THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL 009/ 2018
IND #0087/2008-A
SC#0087/2008

BETWEEN

Larry Ricketts

Appellant

-and-

Her Majesty the Queen

Respondent

CRIMINAL APPEAL 007/ 2018
IND#0077/2012
SC#04126/2012

BETWEEN

Brian Emmanuel Borden

Appellant

-and-

Her Majesty the Queen

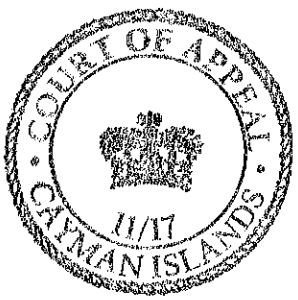
Respondent

CRIMINAL APPEALS 010/2018 & 011 /2018
IND #0060/2010 & 0061/2010
SC#04772/2010 & SC#05085/2010

BETWEEN

Raziel Omar Jeffers

Appellant



-and-

Her Majesty the Queen

Respondent

CRIMINAL APPEAL 013/2018
IND#0084/2010
SC#008844/2010

BETWEEN

Leonard Antonio Ebanks

Appellant

-and-

Her Majesty the Queen

Respondent

CRIMINAL APPEAL 003/2018
IND#0087/2011
SC#05425/2011

BETWEEN

Jeffrey Alexander Barnes

Appellant

- and-

Her Majesty the Queen

Respondent

Before:	**The Rt. Hon Sir John Goldring, President** **The Hon C Dennis Morrison, Justice of Appeal** **The Rt. Hon Sir Jack Beatson, Justice of Appeal**
Appearances:	Mr. Nicholas Dixey of Nelson Law for Mr. Barnes Mr. Guy Dilliway-Parry of Priestleys for Mr. Borden Ms. Amelia Fosuhene of Brady Law for Messrs. Ricketts, Jeffers & Ebanks Mr. Andrew Radcliffe QC & Ms. Elizabeth Lees (DPP) for the Respondent
Heard:	**Thursday 22nd and 23rd August 2019**
Delivered:	**Monday 2nd September 2019**

JUDGMENT

GOLDRING, President

Introduction

Each of these Applicants was sentenced to a term or terms of imprisonment for life prior to the coming into force on 15th February 2016 of the Conditional Release Law, 2014. Each was

returned to the Grand Court under the transitional provisions provided by section 23(1) of the Law for that court to exercise its powers under section 14 and "*specify the period of incarceration [he]...shall serve before [he]... is eligible to be considered for conditional release on licence...*" The Applicants Larry Ricketts, Brian Borden, Raziel Jeffers and Leonard Ebanks were each convicted of murder. The Applicant Jeffery Barnes was convicted of aggravated burglary and rape. The periods specified were as follows:

- Larry Ricketts: 40 years imprisonment.
- Brian Borden: 34 years imprisonment.
- Raziel Jeffers: 38 years imprisonment.
- Leonard Ebanks: 34 years imprisonment.
- Jeffery Barnes: 21 years imprisonment.

1. Each now seeks leave to appeal against those sentences.

The statutory background

The Penal Code, section 182

2. Section 182 of the Penal Code (in both the 2007 and the 2010 Revisions) requires that anyone convicted of murder must be sentenced to imprisonment for life.

The Prisons Law 1975, section 31A

3. By section 29 of the Imprisonment Law 1975:

"A convict...may, if of good behaviour, be granted remission of sentence of up to one third thereof, provided that sentence is more than one month."

4. The Imprisonment Law 1975 was re-named the Prisons Law by the Imprisonment (Amendment) Law 1981.

5. The Prisons (Amendment) Law, 2005, was *"a law to amend the Prisons Law, 1975 to change the eligibility requirements for release on licence..."* As amended, the Prisons Law 1975, provided that:

> *"In lieu of any remission that may be granted under section 29, the Governor, acting in his discretion and on such conditions as he may think necessary, may order the release on licence-*
>
> *(a) of a convicted prisoner serving a sentence for any offence specified in the Schedule at any time after he shall have served at least five-ninths of his sentence...*
>
> *(c) of a convicted prisoner serving a sentence of life imprisonment or being detained during the Governor's pleasure, at any time."*

6. Rape and aggravated burglary were both specified offences.

The Conditional Release Law 2014

7. The *Conditional Release Law* 2014 (*"the 2014 Law"*), was enacted *"to provide for the creation of a conditional release board charged with the duty of making decisions*

regarding conditional release of prisoners on licence...[and] for incidental and connected purposes."

8. Section 3 states that:

> "*This law applies to all prisoners regardless of when they were convicted or sentenced...*"

9. By section 6, the Board is required, among other things, to make "*decisions and orders*" in respect of prisoners on licence. By section 7:

> "*Prisoners shall be eligible for conditional release as follows-*
>
> *(a) prisoners sentenced to imprisonment for life shall be eligible to be considered for conditional release on licence after serving the minimum period of incarceration imposed under section 14(1).*"

10. Section 14 states:

> "*14 (1) Notwithstanding any other Law to the contrary, when sentencing a prisoner to a term of imprisonment for life, the court shall specify the period of incarceration the prisoner shall serve before the prisoner is eligible to be considered for conditional release on licence, the period being such as the court considers appropriate to satisfy requirements of retribution, deterrence and rehabilitation, but for murder, the period shall be thirty years*

before the prisoner is eligible for conditional release unless there are –

(a) extenuating circumstances, exceptional in nature, in which case the court may impose a lower period of incarceration; or

(b) aggravating circumstances, exceptional in nature, in which case the court may impose a longer period of incarceration

(2) In making a decision under subsection (1)(a) or (b), the court shall state the extenuating circumstances or the aggravating circumstances, as the case may be.

(3) The Board may...order conditional release on licence of a prisoner sentenced to a term of imprisonment for life after the prisoner has served the period of imprisonment specified by the court under subsection (1)."

11. Section 21 states that:

"The Cabinet may make regulations prescribing all matters that are required or permitted by this Law to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Law"

12. Section 23 concerns the transitional provisions. It provides that:

"*(1) Within twenty-four months after the entry into force of this Law [15 February 2016], the Director of Public Prosecutions shall*

send to the Grand Court the case records of all prisoners serving life sentences, excluding those whose applications for release on licence are pending under section 31A of the Prison Law, 1975, and the Grand Court shall, in exercise of the powers contained in section 14 pronounce in open court a period of incarceration for each prisoner, and in so doing shall exercise the powers specified in section 14 as if it were sentencing an accused who has been convicted.

(2) Where an application under section 31A of the Prison Law, 1975 is refused, the prisoner may at any time apply to the Grand Court for a tariff to be set, in which case the Grand Court shall exercise its powers in subsection (1).

(3) In exercising the powers referred to in subsection (1), the Grand Court may, where practicable, consult any serving judge who decided the matter concerned, and may exercise such other powers as a judge sentencing an accused in a case tried by him may have under any Law and the accused shall have such right to be heard as he would have had at the time of his original sentence hearing.

(4) At the sentencing hearing referred to in this section, evidence of the prisoner's behaviour in prison after original sentencing is not admissible.

(5) A prisoner who is dissatisfied with a decision made under subsection (1) or (2) shall have a right of appeal in the same manner as a person being sentenced for the first time."

Regulation 14 of the Conditional Release of Prisoners Regulations, 2016

13. Regulation 14 of the *Conditional Release of Prisoners Regulations*, 2016 ("*the Regulations*") was made pursuant to section 21 of the 2014 Law. It provides that:

> *"For the purposes of determining the earliest possible conditional release date in relation to a prisoner on a term of imprisonment for life, the circumstances set out in Schedule 12 shall be considered."*

14. Under the heading "*Sentencing guidelines*," Schedule 12 states:

> "***Introduction***
>
> *1. (1) Where a mandatory life sentence for murder is prescribed by any Law, for the purposes of section 14 of the Law the aggravating and extenuating circumstances are outlined in this schedule.*
>
> *(2) For offences other than murder, for the purposes of section 14 of the Law, the aggravating and extenuating circumstances may include all the relevant circumstances of the offence and or the offender.*

(3) For murder, the period shall be thirty years before the prisoner is eligible for conditional release unless there are extenuating or aggravating circumstances, exceptional in nature, in which case the court may impose a shorter or longer period of incarceration respectively;

Aggravating circumstances and extenuating circumstances

2. (1) Detailed consideration of aggravating or mitigating circumstances may result in a minimum term of any length.

(2) Aggravating circumstances that may be relevant to the offence of murder include -

(a) a significant degree of planning or premeditation;

(b) the fact that the victim was particularly vulnerable because of age or disability;

(c) mental or physical suffering inflicted on the victim before death,

(d) the abuse of a position of trust;

(e) the use of duress or threats against another person to facilitate the commission of the offence;

(f) the fact that the victim was providing a public service or performing a public duty

(g) concealment, destruction or dismemberment of the body

(h) previous convictions

(i) abduction and sexual or sadistic conduct; and

(j) any other circumstances which may be considered relevant.

(3) Extenuating circumstances that may be relevant to the offence of murder include -

(a) an intention to cause serious bodily harm rather than to kill;

(b) lack of premeditation;

(c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 185(1) of the Penal Code (2013 Revision)), lowered the offender's degree of culpability;

(d) the fact that the offender was provoked (for example, by prolonged stress);

(e) the fact that the offender acted to any extent in self-defence or in fear of violence;

(f) a belief by the offender that the murder was an act of mercy;

(g) the age of the offender; and

(h) any other circumstances which may be considered relevant.

Previous convictions

3. (1) In considering the seriousness of an offence committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating circumstance if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to-

(a) the nature of the offence to which the conviction relates and its relevance to the current offence; and

(b) the time that has elapsed since the conviction.

(2) Any reference in this schedule to a previous conviction is to be read as a reference to a previous conviction by a court in the Cayman Islands.

(3) The court may treat a previous conviction by a court outside the Cayman Islands as an aggravating circumstance in any case where the court considers it appropriate to do so...

*...**Duty to give reasons***

5 (1) Any court making an order pursuant to section 14 must state in open court, in ordinary language, its reasons for deciding on the order made."

The Conditional Release Law (2019 Revision)

15. The Conditional Release Law 2014 has been revised by the Conditional Release Law (2019 Revision). As material, it adds to section 14 subsection (1A), by which:

> *"Notwithstanding subsection (1) and any other Law to the contrary, where any of the following circumstances are present-*
>
> *(a) the murder of two or more persons, where each murder involves any of the following-*
>
> *(i) a substantial degree of premeditation or planning;*
> *(ii) the abduction of a victim; or*
> *(iii) sexual or sadistic conduct;*
>
> *(b) the murder of a child where the murder also involves the abduction of the child or sexual or sadistic conduct;*
>
> *(c) a murder done for the purpose of advancing a political, religious, racial or ideological motivation; or*
>
> *(d) a murder by an offender previously convicted of murder, the court shall, when sentencing a prisoner to a term of imprisonment for life, specify the period of incarceration the prisoner shall serve before the prisoner is eligible to be considered for conditional release on licence, the period being such as the court considers appropriate to satisfy the requirements of retribution, deterrence and rehabilitation, the period shall be whole life before the prisoner is eligible for conditional release unless there are extenuating circumstances, exceptional in nature, in which case the court may impose a lower period of incarceration.*

(2) In making a decision under subsection (1)(a) or (b) or (1A) the court shall state the extenuating circumstances or the aggravating circumstances, as the case may be."

16. The transitional provisions remain unchanged: see section 23.

"Exceptional in nature"

17. The meaning of those words was recently considered by this court in *R v Ramoon and Douglas, CICA 7.12.18*. As rightly summarised in Mr Radcliffe QC's skeleton argument on behalf of the Respondent, the court held that:

(i) It cannot have been the Legislative Assembly's intention that the words have anything to do with how infrequent or uncommon the circumstances of the murder in question were in Cayman –

> "*... the words relate not to the frequency of the conduct, but its seriousness. The issue is whether the circumstances of the murder in question were so serious as to mark out the nature of the case as exceptional, and to justify a longer period of imprisonment*" (paragraph 105).

(ii) As to extenuating circumstances, what is important is not how often such circumstances may occur but whether their weight is so exceptional as to justify the imposition of a lower period (paragraph 106).

(iii) With regard to the use of firearms to commit a murder, Schedule 12 paragraph 2(2) is not exhaustive, nor can it have been the Legislative

Assembly's intention to exclude the use of a firearm as a possible aggravating circumstance (paragraph 108).

(iv) Whether or not this is the case will depend on all the circumstances of the case, but

> "*...it does seem to us that in most cases the pre-possession and use of firearms is likely to amount to an aggravating feature*" (paragraph 109).

(v) The sentencing exercise,

> "*...is pre-eminently an area for the application of judicial judgment and discretion. Each case will depend on its own facts. The Judge will stand back and make an overall assessment of the circumstances as he finds them to be. He will, no doubt, take into account, among other things, the prevalence of particular sorts of murder in the Cayman Islands, the protection of the public and such aggravating or mitigating circumstances as he finds in the particular case.*" (Paragraph 110)

(vi) "*We accept ... that it is important not to water-down the meaning of the phrase 'exceptional in nature*" (paragraph 119).

18. In short, as Mr Radcliffe submits, in interpreting Schedule 12, paragraphs 2(2) and (3) (aggravating and extenuating circumstances) and the words "*exceptional in nature*", the factor in question must be of sufficient weight and seriousness so as to take the case into the exceptional category and move the minimum term either upwards of downwards from the starting point of 30 years' imprisonment.

19. In some of the skeleton arguments on behalf of the Applicants, it was suggested that aggravating (or it follows, extenuating) circumstances in the terms of paragraph 2(2) (or, 2(3)), are not on their own sufficient to enable the judge to find that such circumstances are exceptional. A further degree of exceptionality is required. Sensibly, Ms. Fosuhene, who argued the cases of the Applicants with skill and judgment, did not advance such an argument. However, it is right we should to make it plain that we do not accept the submissions in the skeleton arguments. Once the court is sure that one or more of the circumstances set out in paragraph 2(2)(a) to (i) or 2(3)(a) to (g) , or any other relevant circumstance (2(2)(j) or 2(3)(h)), is made out, it has the discretion to increase or reduce the minimum term. It plainly cannot have been the intention of the legislature that the judge's discretion to adjust the minimum term can only arise if there is a further degree of exceptionality or seriousness on the facts of the particular case.

The Cayman Islands Constitution Order 2009

20. Although in the event Ms. Fosuhene, sensibly, did not seriously press her argument under Section 8(1) of Part 1 of the Cayman Islands Constitution Order 2009, we shall, in deference to the submissions made in the skeleton arguments, consider the relationship between section 8(1) and the minimum terms under the transitional provisions.

21. Section 8(1) provides

> "***No punishment without law***

8(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed; nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

22. Section 8(1) is in identical terms to Art. 7 of the European Convention on Human Rights. It is plainly to be interpreted in the same way.

23. In *Stafford v UK [2002] 35 EHRR 32* the European Court of Human Rights held that, in relation to life sentences in domestic law (*paragraph 79*):

> "*...there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment.*"

24. In *R (Uttley) v Secretary of State for the Home Department* [2005] 1 Cr. App. R. 15, a decision of the Supreme Court of England and Wales, the facts of which it is unnecessary to relate, at paragraph 18 and following, Lord Phillips of Worth Matravers said:

"*18. Article 7(1) prohibits the imposition of a penalty which is heavier than the one what was "applicable" at the time the offence was committed. No one... below appears to have focussed on the meaning of the word "applicable." There appears to have been an assumption that this meant "that would have been applied"... I now turn to consider the meaning of "applicable" in Article 7(1).*

19. This question was recently considered by the Judicial Committee of the Privy Council in Flynn v HM Advocate [2004] UKPC D1. The issue in that case was whether changes made by Scottish legislation to the release regime applicable in the case of mandatory life sentences infringed Art.7(1)...

20. Had the Committee had cited to them... the decision of the European Court of Human Rights in Coeme v Belgium, Reports of Judgments and Decisions (June 22, 2000) 2000-VII their task might have been made easier. Ours certainly is, for at [145] the court said this in relation to Art. 7:

> *"The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that punishable, and that the punishment imposed did not exceed the limits fixed by that provision."*

21. This passage lends strong support to the opinions as to the meaning of "applicable" expressed by my noble and learned friends Lord Rodger of Earlsferry and Lord Carswell in Flynn. I am persuaded

that those opinions correctly state the law. It follows that Art. 7(1) will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed on the defendant under the law in force at the time his offence was committed. I observe, in passing, that if statutory changes are made to the release regime of those serving mandatory life sentences those changes may affect the severity of the sentence that the law requires..."

25. The circumstances of *Flynn* were that the appellants were serving mandatory life sentences. The Convention Rights (Compliance) (Scotland) Act 2001 amended the previous provisions (in the Prisoners and Criminal Proceedings (Scotland) Act 1993) relating to mandatory life prisoners. It made transitional provisions to deal with those already serving their sentences. By a schedule to the Act, Scottish Ministers were required to refer the cases of existing life prisoners to the High Court for a hearing at which the court was required to make an order as provided for by paragraph 13, namely:

"*...an order specifying a part of the sentence which the court considers would have been specified as the punishment part under sub-section (2) of section 2 of the 1993 Act had that section, as amended by this Act, applied to the prisoner at the time he or she was sentenced.*"

26. The lower courts decided that that wording meant they could take account of nothing which had happened so far as the prisoner was concerned after he or she had originally been sentenced.

27. The appellants had been informed in writing when the parole board would review their cases. Application of the transitional provisions meant that they would be incarcerated for a longer period before their cases would be reviewed. They submitted, among other things, that that amounted to a breach of Art. 7. Although this found favour with Lord Hope and Lady Hale, and possibly Lord Bingham (see paragraphs 7-8, 42-46 and 99-101) Lord Rodger and Lord Carswell did not agree, and it was their opinions that the Supreme Court adopted in *Uttley*. Lord Rodger said (at paragraph 85) that:

> "*the critical matter is the penalty that was applicable at the time the criminal offence was committed. Under the old system there was no constraint on the length of the period before... [fixing]... the first review. It is therefore not possible to say, in terms of Art 7(1), that any particular punishment part is 'a heavier penalty' "than was" applicable at the time the [murder] was committed.'... the appellants are liable to be required to serve a longer period than would have been likely, but not a longer period than would have been competent, before the first review under the previous system. That is not incompatible with Art 7(1)...*"

28. Lord Carswell stated (paragraph 109):

> "*...I agree with the other members of the board that it is not realistic to treat a life sentence as a sentence of imprisonment for the whole of the defendant's life...I am unable, however, to accept the construction of Art 7(1) propounded by the appellants. It seems to me difficult to escape the conclusion that the meaning of the provision is that the penalty which was 'applicable' at the time the criminal offence was committed is that which the sentence could have imposed at that time, i.e. the maximum sentence then prescribed by law for the particular offence.*"

29. The Judicial Committee as a whole held that the wording of paragraph 13 did not mean that the court should disregard various matters (for example an existing review date when fixing the punishment part (Lord Rodger's observation at paragraph 75). Lord Carswell said (paragraph 106), the transitional provisions,

> "*should if possible be construed so as to have a neutral effect on the prisoners affected by them, that is to say, the procedures specified...should not operate in a significant way to the disadvantage of prisoners in the position of the appellants.*"

30. In *Del Rio Prada v Spain [2014] 58 EHRR 37,* the European Court of Human Rights considered the distinction between a penalty and measures relating to its enforcement or implementation. As was said in paragraphs 89 and 90:

> "*...the Court does not rule out the possibility that measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served may result in the re-definition or modification of the scope of the "penalty" imposed by the trial court. When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in art. 7(1)...*
>
> *In order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, the Court must examine in each case what the "penalty" imposed actually entailed under the domestic law in force at the material time, or in other words, what its intrinsic nature was. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time.*"

31. The argument on behalf of the Applicants, as set out in the skeleton arguments, was that the application of minimum terms under the transitional provision (section 23 of the 2014 Law) amounts to a breach of section 8(1). It results in imposing a heavier penalty than was applicable at the time the Applicants committed their offences and is therefore unlawful.

32. We do not agree. As was made clear in *Uttley*, the penalty "*applicable*" at the time of sentence was life imprisonment. Section 23 and the provisions of the 2014 Law do not

change that. They do not amount to the re-definition or modification of the penalty. They merely concern its execution or enforcement. There is no breach of section 8(1).

Legitimate expectation

33. Ms. Fosuhene does submit however, that the minimum terms specified failed to take account of a legitimate expectation each applicant had arising from the previous regime. The Governor, it is argued, would have considered each Applicant's release from prison under section 31A of the Prisons Law 1975 sooner than will be now be the case in the light of the minimum terms event specified. Each of the Applicants in consequence legitimately expected he would as a result be released sooner than he now will be. Such an expectation was an extenuating circumstance exceptional in nature which should have resulted in a reduction of the minimum term specified.

34. That legitimate expectation, it is said, arises in the following way. Each of the Applicants was aware of the previous regime at the time of his sentence and thereafter. He expected it would apply to him. Under that previous regime, such evidence as there is, suggests prisoners were released having served substantially shorter terms than will the Applicants. In support of that proposition, Ms. Fosuhene has provided us with specific examples. The Applicants were well aware of the process under the previous regime when serving their sentences. The way the previous regime operated would have been common knowledge to them. They legitimately expected it would apply to them. Ms. Fosuhene does not suggest that any specific promise was given to any Applicant, or that any Applicant was given a specific expectation as to when his possible release would be

considered. She accepts this case is on its facts significantly different from *Flynn*. Moreover, Ms. Fosuhene accepts that on any view, each of these Applicants would have had a very substantial period to serve before his case would fall for consideration under the previous regime.

35. Mr Radcliffe rightly accepts that if, in any Applicant's case, there was such a legitimate expectation it was a relevant extenuating circumstance enabling the judge, in his discretion, to reduce the minimum term. He does not suggest that Regulation 15 of the Regulations (which provides that the Director's notice to the eligible prisoner must state that the prisoner may only make submissions relating to facts and circumstances existing at the time of original sentencing), does not prevent such an expectation arising under the 2014 Law. His short submission is that in no Applicant's case was there such an expectation.

36. We agree. A legitimate expectation can only have arisen, in a context such as the present, in one of two ways. First, if it was in terms represented to an Applicant that he would be treated in a particular way. That is what happened in *Flynn* where the appellants had been formally notified of their Parole Board hearing dates, and in cases such as *O'Reilly v Mackman* [1983] 2 AC 237 (where there was the expectation of a specific period of future remission). That was not the case here.

37. Second, a legitimate expectation could have arisen if it could be said, that the Cayman Government, in the context of sentences of imprisonment for life, represented to the

Applicants by its conduct, that consideration of their release, and their possible release, very many years in the future, would follow the process laid in down in section 31A of the Prisons Act 1975. In other words, that by its conduct, the Government was representing that for very many years there would be nothing affecting release in life sentence cases.

38. In our judgment, no Applicant could reasonably have believed that. Moreover, while it may be that on the basis of the very few life sentence releases which occurred under the former regime, terms less than those specified in the present cases were in fact served, there is no reason to believe that would continue to be the case by the time any of the Applicants cases fell to be considered.

39. In the result, it seems to us plain, that no question of legitimate expectation can arise on the facts of these cases.

The Individual Applications

40. We now turn to the individual applications.

Larry Ricketts

41. Larry Ricketts was born on 20th May 1983. He is now 36 years old. He was 25 years old at the date of the commission of the offence. Together with his Co-Defendant, Kirkland Henry, he was convicted of the murder of Estella Scott-Roberts on 11th October 2008. Following the Applicant's conviction for murder, a joint indictment alleging that they

abducted, raped and robbed the victim was left on the file as far as he was concerned. Kirkland Henry had pleaded guilty to it (although not the murder). The learned Chief Justice specified minimum terms of 40 years' imprisonment for both Kirkland Henry and the Applicant.

The facts

42. Estella Scott-Roberts had been celebrating her 33rd birthday with friends at Deckers restaurant, West Bay Road. She had parked her car at the rear of the restaurant. She walked to this unlit area alone when the meal had ended at about 11.15pm. There, she was attacked by the Applicant and Kirkland Henry. They had been lying in wait, having been loitering in the area of the restaurant for at least an hour. She was abducted and driven away in her car. She was taken directly to an isolated part of the island in the Barker's area, where it was alleged both men raped and robbed her of her possessions, including her two cell phones and CNB bank card. She was suffocated. The vehicle was then set alight with her body in it. She had been tied up using duct tape prior to being raped. She had been cut on the hand by a knife brought to the scene by the two men when they first accosted her.

43. Having been reported as missing by her husband, cell site activity in relation to one of her cell phones was recorded in the vicinity of Barkers. The burned out shell of her car containing her charred, shrunken and unrecognisable body was discovered at 12.30pm on 11th October 2008. Identification could only be made by DNA testing.

44. Further telephone evidence revealed that one of Ms. Scott-Roberts' BlackBerry handsets, but by now fitted with the SIM card for Kirkland Henry's number, had called his employer. Moreover, a photograph of the victim's genitalia timed at 0043hrs on 11th October 2010 was recovered from Henry's Samsung cell phone.

45. Kirkland Henry was arrested on 25th October 2008. Ms. Scott-Roberts' laptop was found in his apartment. Having admitted the abduction and rape to police, he showed the officers where the Applicant lived. The Applicant was arrested on 27th October 2008. The second of the victim's cell phones was found at his address.

46. The deceased's debit card had been used unsuccessfully to try to withdraw cash (CI$5000) from ATMs on five occasions between 06.19hrs and 06.31hrs on the early morning of 11th October and again just after midnight on 15th October. CCTV footage at one of the ATMs showed the user to be wearing clothing that matched exactly items taken from the Applicant's home.

47. In interview on 28th October 2008, the Applicant gave answers that amounted to admissions to the murder. He gave as the reason the desire to avoid identification as the kidnappers.

48. The Chief Justice tried the Applicant and Kirkland Henry, sitting alone. The Applicant gave evidence. Henry did not. By his written judgment of 12 February 2010, the Chief

Justice found both men guilty of murder and imposed sentences of life imprisonment. Concurrent sentences of 15 (for the abduction), 20 (for the rape) and 13 years (for the robbery) were subsequently imposed on Kirkland Henry.

49. Both men's appeals against conviction were dismissed.

The Conditional Release Judgment

50. In written reasons given on 15th February 2018, the Chief Justice, as we have said, specified minimum terms for the Applicant and Kirkland Henry of 40 years. Time spent on remand (483 days) was deducted.

51. The Chief Justice set out those findings about which he was sure. He found that the Applicant and Kirkland Henry had acted in concert throughout. He said, among other things:

> "*It is clear ... both offenders were motivated in their attack upon their victim by their intention to rape and rob her.*" *(Conditional Release Judgment paragraph 30(5))*

52. The Chief Justice found several aggravating circumstances, exceptional in nature, such as to require a substantial increase in the statutory minimum term of 30 years.

Significant degree of planning or premeditation: paragraph 2(2)(a)

53. The Chief Justice found both factors present to a significant degree.

(a) The Applicant and Kirkland Henry had, according to the Applicant's interview on 28th October 2008, earlier discussed on the telephone how they could get some money:

> "*...The final plan was to come out on the road and see how the people were rotating and then we could decide what move to make.*"

(b) Pursuant to the plan they went to the area outside Deckers where staff saw them apparently loitering in the area of the car park. Given that Henry said in interview that they had arrived there *"about 15 to 10 or after 10"*, they would have been there for at least an hour. (*Judgment (Verdict) paragraphs 188-9*)

(c) In his interview, but hardly in contrast, the Applicant said that "*...we were chilling for about half an hour in the parking lot at Deckers.*"

(d) They had equipped themselves in advance with a knife (used to inflict a serious cut to the deceased's hand when she was first attacked), duct tape and plastic ties. (*Conditional Release Judgment, paragraph 21*)

(e) The last two named items militated strongly or conclusively against any contention that only a street robbery was planned. (*Conditional Release Judgment, para 30(5)*)

(f) The Chief Justice concluded that:

"*[equally] unbelievable is the notion that such a thing could have been undertaken without any planning whatsoever, entirely on the spur of the moment*" (*Judgment (Verdict) 22.2.10 paragraph 187*)

Prior to raping the victim, the two men gagged and tied her up with duct tape "*which they must have planned in advance to use*" (*paragraph 197*)

(g) The Chief Justice said that having abducted the deceased at about 11.15pm or shortly thereafter, cell site evidence having located Ms Scott-Roberts' BlackBerry in the approximate location of Barkers at 11.39pm:

"*...confirms that she was taken directly to that area from Deckers restaurant, a sign of pre-planning on the part of her abductors.*" (*paragraph 125*)

54. It seems to us plain the Chief Justice was entitled to analyse this aspect of the case in the way he did and reach the conclusions he did. We cannot accept the submission in the skeleton argument that this was merely an opportunistic offence. By the Applicant's own account in interview, the murder took place to prevent the victim from identifying her attackers. That issue faced the Applicant and Kirkland Henry from at least the time Ms. Scott-Roberts was abducted (if not before, given that the two men had pre-equipped themselves with the duct tape and plastic ties).

Mental or physical suffering inflicted on the victim before death: paragraph 2(2)(c)

55. As the Chief Justice found, there was overwhelming evidence of this. Ms. Scott-Roberts was abducted at knife point, driven to a remote part of the Island some distance away, cut

with the knife, gagged and tied up with duct tape before being raped and, according to the Applicant in interview, had begged for her life before being murdered.

Concealment, destruction or dismemberment of the body: paragraph 2(2)(g)

56. Again, as the Chief Justice found, there was overwhelming evidence of this. Having asphyxiated the victim by taping a plastic bag around her head, the Applicant and Kirkland Henry then set fire to the vehicle with the deceased's body inside it in order to destroy or conceal the evidence of what they had done.

Abduction and sexual or sadistic conduct: paragraph 2(2)(i)

57. Ms. Scott-Roberts was abducted and raped before being murdered. The Crown's case (and Kirkland Henry's) was that she was raped by both men. On any view, the Applicant was present throughout. The Chief Justice concluded:

> "*that at the very least, Ricketts must be regarded as an accomplice to the offence of rape as well.*" (*Paragraph 57 of the Conditional Release Judgment*)

58. The seriousness of the sexual conduct in the context of the murder was further aggravated by the taking of the photograph of the victim's genitalia to which we have referred which was recovered from Henry's Samsung cell phone. As Mr Radcliffe points out, under the Chief Justice's *'Cayman Islands Sentencing Guidelines'*, October 2015, an aggravating factor in the context of a sexual offence which indicates a more than usual degree of harm is-

"*Additional degradation of the victim (eg taking photographs of a victim as part of a sexual offence.*" (*Cayman Islands Sentencing Guidelines (Oct 2015)*)

Any other circumstances which may be considered relevant: paragraph 2(2)(j)

59. In his answers in his police interview on 28th October 2008, the Applicant described a general plan to rob that night. The Chief Justice found that both offenders had been motivated in their attack by their intention to rape and to rob. In the event, the victim was robbed of a lap top computer, a quantity of cash, her bank card and two BlackBerry cell phones, one of which was later recovered in the Applicant's possession. Thereafter, a number of unsuccessful attempts were made to steal money from her bank accounts by using the bank card.

60. As the Respondents point out, in England and Wales, a murder done for gain, is defined in the wording of Schedule 21 para 5(1)(c) of the Criminal Justice Act 2003 as being-

"*...such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in expectation of gain as a result of the death*"

61. As such, it would normally attract a minimum term of 30 years, elevating such a crime of murder from a starting point of 15 years had such a feature not been present.

62. No extenuating circumstances were found. None are advanced.

The grounds of appeal

63. Ms. Fosuhene, relying on the submissions made in the skeleton argument, submits this was opportunistic offending. For the reasons we have already given, we do not accept that submission.

64. Secondly, Ms. Fosuhene, again on the basis of the skeleton argument, submits that the Applicant was not convicted on the second indictment. The Chief Justice dealt with him as though he was. He was not entitled, in other words, to sentence on the basis that this was a joint enterprise, each man being equally involved.

65. We do not agree. As was made clear by the English Court of Appeal in *R v Healy* [2009] 2 Cr App R (S) 3, a trial judge in a case such as the present is entitled to make his own determination of the facts about which he is sure and take them into account when passing sentence. That must particularly be so when, as here, the trial judge was the judge of the facts at the trial. Any other approach would have been highly artificial.

66. Finally, Ms. Fosuhene submits that 40 years' imprisonment was out of line with a number of English cases she has drawn to our attention. That is particularly so given the Applicant has no previous convictions.

67. In our judgment, those English cases, which of course have to be considered against the different legislative background of England and Wales, provide little guidance.

68. This was a truly horrific murder. There were multiple aggravating circumstances. Two men, having laid in wait, kidnapped a woman, forcibly took her to a remote part of the island, caused her injury, at least one of them raped her in the other's presence, photographed her genitalia, suffocated her, burned her body so it was unrecognisable, stole some of her belongings and thereafter sought to use her bank cards. In our judgment the Chief Justice was entitled on those facts to conclude that a minimum term of 40 years' imprisonment was appropriate having regard to the requirements of retribution, deterrence and rehabilitation. It cannot arguably be regarded as manifestly excessive. We refuse leave to appeal.

Brian Emmanuel Borden

69. The Applicant, Brian Borden, was born on 27th May 1985. He is presently 34 years old. He was 26 years old at the date of the murder. On 6th August 2014, he was convicted of the murder of Robert Bush, on 13th September 2011. A co-defendant, said to have provided the ammunition used to shoot Robert Bush, was acquitted at the close of the Crown's case. On 9th February 2018, Henderson J specified a minimum term of 34 years' imprisonment.

The facts

70. Shortly before 11.20pm on 13th September 2011, Robert Bush was shot by the Applicant and another man. He was sitting in the driver's seat of his car in West Bay. He had just picked up his girlfriend, Mayra Ebanks. The principal motive for the killing was gang

related hostility between those from the Logwoods area (such as Robert Bush) and those from the Birch Tree Hill area (including the Applicant and a man called Jordon Manderson). Some degree of sexual jealousy may also have played a part. The Applicant had previously been involved in a relationship with Mayra Ebanks.

71. There was evidence that the Applicant had long intended to kill Bush. Tracey Watler, his girlfriend, said he told her when she saw him in prison. After his release from prison on 5th October 2010, she said he boasted to her that he was now the leader of the Birch Tree Hill group. He said again he wished to kill Robert Bush. In July and August 2011, Tracey Watler said he was asking her to tell him when Robert Bush visited or stayed over at her home and when he planned to leave that address. On one occasion he waited outside her home for Robert Bush to leave. She said he asked where Robert Bush was sleeping; whether he could shoot him through a window.

72. As we have said, Mayra Ebanks was Robert Bush's girlfriend. She lived in the Birch Tree Hill area. On 12th September 2011, following an argument with Mayra Ebanks, the Applicant, in what would have been regarded as an act of bravado by the Birch Tree Hill group, drove to 177 Birch Tree Hill and in the presence of others (including Jordan Manderson of the Birch Tree Hill group), asked Mayra Ebanks to get some cigarette paper and rum.

73. The murder took place on the next night, 13th September 2011. Before it took place, and without going into the detail Jordan Manderson sought to establish whether Robert Bush

would be there. He visited Mayra Ebanks asked her to let him know. She did so (via someone called David Ebanks) very shortly after 11pm. Within minutes the Applicant was informed. Robert Bush arrived at Birch Tree Hill Rd in his car. Mayra Ebanks got in. Two men, masked by shirts tied around their heads, approached. The Applicant was holding a shotgun. She shouted to Robert Bush to drive off. He fired the shotgun. Robert Bush drove into a wall. The two men ran to the driver's side of the car. Further shots were fired at Robert Bush. By a shotgun blast, the Applicant destroyed the upper left side of Robert Bush's face. By a bullet fired from his handgun, the second man fired which entered Robert Bush's skull behind his right ear.

74. The Applicant was subsequently arrested on other firearms related matters. When in custody he was questioned about the murder. He made a witness statement in which he claimed to have been at his girlfriend's home at the relevant time. Cell site analysis showed that was a lie. It revealed that at the material time the Applicant had been in the area of the shooting less than 15 minutes before it.

75. Critical evidence came from Marlon Dillon, an affiliate of the Birch Tree Hill group. He was awaiting sentence for his part in two armed robberies. In short, he said that in early 2012 the Applicant pointed out where Robert Bush's car had crashed into the wall after the first shot had been fired. He said that he and the other man had *'mashed up'* Robert Bush: that he had used a "*mass bird to lick him with.*" "*Lick*" was slang for shoot. "*Mass bird*" was slang for the firearms manufacturer, Mossberg. He spread his arms to demonstrate how he had fired the shotgun. He said the other weapon used had been a

Browning 9mm handgun belonging to another man. He said that he had been alerted to the fact that Robert Bush was on his way. They heard the loud music from his car as it approached. They fetched the guns before running to the place where they carried out the murder.

76. The trial took place before Henderson J, sitting without a jury. The Applicant did not give evidence. In a written judgment of 6th August 2014, the Applicant was convicted of murder and sentenced to life imprisonment. The Applicant's appeal against conviction was subsequently dismissed.

The Conditional Release Judgment

77. As we have said, on 9th February 2018 Henderson J specified the minimum term of imprisonment as 34 years. The period served on remand (723 days) was deducted.

Significant degree of planning or premeditation: paragraph 2(2)(a)

78. The judge concluded there was evidence of a significant degree of premeditation. Although he found that Tracey Watler had exaggerated regarding some aspects of her evidence, the judge was satisfied on its basis that the Applicant had been "*stalking*" Robert Bush; that he had repeatedly threatened to kill him over months and years. Weapons were obtained. Arrangements were made to tip off the Applicant when Robert Bush was due to arrive. The Applicant and another went to the scene to carry out the murder.

79. The judge found that the planning was not unusual and, in the light of the subsequent decision in *Ramoon*, he wrongly concluded that it could not be exceptional. However, he did find the evidence of premeditation as substantial and considered that, "*the nature and extent of the premeditation to be a significant aggravating feature.*"

80. Mr. Dilliway-Parry on behalf of the Applicant rightly submits that to amount to an aggravating circumstance under Regulation 12(2)(a) the judge had to be satisfied that there was a "*significant degree*" of premeditation, which is not the same thing as "*substantial evidence*" of it. That was an error of law by the judge, he submits.

81. Moreover, Mr. Dillaway-Parry submits that Tracey Watler was, on the judge's findings, prone to serious exaggeration. No reliance could be placed on her evidence so as safely to conclude there was a significant degree of pre-meditation. What she said she heard may have been no more than bravado.

82. In our judgment, there is nothing in either point Mr. Dilliway-Parry makes.

83. First, it is clear that the judge had well in mind the wording of Regulation 12(2)(a). He had referred to it shortly before, in paragraph 12 of his judgment. Moreover, he later spoke of the "*nature and extent [our emphasis] of the premeditation.*"

84. Second, the extent of reliance the judge felt able to place on Tracey Watler's evidence was very much a matter for him. It was too a matter for him to assess whether what she

recounted was mere bravado, or something more serious. He saw and heard her. It not for this court now to second-guess what were essentially matters for the judge of fact to decide.

Any other circumstances which may be considered relevant: para 2(2)(j)

85. The judge considered that there were other relevant, exceptionally aggravating circumstances. He found that the murder, in the context of a gang related dispute, was an aggravating circumstance within the meaning of the legislation. He said the Applicant committed the murder to enhance his standing within the Birch Tree Hill gang. He executed Bush in a public place so that others might see him as someone to be feared and obeyed.

86. We observe that as we said in *Ramoon*, the judge would have been entitled to consider and find that the use of firearms alone to carry out this murder was an exceptionally aggravating circumstance.

87. Mr. Dilliway-Parry submits that the judge was wrong to regard the killing in the context of a gang related dispute as an exceptionally aggravating circumstance. He submits that no distinction should be drawn between such a murder and that in a domestic context.

88. For present purposes it suffices merely to say this. To decide to kill someone from an opposing gang to advance, in substantial part at least, one's gangland standing is

something which a judge is entitled to regard as an exceptionally serious circumstance. That, in our judgment, is what happened here.

The Applicant's previous convictions

Schedule 12 para 3(1) of the Regulations

89. The Applicant had a total of 10 previous convictions. Most were irrelevant. However, on 23rd September 2008, for an offence of causing grievous bodily harm with intent, he was sentenced to 3 years' imprisonment. His release (on 5th October 2010) was approximately 11 months before he murdered Robert Bush. That offence involved the Applicant stabbing someone in the chest following an argument about drugs. The Applicant pleaded guilty following a *Goodyear* indication. The judge did not regard it as reasonable to treat this conviction as an aggravating circumstance. It does seem to us the Applicant was fortunate in the view the judge took. However, it is something we need not consider further.

90. Mr. Dilliway-Parry made several more general points. Among them, he emphasised that on any view, a minimum of 30 years before release can even be considered is a very long time. He submits that the court should be careful not too readily to conclude that there existed "*circumstances exceptional in nature*" resulting in a minimum term of more than 30 years.

91. Finally, Mr. Dilliway-Parry draws our attention to other cases, which, he submits, suggest the present sentence was out of line. While we agree that it is important there be a broad

degree of consistency in this, as any area of sentencing, there is in such an exercise the danger of overlooking that in no two cases are the facts the same.

92. In the case of *R v Trevino Bodden* IND 91/2006A dated 12 May 2017, a double murder with a firearm, a minimum term of 28 years was specified. However, that was a case in which there was considerable provocation. *R v Ramoon & Douglas* (IND 53/2015 dated 19 December 2016) was a case of a "*public execution*" as the judge described it, in which 34 and 35 year minimum terms were specified. In *R v Anglin*, IND 79/2013 dated 9 June 2017, a minimum term of 34 years was specified where, among other things, a defendant on bail with a bad criminal record, burned the body. Those cases (among others) suggest, submits Mr. Dilliway-Parry, the sentence in the Applicant's case was out of line.

93. As we have said, it seems to us the judge was entitled for the reasons he gave to find the exceptionally aggravating circumstances he did. He might, on proper application of the statutory provisions, have found more. In the final analysis, this was a case in which, in a residential area of Cayman, at night, two men, each armed with a firearm, publicly executed a young man (to adopt the phraseology of *Ramoon*) because he was not a member of their gang, something which one of the perpetrators at least had wished to carry out for a long time. There were no extenuating circumstances. In our judgment, on the basis of his analysis of the facts and law, the judge was entitled to conclude that the appropriate minimum term of 34 years was appropriate. It was not in our judgment arguably manifestly excessive. This application for leave is refused.

Raziel Omar Jeffers

94. The Applicant, Raziel Jeffers, was born on 19th July 1983. He is now 36 years old. He was convicted of two murders. The first was of Marcus Ebanks on 8 July 2009 ("the Ebanks murder"), the second of Damion Ming on 25 March 2010 ("the Ming murder). He was 25 when he committed the Ebanks murder, 26 when he committed the Ming murder. On 12 February 2018 Quin J specified 38 years' imprisonment as the minimum term. There were separate indictments and separate trials in the Ebanks murder and in the Bing murder.

The Ebanks murder

95. The Applicant faced an indictment containing six counts. They all arose from a shooting on 8th July 2009 at Bonaventure Road, West Bay. They were as follows:

Count 1	Murder of Marcus Ebanks.
Count 2	Attempted murder of Jose Sanchez.
Count 3	Attempted murder of Adryan Powell.
Count 4	Attempted murder of Rod Aaron Ebanks.
Count 5	Attempted murder of Al Martino.
Count 6	Possession of an unlicensed firearm.

The facts

96. In the early evening of 8th July 2009, the Applicant left his home in West Bay, together with another male known as 'Ozzy' to collect firearms stored by 'Ozzy' in the Scranton area of George Town. At about 7.30pm, a group of about six males, including those

named in the Particulars of Offence in counts 1-5, were sitting in the yard of 9, Bonaventure Road, West Bay. Two masked and armed men, whom the Applicant later named to his then girlfriend, Meagan Martinez, as himself and 'Ozzy', came from the direction of Bonaventure Road and randomly opened fire on the group.

97. Marcus Ebanks, who was 20, was shot dead as he tried to run away. He received three gunshot wounds to his back and shoulder. Adryan Powell, who was 14 years, received eleven gunshot wounds. He was left in a permanent paraplegic state. Rod Ebanks, then aged 18, the brother of Marcus, received four gunshot wounds to his hip, hand and two to his leg. Jose Sanchez and Al Martino Bush fled to safety and were uninjured.

98. The motive for the attack was the ongoing hostilities between gang related factions of young men from the Birch Tree Hill Road area, which included the Applicant, and those from the Logwoods area, which included Jose Sanchez. Evidence was given at trial that the Applicant had previously threatened to kill those from Logwoods.

99. Sometime later, probably in about March 2010, the Applicant admitted to Meagan Martinez that he was one of the two gunmen involved in the shooting and that his intended victim was Jose Sanchez. He shot Marcus Ebanks thinking he was Jose Sanchez.

100. Two further factors had increased the Applicant's personal animosity towards Jose Sanchez. Jose Sanchez had had a sexual relationship with Kendra Powery, the mother of

two of the Applicant's children. Also, some months before the shooting, Meagan Martinez told the Applicant that Sanchez had assaulted her.

101. The Crown relied upon a positive identification of the Applicant as one of the gunmen by Adryan Powell and the Applicant's confession to Meagan Martinez. There was too the evidence of motive, the presence of gunshot residue found on a Rizla packet in the Applicant's trousers and telephone and cell site evidence which effectively plotted the movement of two cell phones attributed to Raziel Jeffers on the night in question from his home in West Bay to George Town where he collected the guns, back to West Bay into the cell site sector best serving the crime scene at the time the murder took place and then his immediate flight after the time of the shooting, eventually to the Bodden Town area where he was arrested early the next morning.

102. The Applicant was tried by Quin J, sitting without a jury. He did not give evidence. In his written Judgment of 23rd February 2012, Quin J convicted the Applicant on all counts and sentenced him to life imprisonment on each. The Applicant's appeal to the Court of Appeal was dismissed.

The Ming murder

103. That arose from a shooting on 25th March 2010, at 177, Birch Tree Hill Road. That is where the Applicant Leonard Ebanks murdered Tyrone Burrell (a prosecution witness in the murder of Damion Ming) on 8th September 2010 and is almost directly opposite the

junction where the Applicant Brian Borden murdered Robert Bush on 13th September 2011.

The facts

104. On the afternoon and evening of 25th March 2010, Earl Ebanks and others, including the victim, Damion Ming, were working in the yard of 177, Birch Tree Hill Road by the side of the house. Shortly after 9.30pm (when it was dark) the Applicant emerged from the rear of the property, armed with a handgun and opened fire from close range on Damion Ming. He fired twice. One shot was to the heart. The other was to Damion Ming's back when he was trying to get away. The Applicant fled the scene and cycled to a waiting motor car. Telephone and cell site evidence showed that he was promptly driven away from West Bay to the south of the island by a man called Lance Barnett. Afterwards, the Applicant telephoned the house to ask whether Damion Ming was dead. Eight 9mm shell casings, all fired by the same 9mm auto loading gun, were recovered by the rear of the house as were later two .38 calibre warheads or projectiles, being the type of bullets normally loaded into 9mm cartridges, were also recovered from the scene.

105. The motive for the shooting again was gang related. In the weeks prior to the shooting, the Applicant had repeatedly referred to Damion Ming as his "*enemy*". In addition, jealousy is likely to have played a significant part; the Applicant and the mother of one of his several children, Meagan Martinez, had separated in January 2010 before reconciling in early March 2010. In the interim, Ms. Martinez had associated with Damion Ming.

106. Within days of the shooting, the Applicant boasted to Ms. Martinez of having been responsible. He said how he had made arranged to borrow a 9mm handgun, which he had stored at an address of some associates, also part of the Birch Tree Hill group. He said he had been tipped off that Damion Ming was present at 177, Birch Tree Hill Rd. He had telephoned to confirm he still was.

107. The Applicant was tried by Swift J and a jury. He was convicted on 3rd April 2014. He had given evidence and called witnesses in his support. His appeal to the Court of Appeal was dismissed.

The Conditional Release Judgment

The Ebanks indictment

Significant degree of planning or premeditation: paragraph 2(2)(a)

108. Quin J found this exceptional circumstance was made out. The Applicant, having learned of the whereabouts of Jose Sanchez and the victims of the shooting, collected the two firearms to be used, and with them went to the scene to commit the murder approximately 20 minutes before the shooting. A very significant and substantial degree of premeditation and planning was demonstrated by the steps necessary to organise and collect the firearms and pinpoint the location of his target. Such planning involved the assistance of at least one other, in addition to the second gunman, in order to locate Sanchez.

Any other circumstances which may be considered relevant: paragraph 2(2)(j)

109. Quin J said that this was a gang related intended execution of a rival who, as with the others present in the yard of 9, Bonaventure Road, was unarmed. The multiple shots, randomly fired by the Applicant and his confederate not only killed Marcus Ebanks, an innocent bystander but also resulted in serious injuries to Rod Ebanks (count 4) and left Adryan Powell (count 2), a 14 year old boy, a paraplegic. The planned, deadly assault involved the use of two firearms and must properly be regarded as an aggravating circumstance.

The Ming indictment

Significant degree of planning or premeditation: paragraph 2(2)(a)

110. This was a gang related execution by shooting of an unarmed and defenceless man that involved not merely significant but substantial premeditation and substantial and careful planning. It required the cooperation and assistance of others to carry it into effect. In the weeks before the murder the Applicant had frequently referred to Damion Ming as his "*enemy*". To carry out the shooting, the Applicant first had to acquire the means to do so and made arrangements to borrow a 9mm handgun. Having obtained it, he stored it with others until the opportunity to kill Damion Ming arose. He arranged to be tipped off when Damion Ming was suitably located to shoot him. Having confirmed he was, he arranged to be driven to and collected from there.

Any other circumstances which may be considered relevant: paragraph 2(2)(j)

111. This was a further gang related execution of an unarmed rival.

112. The murder was committed by the use of a firearm.

The Applicant's previous convictions

Schedule 12 para 3(1) of the Regulations

113. The Applicant had a total of 19 previous convictions. Most, it was agreed, were irrelevant for the purposes of Schedule 12 para 3(1). However, on 4th March 2005, he was convicted of causing grievous bodily harm and was sentenced, on appeal, to 5 years' imprisonment. He was released on 6th March 2008, 16 months before he murdered Marcus Ebanks. The offence of causing grievous bodily harm involved the Applicant threatening and then slashing a man with a switchblade knife. The victim was extensively injured. He required a total of 58 stitches.

114. The judge treated this conviction as an aggravating circumstance. He also regarded a conviction for assault occasioning bodily harm on 31st August 2005 as relevant.

115. There is final conviction recorded against the Applicant. It is for manslaughter. It post-dates the original sentences on both indictments. The Crown does not argue that it should be taken into account for present purposes. It is a factor for the Conditional Release Board to consider in due course. We shall in the circumstances say no more about it.

116. No extenuating circumstances were found. None are advanced.

117. Quin J, having found the aggravating circumstances set out above, and taking into account the convictions, added 4 years' imprisonment to the 30 year starting point in respect of each indictment, arriving at the minimum term of 38 years referred to above. He deducted 658 days spent on remand.

The grounds of appeal

118. By paragraph 5 of his skeleton argument, the Applicant does not argue that the minimum term is objectively too long but bases his application for leave on the section 8(1) and legitimate expectation arguments, with which we have dealt. In the result it cannot arguably be said that the minimum term set by the judge was manifestly excessive. We refuse leave to appeal.

Leonard Antonio Ebanks

119. Leonard Ebanks was born on 27th November 1970. He is currently 48 years old. He was 39 years old at the date of the commission of the offence. He was convicted of the murder on 8th September 2010, at 177 Birch Tree Hill Road, West Bay, of Tyrone Burrell. On 13 February 2018 Quin J specified 34 years as the appropriate minimum term.

The facts

120. The Applicant and the victim, Tyrone Burrell, were both regular visitors to 177, Birch Tree Hill Road. On 8th September 2010, the victim had arrived there during the late morning He remained there throughout the day. The Applicant had been there from the morning but left at about 4pm. At the time he was wearing jeans shorts and a white top.

At shortly before 8.00pm he returned. He was now dressed all in black wearing black shorts, a black long sleeved shirt, a black baseball cap and had a black and white handkerchief wrapped around his hand. Seconds later, there was a single gunshot. The two women at the property went outside. Tyrone Burrell was lying on the ground at the front left of the house by a boat parked there on a trailer. He died from a single gunshot wound to the back of his head. Within about 10 seconds of the shot, a next door neighbour, Nora Ebanks, saw and spoke to the Applicant. He told her she was lucky not get her brains "*blowed out too.*" He later saw Nora Ebanks again. He told her that she "*shouldn't have got into it*" because it did not concern her two children, whom he named. He said she was "*trying to sink him.*" He repeated that she was lucky not get her brains "*blowed out too.*" Ms. Ebanks said the Applicant's comments made her feel threatened and intimidated.

121. On 10th September 2010 the Applicant confessed to the murder to one of the women who had been at 177 Birch Tree Hill Rd. He gave two reasons for it. First, Tyrone Burrell had shot up "*Devon's*" mother's house (in interview said to be *'Devon's grandmother's house'*). The judge found that Devon was an ally of the Applicant. Second, in the context of ongoing gang related trouble between young males from Logwoods and those from Birch Tree Hill, Tyrone Burrell had been passing information to the Logwoods gang. The Applicant was later to tell a police officer that Tyrone Burrell had been setting him up to be killed.

122. On 21st September 2010, the Applicant was again at 177, Birch Tree Hill Road. He showed the one of the women who had been in the house at the time of the killing a handgun he was carrying.

123. The Applicant was tried by Quin J sitting alone. By a written judgment of 30th September 2011, he was found guilty and sentenced to life imprisonment. His appeal against conviction was dismissed.

The Conditional Release Judgment

124. On 13th February 2018 Quin J fixed a minimum term of 34 years. Time spent on remand (119 days) was deducted.

125. Quin J found the following aggravating circumstances to be present.

Significant degree of planning or premeditation: paragraph 2(2(a)

126. The Applicant premeditated and carefully planned the murder. He was motivated by a desire for revenge and/or punishment of Tyrone Burrell. He believed Tyrone Burrell played a part in shooting up the house of the grandmother of an ally. He also believed he was an informant or spy for the rival Logwood's gang. The Applicant returned to 177 Birch Tree Hill Rd at about 8.00PM with the firearm. He knew Tyrone Burrell was there. He intended to carry out the shooting. He dressed in black to disguise himself against the cover of darkness. He wrapped a handkerchief around his hand to avoid gunshot residue being deposited on his hand which might link him to the shooting. He left the scene

immediately after the murder by a pre-planned route through the bushes. That removed him from the scene as quickly and as efficiently as possible.

Any other circumstances which may be considered relevant: paragraph 2(2)(j)

127. Quin J said that the use of a firearm to deliver a single shot to the back of Tyrone Burrell's head amounted to:

> *"...a public execution of the most evil nature and could accurately be described as "chillingly clinical" in its planning and execution' [paragraph 57]"*

128. The murder was gang related.

129. The words to the neighbour that she was "*lucky not to get your brains blowed out too*" was taken as a threat. He later threatened her again.

The Applicant's previous convictions

Schedule 12 para 3(1) of the Regulations

130. The Applicant had 51 previous convictions, many of which were irrelevant. Quin J regarded six as relevant.

131. On 25th March 1991 the Applicant was sentenced to 4½ years' imprisonment for robbery. On 29th June 2004 he was sentenced to 5 years' imprisonment, again for robbery. He had gone to a house in West Bay and, after demanding cigarettes, forced his way in using a

machete. He then damaged clothing, broke a gold chain from around the occupant's neck and stole it. He pleaded guilty. On 19th January 2011 he was sentenced to 6 months imprisonment for assault occasioning actual bodily harm. He had punched the victim three times in the face. On the same date, for carrying an offensive weapon, he was sentenced to 6 months' imprisonment. When stopped by a police officer he was found to have a 4 ½ inch kitchen knife in his back pocket. There was a similar further conviction for carrying a lock knife.

132. The final conviction recorded in the Applicant's antecedent history is an offence of being an accessory after the fact to murder, for which he was sentenced to 20 years imprisonment. However, that conviction postdates the original sentence and the Crown does not seek to rely on it. We therefore say no more about it.

133. No extenuating circumstances were found. None are advanced.

The grounds of appeal

134. Ms. Fosuhene submits that the judge was wrong to regard the comments he found had been made to Nora Ebanks as a threat. It was not open to the judge to do so.

135. We do not agree. Quin J was the judge of fact. He heard the evidence. There no basis now for this court to interfere with his conclusions, which are on their face plainly sustainable.

136. The submission to the effect the minimum term was out of line is again made. So too is reference to English authority. We shall not repeat what we have previously said in rejecting this submission.

137. This again was a planned, execution of someone in the context of gang violence. We have no doubt the judge was entitled to find the exceptional circumstances he did for the reasons he gave. He was unarguably entitled to impose a minimum term of 34 years' imprisonment. This application for leave is refused.

Jeffrey Alexander Barnes

138. The Applicant was born on 7th November 1979 and is currently 39 years old. He was aged 31 years at the date of the commission of the offences. On 8 April 2013 he was convicted by a jury of aggravated burglary (count 1), contrary to s.244 Penal Code (2010 Revision) and two counts (counts 2 and 3) of rape, contrary to s.127(1) Penal Code (2010 Revision).

The facts

139. They were starkly set out in the judgment of this court when the applicant unsuccessfully sought leave to appeal his discretionary life sentence. (*see Criminal Appeal 21/2013*)

140. Ms C lived alone at her home at 56, Palm Suites, George Town. The Applicant normally lived at No.63. On 21st October 2011, she returned home from work. She locked the door, removed her trousers and went to bed. She left a window open. At about 03.00, she woke

up. The Applicant was lying on top of her. He had one hand around her throat. He was holding a knife in it. He had brought it with him when he broke in through the open window. As his conviction on count 1 shows, he plainly intended to use it to facilitate rape. The knife was up against Ms. C's windpipe. The pressure applied was such that it broke the skin on her neck. When she struggled, the Applicant squeezed her throat tighter. She begged him not to rape her, telling him she was having her period. She was crying. She again begged him not to rape her. The Applicant said that he did not care. He cut off her clothes before undressing himself and putting on a condom. He told her to stop crying. He said it could have been worse. It could have been six men. He then raped her vaginally whilst continuing to hold the knife against her throat. When he tried to kiss her, she closed her mouth. He told her to act as though she was enjoying it. He started touching her again. He placed his penis inside her vagina. He then told her to turn over onto her hands and knees. When she said she could not do so because her stomach was hurting, he said he did not care. When she turned over, the Applicant saw she had been lying on her mobile phone, which she had tried unsuccessfully to hide. He placed the knife between her vagina and anus and told her that if she tried anything stupid, he would cut it out. He then had anal sex with her. He eventually ejaculated, having placed his penis inside her vagina. He went to sleep for a short while.

141. Ms. C's ordeal lasted a number of hours. It ended when, shortly before 6.00AM she persuaded the Applicant she had to go to work. He allowed her to get up to get dressed. He said he would be at her home when she later returned. He agreed that she could put the light on in order to dress. She was able to see that he was tattooed, with the word

'GANGSTA' across his trunk. She recognised him, having seen him in the vicinity of the apartment complex previously.

142. He threatened to burn her with an iron she used to iron a work shirt, should she think of using it against him.

143. As she left, at about 7.00AM, he asked if she would be coming back. He told her he had a gun. She should not report the matters to the police. She agreed to return, fearing he would kill her otherwise.

144. In fact, having left, she immediately then telephoned her fiancé in Jamaica. She told him what had happened. She also told her employers when she arrived at work. They rang the police who asked her to attend the police station, but, afraid to do so, Ms. C flew to Jamaica the next morning, leaving her house keys with her employers.

145. When her employers went to her apartment, they saw that it was uncharacteristically in disarray. There were red stains on the bed sheet and a torn condom wrapper on the floor. They called the police.

146. On 10th November 2011 the Applicant was arrested. He denied responsibility. Photographs were taken of him revealing the word *'GANGSTA'* tattooed across his stomach.

147. DNA analysis of items collected by the police established the presence of the Applicant's semen on a pillow taken from the bedroom. His DNA was also on the condom wrapper and the victim's bra.

148. The Applicant pleaded not guilty. After a trial of some 14 days, he was, as we have said, convicted on all three counts.

149. The maximum sentence for each of the three offences was life imprisonment (sections 244 and 128 of the Penal Code (2010 Revision). Moreover, by section 23, a life sentence may be imposed if a person is convicted after 31st August 2004 of a second Category A offence (defined in section 23(4) as an offence triable on indictment). The Applicant had a previous conviction for rape in 2001 and thus section 23 applied to him. On 23rd September 2013 Quin J passed discretionary life sentences on each count.

150. Appeals against conviction and sentence were subsequently dismissed.

The Conditional Release Hearing

151. On 2nd February 2018 Quin J specified 21 years as the period of imprisonment that the Applicant should serve before becoming eligible to be considered for conditional release on licence. In arriving at that figure, he first assessed the notional determinate sentence at 35 years. He discounted that figure by 40% in order to give effect to section 7 of the 2014 Law (which provides that prisoners sentenced to imprisonment for in excess of one year will be released after serving 60% of their sentence, subject to not having forfeited

remission). Mr. Dixey on behalf of the Applicant agrees the judge was correct in the manner in which he arrived at the minimum term.

152. It was agreed that time served on remand did not arise, time in custody following arrest having previously been taken into account.

153. Mr. Dixey submission is now straightforward. It is that a notional determinate sentence of 35 years was manifestly excessive, even taking into account the sentencing regime in the Cayman Islands in cases of rape.

The sentencing of rape cases in the Cayman Islands

154. The leading authority on sentencing for rape in the Cayman Islands remains the judgment of the Court of Appeal in *R v Dilbert, R v Samuels [2010] 1 CLR 10* (*"Dilbert"*). In that case, the President, giving the judgment of the court, set the starting point for rape after a trial as between 10 and 12 years. In doing so, he acknowledged a starting point higher than that then current in England and Wales, as set out in *R v Millberry and others* [2003] 2 Cr App R(S) 31. The higher starting point in the Cayman Islands reflected Chief Justice Smellie's Statement on Tariffs and Guidelines issued in 2002, because rape in the Cayman Islands "*had become increasingly and alarmingly prevalent.*" That starting point was itself higher than the 10 year starting point set out in guidance issued by Chief Justice Harre in 1998. This court (in paragraph 10 of the judgment in *Dilbert*), however, endorsed those aggravating factors set out in *Milberry* which increased the starting point. They have helpfully been summarised by Mr Radcliffe in the following way:

(i) Rape by two offenders acting together.

(ii) The offender is in a position of responsibility towards the victim (eg doctor, teacher) or trust (eg taxi driver, clergyman, police officer).

(iii) The victim is abducted and held captive.

(iv) Rape of a child or especially vulnerable person (through physical frailty or mental impairment).

(v) Racially aggravated rape or where the victim has been targeted because of membership of a vulnerable minority

(vi) Repeated rape in the course of one attack.

(vii) Rape by a man who is knowingly suffering from a life threatening sexually transmitted disease (whether or not it was actually transmitted).

155. The President also endorsed nine further aggravating factors, which had been proposed by the Sentencing Advisory Panel of England and Wales as being aggravating features (*paragraph 15*). They were:

(i) The use of violence over and above the force necessary to commit the rape.

(ii) The use of a weapon to frighten or injure the victim.

(iii) The offence was planned.

(iv) An especially serious physical or mental effect on the victim; this would include, for example, a rape resulting in pregnancy or in the transmission of a life threatening or serious disease.

(v) Further degradation of the victim, eg by forced oral sex or urination on the victim.

(vi) The offender has broken into or otherwise gained access to the place where the victim is living.

(vii) The presence of children when the offence is committed.

(viii) The covert use of a drug to overcome the victim's resistance and/or obliterate his or her memory of the offence.

(ix) A history of sexual assaults or violence by the offender against the victim.

156. The rationale for a higher sentencing regime in Cayman was spelled out by the President in paragraph 20 of the judgment in *Dilbert* in the following terms:

> "*We find it impossible to avoid the conclusion that the tariff for rape [in the Cayman Islands] was set, deliberately, at a higher level than that which, at the time, was thought appropriate in England and Wales. We find that a matter of no surprise; those responsible for the 1998 Guidelines and the 2002 Statement may be taken to have had proper regard for what circumstances local to these Islands required*"

157. At paragraph 25, the President said that:

> "*...we think it important to make clear that...the fact that an offender has broken into or otherwise gained access to the victim's dwelling is a significant aggravating factor...it is no less significant a factor than other factors which would lead...to the substantial uplift in the appropriate*

starting point. It is a feature which is alarmingly prevalent in rape cases in these Islands. It is particularly serious in a case where the offender has broken into the victim's dwelling at night."

158. Current sentencing guidelines in England & Wales, as set out in the Definitive Guideline for rape, remain unchanged from *Milberry*, to the extent that, for adult offenders sentenced after a trial on or after 1st April 2014, for a single offence of rape with no special or aggravating factors (Category 3B, the lowest degrees of harm and culpability), the starting point is 5 years, with a category range of 4-7 years.

159. In short, as Mr. Radcliffe submits, the position is that for rape offences in the Cayman Islands, sentences are very significantly higher than for their equivalent in England & Wales.

The Conditional Release Judgment

160. Quin J set out at paragraph 85b of his Conditional Release Judgment of 2nd February 2018, 12 aggravating factors he had described when imposing the life sentences on 23rd September 2013. They included:

(i) This was a case of repeated rape in the course of the attack. The victim was raped, first, vaginally and, secondly, anally and vaginally.

(ii) The Applicant broke into her home in darkness at about 3.00AM with the intention of raping her. Such an offence was described, in *Attorney*

General's Ref (Nos.73 and 75 of 2010, No.3 of 2011) [2011] 2 Cr App R(S) 100 in the headnote,

> "*... as representing the ultimate nightmare for a woman asleep alone in her home at night*".

(iii) The offence was planned. The Applicant normally lived in the same apartment complex and the victim recognised him from the locality. It may safely be inferred that he knew she lived alone and therefore targeted his vulnerable victim.

(iv) The Applicant prepared for the assault by arming himself with a knife brought with him for the purpose of committing the offences in Counts 1-3, inclusive (a matter established by his conviction on Count 1).

(v) He used the knife to injure the victim (causing a cut on her neck with it), to facilitate the first rape (by holding the knife against her neck during the act of vaginal intercourse) and to frighten her. Prior to the second rape he held the knife between her anus and vagina, threatening to *'cut it out'* if she did anything *'stupid'*. We would add, he used the knife to cut off her clothing.

(vi) He told her he had a gun, leading the victim to fear he would kill her if she reported the matter.

(vii) The especially serious mental effect on the victim resulting from the Applicant's attack is described in the Victim Impact Report (set out in full at paragraph 86a of Quin J's Conditional Release Judgment of 2nd February 2018).

161. We have no doubt that each of these factors was an exceptionally aggravating circumstance in the context of rape and for the purposes of Regulation 12(2). So too were the Applicant's previous convictions, which we set out below. No extenuating circumstances were found. None are now advanced.

The Applicant's previous convictions

Schedule 12 para 3(1) of the Regulations

162. The Applicant had 29 convictions prior to the present matters, 13 for offences of violence. Within approximately 15 years he had been convicted twice of rape, once of attempted rape, once of abduction and once of indecent assault.

163. On 26th February 2001 the Applicant was sentenced to 10 years' imprisonment for rape. On 25th June 1999, the 16 year old victim was living at an address in East End. At about 3.00AM the Applicant and another man entered her bedroom, woke her and told her that her closest friend had been involved in a road traffic accident, was trapped and they needed her help to free her. She dressed and went with them (in a car later found to have been stolen). The car was parked. The Applicant raped her twice, the other man once before she was driven home. Following his conviction, the Applicant escaped from custody and was subsequently convicted of that offence and an offence of arson, resulting in 12 months being added to his 10 year sentence. He was released from prison on 15th October 2009.

164. On 14th December 2010 the Applicant was convicted of indecent assault. He was sentenced to 18 months' imprisonment. Five months after his release on 28th March 2010, he and another man left a bar in George Town at about midnight with a 16 year old girl. They had been drinking together. They drove to East End. The Applicant refused to allow the girl to get out of the car. The other man was dropped off. The Applicant drove past the victim's house to a public beach. He demanded sex. He held the girl around her neck until she passed out. When she came to, her trousers and underwear were around her ankles. The Applicant was putting his clothes back on. The girl feared she had been raped. The Applicant told her he would kill her if she told anyone what had happened. For that offending, he was convicted of indecent assault. He was released from this (short) sentence on 31st March 2011.

165. On 31st May 2013 the Applicant was convicted of abduction, rape and attempted rape. He was sentenced to concurrent sentences totalling 15 years. The three offences were committed on 29th October 2011, nine days after the present offences for which the life sentences were imposed but dealt with shortly before the instant matters and sentenced separately on 31st May 2013. On 29th October 2011, less than seven months after the Applicant's release from prison, he waylaid the victim. She was standing at a bus stop. The Applicant drove up in a red Honda Civic and threatened her, forcing her to get into the car. He drove to Admiral's Landing where he raped her vaginally and anally. He left the scene, but she was able to record the registration number of his car and, aided by a passer-by, called the police. They attended promptly and recovered a condom the

Applicant had used during the assault. DNA analysis provided a strong match to the Applicant.

The grounds of appeal

166. As we have said, there is now only one issue in this appeal. It is whether the notional determinate sentence of 35 years arrived at by the Quin J was manifestly excessive.

167. By application of the English and Welsh guidelines, as the judge found, and as Mr. Dixey accepts, the aggravating features of this case would have placed it into Category 1 of harm and Category A of culpability, resulting in a starting point of 15 years' imprisonment and a range of 13 to 19 years. Mr. Dixey submits that that suggests a sentence of 35 years was substantially out of line. He submits, as he did below, that the appropriate term would have been 20 years.

168. Mr. Dixey refers to several cases which he submits suggest that 35 years was manifestly excessive. None is a guideline case. Each depends on its own facts. Some are cases from England and Wales. We derive little assistance from them. We shall only refer to one.

169. *R v Dave Whittaker [2010] 1 CLR 29*, was a decision of the Cayman Court of Appeal. Judgment was delivered on the same day (8th December 2009) as was the judgment in *Dilbert*. However, there was no reference to *Dilbert*. That may be because the case had been argued in the earlier session of the Court. In *Whittaker*, having allowed an appeal against a conviction for aggravated burglary, the court reduced the sentence of 25 years'

imprisonment to 20 years. Although there were serious acts of forced oral sex by a man with a serious criminal record (albeit less serious than the Applicant's), there was no conviction for rape.

170. In our judgment, given both the absence of consideration in *Whittaker* of *Dilbert* and the factual differences between that case and the present (carefully set out by Quin J), *Whittaker* provides no guidance as to the appropriate determinate sentence here.

171. As we have said, we equally derive no assistance from the series of English cases referred to by Mr. Dixey. They reflect the sentencing regime for rape in England and Wales. What, it seems to us, needs to be grasped, is the consequence of the significant uplift of the starting point in the Cayman Islands, an uplift, as Mr Radcliffe points out, of between 70% and 150%.

172. It is clear that simply applying an uplift of those sort of percentages to the English and Welsh guidance, suggests a notional determinate sentence of 35 years in the Cayman Islands was not manifestly excessive. While Mr. Dixey agrees, he submits that is to misunderstand the effect of the Appeal Court's decision in *Dilbert*. The court was doing no more, he submits, than letting it be known that every rape in Cayman will result in a prison sentence of at least 10 years. It was a sort of warning to the public. It was not the intention to increase sentences proportionately, so as to result in what he described as the "*absurdly high*" sort of sentence as the present. If the Court of Appeal had had that intention, it would have said so.

173. However, as Mr. Radcliffe rightly points out, there is nothing in *Dilbert* to suggest that the 'Cayman uplift' was intended to be restricted to the starting point. That is illustrated by what the President said in paragraph 25, in which is contemplated an uplift in cases attracting 8 years in England and Wales, to 15 years. In short, submits Mr Radcliffe, Quin J did no more than apply the principles set out in *Dilbert.*

174. In our judgment, it is clear both by what was said in *Dilbert* and as a result of general principle, the Cayman uplift cannot be limited simply to the starting point. The court did not say that. It suggested the contrary. Moreover, limiting the uplift to the starting point would mean that more serious cases are not proportionately sentenced. That cannot have been the Court of Appeal's intention. There has, as it seems to us, to be a substantial uplift from the equivalent sentence in England and Wales, throughout the range of rape sentences.

175. That having been said, we do not think it can be a question of a simple percentage increase in each case. The court in Cayman, in cases of rape with aggravating factors, will obviously seek to keep the resulting sentence within bounds, so as not to result in unrealistically high and disproportionate sentences. That may mean that the degree of uplift in the most serious cases, while significant, will be proportionally lower.

176. We return to the present case.

177. It is, as it seems to us, of the utmost seriousness. We have set out the aggravating factors of the actual rapes in some detail. We shall not repeat them. They are exceptional in nature. Added to them must be the Applicant's previous convictions. He has in short been convicted of two previous rapes, an attempted rape, an abduction, and an indecent assault, the facts of which were very serious. These convictions seriously aggravate the present offences and are bound, significantly, to aggravate any notional determinate sentence.

178. Quin J did not set out in detail how he arrived at the notional determinate sentence he did. We suspect he may have taken as the notional determinate sentence in England and Wales, by application of the Sentencing Guideline, some 18-19 years, and increased it to reflect the Cayman uplift. If that was the approach, we would not criticise it on the facts of this case. It has resulted, as it seems to us, in a notional determinate sentence, which, in this particularly serious case, reflects both the circumstances of the offences and the Applicant's previous convictions.

179. We have concluded that the notional determinate sentence was not manifestly excessive. It follows that neither was the period of the minimum term. This application for leave to appeal is refused.

180. Finally, we would add this. We are conscious that our comments in paragraph 176 above provide limited assistance to judges facing a sentencing exercise in one of these cases. It

does seem to us that the sooner there are sentencing guidelines for the Cayman Islands in this area, the better.

GOLDRING, P

MORRISON, JA

BEATSON, JA