IN THE COURT OF APPEAL OF BELIZE AD 2020

CRIMINAL APPEAL NO 11 OF 2017

EDWIN HERNAN CASTILLO Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

A Sylvestre for the appellant.
S Smith, Senior Crown Counsel, for the respondent.

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31 October 2019 and 13 March 2020

SIR MANUEL SOSA P

I - *Introduction*

[1] Sometime around five o'clock on the clear evening of Thursday 14 June 2012, in the village of Yo Creek in the Orange Walk District, 27-year-old Javier Alberto Ack, also known as Haka ('the deceased'), was killed by a single stab wound which was inflicted on him by a close friend and drinking companion and which penetrated his heart. The friend and companion in question was Edwin Hernán Castillo ('the appellant'), then aged 33. The setting was an unfenced yard said by one witness at trial to belong to a Concepción Castillo, by another to a Javier Blanco, and by yet another to a José Castillo. The day had been one of drinking, with snide remarks, recriminations and even fighting,

amongst some members of a small group of four. Between the deceased and the appellant, however, there had been no such remarks, recriminations or fighting at any stage. The appellant, entirely out of the blue, charged at the deceased and stabbed him on the left side of the chest with a short, narrow machete. The trial proper of the appellant on an indictment charging him with the deceased's murder started before Lord J ('the judge'), sitting without a jury, on 8 May 2017 and ended with the closing speeches of counsel 17 days later on 25 May. By a 135-page judgment in writing handed down on 9 August 2017, the judge found the appellant guilty of murder; and subsequently, at a sentencing hearing held on 3 October 2017, the judge purportedly sentenced the appellant both to imprisonment for life (Record, p 433, lines 5-9) and to imprisonment for a term of 25 years 'less the full time he has spent on remand before he becomes eligible for parole' (Record, p 439, lines 21-23).

[2] The appellant filed a document headed 'Notice of Appeal or Application for Leave to Appeal against Conviction and Sentence' on 11 August 2017; and, upon his appeal coming on for hearing on 31 October 2019, Ms Sheiniza Smith, Senior Crown Counsel, informed this Court that the Crown was unable to support the conviction for murder owing to the inadequacy of the directions given by the judge to himself on the question of intention to kill. Ms Smith however went on to invite the Court to exercise its power under section 30 of the Court of Appeal Act ('the Act') to substitute for the verdict returned by the judge a judgment of guilty of the lesser offence of manslaughter. Mr Sylvestre, for the appellant, not having demurred to this invitation, the Court, regarding it as properly issued in the circumstances, acceded to it and duly exercised its relevant power. Directions were thereupon given for the subsequent filing of submissions in writing on sentencing and, with the consent of the parties, for the determination by this Court of a sentence in respect of the manslaughter conviction on the basis of such submissions only, ie without oral argument. Such submissions were thereafter duly filed. What now follows is the judgment of the Court on sentence.

II - *The submissions to this Court*

1. By the respondent

[3] The submissions of the respondent were filed before those of the appellant. They were prefaced by counsel with emphatic reference to the fact that the appellant had consumed alcohol prior to attacking an unarmed man who was posing no threat whatever to him and plunging the point of a machete more than seven inches into the left side of his chest. Their thrust was that the sentencing range by which the Court was to be guided in the present case was 12-20 years. In her effort to assist the Court, Counsel directed its attention to a total of 14 cases in which it has within the last two decades either imposed or affirmed sentences for the offence of manslaughter where death was caused by stabbing.

2. By the appellant

[4] The commendably concise submissions of the appellant sought to support the core proposition thereof, viz that the range to be applied in the instant case was one of 13-15 years. They invited the Court to focus its attention on the sentences in two of the appeals referred to by the respondent.

III - *Discussion on the cases cited as relevant with respect to range*

[5] Amongst the cases to which Ms Smith directed the attention of the Court were six in which, owing to the nature of decision arrived at on the question of conviction, there had been no canvassing at the appellate level of the sentence involved. The decision of the Court had been to affirm the conviction and, in the absence of any real challenge thereto, the sentence of the court below had automatically been affirmed as well. Falling into this category were the decisions of the Court in *Diego (Crispino) v R*, Criminal Appeal No 24 of 2002 (judgment orally delivered on 13 March 2003); *Olivárez (Eliseo) v R* and *Olivárez (Margarito) v R*, Criminal Appeals Nos 28 and 29, respectively, of 2006 (composite judgment delivered on 20 June 2008); *Gabb (Wayne) v R*, Criminal Appeal No 20 of 2010 (judgment delivered on 28 October 2011); *Bush (May) v R*, Criminal Appeal

No 5 of 2014 (judgment delivered on 24 March 2017); and *Castillo (Rosalilia) v R*, Criminal Appeal No 1 of 2015 (judgment delivered on 2 November 2018). It is to be recalled in this connexion that in *Director of Public Prosecutions v Hyde (Clifford)*, Criminal Appeal No 2 of 2006 (judgment delivered on 22 June 2007) Sosa JA (as he then was), writing for the Court, was at pains to express, at para 11, a clear preference for the citation by counsel of cases in which sentences imposed by judges below have not only been unsuccessfully appealed to this Court but also been the subject of discussion on the hearing of the appeal. Indeed, the learned Justice of Appeal, went so far as to state that this Court considered it 'a mistake' for a trial judge to allow himself 'to be guided, save where inevitable, only by sentences passed in the court below': *ibid*. The Court considers that, in the light of the above, no useful purpose would be served by taking any account in the present discussion of the sentences passed in these five cases.

[6] It needs to be noted before proceeding farther that it was on the sentences in two of these five appeals, viz *Bush* and *Castillo* that Mr Sylvestre invited this Court to focus its attention.

[7] The Court, compelled respectfully to resist that invitation for the reason just given, now goes on to examine the remaining eight cases cited by Ms Smith, referring to each according to its position on the list provided by her at page 7 of her written submissions ('the list'). The first of these, viz *Moreira (James) v R*, Criminal Appeal No 12 of 2001 (judgment delivered on 17 October 2002), was a case in which the Court (Rowe P and Mottley and Sosa JJA) substituted for a conviction for murder a conviction for the lesser offence of manslaughter. The sentence of the judge below thus fell away and this Court found it necessary to impose a sentence of its own in respect of the conviction for manslaughter. Speaking for the Court, Rowe P, dealt with sentencing in a single sentence (at the end of para 16 of the judgment) which reads:

> 'We reviewed the sentence of life imprisonment and held that, having regard to the range of sentences imposed for the offence of manslaughter in recent years an

appropriate sentence was fifteen years imprisonment, which term we substituted for the term of life imprisonment.'

Moreira was a case in which the fatal stabbing had been preceded by a heated argument in the course of which the victim had, in the presence of other people, called Mr Moreira a 'p---ke', an extremely offensive slang term whose meaning must have been perfectly clear to judge and jury at trial, and an exchange of strong insults had followed. Apart from questioning the masculinity of Mr Moreira, the victim, who was the larger in size of the two, had approached Mr Moreira evincing a desire to fight. In these material respects, *Moreira* was different from the present case.

[8] *Smith (Steven) v R*, Criminal Appeal No 21 of 2001 (judgment delivered on 28 June 2002), the second case on the list, was another one in which the Court (Rowe P and Mottley and Carey JJA) substituted a conviction for manslaughter for one for murder. As was customary at that stage of development of the Court, the judgment made only brief reference to the sentence imposed on appeal. Such reference is to be found in para 15, where Rowe P stated on behalf of the Court –

'This was not the worst case scenario of manslaughter for which we have imposed sentences of 25 years imprisonment. It was, however, a wanton, unnecessary and entirely senseless killing and deserved a sentence of 18 years imprisonment. That was the sentence which we imposed upon the appellant.'

The victim in *Smith* was also fatally stabbed. As in the present case, the evidence showed no quarrel or argument between the killer and his victim, and no threat of a physical attack by the victim upon the killer, prior to the stabbing. But the huge preponderance of aggravating features present in the instant case, to be enumerated below, was absent in *Smith*.

[9] The third listed case, viz *Hughes (Bill) v R*, Criminal Appeal No 26 of 2001 (judgment delivered on 17 October 2002), involved a fatal stab wound, six inches deep,

inflicted by Mr Hughes, then aged 15, upon one Dawson in the course of a fight which started when Mr Dawson walked up to Mr Hughes and punched him flush in the face. The wound was inflicted on 14 January 2000. On that same day, Mr Dawson was treated at a hospital in Dangriga. Without having been discharged, Mr Dawson left the hospital later that day. He returned to the hospital, and was further treated, on the next day. On the following day, 16 January, he was discharged from the hospital. By the night of 16 January he was back complaining of continual vomiting. He was then sent by the authorities of the hospital in Dangriga to a hospital in Belmopan and sometime later (the judgment of the Court does not say exactly when and where) died of, in the words of the pathologist, 'septic shock as a consequence of peritonitis due to colon rupture injury … as a consequence of stab wound to the abdomen'. The pathologist expressed the opinion in the course of cross-examination that Mr Dawson should not have been discharged from hospital on 16 January. Mr Hughes' appeal from his conviction for manslaughter was dismissed. But the Court allowed his appeal from his sentence of 15 years' imprisonment. As it had done in *Moreira* and *Smith*, the Court limited its remarks on sentence to one short closing paragraph, which read:

> 'The appellant and the deceased were engaged in a fight during the course of which the deceased ran at the appellant. It was after the deceased ran at the appellant that he was stabbed. However having regard to the nature of the injury and the unfortunate circumstances which led to the death of the deceased, and the age of the appellant, we consider that the sentence of 15 years should be varied. The appeal against sentence is allowed and the sentence is varied to 12 years.'

There can be little, if any, doubt that the phrase 'unfortunate circumstances' in this passage was meant to refer to circumstances including the most regrettable way in which the case of Mr Dawson was handled in the hospital in Dangriga. That, coupled with the significant fact of the physical attack by Mr Dawson against Mr Hughes, makes *Hughes*, seen in retrospect in 2020*,* a case very different from the present one. That is to say nothing of the fact that the youth of the appellant loomed very large in *Hughes*, whereas

in the instant case the appellant was a fully mature man at the time of the commission of his crime. This last consideration alone persuades this Court that the lower end of the sentencing range for purposes of the present case should not be 12 years as Miss Smith suggested.

[10] The principal feature, for present purposes, of *Wade (Eldon) v R*, Criminal Appeal No of 12 of 2005 (judgment delivered on 14 July 2006), the fourth of the cases on the list, is that counsel for Mr Wade mounted no real challenge to sentence on appeal to this Court (Mottley P and Sosa and Carey JJA): see para 16 of the judgment. This having been an appeal by Mr Wade rather than by the Crown, the first question as regards sentence, had counsel chosen to 'press the matter', would have been whether the term of 18 years ought to be reduced. The Court, in a judgment written by Carey JA, dismissed the appeal against conviction and (so far as here relevant) went on to state at para 16:

> 'With respect to sentence, counsel did not choose to press the matter. This was a brutal killing of a man with whom the appellant had no quarrel … It suffices to say that we saw no reason to interfere with the sentence imposed, the jury having returned a verdict of guilty of manslaughter.'

The Court in that final sentence can only have been referring to interference by reducing a sentence appealed from.

[11] *Wade* thus boils down to another example of a case in which a sentence imposed by a judge below was never canvassed in this Court. It therefore falls to be treated no differently from the five already identified at para **[5]**, above.

[12] For a different but equally strong reason, *Anderson (Asband) v R*, Criminal Appeal No 15 of 2005 (reasons for judgment delivered on 8 March 2007), the fifth listed case, is not as helpful, for present purposes as it might have been. That was yet another appeal in which the Court (Mottley P and Carey and Morrison JJA) quashed a conviction for murder and substituted for it one for manslaughter. The Court appears to have announced

its judgment at the close of the oral argument on 17 October 2006, ie some months before giving its reasons for judgment in writing. At the final paragraph (No 12) of those reasons for judgment, there appears the following single sentence regarding sentence:

> 'The appellant was sentenced [by this Court on 17 October 2006] to a term of imprisonment of twenty years.'

There is, regrettably, no indication as to how such sentence was arrived at. It would have been helpful to know whether the Court was in any way influenced by Mr Anderson's claim, made by way of his unsworn statement from the dock at trial, that he had been the victim of an unprovoked armed attack by the deceased and thereafter subjected to so powerful a stranglehold that he defecated in his pants. If there were an indication that the Court was so influenced, there would be some basis for concluding that *Anderson's* case should be regarded as very different from the present one. It must also be noted that the judgment in *Anderson* identifies no sentencing range.

[13] This brings the Court to *Hyde*, the sixth case on the list. In that case, which powerfully depicts the grim realities of life in the new Belize, a law-abiding citizen lost his life because he innocently asked one Russel Hyde, a member of what turned out to be a bunch of thugs, to unblock his path out of a parking area in once-peaceful Belmopan. The Director of Public Prosecutions was rightly moved to apply for leave to appeal from the sentence of only 12 years' imprisonment imposed on Mr Hyde, following his conviction for manslaughter, by González J. This Court (Mottley P and Sosa and Carey JJA) treated the application as the appeal, allowed such appeal and substituted for the sentence of 12 years' imprisonment one of 15 years' imprisonment. It is clear from the judgment that, although the victim's interaction with the thugs began with the innocent request already mentioned above, an altercation with Mr Russel Hyde did ensue, and that the stabbing by Mr Clifford Hyde only occurred after such altercation and a call by Mr Russel Hyde to the other members of his group for assistance. *Hyde* thus differs from the instant case in two not insignificant respects.

[14] The appeal of *Olivárez (Jesus) v R*, Criminal Appeal No 27 of 2006, was cited by Ms Smith together with the appeals of *Olivárez (Eliseo) v R* and *Olivárez (Margarito) v R*, all three of which were heard together and are the subjects of a single composite judgment. (These three appeals therefore appear together as one case, the seventh, on the list.) The Court has already explained at para **[5]**, above why it is taking no account of the second and third of these appeals in determining its sentence in the present appeal. In *Olivárez (Jesus)*, this Court (Mottley P and Sosa and Carey JJA, as already indicated above), at the close of oral argument on 6 March 2008, quashed Mr Olivárez's conviction for murder and substituted therefor a conviction for manslaughter. At the same time, the Court imposed on Mr Olivárez a sentence of 18 years' imprisonment. In the written reasons for judgment given on 20 June 2008, Mottley JA, writing for the Court, refers to the sentence of 18 years' imprisonment but gives no explanation as to how it was arrived at. This case is thus, like that of *Anderson*, of scant assistance for present purposes.

[15] The thirteenth of the cases to which the Court's attention was drawn by Ms Smith, numbered 11 on the list as a result of the three *Olivárez* appeals having been listed as a single case, was *Pasos (Tony) v R*, Criminal Application for Leave to Appeal No 11 of 2016 (judgment delivered on 22 June 2018). In that case, Mr Pasos sought leave to appeal from the sentence imposed on him by Lord J in the court below following his conviction for manslaughter. It was thus wholly unlike cases such as *Anderson* and *Olivarez (Jesus)* in which this Court was called upon to impose on an appellant a sentence of its own. Mr Pasos's application for leave was refused by the Court (Sir Manuel Sosa P and Hafiz Bertram and Ducille JJA). The sentence had been imposed in the court below in less than full compliance with the requirements laid down in *Da Costa Hall v R* [2011] CCJ 6 (AJ). Lord J had actually pronounced against Mr Pasos a term of 17 years' imprisonment and then added words to the effect that time spent on remand in custody was to be deducted therefrom. The sentence was treated by this Court as one of 15 years and 6 months, to bring it into line with the requirements of *Da Costa Hall*, and affirmed. A glaring difference between the facts of *Pasos* and those of the instant case is that, whereas Mr Pasos inflicted a total of 50 stab wounds in the course of a frenetic attack upon his victim, the appellant in the present case inflicted only one stab wound on his, ie

the deceased. On the other hand, Mr Pasos had been subjected to sustained verbal abuse by his victim before finally losing control of himself, whilst, in the instant case, the fact that the appellant was at no time verbally abused or threatened with physical harm by the deceased juts out disturbingly like the proverbial sore thumb.

IV - *Documents placed and statements made before the judge at the sentencing hearing*

1. Impact Statements

[16] If ever there was a time when it was appropriate for this Court, exercising its power under section 30, to limit itself to a simple statement of the term being imposed, such time has long passed. In the present case, therefore, the Court must now proceed to consider, first, such impact statements as were placed before the judge.

[17] There were separate impact statements from three persons, viz Josefina Ack, an aunt of the deceased ('the aunt'); Guadalupe Ack, mother of the deceased ('the mother'); and Sandra Mejia, who called herself the common law wife of the deceased ('the wife'). The aunt said that she raised the deceased from the age of three months and that he lived with her for some 25 years. Both she and the mother said that the death of the deceased was affecting them not only emotionally and physically but also financially, since he used to contribute to the running of their respective households. The mother, a retired nurse, further said that the death of the deceased had caused her to suffer a heart attack which had left her bed-ridden for a period of nine months and that, in addition, she had started suffering from high-blood pressure and a 'rapid' pulse, which conditions sometimes caused her to experience blackouts. The wife said that Javier had died leaving her with two children, aged 12 and 13, respectively, to maintain, in consequence of which she had found it necessary to find paid employment. Her job on the date of her statement was in a fruit and vegetable shop, where her weekly wage was only $100.00 per week. She and the children, one of whom has special needs, missed the deceased very much and were being greatly affected by his death. One child had had to repeat a year in school and the other was not desirous of remaining in school. All three women expressed a desire to see a long prison sentence imposed on, and served by, the appellant. There are

two important points which need to be made in this regard. First, this Court can rarely pass a long sentence nowadays given the legal requirement that whatever it considers an appropriate sentence must be reduced by time spent on remand in custody awaiting trial (which usually amounts to several years) and only the residue of the "appropriate" term actually imposed. (Unfortunately, this gives rise to the potentially dangerous perception amongst many members of the public that the Court is being too soft with offenders.) Secondly, there is legislation, eg that relating to parole, which renders the Court powerless to ensure that even the residue of the appropriate term which it actually imposes is fully served by the relevant offender.

2. Social Enquiry Report

[18] Secondly, the Social Enquiry Report of the Community Rehabilitation Department placed before the judge needs also to be considered. It reports on interviews of Maria Castellanos and Noel Castillo, the mother and brother, respectively, of the appellant. These family members are therein said respectively to have described the appellant as 'the provider' and 'the bread winner (*sic*)' of Ms Castellanos's household prior to the events of 14 June 2012. (The report later states that at the time of its preparation two brothers of the appellant were contributing money towards the running of the household.) At the same time, however, both Ms Castellanos and Mr Noel Castillo were also honest enough to mention the alcohol problem of the appellant, Ms Castellanos going so far as to disclose that, because of his behaviour when under the influence of alcohol, family members had often had to call the police to, in euphemistic terms, 'cool him down'. He had, both interviewees noted, tried unsuccessfully to kick the drinking habit and turn to the church. This 'attempt to change' is kindly but not convincingly presented in the report. The change is said to have been achieved 'for a long time'; but, unsatisfactorily, to say the least, no reliable estimate of the length of the period involved, beside that given by the appellant himself ('almost a year'), is provided. It is true that one Ismael Cal, who appears to be a pastor, also provides an estimate of one year. But Mr Cal is also said in the report to have in one and the same breath spoken of the appellant and the deceased having been 'always together drinking' and of the appellant being 'hard working and dedicated', two descriptions which do not go together well, in which circumstances one

has to wonder whether Mr Cal, if he did say these things, did not get carried away by the desire to be charitable. The report further gives due attention to the appellant's disclosure to the Community Rehabilitation Officer ('the CRO') of his involvement in a rehabilitation programme conducted at the prison, as well as in mentoring other inmates, and to the appellant's claim that he has given his life to God, a claim which is all too commonly made, sincerely and otherwise, by offenders in his position.

[19] On the specific question of a proper sentence, the report cites the appellant's mother herself as saying that she would leave that to the court below and God, having 'no opinion [of her own] as to what sentence he should get'. It goes on to note that both the aunt who raised the deceased from the age of three months and a sister of the deceased felt at the time they were interviewed by the CRO that the appellant's sentence should be one of imprisonment for life. This Court bears in mind that these interviews were conducted at a time when the appellant stood convicted of murder, not manslaughter.

[20] The report relevantly states that the appellant has lived with his mother all his life and makes no mention of his ever having had a wife or fathered children.

3. Kolbe Foundation Letter

[21] Consideration needs to be given, thirdly, to a letter from the Chief Executive Officer ('CEO') of the Kolbe Foundation, which manages the Prison in Hattieville. Such letter is headed 'To Whom It May Concern' and was also placed before the judge prior to the sentencing hearing below. The letter states that the appellant is an inmate of that prison, where he has been found guilty of six separate breaches of prison regulations between 18 July 2013 and 12 April 2017, which breaches are identified in the letter but will not be spelled out here. Given the absence from the Social Enquiry Report of a date from which the appellant became involved in the rehabilitation programme there mentioned, it is not possible to tell whether any or all of these breaches of regulations were committed whilst the appellant was so involved.

4. Statement of character witness

[22] This Court must also keep in mind the statement made below by the appellant's character witness, Mr Ismael Cal. He said that he 'took' the appellant and the deceased with him to church at a time when they used to drink together; and also counselled them. But, after a period of time, they both drifted away from the church. He added that the appellant, when not under the influence of alcohol, was respectful of others.

5. Appellant's statement on his own behalf

[23] The appellant made sure to mouth an expression of remorse early on in his statement at the sentencing phase. But he also kept on insisting, despite the verdict of the judge, that he was not the deceased's killer and that Amir Garcia, the chief Crown witness at trial, 'lied and got away with it', thanks to the shortcomings of his (the appellant's) counsel. He would not, he said, appeal if 'Ms Ack' did not want him to do so. (Since he did appeal, it is perhaps to be presumed that Ms Ack never made it known to him that she did not want him to appeal.) The appellant also told the judge that he had greatly changed his life in prison. In his own words, as recorded by the judge, 'I am now facilitating the preaching of the word of God in prison.'

V - *The sentence of this Court*

[24] The object of the present sentencing exercise is to arrive at sentence which does justice to everyone involved in this tragic affair which started on 14 June 2012 and is continuing even today.

[25] This is unquestionably a case of manslaughter lying on the borderline separating that crime from murder. After all, the judge never found that the appellant had no intention to kill the deceased when he stabbed him. On the contrary, he found that there was such an intention. But, because he misdirected himself in respect of intention to kill, the Crown has made the concession that the murder conviction is unsupportable; and this Court has accepted such concession as eminently sound and proper. It is implicit in the combined concession and invitation of the Crown and the Court's acceptance of the two that

commission by the appellant of the offence of manslaughter was proved at trial. But the fact remains that there has been no finding by either court that the appellant, when he killed the deceased, did not intend to do so. The question whether, had the judge properly directed himself, he would have found that the appellant in fact had an intention to kill has not been asked, let alone answered. That makes this the quintessential case of a crime on the borderline between manslaughter and murder.

[26] The Court now looks at the aggravating factors of the present case. First, the fatal attack was unprovoked, whether by words or by actions of the deceased directed against the appellant. Secondly, it was an armed attack in which the weapon was a sharp and narrow machete; and, as the pathologist's evidence indicated, a sharp pointed instrument could cause a wound 7¼ inches deep even when wielded with no more than moderate force. Thirdly, the deceased was himself completely unarmed. Fourthly, the appellant evinced an inhuman indifference to the gravity of the likely injury. Fifthly, the attack entailed the use of open violence in a spot right next to a public street at an hour on a week day when members of the public, children as well as adults, could be expected to be on the street. (This spot was part of an open lot which, though said to be privately owned, was frequented by drinkers walking in from the street.) Sixthly, the appellant consumed alcohol and smoked marijuana before slaying the deceased. (The Court is satisfied that such consumption and/or smoking increased the likelihood of the attack on the deceased.) Seventhly, the appellant attempted to avoid conviction by resorting to a mendacious claim that his uncle, Mr Florencio Castillo, who died on 19 December 2013, was the one who had stabbed the deceased. The Court is very much aware that this list of aggravating factors differs from that appearing in the sentencing remarks of the judge below.

[27] This Court is, alas, unable to share the generous view of the judge that there are three mitigating factors in the instant case. It regrets being unable to appreciate how the close friendship, involving the drinking of alcohol and smoking of marijuana together, can properly be treated as giving rise to two mitigating factors. It seems to this Court that, to the contrary, there might be some ground for arguing that, all other things being equal,

one who deliberately inflicts grievous bodily harm (the Court here carefully refrains from imputing an intention to kill) on a person who should be, and supposedly is, dear to him should not complain if that circumstance is held as an aggravating factor against him. (In this regard, let it be noted in passing that, in the view of this Court, the general public certainly needs to be protected against an offender if not even his closest friends are safe when in his company.) The Court is also unable to attach more than negligible weight to the reported involvement of the appellant in a rehabilitation programme and in mentoring in the prison. This report would have been impressive if there were not before the Court a less-than-glowing report from the CEO of the Kolbe Foundation speaking of sundry violations of prison rules.

[28] It should come as no surprise that, given the remarks already made at para **[23]**, above, the Court finds it impossible to accept as genuine such expressions of remorse as were articulated by or on behalf of the appellant in the present case. It does not lie in the mouth of an offender to claim to be remorseful when he steadfastly insists that he is innocent of the crime of which he has been convicted. Implicit in a feeling of remorse is an acceptance of one's guilt. A false claim of remorse made before a sentencing court is a most reprehensible display of utter disrespect for that court. That said, however, the Court will not treat the appellant's claim of remorse as an aggravating feature in the present case. That is not to suggest that in a future case the advancement of such a claim will be met with the same, or any, degree of indulgence.

[29] Turning to the other end of the scale, this Court is of the view that the fact that the appellant's crime was unplanned should be regarded as a mitigating factor.

[30] It seems opportune to make a few important general remarks on the topic of a sentencing range at this point in the present judgment. In *Hyde's* case, cited above, the sentencing range in respect of manslaughter cases arising from fatal stabbings was held to be 15 to 25 years although the only cases treated in the judgment as worthy of serious consideration involved sentences of 15 to 18 years only. As is revealed in that judgment, it had been submitted on behalf of the Director of Public Prosecutions in that case that

the upper end of the applicable range should be 20 years, whilst counsel for Mr Hyde was content to take the position that such end should be as high as 25 years (contending, however, that the appropriate sentence for his client should be no more than 15 years' imprisonment). A sentencing range is not, however, inscribed in granite. It is no more than a general guideline. There will inevitably arise from time to time cases calling for deviation therefrom. Like courts in other jurisdictions, this Court must be alive to the fact that the variety of factual situations in which manslaughter is perpetrated is unlimited. Quite apart from that, courts interested in maintaining the essential confidence and trust of a law-abiding public must be prepared to make realistic and hard admissions about the lower end of a sentencing range if the prevalence of the crime to which it applies is not decreasing or, even worse, keeps increasing. Indeed, this Court regards itself as free, in an exceptional case, to fix a sentence beyond even the higher end of the sentencing range where a particular mix of aggravating and mitigating features so demands. The sentencing range is thus an aide used early on in the sentencing exercise, whereas the features, aggravating and mitigating, of the particular case come into play later.

[31] In the present case, starting above, rather than at, the lower end (ie 15 years' imprisonment) of the relevant range, and taking all that has been earlier mentioned into account, this Court considers that, without looking at time spent in custody on remand, the appropriate sentence to impose on the appellant (the 'notional term', in the words of the majority in *Da Costa Hall)* would be one of 20 years' imprisonment. The Court is fully aware, in so considering, that a term of 20 years is longer than the terms respectively imposed in *Moreira*, *Smith* and *Hyde*, which, for reasons already revealed above, it has found helpful. (Less helpful is the case of *Pasos*, which involved, it must be remembered, an application by Mr Pasos for leave to appeal from his sentence - rather than an application by the Crown for leave to appeal against such sentence - and in respect of which it may be said that Mr Pasos was somewhat fortunate.) The Court is nevertheless of the view that it would take a sentence of 20 years sufficiently to mark publicly the gravity of the appellant's crime. But time spent in custody on remand must be a determining factor in arriving at the actual sentence. It was, according to the letter of the CEO of the Kolbe Foundation, on 19 June 2012 that the appellant was taken into custody on remand

pending his trial. That date has not been questioned by the appellant. The figure of 20 years must therefore be reduced, first, by 5 years, and 51 days. But the Court feels itself obliged, following the approach which, guided by section 34(2) of the Act, it first took in *Sabido (Osmar) v R*, Criminal Appeal No 6 of 2016 (reasons for judgment delivered on 21 June 2019), further to reduce this figure of 20 years in view of the time that the appellant has spent in prison from the date of his conviction to today's date, a period of two years and 218 days.

[32] The sentence actually imposed on the appellant by this Court (not to be confused with the so-called 'notional term') is, therefore one of imprisonment for a term of 12 years and 96 days, to commence forthwith.

Postscript

[33] The judge, as noted at para **[1]**, above, despite the clear guidance given by the majority in *Da Costa Hall*, somehow ended up purporting to impose two separate terms of imprisonment on the appellant. It needs to be noted that this is not the first appeal in which this Court has found fault with the judge's approach to sentencing in the light of *Da Costa Hall*. It is recalled that, in sentencing Tony Pasos in 2016, he failed both (a) to follow the guideline given in para 26 of the judgment in *Da Costa Hall* and (b) to otherwise adopt the approach laid down in that judgment: see para **[21]** of this Court's reasons for judgment in *Pasos's* case, cited above. The closing sentence of that paragraph of those reasons for judgment reads as follows:

> 'This paragraph is meant to serve as a reminder [of the pertinent guideline and approach] to all trial judges going forward.'

The Court renews this reminder in the fervent hope that there shall be no occasion for another such renewal hereafter.

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SIR MANUEL SOSA P

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HAFIZ BERTRAM JA

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DUCILLE JA