

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE

3
4 INDICTMENT NO: 0008/2017

5
6 REGINA

7
8 v.

9
10 WILLIAM IAN RIVERS



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13 **Appearances:**

Mrs. Candia James-Malcolm for the Crown

14
15 Mr. Crister Brady and Mr. John Furniss for
16 Defendant

17 **Before:**

Justice Frank Williams (Actg.)

18 **Heard:**

1st March 2019

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22 **HEADNOTE**

23 *Criminal Law – Murder – Conditional Release Law – Exceptional Circumstances*
24 *argued – Aggravating and Mitigating circumstances*
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28 **SENTENCE JUDGMENT**
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1 4. The court has had the benefit of full written submissions – mainly in relation to the
2 murder conviction – and also a Victim Impact Report (VIR) and a Social Inquiry Report
3 (SIR). The written submissions were also supplemented by oral submissions made via
4 zoom on the 1st March 2019.

5 **THE OFFENDER**

6 5. The Defendant was born on the 1st February, 1979, making him 38 years old at the time
7 of the offence and just a little over 40 years at this, his time of sentencing.

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9 6. He is the father of four children with his common law spouse and one other, some 9
10 years of age.

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12 7. He has had a history of run-ins with the law, mostly for drug-related offences. He,
13 however, has a conviction recorded in 1998 for causing grievous bodily harm. For this
14 he was given a two-year sentence, suspended for two years.

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16 8. His SIR speaks to an unfortunate upbringing involving drug and alcohol use and
17 prolonged periods of unemployment.

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19 9. At his trial, he relied on a defence of diminished responsibility, mainly on the basis of
20 his alleged schizophrenia. However, that defence was rejected by the jury, which, as a
21 result, also rejected the possibility of accepting a verdict of manslaughter; returning
22 instead, a verdict of guilty of murder.

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1 **SENTENCING IN RESPECT OF THE LESSER OFFENCES**

2 10. In regard to the lesser offences of Possession of an Unlicensed Firearm and Unlawful
3 Use of a Firearm, there is not much controversy between the Crown and defence – the
4 focus of the submissions of the defence being, not unnaturally, on trying to reduce the
5 length of the period the Defendant is to serve for the offence of murder before becoming
6 eligible for conditional release.

7

8 11. Before looking at each offence and its appropriate sentence, it may be useful to remind
9 oneself of the classical objectives of sentencing.

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11 **THE OBJECTIVES OF SENTENCING**

12 12. These were usefully set out in the case of *R v James Henry Sargeant*². In that case,
13 Lawton LJ, writing on behalf of the English Court of Appeal discussed the principles
14 thus, beginning at page 77:

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“What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.”

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25 13. In discussing the principle of *retribution*, the learned Lord Justice opined as follows:

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² (1974) 60 Cr. App. R. 74

1 *"I will start with retribution. The Old Testament concept of an eye for an*
2 *eye and tooth for tooth no longer plays any part in our criminal law. There*
3 *is, however, another aspect of retribution which is frequently overlooked: it*
4 *is that society, through the courts, must show its abhorrence of particular*
5 *types of crime, and the only way in which the courts can show this is by the*
6 *sentences they pass. The courts do not have to reflect public opinion. On the*
7 *other hand courts must not disregard it. Perhaps the main duty of the court*
8 *is to lead public opinion. Anyone who surveys the criminal scene at the*
9 *present time must be alive to the appalling problem of violence. Society, we*
10 *are satisfied, expects the courts to deal with violence. The weapons which*
11 *the courts have at their disposal for doing so are few. We are satisfied that*
12 *in most cases fines are not sufficient punishment for senseless violence. The*
13 *time has come, in the opinion of this Court, when those who indulge in the*
14 *kind of violence with which we are concerned in this case must expect*
15 *custodial sentences."*

16
17 14. Of the principle of deterrence, he said this:

18 *"I turn now to the element of deterrence, because it seems*
19 *to us the trial judge probably passed this sentence as a*
20 *deterrent one. There are two aspects of deterrence:*
21 *deterrence of the offender and deterrence of likely*
22 *offenders. Experience has shown over the years that*
23 *deterrence of the offender is not a very useful approach,*
24 *because those who have their wits about them usually find*
25 *the closing of prison gates an experience which they do not*
26 *want again. If they do not learn that lesson, there is likely*
27 *to be a high degree of recidivism anyway. So far as*
28 *deterrence of others is concerned, it is the experience of the*
29 *courts that deterrent sentences are of little value in respect*
30 *of offences which are committed on the spur of the moment,*
31 *either in hot blood or in drink or both. Deterrent sentences*
32 *may very well be of considerable value where crime is*
33 *premeditated. Burglars, robbers and users of firearms and*
34 *weapons may very well be put off by deterrent sentences."*



35 15. Of the principles of prevention and rehabilitation, he delivered himself thus:

36 *"We come now to the element of prevention. Unfortunately*
37 *it is one of the facts of life that there are some offenders for*
38 *whom neither deterrence nor rehabilitation works. They*
39 *will go on committing crimes as long as they are able to do*
40 *so. In those cases the only protection which the public has*
41 *is that such persons should be locked up for a long period.*
42 *This case does not call for a preventive sentence.*
43 *Finally, there is the principle of rehabilitation. Some*
44 *20 to 25 years ago there was a view abroad, held by*
45 *many people in executive authority that short*

1 *sentences were of little value, because there was not*
2 *enough time to give in prison the benefit of training.*
3 *That view is no longer held as firmly as it was. This*
4 *young man does not want prison training. It is not*
5 *going to do him any good. It is his memory of the*
6 *clanging of prison gates which is likely to keep him*
7 *from crime in the future.*

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9 16. It is apposite as well, in considering the objectives of sentencing, to have regard to the
10 *Chief Justice’s Sentencing Guidelines of 16 January 2002*³, now replaced by the 2015
11 guidelines. At pages 8-9 of the 2002 guidelines Smellie CJ gave the following guidance:

12 *“The exercise of sentencing is never an easy one. There*
13 *inevitably exists a tension between the public interest in*
14 *detering the offender and others who might offend and the*
15 *important objective of tailoring the sentence to ensure that*
16 *the offender is given a proper opportunity for*
17 *rehabilitation.*

18 *The primary aims of sentencing are rehabilitation,*
19 *deterrence, incapacitation and restitution, but not*
20 *necessarily in that order.*

21 *The Court is always faced with a dilemma whether to*
22 *impose upon any defendant a sentence in the name of*
23 *general deterrence, to reflect the offender’s culpability or*
24 *to seek to influence his future behaviour by subjecting him*
25 *to an appropriate measure of supervision, treatment or*
26 *preventive confinement. Sometimes a combination of these*
27 *objectives must find expression in the same sentence. Often,*
28 *this is not possible. A primarily deterrent approach is not*
29 *likely to assist the offender towards conformity with the law*
30 *in the future and may positively damage such future*
31 *prospects as already exist. Measures designed to assist the*
32 *offender to regulate his behaviour may appear to diminish*
33 *the gravity of the offence and weaken the deterrent effect of*
34 *the law on potential offenders. Faced with this conflict the*
35 *Court must always decide which objective should prevail in*
36 *the particular case depending on the particular*
37 *circumstances. With this in mind the Court must always*
38 *consider carefully those factors which will push a sentence*



³ *Statement on Tariffs and Guidelines for Sentencing for Certain Offences (2002)*

1 *either above or below the specified tariff – We refer of*
2 *course to mitigating or aggravating circumstances.”*

3
4 17. The statement of these principles received fairly-recent affirmation in the *Cayman*
5 *Islands Sentencing Guidelines of October 2015*, in which, on the first page of the main
6 body of those guidelines, the following is said:

7 “1. *Aims of Sentencing*

8 *In sentencing an offender, the Court has to balance a*
9 *number of competing interests and objectives, tailoring the*
10 *punishment to the individual circumstances of the offender*
11 *whilst ensuring that the punishment is commensurate with*
12 *the seriousness of the offence.*

13 *A number of aims govern the sentencing process and it will*
14 *be rare for them all to be met; the task of the Court is to*
15 *consider which of these aims will be best served by the*
16 *sentence to be passed on an individual offender.*

17 *The following are the principal aims of sentencing:*

18 *(a) Incapacitation*

19 *(b) Deterrence*

20 *(c) Punishment*

21 *(d) Rehabilitation,*

22 *(e) Restitution.”*



23
24 18. The court is also required to bear in mind the principle of *proportionality*, also stated at
25 page 13 of the *2015 Sentencing Guidelines* as follows:

26 “4. *The Principle of Proportionality*

27 4.1 *The Principle*

28 *The principle of proportionality provides that the severity*
29 *of the punishment inflicted should be proportional to the*
30 *gravity of the offence, that is, that ‘the punishment should*
31 *fit the crime’. The Court should ensure that the sentence*
32 *passed is commensurate with the seriousness of the offence,*
33 *so, less serious crimes should attract a lower sentence and*
34 *serious crimes a stronger sentence.”*

35
36 19. The need for there to be *parity* of sentences is yet another important consideration that
37 the sentencing guidelines of 2015 also discusses as follows:

1 **POSSESSION OF FIREARM**

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3 22. Pursuant to s.15(5) of the *Firearms Law* (2008 Revision), the maximum sentence for
4 this offence is 20 years' imprisonment. A minimum of seven years is to be imposed upon
5 a guilty plea, as is indicated in s.39(2) of that law, which reads as follows:

6
7 *“unless the relevant court is of the opinion that there are exceptional*
8 *circumstances relating to the offence or to the offender which justify its not*
9 *doing so; and such exceptional circumstances shall be stated by the relevant*
10 *court.”*

11
12
13 23. The Crown has, by citing *R v Tony Avis*⁴, left it open to this court to say whether there
14 are aggravating circumstances calling for a higher sentence than the minimum sentence,
15 or one near the minimum.

16
17 24. I have a concern, however, that in taking some of the considerations into account, one
18 might run the risk of double counting, considering that in the *Avis* case, the offences
19 concerned were not accompanied by convictions for the offence of murder. In the matter
20 concerning *Avis* himself, for example, he was convicted of possessing a firearm with
21 intent to cause fear of violence contrary to S.16A of the *Firearms Act 1968*.

22
23 25. In the *Avis* case, the court (per the Lord Chief Justice (Lord Bingham of Cornhill) gave
24 the following guidance:

25 *“The appropriate level of sentence for a firearms offence, as for any*
26 *other offence, will depend on all the facts and circumstances*
27 *relevant to the offence and the offender, and it would be wrong for*
28 *this court to seek to prescribe unduly restrictive sentencing*
29 *guidelines. It will, however, usually be appropriate for the*
30 *sentencing court to ask itself a series of questions:*



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- (1) *What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.*
- (2) *What (if any) use has been made of the firearm? It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm: the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.*
- (3) *With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.*
- (4) *What is the defendant's record? The seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence.”*



- 26. In this case, some of the considerations that the *Avis* case recommends, might well possibly also fall to be considered when the sentence for the offence of murder is to be determined.
- 27. Of course, any double counting would not be fair to the convict. And the court bears this firmly in mind.

1 28. In the result, and having given very careful consideration to the submissions of counsel,
2 I find a sentence of eight years' imprisonment for this offence to be sufficient and fair
3 in all the circumstances.

4

5 **UNLAWFUL USE OF FIREARM**

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7 29. In relation to the offence of unlawful use of firearm, we must refer to the statement of
8 Sarah Lee Hellen Bush, who was the complainant. Her statement was received into
9 evidence pursuant to s.28(b) of the *Evidence Law* (2018 Revision), she having died
10 before the trial.

11

12 30. She stated that she saw Mr Rivers, the Defendant, shoot the deceased and as he was
13 going to the exit to make his escape he said to her: "*if you say anything*" whilst pointing
14 the gun in her face, which she took to mean that if she said anything to anyone about the
15 shooting he would have killed her.

16

17 31. Pursuant to the s.208 of the *Firearms Law*, the maximum sentence for this offence is
18 five years' imprisonment. Discounting the maximum sentence on account of the guilty
19 plea and trying to strike a balance in respect of the objectives of sentencing of deterrence,
20 prevention, rehabilitation and retribution, an appropriate sentence, it seems to me, would
21 be three years' imprisonment. That is the sentence being imposed.

22

23 **THE SENTENCE FOR THE OFFENCE OF MURDER**

24 32. It was on this conviction and the sentence for this offence that most of the submissions
25 were focused. However, there was common ground between both sides as to the
26 requirements of the law.



1 **THE REQUIREMENTS OF THE LAW (MURDER)**

- 2 33. The defence and prosecution are *ad idem* that the relevant pieces of legislation are:
- 3 i. Section 182 of the *Penal Code*, which prescribes life imprisonment for the offence
- 4 of murder;
- 5 ii. Section 14(1) and (2) of the *Conditional Release Law*, which came into effect on
- 6 15th February 2016 and prescribes a minimum normal starting point of 30 years’
- 7 imprisonment for a convict to serve before being released conditionally; and
- 8 iii. Schedule 12 of the *Conditional Release Regulations*.

9

10 These are sufficiently important to a consideration of this matter, as to warrant being set

11 out in full:

12

13 34. **Section 182 of the *Penal Code***

14

15 “182. *Any person convicted of murder shall be sentenced to imprisonment for*

16 *life.*”

17

18

19 35. **Section 14(1) and (2) of the *Conditional Release Law***

20 “14. (1) *Notwithstanding any other Law to the contrary,*

21 *when sentencing a prisoner to a term of*

22 *imprisonment for life, the court shall specify the*

23 *period of incarceration the prisoner shall serve*

24 *before the prisoner is eligible to be considered for*

25 *conditional release on licence, the period being*

26 *such as the court considers appropriate to satisfy*

27 *requirements of retribution, deterrence and*

28 *rehabilitation, but for murder, the period shall be*

29 *thirty years before the prisoner is eligible for*

30 *conditional release unless there are -*

31 (a) *extenuating circumstances, exceptional in nature,*

32 *in which case the court may impose a lower period*

33 *of incarceration; or*



- 1 (b) *aggravating circumstances, exceptional in nature,*
2 *in which case the court may impose a longer period*
3 *of incarceration.*
4 (2) *In making a decision under subsection (1)(a) or*
5 *(b), the court shall state the extenuating*
6 *circumstances or the aggravating circumstances,*
7 *as the case may be.”*
8

9 36. In the circumstances it is necessary to set out the first two paragraphs of Schedule 12 of
10 the *Regulations* (the Schedule) in full as follows:

11 **“Introduction**

- 12 1. (1) *Where a mandatory life sentence for murder is prescribed by any*
13 *Law, for the purposes of section 14 of the Law the aggravating*
14 *and extenuating circumstances are outlined in this schedule.*
15 (2) *For offences other than murder, for the purposes of section 14 of*
16 *the Law, the aggravating and extenuating circumstances may*
17 *include all the relevant circumstances of the offence and or the*
18 *offender.*
19 (3) *For murder, the period shall be thirty years before the prisoner is*
20 *eligible for conditional release unless there are extenuating or*
21 *aggravating circumstances, exceptional in nature, in which case*
22 *the court may impose a shorter or longer period of incarceration*
23 *respectively;*

24 **Aggravating circumstances and extenuating circumstances**

- 25 2. (1) *Detailed consideration of aggravating or mitigating circumstances*
26 *may result in a minimum term of any length.*
27 (2) *Aggravating circumstances that may be relevant to the offence of*
28 *murder include –*
29 (a) *a significant degree of planning or premeditation;*
30 (b) *the fact that the victim was particularly vulnerable because*
31 *of age or disability;*
32 (c) *mental or physical suffering inflicted on the victim before*
33 *death,*
34 (d) *the abuse of a position of trust;*
35 (e) *the use of duress or threats against another person to*
36 *facilitate the commission of the offence;*
37 (f) *the fact that the victim was providing a public service or*
38 *performing a public duty;*
39 (g) *concealment, destruction or dismemberment of the body;*
40 (h) *previous convictions;*
41 (i) *abduction and sexual or sadistic conduct; and*
42 (j) *any other circumstances which may be considered relevant.*
43 (3) *Extenuating circumstances that may be relevant to the offence of*
44 *murder include –*



- 1 (a) an intention to cause serious bodily harm rather than to
2 kill;
3 (b) lack of premeditation;
4 (c) the fact that the offender suffered from any mental disorder
5 or mental disability which (although not falling within
6 section 185(1) of the Penal Code (2013 Revision)), lowered
7 the offender's degree of culpability;
8 (d) the fact that the offender was provoked (for example, by
9 prolonged stress);
10 (e) the fact that the offender acted to any extent in self-defence
11 or in fear of violence;
12 (f) a belief by the offender that the murder was an act of mercy;
13 (g) the age of the offender; and
14 (h) any other circumstances which may be considered
15 relevant."

16
17 **Previous convictions**

- 18
19 3. (1) In considering the seriousness of an offence committed by
20 an offender who has one or more previous convictions, the
21 court must treat each previous conviction as an
22 aggravating circumstance if (in the case of that
23 conviction) the court considers that it can reasonably be
24 so treated having regard, in particular, to -
25 (a) the nature of the offence to which the conviction
26 relates and its relevance to the current offence; and
27 (b) the time that has elapsed since the conviction.
28 (2) Any reference in this schedule to a previous conviction is
29 to be read as a reference to a previous conviction by a court
30 in the Cayman Islands.
31 (3) ..."



32
33
34 **REGULATION 14**

- 35
36 37. The above guidelines were made pursuant to Regulation 14 of the sentencing guidelines,
37 which reads as follows:

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

1 **SUMMARY OF SUBMISSIONS**

2 **FOR THE CROWN**

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4 38. On behalf of the Crown it was submitted in summary, that no extenuating circumstances
5 exist to have this court choose a starting point that is lower than the prescribed 30 years.

6

7 39. On the other hand, it was submitted on behalf of the Crown that there were several factors
8 that the court could take into account as being aggravating: for example:

9

10 i. his previous conviction for the offence of inflicting grievous bodily harm in 2008,
11 pursuant to Regulation 3 of Schedule 12 of the Conditional Release Law
12 Regulations;

13 ii. the threat to Sarah Bush and

14 iii. the attempts to shoot Joshua Pars and Ashley Foster.

15

16 40. It was submitted as well on behalf of the Crown that it would be difficult to envisage a
17 situation in which the 30 year minimum recommendation was not adhered to where, as
18 in this case, the offender carried a firearm to be used as an offensive weapon (citing *R v*
19 *Jones*⁵).

20

21 41. In relating to any possible extenuating circumstance, the Crown tried to persuade the
22 court to the point of view that there is none that would lower his degree of culpability –
23 certainly not the fact that the convict suffers from an antisocial personality disorder, it
24 was submitted.

25



⁵ [2006] 2 Crim App Rep (S) 19 at para 26)

1 42. It was accepted by the Crown that the convict should receive credit for the time he has
2 spent in custody on remand before and after his trial and that this should be factored into
3 the time to be stipulated that he spend in prison before becoming eligible for conditional
4 release.

5
6 43. The court was also referred by the Crown to a number of decided cases in relation to the
7 Conditional Release Law and otherwise, among them:

- 8
9 i. *R v Tamara Olita Butler*⁶ ; and
10 ii. *R v Tareek Ricardo Ricketts*⁷.

11
12 **SUMMARY OF SUBMISSIONS FOR THE DEFENCE**

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14 44. On behalf of Mr. Rivers, heavy reliance was placed on the Conditional Release Hearing
15 in the matter of *R v John Talmage Goulbourne*⁸ in which Quin J decided that the period
16 to be served before being granted conditional release was to be 23 years.

17
18 45. Much emphasis was placed on that case on the Applicant's mental state at the time of
19 the killing, although it did not rise to the level of a mental disability diminishing his
20 responsibility within the meaning of s.185(1) of the Penal Code.

21 46. It was submitted that there were a number of extenuating circumstances in the
22 *Goulbourne* case and that these bear some similarity to the circumstances of the instant
23 case: for example, the mental state of the applicant in the *Goulbourne* case; his mature

⁶ Indictment no 102/14 (Henderson J)

⁷ Indictment no. 114/12 (Henderson J)

⁸ indictment no. 53/2004



1 age (he was 55 at the time of the offence); the absence of relevant convictions; and the
2 absence of any significant aggravating features.

3
4 47. The court should also be guided, it was further submitted, by the consideration adopted
5 by the judge in that case of passing a sentence that would allow the convict to see “*light*
6 *at the end of the tunnel*”.

7
8 **DISCUSSION**

9 48. In considering what period will be just and fair in the circumstances of this case, I have
10 taken into account all the authorities cited to the court, even those I have not specifically
11 mentioned in this judgment. I recognize that when trying to determine whether
12 aggravating circumstances exist, the standard of proof is the same as that used by the
13 jury to reach their verdict. As Henderson J observed at paragraph 10 of *R v Tareek*

14 ***Ricardo Ricketts***:

15 *“When deciding whether one or more aggravating circumstances are present, the*
16 *standard of proof is the same as that applied by the jury in reaching their verdict.*
17 *Before a circumstance is viewed as aggravating, the Court must be sure of its*
18 *existence; the evidence must establish that beyond a reasonable doubt. That is the*
19 *effect of a decision of the UK Court of Appeal in R v Davies [2008] EWCA Crim*
20 *1055 (in relation to the fixing of a minimum term) and of the decision of Quin J in*
21 *R v Ramoon & Douglas (Indictment 53/2015 (unreported) December 19, 2016). The*
22 *rule is a salutary one, providing significant protection to a defendant.”*

23
24
25 49. I also accept the guidance of Henderson J at paragraph 17 of that judgment when he
26 states that any departure from the norm of 30 years must be exceptional.

27
28 50. Henderson J’s dictum at paragraph 21 of the judgment also commends itself to me. It
29 reads as follows:

1 *“Assessment of whether the circumstances taken as a whole, are exceptional is the*
2 *first part of the analysis. If they are not, the 30-year minimum term must be imposed.*
3 *If they are exceptional, the second stage requires an assessment of whether, in light*
4 *of the exceptional circumstances that have been found to exist, imposition of the 30-*
5 *year minimum term would be arbitrary and disproportionate.”*
6

7 51. In approaching the difficult task of sentencing in this case, there is another helpful
8 authority, from which I draw guidance, though it is not from this jurisdiction. It is
9 *Meisha Clement v R*⁹. In that case coming from the Jamaican Court of Appeal, Morrison
10 P (who, incidentally also sits on the Court of Appeal for the Cayman Islands) outlined
11 what approach should be followed by sentencing judges. He offered the following
12 guidance at paragraph [41] of the judgment:

13 *“As far as we are aware, there is no decision of this court explicitly*
14 *prescribing the order in which the various considerations identified*
15 *in the foregoing paragraphs of this judgment should be addressed*
16 *by sentencing judges. However, it seems to us that the following*
17 *sequence of decisions to be taken in each case, which we have*
18 *adapted from the SGC’s definitive guidelines 42 , derives clear*
19 *support from the authorities to which we have referred:*

- 20 i. *identify the appropriate starting*
- 21 *point;*
- 22 ii. *consider any relevant aggravating*
- 23 *features;*
- 24 iii. *consider any relevant mitigating*
- 25 *features (including personal*
- 26 *mitigation);*
- 27 iv. *consider, where appropriate, any*
- 28 *reduction for a guilty plea; and*
- 29 v. *decide on the appropriate*
- 30 *sentence (giving reasons)”*



31
32 52. A similar approach is also recommended in the Cayman Islands Sentencing Guidelines,
33 at page 46 onwards
34
35

⁹ [2016] JMCA Crim 26

1 **EXCEPTIONAL CIRCUMSTANCES**

2
3 53. In the case of *Yacoub v Pilkington (Aust) Ltd*¹⁰, a decision of the New South Wales
4 Court of Appeal, the court (*per Campbell JA at paragraph [66]*) gave the following
5 summary of factors that might be considered in determining whether “*exceptional*
6 *circumstances*” exist:

7 *“In San v Rumble (No 2) (2007) NSWCA 259 at [59]–[69], I gave*
8 *consideration to the expression “exceptional circumstances” in a*
9 *different statutory context to the present. Without repeating that*
10 *discussion in full, I shall state such of the conclusions as seem to me*
11 *applicable in the construction of r 31.18(4).*

12 (i) *Exceptional circumstances are out of the ordinary course or*
13 *unusual, or special, or uncommon. They need not be unique, or*
14 *unprecedented, or very rare, but they cannot be circumstances that*
15 *are regularly, routinely or normally encountered: R v Kelly*
16 *(Edward) [2000] 1 QB 198 (at 208).*

17 (b) *Exceptional circumstances can exist not only by reference to*
18 *quantitative matters concerning relative frequency of occurrence,*
19 *but also by reference to qualitative factors: R v Buckland [2000] 1*
20 *WLR 1262; [2000] 1 All ER 907 (at 1268; 912–913).*

21 (c) *Exceptional circumstances can include a single exceptional*
22 *matter, a combination of exceptional factors, or a combination of*
23 *ordinary factors which, although individually of no particular*
24 *significance, when taken together are seen as exceptional: Ho v*
25 *Professional Services Review Committee No 295 [2007] FCA 388*
26 *(at [26]).*

27 (d) *In deciding whether circumstances are exceptional within the*
28 *meaning of a particular statutory provision, one must keep in mind*
29 *the rationale of that particular statutory provision: R v Buckland*
30 *(at 1268; 912–913).*

31 (e) *Beyond these general guidelines, whether exceptional*
32 *circumstances exist depends upon a careful consideration of the*
33 *facts of the individual case: Awa v Independent News Auckland*
34 *[1996] 2 NZLR 184 (at 186).”*

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¹⁰ [2007] NSWCA 290



1 APPLICATION OF THE PRINCIPLES

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54. Having considered all the evidence and submissions, I find that nothing emerges from the circumstances of this case that amounts to being exceptional from a mitigating standpoint, for me to go below the 30-year minimum.

55. I have considered the facts and circumstances of the case of *R v John Talmage Goulbourne* and it seems to me that that case features important differences from the instant case. For example, at the time of the killing, *Goulbourne* was 55 years of age. He had, at that age, no previous convictions of any sort. In fact he had what the court referred to as an “exemplary record”. The court considered, based on a letter that had been written by that applicant, a man who had already spent over 13 years in prison, serving his sentence that he was “genuinely remorseful”. He was, without doubt, a man of previously-good character.

56. The Defendant in this case displays features that in some instances are quite the opposite. With some 26 previous convictions – even if they are not to be taken into account as individual aggravating circumstances - he could not truthfully be said to be a person of previously-good character. He was also some 17 years younger than *Goulbourne* at the time of the commission of the offence.

57. In *Goulbourne’s* case *Quin J.*, was concerned that that applicant, had the 30-year minimum been maintained, would not have been released until age 86. With the reduction to 23 years, it was thought fair for him to be released at age 80. In this case, if the 30-year minimum should be applied without further adjustments to the sentence, this Defendant, in contrast, would be released at age 70.



1 58. Also, on the question of remorse, page 12 of the SIR discloses that the prisoner is
2 apparently clinging to an account of the incident that has him acting in self-defence and
3 perhaps from diminished responsibility, which account runs counter to the evidence of
4 the witnesses at the trial.

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6 **AGGRAVATING CIRCUMSTANCES**

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8 59. It must be noted that this was a gun murder committed in broad daylight, in the presence
9 and view of several persons, who could be seen on the CCTV footage fleeing the scene
10 in the immediate aftermath of the shooting. The deceased was shot and killed whilst
11 trying to flee with his life. There are two or so of the sentencing guidelines that bring
12 themselves forcefully to my attention. They are as follows:

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

14

and

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

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60. In relation to the consideration of mental or physical suffering, it is apparent from the
22 evidence that the victim tried to flee whilst being shot. When he fell, Mr Seymour is said
23 to have asked the convict why he was shooting him.

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61. One witness said that when the Defendant, Mr. Rivers, went over Mr Seymour to give
26 him the final and fatal shot, he said this is what we “*does dogs*”, or words to that effect.

27

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62. Another witness said what she heard the Defendant, Mr Rivers say was: “*I making sure
29 you dead.*” In his last few moments he would no doubt have been aware that the intention
30 was to kill him and that he was about to die.

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1 63. That is the important consideration on this issue. The threat to Ms Bush could also be
2 (and is) considered under paragraph 59(e).

3
4 64. The Defendant's previous conviction I would also take into account; but would attach
5 relatively nominal weight to it, in light of the passage of time since the commission of
6 that offence.

7
8 65. The SIR also shows that the Defendant is someone whose overall risk of offending is
9 "very high". There is also a lack of what was described as: "victim empathy." This would
10 call for some emphasis to be placed on the preventive and deterrent objectives of
11 sentencing.

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13 66. Consideration has to be given as well to the effect of the killing on the victim's daughter
14 (who ran to the scene and tried to resuscitate her already-dead father) and on the son, on
15 whom the killing has brought about an apparent change in personality – for the worse.

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17 67. The case of *R v Ramoon and Douglas*¹¹, cited by the Crown, is also one that warrants
18 some discussion as having some similarity to (as well as, admittedly, differences from)
19 the instant case. In that case, the Defendants were sentenced as follows:



- 20
21 i. Douglas: 34 years' imprisonment, and
22 ii. Ramoon: 35 years. An additional year was added on account of his previous
23 conviction for a firearm offence.

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25 68. The sentencing judgment of Quin J., discloses a number of factors considered as
26 aggravating, which, among others, led the learned judge to increase the sentence from

¹¹ Ind. 53/15

1 the minimum of 30 years to the 34 and 35 years ultimately imposed. Among the
2 considerations (see page 16-17 of the judgment) were the fact that:

- 3 i. The victim was shot in the head at point-blank range, killing him instantly;
4 ii. The pre-possession of the illegal firearm used in the killing;
5 iii. The victim was just standing there drinking a beer when he was killed, there being
6 no evidence of provocation by him;
7 iv. After killing the victim, Ramoon tried to shoot the victim's friend who had witnessed
8 the murder, but was thwarted in his attempt to do so as the gun failed to fire.

9
10 69. This is how Quin J categorized the murder in the case of *R v Ramoon and Douglas*:

11 "47. *It was in fact a very public execution of the most evil nature and it could be*
12 *accurately described as chillingly clinical in its planning and execution.*

13
14 48. *To adopt Lord Bingham's words in R v Kelly, it is a public execution which*
15 *is far from "regular", far from "routine" and far from "normal".*
16 *Accordingly, in my view, these are aggravating circumstances exceptional*
17 *in nature."*

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20 70. It will be seen that there are quite a few similarities between the way the killing in the
21 instant case was carried out and the killing in the case of *R v Ramoon and Douglas*.

22
23 71. One witness (Mr William Ashley Ebanks) testified to seeing the Defendant, Mr Rivers,
24 on the morning of the shooting, repeatedly looking in the direction of the place where
25 the victim was eventually shot. Additionally, the shooting was carried out shortly after
26 the victim's arrival. There is evidence, other than Mary Helen Bush, of Mr Rivers
27 shooting at or using the gun to intimidate others after the shooting.



1 MITIGATING CIRCUMSTANCES

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72. I am not persuaded that mitigating circumstances exist in this case.

73. The medical evidence, as I recall it, especially from Dr Myers and Dr Grant (whose expert evidence the jury apparently accepted in returning the verdict of murder) does not support the finding of a mental disability that would amount to an extenuating circumstance, even if not available to the Defendant as a defence under s.185(1) of the Penal Code.

74. Dr Myers attributed the root cause of the shooting to the Defendant’s ruminating about the alleged affair between his common law spouse and the victim. The evidence also speaks to the Defendant having an anti-social personality disorder, which, on the evidence, can be found in about 98% of the prison population. Dr Myers stated that if the defendant was going crazy (as he, the defendant claimed) it was “*crazy with jealousy*”. Dr Myers also testified that from his examination of the Defendant: “*What he was doing and acting out did not fit with any mental illness that I know of.*”

75. Dr Myers further testified, when he was asked specifically whether having an anti-social personality disorder would impair the defendant’s mental responsibility at the time of the shooting and he said: “*No. It doesn’t rob you of your connection to reality or your judgment – your understanding of what’s right or what’s wrong.*”





1 76. Equally importantly, Dr Myers also gave evidence that the Defendant, Mr Rivers, was
2 not suffering from a disability of mind. He was not suffering from a major mental illness
3 such that his mental responsibility for his actions would have been substantially impaired
4 – because the only mental condition he was able to see in the Defendant was an anti-
5 social personality disorder; not psychotic illness.

6
7 77. Dr Myers also said that in an interview with the Defendant, Mr Rivers, on the 23rd July
8 2018, the Defendant stated that he did not regret what had happened.

9
10 78. Based on all these considerations, I find myself unable to accept the argument advanced
11 by the defence that mitigating circumstances of an exceptional nature - especially
12 relating to his mental state) reducing his culpability – exist in the circumstances of this
13 case.

14
15 79. To the contrary, I find the circumstances of the shooting to amount to aggravating
16 circumstances of an exceptional nature. Similar to the finding of Quin J., in the case of
17 *R v Ramoon and Douglas*, I find the circumstances of this case to amount more or less
18 to a public execution in broad daylight, ignited by a jealous rage, and with the Defendant
19 thereafter unleashing a reign of terror on a relatively-peaceful community in a relatively-
20 peaceful country.

21
22 80. The sentence to be imposed will be one that reflects some consideration of the
23 rehabilitation of the offender but at the same time will deter him from reoffending, deter
24 like-minded persons from offending, promote the maintenance of a peaceful and
25 relatively-safe society and promote respect for law and order.

1 81. In the result, it is fair and just to conclude that the circumstances of this case require an
2 increase of the starting point of 30 years, to 35 years. In arriving at this figure, the court
3 is doing the best it can to arrive at a sentence that is fair and just in all the circumstances
4 and, it is hoped, it will not be regarded as an “application” of the case of *R v Ramoon*
5 *and Douglas* or any of the other cases cited in this matter. The cases cited were referred
6 to and considered just as general guides – the Court recognizing that no two cases are
7 ever the same.

8

9 **TIME SPENT IN CUSTODY PENDING TRIAL AND AFTER HIS CONVICTION**

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11 82. In *Romeo DaCosta Hall v The Queen*¹² the following observation was made:

12 *“...The judge should state with emphasis and clarity what he or she*
13 *considers to be the appropriate sentence taking into account the gravity*
14 *of the offence and all mitigating and aggravating factors, that being the*
15 *sentence he would have passed but for the time spent by the prisoner on*
16 *remand. The primary rule is that the judge should grant substantially*
17 *full credit for time spent on remand in terms of years or months and*
18 *must state his or her reasons for not granting a full deduction or no*
19 *deduction at all.” (Emphasis added)*

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21 83. Similarly, in *Meisha Clement v R*, at paragraph [34], Morrison P observed as follows:

22 *“[34] ...[I]n relation to time spent in custody before trial, we would*
23 *add that it is now accepted that an offender should generally receive*
24 *full credit, and not some lesser discretionary discount, for time*
25 *spent in custody pending trial. As the Privy Council stated in*
26 ***Callachand & Anor v The State** 29, an appeal from the Court of*
27 *Appeal of Mauritius –*

28 *“... any time spent in custody prior to sentencing should be taken*
29 *fully into account, not simply by means of a form of words but by*
30 *means of an arithmetical deduction when assessing the length of the*
31 *sentence that is to be served from the date of sentencing.”*



¹² [2011] CCJ 6 (AJ),

1 84. Full credit will therefore be given for the time that the Defendant has spent in custody
2 up to now.

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4 85. The Defendant was taken into custody the date of the incident – that is the 28th day of
5 January 2017. He would therefore have been in custody up to today’s date a total of 791
6 days or approximately 2 years and two months and a day. That period is to be deducted
7 from the period to be served before eligibility for conditional release.

8
9 86. In accordance with the law, the sentence of the court is life imprisonment. The court
10 stipulates that the prisoner is to serve a period of 35 years’ imprisonment before
11 becoming entitled to conditional release. Effectively, therefore, as of today’s date, he
12 will serve a period of approximately 33 years’ imprisonment.

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14 87. The sentences are to run concurrently.

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17 **Dated this the 29th March 2019**



18
19 *Frank Williams*
20 **Justice Frank Williams (Actg.)**
21 **Acting Judge of the Grand Court**

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