IN THE COURT OF APPEAL OF BELIZE, A.D. 2023

CRIMINAL APPEAL NO. 3 OF 2022

BETWEEN:

TYRON REID

Applicant

and

THE KING

Respondent

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Before:

The Hon Madam Justice Hafiz-Bertram — President
The Hon Mr. Justice Bulkan — Justice of Appeal
The Hon Madam Justice Arana — Justice of Appeal

Appearances:

Ms. Peta-Gay Bradley for the applicant.
Mrs. Cheryl-Lynn Vidal S.C., Director of Public Prosecutions, for the respondent

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2023: October 25;
November 16.

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JUDGMENT

[1] **BULKAN, JA:** The applicant was indicted for murder, contrary to s. 117 read along with s. 106(1) of the Criminal Code, the particulars alleging that together with one Keon Dennison he murdered Reuben Perez on November 26, 2015. When his matter was presented at the assizes he sought a sentence indication, which took place on March 21, 2022. At that proceeding Sandcroft J delved into the applicable legal principles and the relevant factual considerations fairly comprehensively, before indicating that the sentence would be imprisonment for a term of 25 years minus the period of 6 years, 3 months spent on remand (resulting in a sentence of 18 years, 9 months).

[2] Having been thus informed, the applicant was permitted to confer with his counsel, Ms. Barrow, after which he was arraigned and pleaded guilty. At the sentencing hearing three weeks later, on April 12, Sandcroft J made various adjustments for aggravating and mitigating factors and duly credited time spent by the applicant on remand, then sentenced the applicant to imprisonment for a term of 18 years, 7 months, with a further stipulation that he would have to serve 12 years before becoming eligible for parole.

[3] From this sentence, the applicant sought leave to appeal, though in actuality what was filed was a Notice of Appeal and not an Application for Leave. At the hearing on October 25, 2023, pursuant to the court's inherent power[1] we acceded to Ms. Bradley's oral application and treated the purported Notice of Appeal as an application for leave, proceeding then to hear the parties. At the conclusion of the hearing, we indicated we would refuse the application for leave and that our reasons would follow. We provide them now.

[4] The jurisdiction of the Court of Appeal to review sentences and the principles that should operate to guide it when doing so have been frequently rehearsed in recent times, both by the CCJ and most recently by Hafiz-Bertram P in ***Faux and others v the King***.[2] Nevertheless, it would be useful to set them out briefly to establish the framework within which this decision operates. The power itself is set out in section 216(3) of the ***Senior Courts Act 2022***, which is a faithful reproduction of s. 30(3) of the ***Court of Appeal Act***, and which empowers this Court to re-exercise the sentencing discretion on the simple basis where "it thinks that a different sentence should have been passed". In exercising its discretion, this Court can reduce or increase the sentence as it sees fit.

[5] The brevity of the statutory provision has been supplemented by case law, such as ***Pompey v DPP*** where Saunders PCCJ described the task of a sentencing court as being that of balancing between the need to individualise sentences and having to ensure that it matches the crime and the impact on the victim. A reviewing court, however, must be prepared to step in so as "to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law."[3] Quoting Massiah C of the Guyana Court of Appeal,[4] Saunders PCCJ added that

[1] *FW v the Queen*, Court of Appeal of Belize, Cr. App. 18/2011, decision dated 17 December 2020.
[2] Court of Appeal of Belize, Cr. Apps. 24-26/2019, decision dated 19 June 2023.
[3] [2020] CCJ 7 (AJ) GY at [2].
[4] In *Williams v Walters*, Cr. App. 24 of 1985 (unreported, July 18, 1985).

a reviewing court must not alter a sentence merely because the members of the court might have passed a different sentence but should only interfere if the sentence passed is "manifestly excessive or wrong in principle".[5]

[6] As to the actual aims of sentencing, multiple cases have identified these as being the following: (i) first and foremost, satisfying the public interest in punishing and preventing crime; (ii) retributive or punitive; (iii) deterrent – both in a general and in an individual sense; (iv) preventative – aimed at the particular offender; and (v) rehabilitating the offender.[6] Balancing these multiple dimensions is essential to maintaining public trust in the criminal justice system and the rule of law,[7] ultimately requiring sensitivity to contextual sentencing.[8]

[7] The methodology to be adopted for this process was set out in detail in ***Teerath Persaud v the Queen***.[9] Writing for the Court, Anderson JCCJ indicated that the sentencing court should fix a starting point with reference to the particular offence under consideration, and thereafter adjust the sentence upwards or downwards according to the aggravating and mitigating circumstances particular to the offender.[10] In calculating the starting point, Anderson JCCJ said that instead of considering all possible aggravating and mitigating factors, only those concerned with the objective seriousness and characteristics of the offence should be taken into account. Other cases have provided examples of the types of factors bearing upon the seriousness of the offence – such as whether it involves violence, the manner of its commission (whether premeditated, highly organised; involving more than one participant), the specific role played by the offender, and importantly, its prevalence in society.[11]

[8] Once the starting point has been identified, the sentencing court is then required to take into account the circumstances peculiar to the offender. These cover such aspects as the offender's antecedents – age, character and other relevant circumstances – along with any expression of remorse, including a guilty plea and/or cooperation with law enforcement. Also important is the impact on the victim, including whether any violation of trust is involved. Finally, the offender's

[5] *Pompey*, note 3 at [29].
[6] Ibid, per Jamadar JCCJ at [52]; *Lashley v Singh* [2014] CCJ 11 (AJ) at paras. [31]-[32]; *Alleyne v the Queen* (2019) 95 WIR 126 (CCJ Bel), per Anderson JCCJ at [44].
[7] *Alleyne*, ibid, per Barrow JCCJ at [89].
[8] *Pompey*, note 3, per Jamadar JCCJ at [53].
[9] [2018] CCJ 10 (AJ)
[10] Ibid at [46]; applied in *Faux* (above n 1) at [8]-[9].
[11] See, for example, *State v Sydney* (2008) 74 WIR 290 (CA Guy).

conduct in mitigation is important, including the form that it takes, which could range from an apology to material reparation.[12] Finally, full credit must be given to the period spent in pre-trial custody, after which the remainder constitutes the sentence to be imposed.[13]

[9] As this brief overview makes clear, sentencing is not a summary or mechanical exercise but requires detailed information which has to be carefully and sensitively assessed. There are many different interests at stake, but the offender is not to be lost in the process or treated as an abstraction. Ultimately, the goal is to achieve a just outcome which ensures public trust and confidence in the criminal justice system and the preservation of the rule of law.[14]

[10] In this matter, Ms. Bradley on behalf of the applicant raised four grounds in support of her application for leave. These were that the trial judge erred by not giving an additional discount to the applicant as a first-time offender, or for his cooperation with the police by giving a caution statement, or for the delay in his trial; and also that the applicant was denied a fair hearing because he was not given an opportunity to be heard or to call character witnesses on his behalf. In response, Ms. Vidal S.C. for the Crown contested each of these grounds, submitting overall that the statutory test for granting leave, namely whether a different sentence ought to have been passed, was not satisfied as the sentence was not manifestly excessive. Warming to her case, Ms. Vidal S.C. submitted that when she read the record of appeal after it was filed, she questioned why *she* had not been the one to appeal the sentence for being unduly lenient. Given these diametrically opposed positions, it would be useful to recount the salient facts of the incident before deliberating on their respective merits.

[11] As summarised by the trial judge, the incident which gave rise to these proceedings took place on November 26, 2015. Sometime around 3:15pm that day, the applicant and an accomplice rode into the compound of Reuben Perez Hardware Store and residence located on Vernon Street in Belize City. The two men accosted Mr. Perez intending to rob him and the applicant produced a firearm that was concealed under his clothing and pointed it at Mr. Perez, who flinched. The applicant then fired a single gunshot towards Mr. Perez from a close range of within twelve feet. The gunshot caught Mr. Perez in his neck. The applicant and his accomplice then made good their escape. Reuben Perez succumbed to the gunshot injuries a few minutes

[12] See *Pompey* (note 3 above).
[13] *Romeo da Costa Hall v the Queen* [2011] CCJ 6 AJ.
[14] *Pompey* (note 3 above), per Jamadar JCCJ at [51]-[53].

thereafter. On the following day, the applicant was arrested and detained for the murder of Reuben Perez, and on that very date he gave a statement under caution to the police, in which he confessed to the offence. He was subsequently charged for the murder of Reuben Perez.

Ground 1: No discount for a first-time offender

[12] Ms. Bradley's first contention is that the trial judge erred by not giving the applicant an additional discount as a first-time offender. While acknowledging that the trial judge did mention this fact, Ms. Bradley submitted that when he actually computed the sentence at the end of his judgment, he listed only 2 mitigating factors – the applicant's youth and immaturity and his good prospects for rehabilitation. Later, he also factored in the applicant's guilty plea, for which he awarded a substantial discount.

[13] In response, Ms. Vidal S.C. submitted that even though the judge did not mention the fact of being a first-time offender at the end of his judgment, he was clearly aware of it when one considers the totality of what he said. In her written submissions, the learned DPP cited at least three occasions where the judge referenced the applicant's antecedents. In one of these he stated, tellingly we would add: "This sentence will deter and denounce. **It should not be forgotten** that I am imposing a jail sentence on a young first offender."[15]

[14] Having considered the submissions of both counsel in relation to the entire judgment of the trial judge at the sentencing hearing, we are of the view that the learned judge did not err as alleged. As Ms. Vidal pointed out, even though the judge did not list this fact at the end when computing the sentence, he repeatedly demonstrated his awareness of its importance in the lengthy explanation which preceded the sentence. Moreover, having pointedly stated that it "should not be forgotten" that he was dealing with a first-time offender, it would be unfair of this Court to accuse the judge of precisely that error merely because he did not single out that factor at the final stage, which would have taken place minutes later and in the course of the same judgment.

[15] But there is another aspect to this submission that reinforces our view. The rationale of crediting an offender's antecedents reflects an almost universal reaction of making allowances for the first time a person slips up or commits some infraction. As this is sometimes colloquially expressed,

[15] Record of Appeal, page 56 (my emphasis).

it is the act of cutting the offender "some slack". This is rooted not just in a desire to credit a history of otherwise good behaviour, but more importantly to acknowledge that it is only human to make a mistake. Arguably, the trial judge was sensitive to the *substance* of this consideration – perhaps excessively so in fact. The trial judge characterised the factor of being a first-time offender as a "traditional" mitigating one, and then proceeded to discuss the vicissitudes that shaped the applicant's life in a detailed exposition. Among these, he listed the applicant's socio-economic challenges, his marginalisation as a Creole and the lack of opportunities in the small village where he grew up, his interrupted schooling, the absence of his father, and the death of his mother while he was still a minor. All this, the judge said, "softened" the aim of general deterrence in relation to the applicant and called for restraint in sentencing.

[16] In deliberating on the appropriate sentence, the trial judge frankly disclosed his awareness of the difficulty of having to balance the deterrent role in sentencing with the need to acknowledge nuances related to individual responsibility. In considering the latter, the trial judge did not confine his inquiry to the applicant's immediate circumstances, but reflected on the longer-term impacts of colonialism and colourism on the applicant as a young black man. As he expressed it: "what I do say is that your choice was constrained by these forces. Social structures and societal attitudes that were born of colonialism, slavery, and colourism have a very long reach. We must not forget this. Our memory of past injustices must be long enough to do justice in an individual case."[16] All this was said by the judge in an attempt to strike the right balance among the varied objectives of sentencing, which informed his overall position that "the needs of general deterrence and denunciation may be met with sentences of greater restraint, if viewed through a larger systemic lens."[17]

[17] As is evident from the totality of the judgment, the judge's discussion was not formulaic or ritualistic but uniquely considered larger historical and societal forces that might have led the applicant to act as he did. The sentence he imposed was tailored not merely to the applicant as a first-time offender, but one which took into account how slavery, colonialism, and society's institutional and historical prejudices might have affected him. Against this thoughtful and empathetic review conducted by the trial judge, it would be nothing short of perverse to accuse him of neglecting any aspect of the applicant's situation, including that of being a first-time

[16] Ibid at page 44.
[17] Ibid at page 41.

offender – and less so when he actually referred to that specific fact multiple times. For these reasons, we find no merit in the first ground.

Ground 2: No discount for cooperating with the police

[18] The second ground raised on the applicant's behalf was somewhat similar, namely that the trial judge erred by not giving the applicant an additional discount for cooperating with the police by giving a full confession. In her written submissions, Ms. Bradley again focused on the conclusion of the judgment, where the trial judge listed only two mitigating factors, namely those of his youth/immaturity and his prospects for rehabilitation. In the face of Ms. Vidal's written reply, where she countered that the confession formed part of the applicant's acceptance of responsibility for which the judge knocked 1/5 off his sentence, Ms. Bradley persisted before us by arguing that these were separate acts – one being cooperation with the police and the other not wasting the court's time – for which he should have been separately credited.

[19] Here again, Ms. Bradley has fallen into the error of minutely parsing the judge's reasons and failing to consider the judgment as a whole. On taking the latter approach, it is immediately clear, as the learned DPP has pointed out, that the applicant's confession was all part and parcel of his acceptance of culpability and which led to his guilty plea – for which 1/5 of his sentence was discounted by the trial judge. The fact that the judge did not single out the confession as a separate mitigating factor cannot, in the context of the hefty discount for the guilty plea, be treated as an aberration that would warrant us substituting a different (and lesser) sentence.

[20] On the latter point, Ms. Bradley was asked by the Court during the hearing what sort of discount in the sentence these purported errors should attract, were we to find merit in her submissions. In answer, she suggested discounting one year for each of them. This answer was met with barely concealed derision from Ms. Vidal, who suggested that the fact of a guilty plea should not be exaggerated in the context of the Crown's case (there was, apparently, a recording of the incident) and moreso because even if it could be said that the judge erred by not crediting these factors, an overshoot by two years could hardly attract the statutory criteria for interference by an appellate court. According to Ms. Vidal, it must be shown that the sentence imposed is manifestly excessive in order to justify the substitution of a different sentence – and a mere two years more than what was warranted does not meet that standard. In our view, while manifest excess is not the sole flaw that could taint a sentence – Saunders PCCJ mentioned in his

judgment the need for an appellate court to also correct discrepancies and reverse aberrations – we agree with the DPP's larger point in this instance. The fact that Ms. Bradley made such a conservative estimate undoubtedly reflects her unspoken endorsement of the fairness of the sentence, where an offender received a term of just 18 years, 7 months for murder in the context of a violent robbery. Not only did the trial judge explicitly acknowledge the factors of the applicant's antecedents and his remorse (expressed in the guilty plea and earlier cooperation with the police), the sentence eventually imposed by him cannot be described as excessive or as an aberration for any other reason. Accordingly, this ground also fails.

Ground 3: No discount for delay

[21] Ms. Bradley next submitted that the trial judge erred by failing to give an additional discount for the delay in the trial, which she computed as 5 years, being the time that elapsed from his indictment in June 2017 to the time of sentence in April 2022. In truth, the total period is longer than this, for the Crown's responsibility runs from the time of arrest, which was November 27, 2015, as it was from that point onwards the applicant's liberty was restrained. In any event, Ms. Bradley contends that even the shorter period constituted a breach of the applicant's right to a fair trial within a reasonable time, for which the trial judge should have given an additional discount.

[22] As part of its response to this submission, the Crown relied on an affidavit from prosecuting counsel at trial, Mr. Riis Cattouse, who deposed as to the reasons for the delay in trial once he assumed responsibility for the matter in 2020. This was due mainly to two factors: first, the global pandemic which resulted in the suspension of criminal trials for part of 2020 (this being a circumstance that needs no further proof), followed by the difficulties in securing representation for the applicant once court sittings resumed. According to Mr. Cattouse, there were several adjournments occasioned by the illness of counsel then on record for the applicant, which eventually led to his substitution by another attorney. However, the applicant fired that new attorney which necessitated further adjournments to secure alternative representation. None of these events, which contributed to a delay in hearing the matter, can be attributed to the Crown.

[23] The issue of unconstitutional delay is one which, regrettably we would add, has arisen repeatedly in this court, as it does before others in the region. The applicable principles – both in assessing the period as delay and its consequences – are well-known, so there is no need to repeat them

at length. Suffice it to say that the mere characterisation of any given period on remand as delay is not enough to establish a breach of this right, and courts are required to examine alongside the time period, the reason for the delay, the efforts by the defendant to assert his or her rights, and any prejudice to the defence.[18] Where the time period on the face of it is excessive, there may be a presumption of unconstitutionality which can only be rebutted by evidence as to the reasons, but as a general rule the elements identified in *Bell* are crucial to understanding what took place and determining whether a defendant's constitutional right to a speedy trial has been breached.

[24] In this case, the time period involved – calculated from arrest to trial is 6 years, 4 months – cannot be characterised as inordinate in light of the Crown's explanations. It does not seem logical to add the time taken for this appeal to be heard since guilt is not an issue and there is no appeal to the conviction (in other words, irrespective of the outcome of the appeal the applicant would have been in custody anyway). Ms. Bradley pointed out that the Crown's evidence only explained the period from 2020 onwards, but even so, that leaves 4-5 years prior to that, which is not so excessive in light of the notorious backlog and administrative shortages plaguing this jurisdiction.

[25] While we are mindful of the applicant's right to a speedy trial and the negative effects of prolonged incarceration which leaves a defendant in a state of uncertainty, we are equally mindful of the need to balance these considerations with the public interest in ensuring that those charged with criminal offences – especially serious ones – are tried.[19] The offence in question is one of the most heinous in any system, involving as it does the unlawful taking of human life, and an aggravating factor is its prevalence in this society. As such, there is a compelling public interest in granting the Crown some leeway to ensure that the criminal justice system runs its course. This is not meant to give the Crown a 'free pass', but in this context it is important to note that while the Crown has credibly explained at least a part of the period in question, the applicant has made no comparable effort, merely relying on counsel's unsupported submission that the delay was not due to his fault. However, since there is evidence to contradict this assertion (at least by showing that he experienced problems with representation, which prevented an earlier trial), we cannot accept at face value any unsupported allegations of blameworthiness prior to 2020.

[18] *Bell v DPP* (1985) 32 WIR 317 (PC Jam); applied in *Flowers v the Queen* [2001] 1 WLR 2396 (PC Jam) and *The King v Zita Shol*, Court of Appeal of Belize, Cr. App. 2/2018, decision dated 28 September 2022.
[19] *Flowers*, ibid, and *Sookermany v DPP* (1996) 48 WIR 346 (CA TT).

[26] In the circumstances, therefore, while the period of approximately 5 years between arrest/charge and the events of 2020 is not ideal and should not be treated as normal, it does not by itself rise to such a level where it can be automatically presumed to amount to a constitutional violation. Since the applicant failed to offer any insight as to what took place during this time, or indeed to provide any information as to how this wait may have impacted on his defence, and in light of the countervailing considerations regarding the public interest in the context of serious crime, we cannot conclude that his right to a fair trial within a reasonable time was violated. This ground, therefore, is also rejected.

Ground 4: Denial of a fair sentencing hearing

[27] We come to the final ground raised on behalf of the applicant, namely that he was denied a fair sentencing hearing because he was not given an opportunity to be heard or to call character witnesses on his behalf. Ms. Bradley submitted further that the applicant was prejudiced by the failure of his counsel (Liesje Barrow) to make any submissions at the mitigation hearing. In answer to these submissions, Ms. Vidal countered that the record does not reflect that the applicant was prevented from speaking himself or from calling witnesses or that he was denied that opportunity. As to expressing remorse, Ms. Vidal pointed out that the applicant's perspective was thoroughly canvassed in the Social Inquiry Report (SIR) which was before the court, and also it was clear from the judge's comments that he treated the applicant as remorseful by reason of his guilty plea. Ms. Vidal concluded that the applicant advanced nothing, in light of all that transpired, to indicate how anything additional – whether from him or other witnesses – would have had a further impact on the sentence.

[28] There are three elements to this ground – the purported denial of an opportunity to speak on his own behalf or to call witnesses; the applicant's specific disadvantage in not being allowed to express his remorse directly; and the failure of the applicant's counsel at the hearing to make any submissions on his behalf. We will deal with each of these in turn.

[29] It is clear that the applicant was not prevented from calling character witnesses or speaking on his own behalf. In fact, what the record shows very clearly is that during the sentence indication, the trial judge constantly addressed the applicant directly. The judge sought confirmation of aspects of his background such as his interrupted education, his family life, the impact of his mother's death, the culture shock on moving to the city and so on – doing so in a simple,

conversational manner. The judge pointedly asked the applicant if he understood what was being said, and explained the process simply but in detail. The judge then permitted the applicant to confer with his attorney, after which he was arraigned and pleaded guilty. In light of this demonstrated care taken by the judge to ensure that the applicant understood the process, even speaking to him directly and then allowing him to confer with Ms. Barrow, it is pellucidly clear that the applicant was not prevented from speaking on his own behalf. On the contrary, the applicant's input was actively sought by the judge, who took pains to assure himself throughout the sentencing indication that the applicant was following the proceedings and was allowed to speak if he wished.

[30] Despite the overwhelming impression created by the Record of Appeal that points to the solicitous and thorough manner in which the trial judge discharged his responsibilities during the sentencing indication, can it still be said that the judge erred by not pointedly asking the applicant if there were any character witnesses whom he wished to speak in court on his behalf? We think not, primarily because the applicant was represented by counsel. If there were witnesses whom he wished to call (or if he wished to speak on his own behalf) it was counsel's duty to make that request to the court. Since no such application was made, the applicant cannot credibly claim to be prejudiced now – and certainly not in the face of the record of proceedings which demonstrates the extent to which the judge sought his participation. Moreover, in light of the meticulous and sensitive manner in which the learned judge discussed the applicant's background (as discussed above, the judge not only focused on 'traditional' mitigating factors but considered the lingering effects of colonialism and slavery), it is truly unclear what more could have been offered in mitigation on his behalf.

[31] What is also instructive is that even up to today, the applicant's current counsel has not indicated that the applicant wishes to speak on his behalf or to call character witnesses now – which this court could permit under the provisions of the ***Senior Courts Act*** that allow for examination of witnesses even at the appeal stage. The impact of any such deficiency at the trial can be corrected now before this court exercises its reviewing jurisdiction, so if indeed there was something relevant omitted during the proceedings below it is strange that no application to correct that omission has been made. In these circumstances where the applicant was represented by counsel both here and in the court below, neither of whom elected to make any application to call witnesses or for the applicant to speak, there is no room to conclude that he was denied this opportunity and thus deprived of a fair hearing.

[32] We also disagree with the applicant's claim of being denied the opportunity of personally expressing remorse, as should be clear from our earlier discussion regarding the trial judge's direct interventions with the applicant and the fact that he was represented by counsel who could have ensured this had it been desired. In addition, we fully agree with the submission of the DPP that the applicant's remorse was noted in the interview with the Community Rehabilitation Officer and recounted by her in the SIR which was then tendered and admitted in evidence. The trial judge made detailed references to this report, clearly accepting these averments as reliable. Ultimately, as Ms. Vidal submitted, the trial judge treated the applicant as remorseful by reason of his guilty plea – making multiple references to this fact. To give an example, only one of several instances where the trial judge discussed the implications of a guilty plea, he said during his judgment: "The view that a plea of guilty may be treated as an expression of remorse on the part of the offender has been adopted by many courts on more than one occasion. The plea of guilty is to be characterised as an indication of repentance and a resignation to the treatment of the court."[20]

[33] Thus, the applicant's expression of remorse was before the court both directly, by way of his own statements during the interview with the Community Rehabilitation Officer, and indirectly, by way of the trial judge's generous interpretation of his guilty plea. In these circumstances, it is unclear what more could have been added by the applicant repeating this at the sentencing hearing, nor has counsel indicated what further impact it could have had on the sentence. Given that the fact of his remorse was indisputably before the court and expressly taken into account by the trial judge, we find no merit in this complaint.

[34] The final element of this ground – namely that the applicant was prejudiced by the failure of his counsel to make any submissions on his behalf – is potentially the most concerning, but yet the one on which both parties have said the least. Ms. Bradley simply raised the fact in her written submissions as part of her contention that the applicant did not have a fair hearing, while Ms. Vidal did not address it before us and was content to rely on an affidavit from said counsel which was tendered and admitted. Since it was raised, however, and in light of the affidavit of Ms. Barrow now before us, we must explore the impact – if any – of this failure.

[20] Record of Appeal, pp. 35-36.

[35] A complaint regarding the conduct of defence counsel at trial is one which seeks to impugn the quality of representation and the consequences for a defendant. In this case, the allegation is that because of counsel's failure to address the court, the applicant was denied a fair hearing – presumably resulting in a sentence that was somehow irregular, wrong in principle or manifestly excessive.

[36] Where counsel's conduct is called into question, the task for an appellate court is to determine its impact on the trial itself[21] – that being in this instance confined to the sentencing hearing and its outcome. It is clear that incompetence involves a question of degree – where minor errors or other breaches occurred, the reviewing court must assess whether such missteps affected the outcome to a defendant's prejudice. It is otherwise where the mistakes proliferate.

[37] As De la Bastide CJ (as he then was) pointed out in the Court of Appeal of Trinidad and Tobago, where counsel's incompetence or other misconduct has become so extreme as to result in a denial of due process to the defendant, there is no longer any need to consider what impact such misconduct had. This is because a denial of due process is a constitutional breach, and a conviction without due process amounts to a miscarriage of justice regardless of guilt or innocence – requiring the conviction to be quashed.[22] This statement of the law was endorsed fully by the Privy Council in ***Ann Marie Boodram v the State***,[23] where they elaborated further in explaining de la Bastide's pronouncement.

[38] In *Ann Marie Boodram*, the appellant was convicted of murder and sentenced to death after a retrial. On appeal, the main ground canvassed was her new counsel's incompetence, based on a number of failures on his part including his apparent lack of awareness that it was a retrial (and thus not having the transcript of the former trial) and failing to object to two confessions, notwithstanding certain serious allegations surrounding how they had been obtained. While the Court of Appeal dismissed the appellant's appeal, she succeeded before the Privy Council which quashed her conviction. Describing this case as the "worst" of its kind that they had ever encountered, their Lordships held that counsel's multiple failures revealed either gross incompetence or a cynical dereliction of the most elementary professional duties. The breaches

[21] *Sankar v the State* (1994) 46 WIR 452.
[22] *Bethel v the State (No. 2)* (2000) 59 WIR 451 at 459-460.
[23] (2001) 59 WIR 493.

were so fundamental that it led to no other conclusion than that the appellant was deprived of due process and there was no need to even investigate their impact.

[39] While *Boodram* acknowledges that cases of extreme misconduct are rare, it establishes that where they occur a presumption arises that the accused did not have a fair trial or the appearance of a fair trial. Of course, to reach such a level the incompetence must be glaring, involving breaches of a "fundamental" nature – in which case, there is no need to investigate what impact they actually had. Prejudice is assumed and no conviction can stand.[24]

[40] The question that arises for us, therefore, is how to classify the failure of defence counsel below to make submissions on behalf of the applicant. This was a questionable decision, but it certainly cannot be classified as damaging to the point where it can be presumed that the applicant did not as a result have a fair hearing. Accordingly, we must go on to assess the impact of this decision, if any, on the applicant's sentence.

[41] In an affidavit tendered by the Crown and admitted during the hearing of the appeal, Ms. Barrow deposed that at the proceedings below the Court had a number of documents before it, including an SIR which was prepared by the Community Rehabilitation Officer after personal interviews with the applicant, two of his siblings and his step-mother, along with a Victim Impact Statement, a document of the applicant's antecedents (showing that he had no previous convictions), and a list of cases speaking to the trends in sentencing. She therefore formed the view that the judge had enough information before him to give an appropriate sentencing indication and since the judge did not ask for any further assistance, she opted not to address the court. After the judge gave the sentence indication – which was 25 years minus the period of 6.3 years spent on remand – she discussed its implications fully with the applicant, who then decided to plead guilty. Ms. Barrow added that she determined it was unnecessary to make any submissions or place additional material before the judge at the sentencing stage itself, given that in her view, during the sentencing indication the judge considered all the pertinent factors bearing upon an appropriate punishment. She felt reinforced in this view by virtue of her knowledge of the trend in sentencing for murder (as compared with what the judge indicated) alongside the applicant's indication to her that he did not wish to speak or to call any witnesses as this had already been done with the Community Rehabilitation Officer.

[24] Ibid, per Lord Steyn at [39]-[40].

[42] As we mentioned above, it is indeed unusual for defence counsel not to mitigate personally at trial, even where comprehensive information is available to the judge. There is always room for persuasion or to counteract unfavourable material – for nothing can ever be wholly positive, and this case is no exception. For instance, in the conclusion of her report, the Community Rehabilitation Officer noted that "…throughout the interview, it was observed that the defendant showed no sign of sympathy towards the victim's family. He also showed no remorse, despite apologizing to the family." This is an explosive conclusion which could have potentially prejudiced the applicant's chances of a balanced sentence. For that reason, it might have been prudent to explain these words or stress other aspects of the report or otherwise advocate for leniency. That, after all, is quintessentially the role of counsel. But having failed to do so, what was the impact of counsel's decision?

[43] Aside from the concluding assessment mentioned above, the SIR was otherwise highly favourable to the applicant overall and based on concrete information (as distinct from generalised statements). The details painted a sympathetic picture of the applicant as someone who experienced tremendous adversity throughout his life, starting with being abandoned by his father and the consequent material and psychological hardship this created for the entire family. This was aggravated when his mother died and the applicant moved to Belize City, where he continued to struggle without meaningful guidance. Worse, even though he connected with his biological father then, the father offered no support but actually exploited him. All these factors and others were noted by the trial judge, who discussed – as mentioned already – not just the applicant's immediate circumstances but the longer-term impacts of colonialism and slavery and what that meant for the applicant's choices and situation.

[44] Ultimately, that the trial judge displayed tremendous understanding as well as sympathy for the applicant is undeniable. Not only did he ignore the conclusion mentioned above, he explicitly treated the applicant as being remorseful. There is considerable evidence for this assessment in the Record, and one example will suffice. In the course of discussing the SIR and other factors related to sentencing, the trial judge commented: "These are systemic and case-specific factors that lessen your moral blameworthiness for this offence and soften the impact of general

deterrence and denunciation in your particular case, Mr. Reid. They are relevant and compelling in my view."[25] A more sympathetic judge would be hard to find.

[45] In these circumstances, we can confidently say that counsel's decision not to address the court in mitigation clearly had no prejudicial impact on the applicant. However risky that decision was, counsel's assessment of the temperature turned out to be correct, and the information favourable to the applicant was relied on heavily by the judge in imposing sentence. For these reasons, none of the objections regarding the conduct of the proceedings have merit, and we reject the submission that the applicant was denied a fair hearing.

Conclusion

[46] At the end of the day, the statutory test for interfering with a sentence is whether this court thinks that a different sentence should have been passed. In interpreting this standard, our apex court said in ***Pompey v DPP*** that it is the function of a reviewing court to intervene in order to "to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law."[26] Applied to this case, therefore, if we are of the view that the sentence passed by Sandcroft J is manifestly excessive or otherwise flawed then we would be justified in concluding that a different sentence should be substituted for the one passed.

[47] As discussed above, none of the grounds advanced by counsel for the applicant has succeeded. While some unusual aspects have been established – such as the style of the trial judge in discussing mitigating factors at one point but not listing them in his conclusion, or the decision of defence counsel not to address the court in mitigation – nothing has been shown to be of any significance or prejudicial to the applicant. Quite the contrary, the judge was clearly knowledgeable of the applicable sentencing principles and at all times displayed great understanding of and sympathy for the applicant's situation.

[48] Conversely – for it would be remiss of us not to mention this – the judge did not dwell to the same extent on the aggravating factors of this case. While he mentioned them at the beginning of his judgment, at the time of computing the sentence he only referred to three aspects – namely that it was organised criminal activity, that the offence was unprovoked, and the location of the crime

[25] Record of Appeal at pp. 43-44.
[26] Note 3 above, per Saunders PCCJ at [2].

(namely, the deceased's workplace).[27] Omitted from this list were some highly relevant considerations which, although mentioned in passing, merited closer attention. Among these were the offence itself (one of the most serious under the law), its known prevalence in the society, the nature of its commission (involving a firearm), and the conduct of the applicant – not just the unprovoked nature of the attack as mentioned by the judge, but also the fact that he aimed at the deceased's throat. Such an act was clearly done not to incapacitate the victim or merely to facilitate the robbery, but with a specific intent to kill. These factors are relevant when one estimates the gravity of the offence and public interest considerations such as the impact of fatal violence in society on the safety and security of its members.

[49] Considered in totality, therefore, it cannot be said that the sentence was manifestly excessive or otherwise an aberration or wrong in principle. The statutory test has thus not been met, as we do not think that a different (and lower) sentence should have been passed. For these reasons, the application for leave to appeal is refused.

Arif Bulkan
Justice of Appeal

Minnet Hafiz-Bertram
President

Michelle Arana
Justice of Appeal

[27] Record of Appeal, page 54.