; **Barbados -** Criminal Appeal Act, Cap 113A; **Belize -** Court of Appeal Act, CAP 90; **British Virgin**

Islands - Criminal Procedure Act, CAP 18; **Cayman Islands -** Court of Appeal Law (2011 revision); **Grenada -** West Indies Associated States Supreme Court Grenada Act, CAP 336; **Guyana -** Constitution of the Co-operative Republic of Guyana Act, Cap 1:01, Court of Appeal Act, Cap 3:01, Criminal Law (Offences) Act, Cap 8:01; **Jamaica -** Offences Against the Person Act; **St Kitts and Nevis -** Eastern Caribbean Supreme Court (St Christopher and Nevis) Act, Cap 3:11; **St Vincent and the Grenadines -** Eastern Caribbean Supreme Court (St Vincent and the Grenadines) Act, CAP 24; **Trinidad and Tobago -** Supreme Court of Judicature Act, Chap 4:01.

Other Sources referred to:

'Needham's Point Declaration on Criminal Justice Reform in the Caribbean: Achieving A Modern Criminal Justice System' (CCJ Academy for Law Seventh Biennial Conference, Bridgetown Barbados, 20 October 2023); Patterson C, 'Gov't Looking to Increase Mandatory Minimum Sentence for Murder to 45 Years' (Jamaican Information Service, 25 January 2023) < https://jis.gov.jm/govt-looking-to-increase-mandatory-minimum-sentence-for-murder-to-45-years/ > accessed 1 April 2024.

REASONS FOR DECISION

Saunders P (Barrow, Burgess, and Jamadar JJ concurring)

Anderson J

SAUNDERS P:

[1] At an early stage, the Director of Public Prosecution ('the DPP') decided to concede this appeal. Even though this Court's view on that concession ultimately counts for nought, it was a decision that, respectfully, was the right one to make and it ensured that precious time and costs were saved.

[2] The appeal was brought by Roy Jacobs who had been convicted of murder. On 30 June 2011, along with others including Orwin Hinds and Cleon Hinds, Jacobs embarked on a joint criminal enterprise to kill Clementine Fiedtkou-Parris. It was a crime committed for money. Such a dastardly murder is specifically contrary to s

100(1)(d)(i) of the Criminal Law Offences Act, Cap 8:01. It falls into a legislative bracket that addresses the worst types of murder.

[3] Jacobs was arrested on 29 October 2011 and has been incarcerated since then. The evidence against him consisted of an untested eyewitness account given by Fitzroy Fiedtkou, the deceased's brother. Unfortunately, Mr Fiedtkou died before the trial. He could not therefore be cross-examined, but his statement given in the Magistrate's Court was read into evidence at the trial. His statement was that around 7:45 in the evening of 30 June 2011, he was sitting on the steps at the home of his 72-year-old sister when two men came and asked for her. He called for her and when she came, one of the men shot and killed her. At an identification parade, Mr Fiedtkou identified Jacobs as the person who fatally shot his sister.

[4] Jacobs gave a caution statement to the police. He confessed to participating in the crime, but he denied that he was the one who pulled the trigger. He and his co-accused all claimed that the deceased was killed by a person named 'Dutchie' who was never apprehended by the State. Jacobs did admit, however, that he 'get the men fu do the work. But did not went dea'. Jacobs stated that he was paid GYD50,000 for 'de work'.

[5] At the trial, Jacobs objected to his caution statement going into evidence. That objection was overruled. The statement was admitted and placed before the jury. On 24 November 2015, Jacobs and his co-accused were all found guilty. Each was sentenced by the trial judge to 81 years' imprisonment with eligibility for parole after 45 years. To arrive at the sentence of 81 years, the judge started with a base of sixty years, deducted four years for the time spent in pre-trial detention, added ten years because it was murder for pay, added another ten years for pre-meditation, and another five for the use of a firearm. The judge fixed a period of 45 years before their eligibility to be released on parole.

[6] On 3 December 2015, the co-accused each filed a notice of appeal against their convictions and sentence. Counsel submitted to the Court of Appeal that the sentences imposed were excessive. On 1 February 2022, the Court of Appeal dismissed the appeals against conviction and allowed the appeals against sentence. The Appeal Court reduced the sentences to 50 years' imprisonment for each accused. No time limit before eligibility for parole was specifically indicated.

[7] The men appealed further to this Court. Jacobs had difficulty obtaining legal representation and so the appeals of Orwin Hinds and Cleon Hinds came on for trial at a date much earlier than this one for Jacobs. On 17 January 2023, this Court reconsidered the sentences imposed on the Hinds brothers. In a single unanimous judgment[1], we allowed their appeals against sentence. We set aside the sentences of 50 years' imprisonment imposed by the Court of Appeal and we re-sentenced the men each to imprisonment for life, with eligibility for parole after a period of 20 years including the time spent on remand awaiting trial. At [18] of the judgment, Barrow J reiterated that:

> …life imprisonment means exactly what it says: it is a sentence of imprisonment for life. The convicted person has no right to be released. The fact that the system of parole may usually result in the convicted person being released and not dying in prison does not alter the nature and duration of the sentence that is imposed.

[8] The fact is that, as the parole regimes in Guyana, and also in Belize, currently stand, even where a life sentencer is released on licence, it still remains the case that, as I indicated in *August v R*[2], for the remainder of his natural life, the offender's autonomy is continually compromised in significant ways aimed at protecting the public and rehabilitating the offender. Moreover, the offender is always at risk of being re-incarcerated to serve out the life sentence imposed upon him.

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[1] *Hinds v The State* [2023] CCJ 1 (AJ) GY.
[2] [2018] CCJ 7 (AJ) (BZ), [2018] 3 LRC 552 at [141] – [142].

[9] In Guyana, the worst types of murders are placed in a class of their own for the purpose of sentencing. This class embodies five categories identified by reference to the identity or status of the victim or the nature of the crime: see s 100(1)(a)-(e) of the Criminal Law (Offences) Act, Cap 8:01 ('the Act'). A murder that is committed for money falls within one of the five categories: see s 100(1)(d) of the Act. An offender who falls within any one of these five categories may only be subjected either to death or to life imprisonment. Further, in keeping with s 100A(1)(a) of the Act, when such an offender is sentenced to life imprisonment, the court is required to specify a period, being not less than 20 years, which the offender should serve before becoming eligible for parole. No constitutional challenge has been successfully made to this parliamentary prescription and we received no submissions on that point in this case.

[10] The sentences imposed by each of the courts below were inconsistent with the legislatively mandated sentencing regime because, as previously stated, barring any successful challenge to the constitutionality of the relevant provisions, a court is only authorised to impose, as punishment for this type of offence, either death or life imprisonment. The Court of Appeal did not advert to this nor did that court specify any minimum period to be served before Jacobs could become eligible for parole.

[11] Jacobs, no doubt in reliance on the *Hinds*[3] decision, filed a notice of appeal on 25 October 2023. In his grounds of appeal, he submitted that:

a. The sentence imposed by the Court of Appeal was excessive and contrary to the law.
b. In contravention of the law, no time within which he would be eligible for parole was prescribed.
c. His sentence should be consistent with the sentences imposed on his co-accused, that is life imprisonment with the possibility of parole after serving twenty (20) years imprisonment (inclusive of time spent on remand and time in custody since the date of conviction).

[3] *Hinds* (n 1).

[12] After taking note of these grounds of appeal, and no doubt considering all the information at their disposal, the DPP conceded the appeal. The Director agreed that Jacobs should be sentenced to life imprisonment with eligibility for parole after 20 years' imprisonment. The DPP premised her concession on the parity principle, as explained by this Court in *Persaud v R*[4], and also on the unanimous decision of this Court to sentence Jacobs' co-accused to life imprisonment with eligibility for parole after 20 years[5].

[13] The notion that when this Court ordered that the Hinds brothers should not be eligible for parole until after 20 years' imprisonment the Court thereby gave them a 'lenient' 20-year sentence is misleading. We reiterate the point made by Barrow J in *Hinds* and cited above at [7]. The sentence imposed on them was *life imprisonment*. It is true that they were made eligible for parole after serving 20 years, but it is not automatic that they will receive parole then. The Parole Board may advise the Minister with respect to their release after they have served 20 years, but equally the Board may decline to render any such advice. Alternatively, the Minister may decide not to accept the advice of the Parole Board that any particular prisoner be released on licence. But even where the Minister decides to release a prisoner on licence, the Minister may impose such conditions as deemed fit; and the Minister may, after such release, vary or cancel any such condition or insert a new condition. A licence may include provisions that the person released shall be under the supervision of the officer in charge of the Police Station or the officer in charge of the Probation office, or both such persons ('the supervising officer') during the period specified in the licence and that the prisoner shall keep in touch with his supervising officer as required; and comply with the directions of his supervising officer or officers as to his conduct.

[14] Leaving aside a death penalty, a life sentence is the most severe sentence a judge can impose. A life sentence in large measure satisfies the goals of punishment and

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[4] [2018] CCJ 10 (AJ) (BB), (2018) 93 WIR 132 at [32] –[33].
[5] *Hinds* (n 1).

retribution; but sentencing also has other objectives. An efficient system of parole allows the Parole Board and the Executive authority to play a role in addressing such salutary matters as how best to deter a convicted person from re-offending; how best to protect the society from the particular offender; and how to rehabilitate the prisoner so that, if possible, he may yet be reintegrated successfully into society. These are also important sentencing objectives. A judge-imposed life sentence that carries with it little or no possibility for parole before an inordinately lengthy period of incarceration is spent may be a fit sentence in rare cases, but judges should bear in mind that the lengthier the period before eligibility for parole, the more likely it is that such a sentence confines itself only to satisfying punishment and retribution goals to the exclusion of other goals of sentencing. We do not support the notion that even in the worst forms of murder, in every case the prisoner should be locked up with little or no prospect of parole. This is inconsistent with modern penological practices that strive to balance such varied concepts as punishment and public safety, rehabilitation and humaneness, restorative justice and care and concern for society, victims, and their families.

[15] The DPP, very ably represented at the appeal before us by Ms Lake, together with Ms Glasford, was entitled and right to concede this appeal for three principal reasons. Firstly, the sentence imposed by the courts below did not take account of the legislative regime governing persons convicted of murder for pay. As long as that regime remained valid the courts had no choice but to sentence Jacobs to death or to life imprisonment.

[16] Secondly, there was good reason to apply the parity principle in this case. Parity in this sense refers to the principle of equality before the law; the idea that similar offences committed under similar circumstances should receive similar punishment. As Anderson J explained in *Persaud v R*[6]

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[6] *Persaud* (n 4) at [32].

> The principle of equality before the law requires that co-accused whose personal circumstances are similar and whose legal liability for the offence are relative should normally receive comparable sentences. Where the sentences are manifestly and unjustifiably disparate, the accused who has been dealt with more harshly may entertain a legitimate sense of grievance at that unfair treatment. It is also harmful to the public confidence in the administration of justice where significant disparity in sentences cannot be properly justified. Public confidence is eroded if, as it has often been put, a right-thinking member of the public, with full knowledge of all the relevant facts and circumstances would, on learning of the disparity in sentences, consider that something had gone wrong with the administration of justice.

[17] The evidence adduced by the State that Jacobs was the trigger man was untested and ambiguous. The deceased's brother did say so in his statement, but he was not available for cross-examination. On the other hand, the State also relied on Jacobs' caution statement in which Jacobs stoutly denied that he actually shot the deceased but admitted being part of the murder conspiracy. It is impossible to know, from the mere conviction, which of these two versions of the event the jury accepted. The trial judge, who, having seen all the witnesses and considered all the evidence, was in the best position, did not conclude that the convicted persons should be differently sentenced. The trial judge evidently found them culpable to more or less the same degree. Nor did the Court of Appeal find any reason to attach greater culpability to any particular participant. Each of the courts below imposed upon each of the co-accused the identical sentence. No new material has been placed before this Court to warrant a reversal or departure from that approach and in light of this, it would have been quite arbitrary for this Court so to do.

[18] Thirdly and most importantly, art 116 of the Constitution of the Co-operative Republic of Guyana Act, Cap 1:01 establishes the office of the DPP as a public office. The functions and powers of the DPP are set out in art 187. The powers granted are very wide. For example, among other powers, art 187 vests exclusively in the DPP, the power to discontinue any criminal proceedings instituted or undertaken by the DPP at any stage before judgment is delivered. The Article also makes it clear that the powers accorded to the DPP by the Constitution are vested in

the DPP *to the exclusion of any other person or authority*. It follows that, barring the exceptional circumstance where the exercise of discretion on the part of the DPP is formally challenged by way of judicial review, the DPP's decision to concede this appeal or to exercise her powers in a particular manner or to alter her views about how the State should treat with the appeal should be respected and cannot be questioned even by this Court.

[19] For all the above reasons, the Court allowed the appeal and ordered that, consistent with the penalty imposed on his co-accused, Jacobs should serve a life sentence with no eligibility for parole for a period of 20 years.

ANDERSON J:

<u>Introduction</u>

[20] This is an appeal against sentence in a case of murder for hire. In written submissions and at the oral hearing of the appeal, the Director of Public Prosecutions ('the DPP') conceded the appeal. Accordingly, by Order dated 4 March 2024, this Court allowed the appeal with reasons to follow. My reason for allowing the appeal is solely and exclusively the fact of the concession by the DPP, there being no other avenue for countervailing contentions. That concession causes concern in two respects to which I shall come presently. These concerns necessitate a short remark on the role of the DPP in sentencing.

<u>Background</u>

[21] Roy Jacobs ('the appellant'), together with his co-accused Orwin Hinds, Cleon Hinds, and Kevin October, were found guilty by a jury of murdering an elderly woman of 72 years, Clementine Fiedtkou-Parris, for pay contrary to s 100(1)(d) of the Criminal Law (Offences) Act, Cap 8:01, ('the Act'). This type of murder is considered by the Guyanese Parliament as constituting one of the worst forms of

murder and must, according to s 100A(1)(a) and (3)(a) of the Act, be sanctioned by either a sentence of death or imprisoned for life. When imposing a life sentence, the Act requires the court to specify the period to be served before becoming eligible for parole, with the minimum period of such service being 20 years.

[22] Singh J sitting in the High Court sentenced the appellant and his co-accused to 81 years' imprisonment with eligibility for parole after 45 years. Their appeal against sentence was allowed by the Court of Appeal which, on 1 February 2022, substituted the sentence of 50 years' imprisonment. The co-accused, Orwin and Cleon Hinds appealed their sentence to this Court arguing that they ought to have been given a term of life imprisonment with eligibility for parole after 20 years. Their reasoning was that in practice a 50-year sentence that does not specify eligibility for parole was more severe than life imprisonment which usually amounted to a lesser term of years. On 17 January 2023, this Court in the case *Hinds v The State*[7], allowed the co-accused's appeal on sentence and substituted the sentence of imprisonment for life, with eligibility for parole after serving a period of 20 years' imprisonment.

[23] The appellant, having successfully applied for an extension of time to apply for special leave, was granted special leave to appeal the sentence of 50 years' imprisonment imposed by the Court of Appeal. He placed strong reliance on the decision of this Court in *Hinds* and argued that the sentence imposed by the Court of Appeal was: (i) excessive, (ii) wrong in law as it failed to specify when he would be eligible for parole, and (iii) that a fit and proper sentence would be life imprisonment with eligibility for parole after 20 years taking into consideration the time spent on remand.

[24] As earlier indicated, the DPP has agreed with these submissions. Clearly, the sentences imposed in the courts below did not conform with s 100A(1)(a) and (3)(a) of the Act. The High Court imposed a sentence of 81 years rather than life

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[7] *Hinds* (n 1).

imprisonment: *August v R*[8]. This flaw in the sentence was not cured by the Judge's satisfaction of the statutory obligation to impose a period of imprisonment before eligibility for parole; in this case, a tariff of 45 years' incarceration. Similarly, the sentence of the Court of Appeal was not in conformity with the Act in that it did not impose life imprisonment. Further, the bare imposition of the sentence of 50 years' imprisonment did not conform with the mandatory obligation to specify the period to be served before eligibility for parole. The submissions of the appellant on this aspect of the case were clearly correct and the concession of the DPP was plainly properly made.

[25] My concerns relate to the further concessions of the DPP which imply application of the parity principle, and which do not address the issue of the DPP's acceptance of the sentencing policy of the Court of Appeal. I now turn to consider these two issues separately.

The Parity Principle

[26] Speaking for this Court in *Persaud v R,*[9] I explained the parity principle as follows:

> The principle of equality before the law requires that co-accused whose personal circumstances are similar and whose legal liability for the offence are relative should normally receive comparable sentences. Where the sentences are manifestly and unjustifiably disparate, the accused who has been dealt with more harshly may entertain a legitimate sense of grievance at that unfair treatment. It is also harmful to the public confidence in the administration of justice where significant disparity in sentences cannot be properly justified. Public confidence is eroded if, as it has often been put, a right-thinking member of the public, with full knowledge of all the relevant facts and circumstances would, on learning of the disparity in sentences, consider that something had gone wrong with the administration of justice.

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[8] *August* (n 2) at [141 – 142].
[9] *Persaud* (n 4) at [32].

[27] The parity principle was implicitly invoked in the acceptance by the DPP that the appellant should receive the same sentence as his co-accused ie, life imprisonment with eligibility for parole after a period of 20 years' imprisonment. Specifically, the DPP stated:

> The Murder of Clementine Fiedtkou was a grave murder and the sentence passed by this court for the two other co-accused was life imprisonment with the possibility of parole after serving 20 years. It is respectfully submitted that in circumstances the sentence of the Appellant Roy Jacobs ought to be consistent with the sentence passed in *Orwin Hinds and Cleon Hinds v The State [2023] CCJ 1 (AJ) GY* which was imprisonment for life, and he shall become eligible to be considered for parole after a period of 20 years imprisonment including the time spent on remand awaiting trial.[10]

[28] However, in its Affidavit of Opposition to the appellant's application for special leave, the DPP objected to the same punishment for the appellant as for his co-accused on the ground that he had a greater involvement in the murder than the co-accused. Specifically, the DPP objected to the tariff of becoming eligible for parole after serving 20 years. At para 15 of the Affidavit, the Assistant Director of Public Prosecutions deposed that the appellant:

> … was the person who shot the deceased and it is open to this Honourable Court to impose a different tariff in relation to him from the tariff imposed for Orwin Hinds and Cleon Hinds.

[29] This suggestion of the appellant's greater involvement in the murder was maintained in the DPP's written submissions. Those submissions referenced the eyewitness evidence of Fitzroy Fiedtkou, the brother of the murder victim, who testified at the preliminary inquiry but who died before the trial so that only his deposition was before the jury, and which was therefore the subject of specific directions by the trial judge. The evidence supplied by Fiedtkou, and relied on by the DPP, was as follows:

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[10] 'Submission on behalf of the Respondent', 24 January 2024. Paragraph numbering and heading omitted, emphasis added.

> On Thursday the 30th June, 2011 about 19:45 hours Fitzroy Fiedtkou was sitting on the top step of his sister's house waiting to watch television. His sister, Clementine was in her bedroom. While sitting on the top step, he saw two negro men at the gate. They asked him "where is Aunty." He asked them which Aunty they talking about and they replied saying "where is Aunty." At that time his sister Clementine came out of her bedroom and walked into the hall. One of the men hoisted him from the top step and put him in the corner and pulled out a black gun from his waist and pointed it to his sister and started shooting her. He heard about six gunshots and saw his sister fall in the chair. At this time, he tried to scramble the man who was shooting. The other negro man was standing on the step. He stated that he looked at both of them and saw their faces. He said the house was bright and also there was light on the street. On the 31st October, 2011, he attended an identification parade at the Brickdam Police Station where he identified the Appellant Roy Jacobs as the person who shot his sister. The Appellant Roy Jacobs also gave an oral and a written statement to the police about the plan to kill the deceased.[11]

[30] The oral and written statement given by the appellant to the police was a concession of his participation in the murder. Although he denied shooting the victim, or being at the scene of the shooting, he admitted that he 'get the men fu do the work.' Jacobs stated that he was paid GYD50,000 for 'de work'.

[31] This Court has repeatedly stated its preference for the reliance on modern modes of forensic evidence over eyewitness and confession evidence: *Sealy v R*;[12] *Edwards v R*.[13] This preference has now been affirmed in the regional *Needham's Point Declaration on Criminal Justice Reform* adopted in Barbados in October 2023.[14] Fortunately, the nature and quality of the evidence are not matters in dispute in this case; there is no appeal before this Court on the issue of conviction.

[32] At the hearing of the appeal, Counsel for the DPP, in response to questions from the Bench, indicated that the appellant will be eligible for parole this December 2024, in respect of a murder for hire on 30 June 2011. Counsel maintained that the sentence

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[11] ibid. Paragraph numbering omitted.
[12] [2016] CCJ 1 (AJ) (BB), (2016) 88 WIR 70.
[13] [2017] CCJ 10 (AJ) (BB), (2017) 90 WIR 115.
[14] 'Needham's Point Declaration on Criminal Justice Reform in the Caribbean: Achieving A Modern Criminal Justice System' (CCJ Academy for Law Seventh Biennial Conference, Bridgetown Barbados, 20 October 2023) paras 5, 10, 17. Adopted by acclamation on 20 October 2023 at the Hilton Hotel in Needham's Point, Bridgetown, Barbados.

of life imprisonment with eligibility for parole after 20 years, was not a proper punishment for the appellant.

[33] It is plainly no answer to this view of the case taken by the DPP to reference the fact that the appellant will remain under the life sentence even after parole. Nor can the sentencing tribunal abdicate its responsibility to determine the appropriate tariff by pointing to the possibility that the parole Board might refuse the grant of parole. Writing the main judgment of this Court in *Alleyne v R,*[15] I stated as follows:

> [65] This Court has emphasized its unhesitating acceptance that the rehabilitation of the offender is a factor that must be considered by the sentencing judge in fashioning the appropriate sentence and that it will be for others in the criminal justice system to ascertain when rehabilitation has been accomplished. However, in discharging its judicial function to fashion an appropriate sentence we are equally sanguine in the view that the sentencing judge when imposing a life sentence (as distinct from a determinate sentence) not only has the authority but, we venture to say, the responsibility to recommend the tariff or minimum period of sentence to be served for purposes of deterrence and punishment. The judge, having within his or her purview, the detailed knowledge of the facts of the case, any instructive reports, should weigh up all the factors, aggravating as well as mitigating, and recommend, as a term of the sentence of life imprisonment, a tariff or minimum period to be served before there is any possibility of release. Recommending a minimum period of incarceration is consistent with the constitutional rights to a fair hearing before an independent and impartial tribunal, protection of the law and equality before the law. Of course, such a recommendation is necessarily without prejudice to the constitutional regime and powers of the Barbados Privy Council specified in ss 76-78 of the Constitution.

[34] In his concurring opinion Saunders P wrote as follows:

> [83] Life imprisonment is an indeterminate sentence. In practical terms, its execution could mean different things to a 20-year-old than to a 70-year-old offender. We must also bear in mind that, as pointed out in the main judgment, life imprisonment in practice in Barbados rarely ever means that the prisoner dies in prison. The historical experience suggests that he may

[15] [2019] CCJ 6 (AJ) (BB), (2019) 95 WIR 126.

> spend anywhere from 8 (the shortest mentioned minimum) to 33 (the longest) years in prison. Indeed, at the sentencing hearing, Alleyne's lawyer candidly acknowledged that for Alleyne, 'the possibilities under a life sentence are better than a lengthy sentence'.
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> [84] I believe this case provides the first instance where in Barbados a recommendation is being made as to the minimum length of time a prisoner should remain incarcerated before being eligible for release. Given the disparities and inconsistencies involved in the execution of life sentences, I believe that, without in any way compromising the constitutional powers of the Barbados Privy Council, the recommendation suggested by the Court is appropriate.

[35] There could well be good reasons for consistency in the sentences of the appellant and his co-accused. Unfortunately, the DPP made no proffer of those reasons. The bare concession to 'consistency' in sentencing appears to be in tension with the extant view of the DPP that the appellant had a greater involvement in the murder than his co-accused. That view clearly means that the parity principle enunciated by this Court in *Persaud v R* is inapplicable in this case. To the contrary, the principle that participants in a criminal joint enterprise may be sentenced differently depending on whether they played a central or peripheral role in the enterprise would, at first blush, appear to be more apposite: *R v Rahman;*[16] *R v Jogee.*[17]

Sentencing Policy of the Court of Appeal of Guyana

[36] This Court has consistently held that the sentencing process should be characterised by the application of the appropriate sentencing principles ideally in a separate sentencing hearing: *Persaud v R*;[18] *Pompey v DPP*;[19] *Alleyne v R*;[20] *Greaves v The State*.[21] In its written submissions, the Office of the DPP quoted from Jamadar J in *Pompey* as stating that:

[16] [2009] AC 129 at [32].
[17] [2016] UKPC 7, (2016) 87 WIR 439 (JM) at [74].
[18] *Persaud* (n 4).
[19] [2020] CCJ 7 (AJ) GY, GY 2020 CCJ 2 (CARILAW).
[20] *Alleyne* (n 15).
[21] [2022] CCJ 9 (AJ) BB.

> Sentencing is an inherently contextual exercise, and the greatest judicial experience, insight and wisdom lies with the local judicial officers who are called upon regularly to deal with particular species of offences in their jurisdiction. If this Court is to be faithful to the starting point approach which it has approved and applied, and is to pay due deference to the local courts and to the court of appeal in particular a starting point cannot reasonably and contextually be described as excessive, let alone 'manifestly excessive', if it is grounded in a broad data base of local precedent, and is consistent with the current approaches of the court of appeal to individual offence sentences.

[37] Immediately following this citation, the DPP defended the sentencing principles adopted in the Court of Appeal in this case. The submissions read in part:

> Recently in Guyana the courts have been using a starting point in determining a sentence. The Court of Appeal in *Abdul Budhoo v The State* and *Lakeraj Fredericks v The State* used the starting point of 30 years while in *Jarvis Small and Bibi Gopaul v The State* the starting point of 35 years was used. The starting point of 35 years in this case was consistent with the starting point the Court has been using for the offence of murder, which is between 30-35 years. The starting point of thirty-five (35) years for the offence was appropriate in the particular circumstances of this case. Here the 72-year-old deceased was shot and killed by persons hired to kill her. This case is what would be described as one of the rarest of the rare cases. The Court of Appeal of Guyana did not err in utilising thirty-five (35) years as a starting point in this case given the particular circumstances of the planned murder. The Court of Appeal varied the sentence in the instant case and used sentencing principles to arrive at a starting point of 35 years and the final sentence of 50 years as the circumstances were exceptional and fell within the realm of the rarest of the rare.[22]

[38] It should be said that the starting point of 35 years for this type of murder is by no means uncommon in the Caribbean and that some jurisdictions specify a significantly higher tariff. *Alleyne v R*[23] referenced the tariff of 20 years in Jamaica but in 2023 legislators in that country agreed to amend the Offences Against the Person Act to provide in s 3(1C) for an increase to the mandatory minimum sentence

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[22] 'Submission on behalf of the Respondent', 24 January 2024. Paragraph numbering and footnotes omitted.
[23] *Alleyne* (n 15).

to be served before being eligible for parole, from 20 years to 50 years.[24] Trinidad and Tobago courts have imposed sentences of 30 and 40 years before release: *Nicholas v The State*;[25] *Pitman v The State*.[26] In the recent case of *DPP v Wells*[27] sentences of 35 and 30 years before release were considered appropriate by the Eastern Caribbean Supreme Court. The case of *Faux v R*,[28] decided by the Court of Appeal of Belize, contains a useful Appendix of some 50 cases detailing notional sentences and often specifying the minimum tariff with an average above 30 years before eligibility for parole; as there is no categorisation of murders in Belize the survey appears inclusive of all murders, not simply the worse of the worse.

[39] In the present appeal, acceptance by the DPP of the Court of Appeal's starting point of 35 years may be difficult to reconcile with the tariff of 20 years conceded by the DPP for the major participant in this appeal involving the joint enterprise of the murder for hire of an elderly defenceless female citizen of the State. Indeed, there may also be tension with the legislative intent in specifying a *minimum* tariff of 20 years; arguably, the minimum was not intended for the major participants in murder for pay since that might not leave room for a lesser tariff for peripheral participants. In short, the sentencing policy of the Court of Appeal of Guyana, fortified by dicta in *Pompey*, appears to be in direct collision with the concession made by the DPP.

<u>Role of DPP in Sentencing</u>

[40] An appointment in the Office of the Director of Public Prosecutions is not mere employment. It is a vocation and a calling. The DPP's Office is as responsible as any other agency of the State to ensure that justice prevails in criminal cases. In this sense the representatives of the Office are 'ministers of justice' assisting in the administration of justice.[29] This is especially so in relation to serious crimes where

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[24] Chris Patterson, 'Gov't Looking to Increase Mandatory Minimum Sentence for Murder to 45 Years' (Jamaican Information Service , 25 January 2023) < https://jis.gov.jm/govt-looking-to-increase-mandatory-minimum-sentence-for-murder-to-45-years/ > accessed 1 April 2024.
[25](TT CA, 17 December 2013).
[26] (TT CA, 18 December 2013).
[27] KN 2020 HC 40 (CARILAW), (6 November 2020) (Ward J).
[28] (BZ CA, 19 June 2023), together with *Ramirez v R* and *Torres v R*.
[29] *R v Puddick* (1865) 4 F & F 497; 176 ER 662 at 663 (Crompton J) and *R v Banks* [1916] 2 KB 621 at 623 (Avory J).

the State stands in the shoes of the victim for the purpose of righting the criminal wrong, and, as far as the law can and permits, making good the criminal injury perpetrated.

[41] When a person falling under the protection of the laws of the State is the victim of murder and the Office of the DPP is satisfied that there is an adequate evidential basis to proceed against the person or persons accused of that crime, it is the responsibility of the Office to bring the prosecution promptly and thoroughly. The representatives of the DPP's Office do not strain for a conviction but must present the available evidence and legal submissions in conscientious accordance with their function as ministers of justice. This entails scrupulous fairness to the victim and to the accused.

[42] That responsibility does not come to an end in the event of a conviction. The guilt phase is properly followed by the penalty phase of the trial, usually involving a sentencing hearing. The ultimate objective of the penalty phase is to determine the appropriate sentence. Here the DPP's Office retains the critical function of ensuring that the sentencing tribunal is appraised of all factors relevant to the imposition of the appropriate sentence. This usually involves a victim impact statement, information on aggravating and mitigating factors of the offence and the offender. It may also include legal submissions targeting the nature or range but not necessarily the specific sentence that the Office considers appropriate. Indications from the Legislature as to the appropriate sentence even when enacted as 'mandatory' in relation to categories of offences are clearly relevant and helpful.

[43] In most Commonwealth Caribbean jurisdictions, the DPP has the statutory power to appeal a sentence that they consider to be too lenient[30]. If the DPP in Guyana is of

[30] Antigua and Barbuda: Criminal Procedure (Amendment) Act 2004, s 50B(1); Barbados: Criminal Appeal Act, Cap 113A, s 36(B); Belize: Court of Appeal Act, CAP 90, s 49(1)(c) and 49(2)(c); British Virgin Islands: Criminal Procedure Act, CAP 18, s 52(2) (as amended by s 2(1A) of No 3 of 2006), allows the DPP, with the leave of the court, to seek review of sentences where it is considered that a sentence passed is unduly lenient; Cayman Islands: Court of Appeal Law (2011 revision), s 30(1); Grenada: West Indies Associated States Supreme Court Grenada Act, CAP 336, s 40(2)(b) (as amended by No 21 of 2012); St Kitts and Nevis: Eastern Caribbean Supreme Court (St Christopher and Nevis) Act, Cap 3:11, s 42(2)(b); St Vincent and the Grenadines: Eastern Caribbean Supreme Court (St Vincent and the Grenadines) Act, CAP 24, s 61(2)(c); Trinidad and Tobago: Supreme Court of Judicature Act, Chap 4:01, ss 65E and 65H.

the view that a sentence is too lenient, it is in their competence to appeal. Section 33B(1)(b) of the Court of Appeal Act, Cap 3:01 specifies that the DPP has the power to appeal against the sentence passed on a person convicted by the High Court in proceedings by indictment on the ground that: (i) the sentence is one which the Court had no power to pass; (ii) the sentence is manifestly inadequate; or (iii) the sentence is wrong in principle. There is significant Caribbean jurisprudence on the circumstances in which an appellate court will uphold an appeal on the ground of the leniency of sentence: *R v Powell;*[31] *R v Shol;*[32] *R v Hernandez.*[33]

Conclusion

[44] The Office of the DPP has no control over the ultimate sentencing decisions of the courts. The imposing of sentences is and must always remain a judicial function. Nonetheless, it is the duty and responsibility of that Office, independently, fearlessly, and impartially, to advocate for the type or range of sentence that it considers just in the circumstances of the case and in the interests of the society it serves. If the Office of the DPP genuinely and for good cause considers that a sentence is too lenient, it must say so. Justice for those for whom it speaks, especially those who cannot now speak for themselves, demands no less.

/s/ A Saunders

Mr Justice Saunders (President)

/s/ W Anderson

Mr Justice Anderson

/s/ D Barrow

Mr Justice Barrow

/s/ A Burgess

Mr Justice Burgess

/s/ P Jamadar

Mr Justice Jamadar

[31] [2022] JMCA Crim 53, JM 2022 CA 106 (CARILAW).
[32] BZ 2022 CA 30 (CARILAW), (28 September 2022).
[33] (BZ CA, 14 March 2014).