IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CRIMINAL JURISDICTION

Indictment No. 5577 BERBICE

STATE

V

RAYAN ALI c/d KARRAN

(MURDER)

Ms. D. McCammon for the State.
Mr. Doraisami for the offender.

Dec 18, 2014; Jan 9, Feb 3, 11, 2015.

SENTENCING DECISION

Sentencing of person convicted of murder who was under the age of 18 yrs old at the time of the commission of the offence

GEORGE, R., J: Article 138 of the Constitution of Guyana provides for 'Protection of right to life' with art 138 (1A) specifically stating as follows:

> "No person who was under the age of eighteen years at the time when he or she committed an offence, for which that person has pleaded or was found guilty, shall be subject to capital punishment for the commission of that offence."

The Convention on the Rights of the Child, which has been incorporated into our Constitution by virtue of art 154A, provides similarly in art 37 that: "(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age; … ."

Facts of this case

Rayan Ali c/d Karran (the offender) was convicted of murder by a jury at the October 2012 Session of the Berbice Assizes. At his sentencing on November 15, 2012, it was revealed that he was 15 yrs 3 mths at the time of the commission of the offence and was then 16 yrs old at the time of sentencing. The facts of the case are that sometime between 8 – 10 am on July 10, 2011 the offender jumped from behind some bush on a dam at No. 54 Village, Corentyne and lashed the deceased, Premchand Sugrim c/d Copper on his head with an iron bar causing his head to burst. The deceased fell to the ground bleeding. He was subsequently taken to hospital. He died some 10 days later. A post mortem was performed on the body of the deceased and he was found to have a fractured skull. The cause of death was given as cerebral haemorrhage with necrosis as a result of blunt cranial trauma which means that there was bleeding on the brain, with the cells of the brain dying which was caused by the deceased being hit on the head. There was another diagnosis of portal cirrhosis or cirrhosis of the liver which was a very old ailment due to the deceased most likely being alcoholic and fibinous pleuritis, which was an infection of the lungs.

These conditions, based on the pathologist's evidence, were not the cause of death. There was conflicting evidence from witnesses for the prosecution as to whether (1) the deceased had a cutlass and (2) whether he had attacked the offender with it.

On July 10, 2011, the offender was taken into the police by his mother at the No. 51 Police Station, Corentyne where he was told that it was alleged that on the said July 10, 2011 he lashed Sugrim c/d Copper on the head with an iron pipe causing him to receive injuries. The accused was also shown an iron bar and he said that that was the bar he used to hit the deceased. In a written statement under caution and in his statement from the dock the offender admitted lashing the deceased with an iron pipe, but claimed that the deceased was trying to hit him and chop him with a cutlass and as a result he hit him. The offender was therefore saying that he acted in self defence when he hit or lashed the deceased to his head. The jury clearly did not believe this. The offender appealed his conviction.

At his sentencing, being aware of authorities which hold that the sentencing of a minor convicted of murder to be detained at the President's pleasure is considered to be a breach of the doctrine of separation of powers, and given the facts of the case, I sentenced the offender to imprisonment at the Court's pleasure with a review to be done every two years on or about the anniversary of the sentencing date, with the first review fixed to be conducted on or about November 15, 2014, in relation to whether the offender should be released or not. It was also ordered that the prison authorities should ensure that he was brought up for review. Having re-read the Parole Act, Cap. 11:08 which states that a sentence of imprisonment does not include detention under the proviso to s 163 of the Criminal Law (Procedure) Act, Cap. 10:01 and the authorities, which I will go through shortly, I should have used the word 'detention' instead of 'imprisonment' when pronouncing the sentence. (See Lord Hope of Craighead in R v Secretary of State for the Home Department, ex parte Venables and R v Same, ex parte Thompson [1998] AC 407 (CA) and 467 (HL (E).) In effect, the initial minimum period of detention for this offender was fixed at two years.

Pursuant to my order, at the behest of the prison authorities and I gather on advice from the Chambers of the DPP, the review in this case came up for consideration on November 18, 2014 before Bovell-Drakes J who ordered a probation report but who, having been apprised of the case of Scantlebury v R (2005) 68 WIR 88 (CA, B'dos), on the direction of the Chief Justice (ag), referred the matter to me as the original trial judge. At the first call of the matter in Demerara, Ms. Kowlessar, State Counsel in the Chambers of the Director of Public Prosecutions submitted that since the matter had been dealt with at the Berbice Assizes, I had no jurisdiction to conduct the review in Demerara. My short answer to this is that the jurisdiction of the High Court is national and that the issue raised was of no moment, moreso in the context of what I considered to be a more fundamental issue, which counsel were not prepared to address at the time, which was whether I could conduct a review of the sentence in circumstances where the offender had an appeal pending against his conviction for murder.

My preliminary view was that such an appeal would have precluded me from considering a review of his sentence as he had invoked the jurisdiction of an appellate court. The matter was adjourned for counsel on both sides to address me on this issue. However, on the next hearing date, Mr. Doraisami, for the offender, indicated that the appeal had been withdrawn and produced a notice of withdrawal which had been filed with the Court of Appeal. Thus, there was no need to address this issue further and evidence was taken from the representatives of the Guyana Prison Service and the Probation Department.

Reports on the offender

I received reports from Supt Crandon of the Guyana Prison Service and Ms. Gopal, Senior Probation Officer, as to the conduct and disposition of the offender as well as his antecedents. Supt. Crandon testified that the offender is currently housed in the young offenders division of

the New Amsterdam Prison which has an age limit of 18 years old. She further stated that despite having aged out because he is now over 18 years old, the offender has been kept in this youth section of the prison at New Amsterdam primarily because of the age at which he entered the institution. his continued good conduct and the reluctance to have him exposed to the adult inmates in the adult section of the prison. This aspect of the report suggests that the prison authorities do not see a risk in him remaining among younger detainees despite his age. The offender participates in numeracy, literacy, craft, electrical installation and anger management classes in the prison and is cooperative. Supt Crandon's report stated that from all indications the offender has shown remorse for his action and that he had stated that if given a chance to return to society he would be a better person. At a subsequent hearing, Supt Crandon indicated that it would be possible to keep him in this section until age 20 yrs and then he would have to be transferred to the adult section.

Ms. Gopal confirmed the evidence that was led at the trial that the offender and the deceased were known to each other. The offender often stayed at the home of the deceased. She said that he was remorseful but was still contending that he acted in self defence. This is a bit of a contradiction, however, it could be that in his estimation the adult deceased had taken advantage of him as a teenager, a position he advanced at the trial but which the jury clearly did not accept by its verdict. A follow up report was requested from Ms. Gopal to further ascertain the situation of the offender in the prison including whether and for how long he could remain in the youth section. Ms. Gopal reported that there are a total of ten young offenders in the section ranging in age from 14 yrs to 18 yrs with five having been charged with murder. This youth offenders division measures fifteen feet by fifteen feet and is intended to house six persons. The offender was given the opportunity to participate in the numeracy and literacy classes which have a total of forty-one convicted inmates participating. The report noted that the tutor has stated that the offender exhibits good conduct and is attentive, calm and cooperative in class. The social worker attached to the prison reported to her that this offender is very polite and always follows instructions. As regards the community where he lived, there are mixed feelings about his return with many considering that the circumstances of his situation are unfortunate and that he should be pardoned because of his youth. Some persons expressed the view that he should be punished for the crime committed. Ms. Gopal expressed some concern for his continued incarceration which may expose him to criminal behaviour of others which could have a negative impact on his current good conduct and disposition. The report by Supt Crandon which reveals that he is still housed in the youth division strongly indicates that the prison authorities are equally concerned about this offender's welfare in this regard.

On the specific issue of the next step in relation to this offender, Ms. McCammon, who now appears for the Chambers of the DPP, submitted that s 163 of the Criminal Law (Procedure) Act, Chapter 10:01 provides that a juvenile offender, such as in this case, should be sentenced to detention at the President's pleasure and that there being no amendment of our legislation, this statute should be applied. The proviso to s 163 which deals with 'Sentence of death' reads as follows:

> "Provided that sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years; but in lieu thereof the Court shall sentence him to be detained during the President's pleasure; and if so sentenced he shall be liable to be detained in such place and under such conditions as the Minister may direct, and whilst so detained shall be deemed to be in lawful custody."

However, I am of the view that a reference to 'detention at the President's pleasure' is 'water under the bridge' so to speak. We have passed that stage in that I had ordered detention of this offender at the Court's pleasure, though not detailing the constitutional foundation for so doing. Mr. Doraisami made no submissions on this issue. While this is not a case where submissions on the constitutionality of detention at the President's pleasure have been advanced, bearing in mind

the authorities and the submissions of Ms. McCammon, I will outline the background to this issue.

Although not conceding, as was done in the authorities to which reference will be made shortly, that detention at the President's pleasure violates the general constitutional principle of the separation of powers, and although not referring specifically to any of the said authorities, Ms. McCammon nevertheless also submitted that the Court can modify s 163, or apply s 5 of the Parole Act, Chapter 11:08, which states that the Minister, on the recommendation of the Parole Board, may release a person under sentence on licence where such sentence is not a sentence for life and that a minimum period of three years detention should be applied pursuant to s 6(6). However, a perusal of Chapter 11:08 reveals that Ms. McCammon must have meant to refer to s 6 and not s 5, though the provisions of s 5(2)(3)(4) and (5) which provide for inclusion, variation and cancelling of conditions of a licence are also applicable pursuant to s 6 (3). Section 6 deals with "Release on licence of persons serving sentence of imprisonment for life, etc." Section 6 (1) as is relevant to this case provides as follows:

> "6 (1) The Minister may, if recommended to do so by the Board on a reference made to it by him, release on licence a person serving a sentence of –
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> ...
>
> (b) detention under the proviso to section 163 of the Criminal Law (Procedure) Act;
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> ...
>
> Provided that no such person shall be released on a licence under this section before he has served the specified period of the sentence.
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> (2) The Minister shall, before the case of a person serving any of the sentences mentioned in subsection (1) is referred to the Board, consult –
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> (i) the Chancellor;
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> (ii) the judge by whom the sentence was imposed on such person, if the judge is then holding any public office;
>
> (iii) the Director of Public Prosecutions.
>
> ...
>
> (5) Where a person serving a sentence referred to in subsection (1)(b) ... is released on a licence under this section, the licence shall, unless it is previously revoked under section 7 or 10, remain in force until the date specified in the licence, such date being –
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> (a) in the case of a sentence referred to in subsection (1) (b), a date specified by the President.
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> ...
>
> (6) In this section 'specified period' means three years or such longer period as the Minister may prescribe by regulations."

Ms. McCammon's submission was unclear as regards the application of s 6 to this case which provides for the Minister to release the prisoners on licence; moreso in light of the new dispensation regarding detention of young offenders at the court's pleasure. But there is another issue that has to be addressed in relation to the applicability of s 6. In an unfortunately worded provision, s 100A (3) of the Criminal Law (Offences) Act Cap. 8:01 as amended by Act No. 21 of 2010 states that s 6 (1) – (4) of the Parole Act has been 'substituted' as regards the eligibility of persons convicted of murder for parole, thereby stipulating a minimum period of imprisonment before such eligibility. Act No. 21 of 2010 also amended the provisions of the Cap. 8:01 to provide for a differentiation between what can be called capital murder as provided for in s100 (1) and non-capital murder as provided for in s 100 (2) with the circumstances that allow for this differentiation being outlined. A conviction for capital murder could attract the death penalty or imprisonment for life with a minimum period to be served fixed at 20 years before the person could be eligible for parole. In the case of a conviction for non-capital murder, a person would be liable to be sentenced to imprisonment for life or a term of years. Where a person is sentenced to a term of imprisonment not being life imprisonment, such term shall not

be less than 15 years with such person having to serve at least 10 years of the sentence before being eligible for parole.

This offender's case falls within the category of non-capital murder, though he was indicted not contrary to the Criminal Law (Offences) Act as amended by Act 21 of 2010 but contrary to common law. Given that this offender cannot be sentenced to a term of imprisonment, then it would seem that s 6 as substituted would not apply to him and therefore the issue of his release on licence as provided for in s 6 (1) (b) as originally formulated would still apply. It does appear in any event that the provisions of the substituted s 6 are meant to guide the Minister and Parole Board as to the period that should be spent in prison before a consideration of release on licence could be entertained, though the use of the word 'substitution' tends to suggest that the original s 6 (1) to (4) has been replaced. I will return to this issue of release on licence and the impact that a sentence to detention at the court's pleasure would have on the considerations regarding the grant of a licence pursuant to Cap. 11:08.

New thinking in relation to reviews of detention at the President's pleasure

The genesis of the shift in thinking in relation to the sentencing of juveniles for the offence of murder came about in R v Secretary of State for the Home Department, ex parte Venables and R v Same, ex parte Thompson [1998] AC 407 (CA) and 467 (HL (E)) where it was established that juveniles sentenced to detention at Her Majesty's pleasure must come up for regular review of their detention and that such reviews should be conducted during any period that is fixed by the Secretary of State as a tariff or minimum period of detention that should be served before release. The concept of the tariff was introduced in 1983 when the Home Secretary in England outlined it in Parliament as a policy to be adopted. (See p 415 per Lord Woolf, MR, CA; p 484 per Lord Goff of Chieveley & pp 492 – 493 per Lord Browne-Wilkinson, HL.) In this case, the applicants successfully approached the court to quash the decision of the Secretary of State for the Home Department on a number of grounds including that they should serve a minimum of 15 years in custody to satisfy the requirements of retribution and deterrence in respect of the offence of murder of which they had been convicted and that their first review of sentence should not come up for consideration until 12 years had been served. This was a case in which the applicants, on their conviction for the murder of a two year old child when they were both 10 yrs old in November 1993, were sentenced to be detained at Her Majesty's pleasure pursuant to the relevant statutory provisions which are not dissimilar to the proviso to s 163.

Both in the Court of Appeal and in the House of Lords, there was recounted the history of the provision that led to persons who were under 18 yrs old who were convicted of murder being detained at Her Majesty's pleasure. A provision similar to the proviso to s 163 was enacted in England and Wales in Part V of the Children Act, 1908 and was subsequently re-enacted as s 53(1) of the Children and Young Persons Act 1933. The provisions, originally applied to the detention of insane persons, were meant to provide for a different policy in dealing with such child and young offenders as against the way adult offenders were treated taking into consideration that the responsibility for the commission of a crime "was diminished though not entirely extinguished." (per Baroness Hale in R (on the application of Smith) v Secretary of State for the Home Department [2006] 1 All ER 407, at 418.) The new provisions were meant to capture the newer thinking that the welfare of children and young persons should be considered in the sentencing process while also meeting an objective of punishment and deterrence. They also provided for an indeterminate period of detention thereby also allowing for the review of the progress and development of the juveniles while in detention. As noted by Lord Woolf MR in the Court of Appeal decision in ex parte Venables (at 437): "Approximately 90 years ago an enlightened Parliament recognized that a flexible sentence of detention is what is required in these cases with a very wide discretion so that the most appropriate decision as to release could be taken in the public interest." And as Lord Steyn (holding with the majority in the House of Lords) stated, at p 523 and 524, a sentence to detention at Her Majesty's pleasure, being a more merciful punishment was therefore not to be equated with a sentence of life imprisonment. Lord

Browne-Wilkinson, also giving judgment along with the majority on the appeal to the House of Lords, in referring to the construction of s 53(1) and the Convention on the Rights of the Child, also outlined the thinking as regards child or young offenders who have been convicted of murder (at pp 498 - 500):

> "... the section states in terms that the child shall not be sentenced to imprisonment for life and provides that detention during Her Majesty's pleasure is to be 'in lieu of' such imprisonment. The words of the section itself make it clear that detention during Her Majesty's pleasure is wholly indeterminate in duration: it lasts so long as Her Majesty (i.e. the Secretary of State) considers appropriate. Therefore in relation to a person sentenced to be detained during Her Majesty's pleasure the Secretary of State is not dealing with a sentence of the same kind as the mandatory life sentence imposed on an adult murderer, the duration of which is determined by the sentence of the court and is for life.
> ... In particular, in the case of child offenders the courts have to have regard not only to retribution, deterrence and prevention of risk but also to the welfare of the child offender himself. ... In the face of clear statutory provision it seems to me inescapable that, in adopting a sentence of detention at Her Majesty's pleasure, the legislature have in mind a flexible approach to child murderers which, whilst requiring regard to be had to punishment, deterrence and risk, adds an additional factor which has to be taken into account, the welfare of the child.
> This conclusion is reinforced by the fact that the United Kingdom (together with 186 other countries) is a party to the United Nations Convention on the Rights of the Child (Treaty Series No. 44 of 1992) (Cm. 1976) ...
> The Convention has not been incorporated into English law. But it is legitimate in considering the nature of detention during Her Majesty's pleasure (as to which their Lordships are not in agreement) to assume that Parliament has not maintained on the statute book a power capable of being exercised in a manner inconsistent with the treaty obligations of the country."

Lord Hope of Craighead also had this to say by way of further explanation of this discretionary regime of detention of persons who were convicted of murder having committed the offence when they were under 18 yrs old (at p 531 - 532):

> "There is here an express prohibition against the imposition on him of a sentence of life imprisonment. And it is not just the word 'imprisonment' which is plainly inappropriate in the case of a child or young person, that has been removed by this direction. The word 'life' also has been removed. The sentence which is to be imposed instead is that of 'detention' which is not to be for life but 'during Her Majesty's pleasure.' Moreover that direction is related specifically to the age of the person at the time of the offence, not at the time of sentence. It does not matter how old the person is at the time when he is convicted of the crime and is being sentenced for his offence. Even if he is over 21, and thus liable to be imprisoned as an adult prisoner, his sentence must be one of detention during Her Majesty's pleasure if he was under 18 years when he committed the murder.
>
> In my opinion the effect of section 1 (5) of the Act of 1965 is that the sentence of detention during Her Majesty's pleasure is a separate and distinct sentence from that of life imprisonment. It recognizes the special characteristics of the young offender, and especially of the child offender. There is built into the sentence a measure of leniency in view of the age of the offender at the time of the offence. The measure of leniency is that, in his case, in the working-out of the sentence punishment and welfare, present and future, are both equally relevant. He is to be detained without limit of time, but expressly on terms which do not deprive him of his liberty for the rest of his days. ... This means that the child's progress and development while in custody, as well as the requirements of

punishment, must be kept under review throughout the sentence. A policy which ignores at any stage the child's development and progress while in custody as a factor relevant to his eventual release date is an unlawful policy. The practice of fixing the penal element as applied to adult mandatory life prisoners, which has no regard to the development and progress of the prisoner during this period cannot be reconciled with the requirement to keep the protection and welfare of the child under review throughout the period while he is in custody."

These sentiments - that the age of the offender at the time of sentencing was not to be taken into consideration - were also endorsed by Lord Bingham of Cornhill in R (on the application of Smith) v Secretary of State for the Home Department [2006] 1 All ER 407 at 415 – 416. In this case, the argument that being 27 yrs old, the respondent's right to continuing review was spent was rejected. His Lordship said:

> "The requirement to impose a sentence of HMP detention is based not on the age of the offender when sentenced but on the age of the offender when the murder was committed, and it reflects the humane principle that an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were. As he grows into maturity a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation. It would in many cases subvert the object of this unique sentence if the duty of continuing review were held to terminate when the child or young person comes legally of age."

(See also the judgment of Lord Bingham in DPP of Jamaica v Mollison [2003] AC 411 (PC) at pp 419 and 428.)

In addition, in Seepersaud v The State [2012] 3 WLR 579 at p 586 (PC, TT), Lord Hope of Craighead DPSC, who delivered the judgment of the Board, stated that "the continuing review must extend to the duration of the detention as well as to the place where and the conditions under which the detainee is kept, even if the minimum term for the detention has been fixed by the judiciary." While, on a review, it is possible for an offender to be released during the minimum period of detention, i.e. the minimum term can be shortened, I would tend to think that there would have to be special or exceptional circumstances for this to be permitted.

Constitutionality of detention at the President's pleasure

The main issue in ex parte Venables turned on whether there should be a review of the sentences to detention. The issue whether it should be the executive or the judiciary which should impose the sentence was not canvassed though Lord Steyn did refer to it en passant at p 526 when he said: "The comparison between the position of the Home Secretary, when he fixes a tariff representing the punitive element of the sentence, and the position of a sentencing judge is correct. In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of separation of powers, a classic judicial function ... . " (Emphasis mine.) However, in the context of territories with a written Constitution based on the separation of powers, such as that in Guyana, it has been successfully argued that the sentencing process is a judicial function and should not be left to the determination of the executive, a position that was discussed in Smith (supra) consequent on the decision of the European Court of Human Rights in V v UK (1999) 30 EHRR 121that the fixing of a minimum term to be served by a child was a sentencing exercise that was part of the trial proceedings and had to be carried out by an independent and impartial tribunal which the Secretary of State as a member of the executive was not. As such in Browne v R (1999) 54 WIR 213 (PC, St Ch & N), after reviewing a number of constitutional cases on separation of powers, most notably Hinds v R [1977] AC 195, it was held that statutory provisions that permitted detention of a juvenile at the pleasure of the Governor-General, should be modified to read detention at the Court's pleasure. This case was applied in DPP of Jamaica v Mollison [2003] AC 411 (PC), Griffith & Ors v The Queen (2004) 65 WIR 50; [2005] 2 AC 235

(PC, B'dos), Scantlebury (supra), Attin (Chuck) v The State (2005) 67 WIR 277 (CA, TT), and as recently as 2012 in Seepersaud v The State [2012] 3 WLR 579 (PC, TT).
In Seepersaud, having established that the provision for detention at the State's pleasure, which in Guyana is stated as the President's pleasure, must be modified to read at the Court's pleasure, Lord Hope went on to hold (at p 592-593) that the continual review process during an indeterminate sentence was a common law principle which, as part of the existing law regarding such sentencing, was saved by the Constitution. As such, the absence of such reviews in the case of the appellants breached their constitutional rights to "(a) ... of the individual to life, liberty, security of the person and ... the right not to be deprived thereof except by due process of law; (b) the right of the individual to ... the protection of the law" pursuant to Sch, s 4, of the Constitution of Trinidad & Tobago and violated the provision that "Parliament may not - ... (h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms" as provided for in s 5 (2) of the said Constitution. This finding was made in light of the submission that as existing law, the provision permitting detention at the State's pleasure was saved by the constitutional savings clause as applicable to the fundamental rights provisions regarding the right not to be deprived of liberty except by due process of law and the right to protection of the law. In this case, the appellants ended up spending 20 years in custody after conviction, though they were released before the completion of what was eventually their successful challenge to their sentences of detention at the State's pleasure with the case being remitted to the High Court for the consideration of the award of damages for the breach of their constitutional rights.

Since sentencing is a part of the trial process, applying the authorities cited, upholding the principle of the separation of powers, art 139 which provides for protection of personal liberty and art 144 which provides for trial by an independent and impartial tribunal, the proviso to s 163 of the Criminal Law (Procedure) Act, Chapter 10:01 has to be read as having been modified to state that a person who has been convicted of an offence that is punishable by death which was committed when s/he was under the age of 18 years shall be detained at the Court's pleasure. In this respect, the review process is an integral part of the sentence. Hence my initial decision to sentence this offender to detention at the court's pleasure. Concomitantly, with the modification of the detention provision for juvenile murder offenders would be the necessity to address the application of s 6 (1) (b) of the Parole Act as outlined earlier. Applying Mollison and Seepersaud, subsection (1) (b) would also have to be interpreted as referring to persons detained at the court's pleasure. Therefore, s 6 (1) (b) would have to be modified so that it would be the court that would decide whether or not to grant a release on licence. In addition, other relevant provisions of the Parole Act as regards the grant, variation and revocation of a release on licence would have to be modified accordingly so as to provide for the court to deal with such issues in the context of an offender who has been detained at the court's pleasure. As such, a release, whenever authorized by the Court on a review, whether prior to the end of the minimum period or after this period would have ended, would be a release whether conditional or unconditional pursuant to the Parole Act. And from ex parte Venables it is noted that this licence could remain in force for the rest of the natural life of the offender (See Lord Steyn at p 523 and Lord Hope of Craighead at p 534 - 535), however s 6 (5) (a) provides for the licence to remain in force until a date specified by the President which would now have to be modified to read to a date specified by the court. Ideally there should be legislative amendment or reform so as to bring this proviso and other applicable legislation into conformity with the Constitution.

Procedural directions/guidelines
In Scantlebury, having held, as noted above, applying Hinds v R, Browne, Mollison and Griffith, that the provision for the sentencing of a person under 18 yrs to detention at Her Majesty's pleasure which was enacted after independence was unconstitutional as being in violation of the constitutional right to a fair hearing by an independent and impartial court and repugnant to the constitutional principle of the separation of powers, and having modified the language of the Juvenile Offenders Act, Cap. 138 to read 'detention at the Court's pleasure', the Court of Appeal

of Barbados issued the following directions of which I detail only those that are relevant to the sentencing of persons under the age of 18 yrs (p 121):

> "1. Where a person, under the age of eighteen at the date of the offence, has been subsequently convicted of murder, he/she shall be sentenced to detention 'during the court's pleasure'.
>
> 2. At the time of the imposition of such a sentence, the trial judge must state in open court what he/she considers to be the appropriate minimum sentence (the tariff) to be served. In making a determination of the minimum sentence the court must take into account:
>
> (a) the penal objectives of retribution and general deterrence;
>
> (b) the seriousness of the offence and the principle of proportionality in accordance with the criteria stated in ss 35 and 36 of the Penal System Reform Act;
>
> (c) the principle of individualized sentencing;
>
> (d) any aggravating or mitigating factors; and
>
> (e) any other relevant matter.
>
> 3. The trial judge must state in open court his/her reasons for making the order.
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> 4. Aggravating factors relevant to a charge of murder include –
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> (a) planning and premeditation;
>
> (b) taking advantage of an elderly or disabled victim;
>
> (c) causing suffering or torture to a victim before death;
>
> (d) killing a person providing a public or security duty;
>
> (e) treatment of the deceased after death.
>
> 5. Mitigating factors relevant to a charge of murder include –
>
> (a) an intention only to do serious bodily harm;
>
> (b) spontaneous action rather than premeditation;
>
> (c) mental disability;
>
> (d) provocation or some evidence of self-defence even though it was rejected by the jury;
>
> (e) the age of the offender.
>
> 6. Sentences to be served 'during the court's pleasure' must be reviewed by a judge of the High Court (preferably the original sentencing judge, if available) at four-yearly intervals. If the sentencing judge is not available, the sentence should be reviewed by the Chief Justice.
>
> 7. For the purposes of a review of sentence, the court must be provided with:
>
> (i) a full report on the offender from the Superintendent of Prisons addressing the conduct of the offender during detention; his/her responses to the punishment and any counseling and /or rehabilitative programmes sponsored by the prison authorities; his/her attitude to the crime, for example, genuine sorrow or remorse; any recommendations by the Superintendent for the guidance of the court;
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> (ii) a report from the Chaplain of the Prisons detailing the offender's response to any moral and/or religious teaching;
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> (iii) an up-to-date medical report from a medical practitioner assigned to the prison;
>
> (iv) such other information derived from the record of the case or otherwise as the court may require.
>
> ..."

(The directions regarding mentally ill persons and persons pleading diminished responsibility are not relevant.)

In Attin the Court of Appeal of Trinidad and Tobago held as unconstitutional s 79 of the Children's Act, Cap 46:01 that a person under the age of 18 yrs who is convicted of murder should be held "during the State's pleasure". This is a similar provision to the proviso to our s 163. Attin, the appellant, was 16 yrs old at the time he committed the brutal murders of two women and was charged and indicted with an adult. In 2003 he filed proceedings challenging the constitutionality of ss 79 and 81, the latter being similar to s 6 of our Parole Act which speaks to release on licence at the direction of the Minister. As a consequence of the decision that the sentence be at the court's pleasure, the matter came up for hearing before another judge sitting in the criminal jurisdiction and it was ordered that the appellant be detained for 25 yrs after which he should be brought back for review. It was also ordered that this minimum or tariff period should be calculated from the date of conviction. He appealed this sentence contending in

summary as recounted in the judgment of Sharma CJ (at p 285) that the sentencing judge "ought to have ordered that the sentence be reviewed at periods prior to its expiration. Further, that the trial judge had not carried out a proper sentencing hearing, in that he had not taken into consideration the objectives of welfare of the offender and his possible re-integration into society. There was also objection to the admission of the report of ... a consultant psychiatrist." The Court of Appeal found that the sentencing judge had comprehensive probation, psychiatric and prison reports before him in relation to the conduct and attitude of the appellant which showed that he had "chosen not to avail himself of programmes operating in the prison system geared towards improving his education, religiosity and life skills. He participated in football and basketball in some small measure. He believed that he had 'paid his debt to society', but was never remorseful. Overall, all the professional officers who had interacted with him during his incarceration reported negatively about his progress." Chief Justice Sharma found that in the circumstances of the case, the process of sentencing pursuant to the court's pleasure amounted to a sentencing and review process, with the assessment of the minimum term being a part of the review process. Chief Justice Sharma did not consider it material that both sentencing and review were being carried out simultaneously. (See p 285.) While noting that the Court had to consider the appellant's rehabilitation, the heinous nature of the crime was such that factors of punishment and deterrence had to be taken into account. As such, the minimum term of 25 yrs was not found to be excessive given the facts of the case, where after 8 yrs of incarceration, there had been little or no change in the appellant's character. The reliance on the psychiatric report was considered to be useful in assisting the court although it was hearsay, with Sharma CJ highlighting, applying R v Marquis (1951) 35 Cr App Rep 33 at 35, that "it is generally accepted that in a sentencing exercise the rules of evidence in relation to character evidence are relaxed." As such it was noted that in this regard, other professional reports can be considered for the purpose of reviewing sentences. The Court concluded that the appellant's reintegration into society was not an option at that time.

It was also determined that in relation to persons who had not been dealt with according to this new dispensation that the following would apply (at p 289) –

> "(i) those who were ordered to be held at the 'State's pleasure' (now 'court's pleasure'); they ought to be brought before the court for their minimum sentences to be fixed;
> (ii) those who were ordered to be held 'subject to the court's pleasure' must have their 'minimum sentences' fixed by the court;
> (iv) young persons who are convicted and awaiting sentence; and
> (v) where minimum sentences have been fixed, then the provisions for review will apply to the young offenders.
> We therefore direct that the prison authorities take appropriate action in relation to all other young offenders whose sentences must now be fixed or reviewed."

The Court in Attin, following in principle the directions given in Scantlebury, gave similar directions, though not outlining any aggravating or mitigating factors, and stating that the review by a High Court judge must be at "3-yearly intervals, or at shorter intervals if exceptional circumstances arise." The Court added the following:

> "An oral hearing will not normally be required unless the Chief Justice thinks that this is necessary. The decision ought, however, to be announced in open court.
> ...
> All relevant reports are to be transmitted to the Registrar of the Supreme Court for the purpose of review every three years; the registrar must forward the reports to the Chief Justice who will fix the matter for review before a judge, or delegate the task of fixing the matter for review to another judge."

Disposal of this case

It is in these circumstances that I have to decide what next for this offender – whether his detention should continue or whether he should be released, and if so whether or not on conditional licence. With such a short minimum sentence in the first instance with the fixture of the initial review date, the necessity for a review during this period did not arise or at the least was not an absolute necessity. This sentence was ordered in the circumstances of this case taking into account the totality of the evidence that was presented at the trial. While noting his age at the time of the commission of the offence and the factors of his welfare and rehabilitation, I must be mindful that the offender has been convicted of a very serious offence and that there must be an element of punishment and deterrence in determining the terms of his detention. It is noted that the fact circumstances are not as heinous as those recounted in Attin, Scantlebury or Mollison. The offender has been in custody for 3 ½ years to date with his pre-trial detention of just over a year being included and taken into account applying DaCosta Hall v R, CCJ [2011] CCJ 6 (AJ). With the withdrawal of his appeal, I consider the total time spent in custody as being this offender's detention at the court's pleasure. Mr. Doraisami has advanced that I should be lenient and that he should be given a chance and released at this time given his youth so that he could make a positive contribution to society. Ms. McCammon for the State made no submissions on this issue, except that, as noted earlier, she submitted that before a release is considered that pursuant to s 6 (6) a specified period of 3 years detention must have been served. In this case, as I have just stated, the offender has been in custody for a total of 3 ½ years which I find satisfies the requirements of s 6 (6).

As recounted earlier, the reports of the Superintendent of Prisons and the Probation Officer are very favourable to this offender. Given his overall good disposition as indicated in the reports, as well as the position taken by the prison authorities to keep him in the youth offenders division of the prison although he has aged out by over a year and the concern expressed for his continued welfare if he is transferred to the adult section of the prison, the following is my decision regarding the future of this offender –

- Supt Crandon having indicated that the offender can be kept in the youth offenders division at least until age 20 yrs, in order to emphasise the aspect of punishment and deterrence, the offender, pursuant to the sentence to detention at the court's pleasure, is to remain in detention and is to be kept in the young offenders division at the New Amsterdam Prison until his 20th birthday, i.e. he is to remain in detention in this division until October 14, 2015. At this date the offender would have spent just over 4 years in custody.
- Thereafter, pursuant to s 6 of the Parole Act, Cap. 11:08 as consequentially modified, the offender is to be released on the said October 14, 2015 on signing a conditional licence with the following conditions:
    - i) He shall report without delay and not later than 72 hours after release to the officer in charge of the Vreed-en-Hoop Office of the Probation and Welfare Office of the Ministry of Labour, Human Services and Social Security.
    - ii) He shall place himself under the supervision of whichever probation officer is assigned for the purpose of supervising him from time to time.
    - iii) He shall keep in contact with his probation officer in accordance with the officer's instructions.
    - iv) He shall, if the probation officer so requires, receive visits from the officer where he is living.
    - v) On release, he shall reside with his mother, Shamdai Ali, at 78 Stewartville, West Coast Demerara, and if he is to reside elsewhere, such residence is to be approved by the probation officer, and he shall inform the probation officer at once if there is any change of address.
    - vi) His place of work is to be approved by the probation officer and he shall inform the probation officer at once if there is a change of job.

vii) He shall be of good behaviour and shall lead a productive life.

viii) He shall not travel outside of Guyana without the prior permission of the probation officer.

ix) He shall not own, possess, carry or have control of any weapon unless the probation officer has specifically given permission.

x) He shall not be in possession of any prohibited drug or substance.

- The conditions of the licence may be varied or cancelled or additional conditions may be added by a Judge of the Court.
- Where any waiver, amendment or modification of any condition is required, such waiver, amendment or modification shall be obtained in writing from a Judge of the Court.
- A Judge of the Court may revoke the licence at any time.
- If the offender is convicted of any offence punishable by imprisonment his licence may be revoked by a Judge of the Court.
- Where the licence is revoked, including pursuant to ss 7 and 10 of the Parole Act, Cap. 11:08 as consequentially modified, the offender would be required to be brought before a Judge of the Court to be heard and dealt with accordingly which in the circumstances of this case may again result in a sentence to detention at the court's pleasure.
- The offender shall comply with these terms and conditions of this conditional licence which is to remain in force until December 31, 2020.

Before concluding this sentencing decision, I think it is apposite to summarise the matters that I have extrapolated from the cases more particularly from the directions that have been given by the Appellate Courts of sister CARICOM jurisdictions as well as from my understanding of the practice in Guyana regarding sentencing generally. Some of these matters have been applied or utilized in arriving at my decision in this case.

1. Where a person, under the age of eighteen at the date of the offence, has been subsequently convicted of murder, he/she shall be sentenced to detention 'during the court's pleasure'.
2. At the time of the imposition of such a sentence, the trial judge must state in open court what he/she considers to be the appropriate minimum sentence to be served. In making a determination of the minimum sentence the court must take account of:
   (a) the penal objectives of retribution and general deterrence;
   (b) the seriousness of the offence and the principle proportionality;
   (c) the principle of individualized sentencing;
   (d) any aggravating or mitigating factors; and
   (e) any other relevant matter, including the length of time already spent in custody.

At this stage, any relevant reports, more especially a probation report, may be ordered to assist the court in determining what the minimum sentence should be.
3. The trial judge must state in open court his/her reasons for making the order.
4. Aggravating factors relevant to a charge of murder include –
   (a) planning and premeditation;
   (b) taking advantage of an elderly or disabled victim;
   (c) causing suffering or torture to a victim before death;
   (d) killing a person providing a public or security duty;
   (e) treatment of the deceased after death.
5. Mitigating factors relevant to a charge of murder include –
   (a) an intention only to do serious bodily harm;
   (b) spontaneous action rather than premeditation;
   (c) mental disability;
   (d) provocation or some evidence of self-defence even though it was rejected by the jury;
   (e) the age of the offender.
6. In determining the minimum period of detention, time served awaiting trial should be taken into consideration. (See DaCosta Hall (supra).)

7. Sentences to be served 'during the court's pleasure' should be reviewed by a judge of the High Court (preferably the original sentencing judge, if available) throughout the minimum sentence period, preferably at quadrennial or triennial intervals, though in the case of a child under the age of 16 yrs a shorter review period, e.g. a biennial period, may be considered, with an even shorter period being ordered if exceptional cases so warrant. If the sentencing judge is not available, the sentence should be reviewed by the Chief Justice.

8. For the purposes of a review of sentence, the court may request any or all of the following reports for the court's consideration:

(i) a full report on the offender from the Superintendent of Prisons addressing the conduct of the offender during detention; his/her responses to the punishment and any counseling and /or rehabilitative programmes sponsored by the prison authorities; his/her attitude to the crime, for example, genuine sorrow or remorse; any recommendations by the Superintendent for the guidance of the court.

(ii) a report from the Chaplain of the Prisons detailing the offender's response to any moral and/or religious teaching;

(iii) an up-to-date medical report from a medical practitioner assigned to the prison;

(iv) such other information derived from the record of the case or otherwise as the court may require, including an updated probation report and a psychological evaluation.

9. Pursuant to s 6(1)(b) of the Parole Act, Cap. 11:08 as modified, if an offender is released on licence, the judge would determine whether the release would be on a conditional or non-conditional licence and pursuant to s 6 (5) (b) for how long the period of licence should remain in force.

10. Where a detainee is not released at the end of the minimum period of detention, the review process is to continue at the original or such other appropriate intervals as fixed by the court.

11. The hearing judge would determine whether or not the review process should entail an oral hearing having had the benefit of reviewing any of the reports presented, since it may be necessary for the persons who prepared the reports to be questioned about the content of the reports and their conclusions. The sentence or review decision ought, however, to be announced in open court.

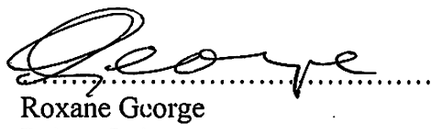
12. The court may direct how and by whom the review process is to be initiated e.g. as in this case, the prison authorities may be mandated to ensure that an offender is brought up for review.

13. The court may direct that all relevant reports are to be transmitted to the Registrar of the Supreme Court for the purpose of a review according to the period set by the particular sentencing court; the Registrar may be requested to forward the reports to the Chief Justice who will fix the matter for review before a judge (preferably the original trial judge), or delegate the task of fixing the matter for review to another judge.

13. Overall the fixing of the minimum sentence and review intervals should allow the court to reconsider the position of the detainee from time to time in order to ascertain his/her development and progress and whether there would be a risk of reintegrating him/her into society. On a review, the court should consider the issues of punishment and deterrence given the facts of the case, as well as the welfare and rehabilitation of the offender and whether he/she would pose a risk if released. As such, depending on the circumstances, a detainee may be released even before the minimum period of detention has expired. The court could continue the detention for as long as in its discretion it is considered necessary. The court may, on a review, specify the place where and the conditions under which the detainee is to be kept.

I am of the view that this case highlights that there may be need for detention facilities for minors/young adults, such as this offender, who have been detained in a youth section of the prison system, but who, due to age must be transferred into the adult section, and who so far as the reports indicate have been cooperative detainees, to safeguard their welfare and hopefully insulate them from hard-core adult offenders who by the time they are released may indoctrinate them in a most unsavoury manner so that the good achieved while in the youth section is diminished or erased. I might add that it would be best if the issues highlighted, as extrapolated from the authorities cited, could be considered in any amendment to or reform of legislation relating to juvenile justice so that both the factors of punishment and deterrence as well as the

rehabilitation and welfare of juvenile offenders convicted of murder can be more comprehensively addressed.



Roxane George
Puisne Judge
February 11, 2015