IN THE COURT OF APPEAL OF BELIZE A D 2016
CRIMINAL APPEAL NO 22 OF 2012

**GREGORY AUGUST** Appellant

v

**THE QUEEN** Respondent

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BEFORE:

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| The Hon Mr Justice Sir Manuel Sosa | President |
| The Hon Mr Justice Samuel Awich | Justice of Appeal |
| The Hon Madam Justice Minnet Hafiz Bertram | Justice of Appeal |

E Courtenay SC along with A Sylvester and I Swift for the appellant
C Vidal SC, Director of Public Prosecutions, along with P Staine and S Lovell for the respondent

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15 July 2015 and 4 November 2016

**HAFIZ-BERTRAM JA**

**Introduction**

[1] On 21 November 2012, Gregory August ('the appellant') was convicted of murder following a jury trial before Lucas J. He was sentenced on 26 November 2012 to life imprisonment which took effect from 26 May 2009. The appellant appealed to the Court of Appeal and the appeal was heard on 13 March 2014. The Court delivered its judgment on 5 February 2015, dismissing the appeal. The conviction of the appellant for the offence of murder and the sentence of life imprisonment was affirmed.

[2] On 20 April 2015, the Caribbean Court of Justice ('the CCJ') granted the appellant special leave to appeal against the decision of the Court of Appeal, on a

number of grounds, two of which were not argued before the Court of Appeal. The CCJ stayed the appeal pending the hearing of the said two grounds by the Court of Appeal. In an order dated 20 April 2015, the CCJ said that it was satisfied that "*the proposed appeal raises issues of great general and public importance regarding the constitutionality of the mandatory minimum sentence of life in prison without parole and the relevance and/or sufficiency of good character directions in a criminal trial generally and in particular in the instant proceedings."* The CCJ considered that these two issues ought ideally first to be adjudicated upon by the Court of Appeal and therefore, ordered, by consent, at paragraph 4, the following:

> "4. This matter be remitted to the Court of Appeal for expeditious hearing on the following two issues:-
> a) The constitutional issue which has been raised before this Court but not argued before the Court of Appeal; and
> b) The good character directions which were not argued before the Court of Appeal."

[3] The two grounds that were remitted as framed by the appellant before the CCJ are: (1) *the trial judge erred in failing to make a good character direction*; and (2) *The minimum mandatory sentence of life imprisonment without parole for murder violates section 7 of the Constitution.* At the hearing before the Court of Appeal, the appellant sought leave to include **section 6** of the **Constitution** under the constitutional ground to which there was no objection by the Director of Public Prosecutions ("the Director"). The Court granted leave to add section 6 of the Constitution under the said ground.

**The facts**

[4] The facts as shown by the summation of the trial judge is that the appellant was indicted on 22 September 2011 for murder contrary to section 117 read along with section 106(1) of the Criminal Code, Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2003. The particulars of the crime is that the appellant and another, on the 23 May 2009, at 8 Miles along the Western Highway, in the Belize District,

murdered Alvin Robinson ('the deceased'). The deceased was 73 years old and physically challenged and blind in the left eye. He was stabbed in his humble abode nine times in the face and neck. Dr. Mario Estrada Bran who conducted the post mortem gave evidence that the deceased had nine external stab wounds. One was on the chin, one on the right cheek, the others behind the ear up to the posterior triangle of the neck. Dr. Estrada Bran said that the smallest stab was 5 cm and the largest was 7 ½ cm. The stab wound to the cheek produced an irregular fracture to the lower portion of the mandible, close to the ear. "*One of the stab wounds on the neck took the direction backwards to forwards, slightly upwards to downwards and right to left and distracting vessels of the area, passing through to the oval cavity where its trajectory end to a depth of 5 1/2 inches…The cause of death was due to bronchial expiration due to multiple stab wounds to the neck and face."*

[5] The case against the appellant depended to a large extent on the correctness of the identification of him by a witness, Terrick Garbutt, which the appellant alleged to be mistaken. This witness, however, was not an eyewitness to the killing of the deceased and there was no eyewitness to the killing. The Crown relied on circumstantial evidence, namely, a Nike tennis shoe print and blood stains on the said tennis shoe and a white T - shirt which they said connected the appellant to the scene and consequently caused the death of the deceased. The trial judge pointed out the inconsistencies in the shoe print evidence and also that the blood analysis did not assist the Crown since it could not be proven beyond a reasonable doubt that the blood was that of the deceased.

[6] The appellant gave a dock statement and gave a defence of *alibi.* He admitted that he (with two other friends) was at the yard where the deceased resided and the purpose of going there was to buy marijuana. Thereafter he went home, received a phone call from his mother who lived in New York, and after slept until morning.

<u>The relevant statutory provisions</u>

*The Belize Constitution*

[7] **Section 6** of the **Belize Constitution** so far as relevant provides:

> "6. (1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.
> (2) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded **a fair hearing** within a reasonable time by an independent and impartial court established by law."

[8] **Section 7** of the **Belize Constitution** so far as relevant provides:

> "7. No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

*Criminal Code*

[9] **Section 106** of the **Criminal Code** of Belize, so far as relevant provides:

"106.-(1) Every person who commits murder shall suffer death.

> Provided that in the case of a Class B murder (but not in the case of a Class A murder), the court may, where there are special extenuating circumstances which shall be recorded in writing, and after taking into consideration any recommendations or plea for mercy which the jury hearing the case may wish to make in that behalf, refrain from imposing a death sentence and in lieu thereof **shall sentence the convicted person to imprisonment for life.**
>
> (3) For the purpose of this section-
> "Class A murder" means:-

(a) any murder committed in the course or furtherance or theft;

(b) any murder by shooting or by causing an explosion;

(c) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody;

(d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting;

(e) in the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting; or

(f) any murder which is related to illegal drugs or criminal gang activity;

"Class B murder" means any murder which is not a Class A murder."

*The Belize Prisons Act*

[10] A Parole Board is established pursuant to Rule 265 of the Belize Prisons Act, Chapter 139. Rule 266 (1) (a) of the subsidiary laws provides for the function of the Parole Board. It states:

"266 (1) The Board shall have the power to deal with and to decide as to –

(a) The release on parole of any offender eligible for parole under the Rules; …"

[11] Rule 267 provides for the eligibility for parole consideration. Rule 267 (1) provides:

"267 (1) Every offender other than an offender sentenced to death, shall be eligible for consideration for release on parole upon the expiry of the following periods from the date of his reception in a prison after sentencing:

(a) 10 years, in the case of every prisoner undergoing imprisonment for life;

(b) After the expiry of one half of the term of the sentence of imprisonment, in the case of every prisoner undergoing any other sentence.

…

267 (8) Notwithstanding sub-rule (1) **an offender convicted of murder shall not be eligible for parole under these Rules**."

*Prerogative of mercy*

[12] **Section 52** of the **Belize Constitution** provides:

"52. – (1) The Governor General may –

…

(d) **remit the whole or any part of any punishment imposed on any person for any offence** or of any penalty or forfeiture otherwise due to the Crown on account of any offence.

(2) The powers of the Governor General under subsection (1) of this section shall be exercised by him in accordance with the advice of the Belize Advisory Council."

[13] The Belize Advisory Council (Procedure) Rules made pursuant to the Belize Constitution at Rule 14(1) provides for the procedure in non-capital cases for prerogative of mercy. It provides:

" 14. (1) Every person in a non-capital case who desires the Governor-General in special or exceptional circumstances to consider the exercise of the prerogative of mercy in his favour shall submit a written application to the Secretary specifying-

(a) the offence(s) of which he was convicted;

(b) the sentence awarded and the name of the sentencing court;

(c) the date of conviction and sentence;

(d) the special or exceptional circumstances which the applicant wishes the Council to take into consideration;

(e) any other information or material relevant to the case."

**Sentencing hearing of the appellant**

[14] Learned senior counsel, Mr. Courtenay for the appellant submitted that on 26 November 2012, at the sentencing hearing for the appellant, the then Defence counsel referred the trial court to the appellant's clean record (except for two minor offences) and his young age, 24 years old at the time of sentencing and that he was in custody for 3 ½ years. He further submitted that the appellant "*should be given a term of imprisonment that would be sufficient to have him serve for the crime and that at the end of the period he will still be able to continue his life*."

[15] The learned trial judge in passing sentence said that the accused had two minor convictions which he would not take into account and as such treated the accused as someone with no criminal record. He said that the Director did not give any notice seeking the death penalty and so he imposed a sentence of life imprisonment. The learned trial judge said:

> "Therefore, in accordance with the judgment of **Agripo Ical v The Queen, Criminal Appeal No. 6 of 2007**, dated 13th March 2008, I have no other recourse but to impose a sentence of Life imprisonment on the Prisoner with effect from 26th May 2009..."

**Appellant's arguments on the mandatory minimum life sentence**

*No judicial discretion*

[16] Learned senior counsel submitted that Lucas J in imposing the sentence of life imprisonment on the appellant did not exercise any judicial discretion. He was

constrained in imposing the sentence of life imprisonment because of the mandatory minimum sentence on conviction for the offence of murder in accordance with section 106 of the Criminal Code.

*No eligibility for parole*

[17] It was further contended that the appellant was not entitled to parole since the Prison Rules provides that an offender convicted of murder "*shall not be eligible for parole under these Rules."* This is the position pursuant to Rule 267(8) of the Prison Rules.

*Inhuman or degrading punishment*

[18] Learned senior counsel, Mr Courtenay submitted that the question for the court is whether a mandatory minimum sentence of life imprisonment for Class B murder without the possibility of parole, a proportionate sentence considering the circumstances of the case and the appellant's antecedent. He submitted that the life imprisonment violates **section 7 of the Constitution** as it amounts to cruel and degrading punishment. He relied on the principles in the cases of **The Attorney General of Belize v Philip Zuniga et al [2014] CCJ 2 (AJ)** where the CCJ applied **R v Smith [1987] 1 R.C.S. 1045;** and **de Boucherville v The State of Mauritius [2008] UKPC 70.**

*Irreducibility of the sentence*

[19] Learned senior counsel also argued that the imposition of an irreducible life sentence may constitute a violation of the prohibition on inhuman and degrading treatment. He relied on the principles in Vinter **v United Kingdom, Applications nos. 66069/09, 130/10 and 3896/10; de Boucherville v The State of Mauritius [2008] UKPC 70.**

*Unfair trial*

[20] Senior counsel contended that where a trial court is bound to impose a mandatory minimum sentence, it would be unable to afford the appellant a fair trial which included an appropriate sentence tailored to his personal circumstances and level

of offending. He relied on the principles in **Poonoo v Attorney General (2011) SLR 424; R v Nur[2015] SCC 15;** and **Harris v Attorney General of Belize, Claim No. 339 of 2006.**

*Regime established by Belize Advisory Council Rules unfair*

[21] Senior counsel submitted that the only possibility for a prisoner serving a life sentence in Belize is remission of the sentence by the Governor General pursuant to section 52 of the Belize Constitution. However, the Belize Advisory Council Rules ('BAC Rules') which set out the procedure to be followed in the exercise of the 'Prerogative of Mercy' by the Governor General in non-capital cases is unfair. There is no definition for what may constitute "special or exceptional circumstances" referred to in Rule 14(1) (d), which the prisoner is required to draw to the Council's attention in his application. Further, the prisoner has no right to receive the comments made thereon by the DPP, Superintendent of Prisons, the Probation Officer and any other person the Council may consider necessary. The appellant relied on the cases of **Reyes v R (Belize) [2002] UKPC11; Neville Lewis et al v The Attorney General of Jamaica and Another (Jamaica) [2000] UKPC 35; In Re Rivas' Application (unreported) 2 October 1992.**

[22] The appellant further relied on fresh evidence by way of affidavit from Liesje Barrow Chung. Mrs. Chung swore to two affidavits. The first affidavit was sworn on 11 June 2015 and the second affidavit was sworn on 24 June 2015. In the first affidavit, Mrs. Chung deposed that she is currently a member of the Belize Advisory Council ('BAC') and was appointed since 2012. Mrs. Chung's evidence is that she caused a search of the records of the Council to be done regarding the number of applications made to the Council by prisoners sentenced to life imprisonment, for the prerogative of mercy to be exercised in their favour for the period of 2000 to 2015. She attached a table containing the results of the search. See Exhibit "LBC-1". At paragraph 5 of her affidavit, Mrs. Chung deposed that based on the results of the search, she believes that BAC has never recommended to the Governor General that the sentence of life imprisonment be remitted for any convicted prisoner serving a life term. Further, since

her appointment in 2012, she has not deliberated on any applications by prisoners seeking the prerogative of mercy. There was one sitting where 6 applications were mentioned but there was no deliberation because the documentation for the applications was incomplete.

[23] Mrs. Chung deposed that the Council has no clear understanding of the meaning of the term "special or exceptional circumstances" appearing in Rule 14(1) of the BAC Procedure Rules. Further, that no applicant has ever been given an opportunity to comment on the representations received by the Council pursuant to Rule 15(1) of the Rules.

[24] At paragraph 8 of her affidavit, Mrs. Chung deposed that she attended a seminar in Belize in July 2014, entitled "Behind the Prison Walls". At the seminar she expressed her dissatisfaction with the procedure set out in the Rules and called for a clear definition of the phrase "special or exceptional circumstances". Also, for there to be an improvement of the procedure so as to make it fair.

[25] In her second affidavit, Mrs. Chung clarified some of her statements in the first affidavit. She deposed that on the occasion when 6 applications were mentioned and upon reviewing the said applications, the members noted that further information was needed from the Superintendent of Prisons. It was for this reason BAC decided not to provide any advice on the applications to the Governor General. Further, the applicants were not given an opportunity to make representations with respect to the comments of the DPP and Superintendent of Prisons. She stated that BAC will consider the comments once they receive further information from the Superintendent of Prisons to conclude the deliberations and provide their advice to the Governor General.

***Respondent's arguments***

[26] The learned Director of Public Prosecutions submitted that the minimum mandatory life sentence without parole for murder does not violate sections 6 and 7 of the Belize Constitution. Madam Director submitted that the sentence is not disproportionate nor

irreducible so there is no breach to section 7 of the Constitution. The Director in her oral arguments relied on the consolidated cases of **Peter Whelan and Paul Lynch v Minister of Justice, Equality and Law Reform, Ireland and the Attorney General [2007] IEHC 374** (High Court).The Director also relied on the decisions in the appeals of that case to the Supreme Court and the European Court of Human Rights (ECHR). She quoted extensively from the decisions in relation to the doctrine of proportionality.

[27] Whelan and Lynch were serving mandatory life sentences for murder, imposed pursuant to section 2 of the Criminal Justice Act 1990. They challenged the lawfulness of the sentences imposed on them on several grounds including that the sentence was disproportionate since the trial judge could not exercise a discretion and that the sentence violated their rights under article 3 of the European Convention on Human Rights. At the High Court, it was held inter alia that proportionality as between sentences of the same nature did not apply to those convicted of murder. In relation to the High Court decision, the learned Director relied on the discussion at pages 20 to 22. At page 21 the court gave its opinion as to whether the question of proportionality arises in relation to murder. The court said:

> "... it is the opinion of this Court that there can be nothing offensive in the Oireachtas promoting the respect for life by concluding that any murder even at the lowest end of the scale, is so abhorrent and offensive to society that it merits a mandatory life sentence and the question of proportionality can never arise so as to weigh the right of the offender to liberty above the right of the legislature to forfeit liberty for life as a penalty for the lowest order of murderous activity. Proportionality as between sentences of the same nature does not in the opinion of this court apply to those convicted of murder…"

[28] The Director also quoted extensively from the decision on appeal to the Supreme Court with the 'Neutral Citation [2010] IESC 34/10, from page 13 to 16, under the heading of *'Decision on the Constitutional Issue',* where the court agreed with the trial judge's decision at the High Court. Accordingly, the Supreme Court concluded that s. 2

of the Act of 1990 in requiring the imposition of a mandatory life sentence for murder was not repugnant to the Constitution.

[29] The Director commended the above reasoning to the Court that the offence of murder is the ultimate offence that can be committed and unlike the position in Ireland, the death penalty has not been abolished in Belize and it has never been deemed to be unconstitutional.

[30] In response to the **Reyes** case relied upon by the appellant, the Director submitted that it was the mandatory nature of the imposition of the death sentence that was unsuccessfully challenged. As a result of this authority there must now be a sentencing hearing regardless of whether a murder is classified under the legislation as Class A or Class B. However, the ultimate sanctions remain the death penalty, except for cases where there are legal justifications or partial excuse and in those cases the conviction would be manslaughter and not murder.

[31] As for the **Vinter** decision, relied on by the appellant, the Director submitted that the Grand Chamber was not called upon to consider the issue of proportionality. She relied on several paragraphs where the Grand Chamber said:

> "Life sentences
>
> 103. Since, however, the applicants have not sought to argue that their whole life orders are grossly disproportionate, it is necessary to examine, as the Chamber did, whether those whole life orders are in violation of Article 3 of the Convention on other grounds.
>
> …
>
> 106. For the same reasons, Contracting States must also remain free to impose life sentences on adult offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention … This is particularly so when such a sentence is not mandatory but is imposed by an

independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case.

107. However, as the Court also found in *Kafkaris*, the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 (ibid.). There are two particular but related aspects of this principle that the Court considers necessary to emphasize and to reaffirm.

108. First, a life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible. (See **Kafkaris**)

In this respect, the Court would emphasize that no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. This is because States have a duty under the Convention to take measures for the protection of the public from violent crime and the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary for the protection of the public……This is particularly so for those convicted of murder or other serious offences against the person. The mere fact that such prisoners may have already served a long period of imprisonment does not weaken the State's positive obligation to protect the public; States may fulfil that obligation by continuing to detain such life sentenced prisoners for as long as they remain dangerous…

109. Second, in determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3…

110. There are a number of reasons why, for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review.

111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognized by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated."

[32] The Director relied on the above paragraphs and contended that the mandatory life imprisonment in itself will not offend the prohibition against inhuman and degrading punishment but there must be some point during the detention of the accused, a process that looks towards a review of the sentence so as to determine whether or not his continued detention is necessary for whatever reason.

[33] The Director also relied on the decisions of **Attorney General's Reference (No. 69/2013); R v McLoughlin; R v Newell [2014] EWCA Crim 188,** where the court said:

"[15] Although there may be debate in a democratic society as to whether a judge should have the power to make a whole life order, in our view, it is evident, as reflected in Sch 21, that there are some crimes that are so heinous that Parliament was entitled to proscribe, compatibly with the Convention, that the requirements of just punishment encompass passing a sentence which includes a whole life order."

[16] In *R v Oakes,* Lord Judge CJ summarised (at paras 9 and 10) the views expressed on the whole life tariff by Lord Bingham CJ and Lord Steyn in *Hindley* as illustrations of a view held by eminent judges in the judiciary of England and Wales. Lord Bingham had said, at a time the whole life tariff was fixed by the Home Secretary:

> "I can see no reason, *in principle*, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving life-long incarceration for purposes of pure punishment . . . Successive Lord Chief Justices have regarded such a tariff as lawful, and I share their view." (769).

Lord Steyn, giving the leading judgment in the House of Lords had specifically agreed with this observation (at p 416) and went onto say at p 417:

> "There is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence."

Lord Judge CJ concluded in *R v Oakes*:

> "At the time when this case [Hindley] was making its way through the courts, the whole-life tariff was not based on an express statutory provision. Nevertheless Lord Bingham and Lord Steyn were expressing views which affirmed support for the principle that there had been and no doubt would continue to be cases in which a whole life order represented just punishment."

[17] We do not read the judgment of the Grand Chamber in *Vinter* as in any way casting doubt on the fact that there are crimes that are so heinous that just punishment may require imprisonment for life. There may be legitimate dispute as to what such crimes are – at one end genocide or mass murder of the kind committed in Europe in living memory or, at the other, murder by a person who

has committed other murders, but that there are such crimes cannot be doubted. In *Vinter* the Grand Chamber accepted that, because what constitutes a just and proportionate punishment is the subject of debate and disagreement, States have a margin of appreciation. Under our constitution it is for Parliament to decide whether there are such crimes and to set the framework under which the judge decides in an individual case whether a whole life order is the just punishment.

[18] We therefore conclude that no specific passage in the judgment nor the judgment read as a whole in any way seek to impugn the provisions of the CJA 2003 (as enacted by Parliament) which entitle a judge to make at the time of sentence a whole life order as a sentence reflecting just punishment.

(b*) Does The Regime Which Provides For Reducibility Have To Be In Place At The Time The Whole Life Order Is Imposed?*

[19] The Grand Chamber made clear, as is self evident, that there is no violation of art 3 if a prisoner in fact spends the whole of his life in prison. One example is an offender who continues to be a risk for the whole of his or her life.

[20] However, the Grand Chamber considered that the justification for detention might shift during the course of a sentence; although just punishment at the outset, it might cease to be just after the passage of many years. It said at paras 110 and 121 of its judgment that for a life sentence to be compatible with art 3, there must therefore be both a prospect of release and a possibility of review. It added at para 122:

> "A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with

> Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration."

[34] The Director contended that the decision of **Attorney General's Reference (No. 69/2013)** confirmed the principles in **Vinter** that the sentence itself is not unconstitutional but that it may be at some point in the detention, whereby it becomes offensive if there is no prospect of release. She applied these principles to the present case and submitted that there is prospect for release as provided by the Constitution which allows for the exercise of prerogative of mercy.

[35] In response to the appellant's contention that if a sentence is unconstitutional, the exercise of the prerogative of mercy will not cure the unconstitutionality, the Director submitted that the sentence itself is not unconstitutional. Further, in the **Reyes** case, the Board found that the sentence imposed was unconstitutional because it was the mandatory death sentence and the murder had been committed with the use of a firearm. Likewise, in the **Bowen** and **Jones** decision, the sentences imposed were unconstitutional because the appellants were minors at the time. As such, the sentence imposed on the accused in this case, who is convicted of murder but not sentenced to death is not an unconstitutional sentence, which has to be cured by an exercise of prerogative of mercy.

[36] The learned Director submitted that based on the evidence of Mrs Chung, the BAC is trying to function but has not finally determined any application because of their view that they do not have sufficient information before them.

[37] The Director distinguished **de Boucherville** since there is no system in place for the possibility of release or review. In relation to the **Zuniga** decision, applying paragraph 61 of the judgment, which defined 'grossly disproportionate', the Director was of the view that in the circumstances of this case, no one, upon learning that a sentence of life imprisonment was imposed on the appellant, could say that the accused offence of murder would attract such a penalty and that it was unexpected and unanticipated in its severity.

[38] The learned Director also referred the court to paragraph 41 of the **Zuniga** decision on the issue of breach of separation of powers and submitted that the legislature set the penalty for murder as being death but in view of any special or extenuating circumstances the court could impose a sentence of life imprisonment. Further, there is nothing offensive and objectionable for the legislature to impose the sanction of death or a mandatory sentence of life imprisonment.

**Discussion**

*Violation of section 7 of the Belize Constitution*

[39] The proviso to **section 106** of the **Criminal Code** is undoubtedly mandatory in nature as it provides that where a person convicted for murder is not sentenced to death in relation to Class B murder, that person shall be sentenced to imprisonment for life. The appellant is not challenging the provision of the minimum term of life imprisonment since it could be constitutional in certain cases. The appellant's position is that the life sentence is not in itself inhuman and degrading. It is the mandatory nature of the proviso to section 106(1) that the appellant is challenging since a sentence cannot be judicially imposed. In other words, a trial judge cannot exercise a discretion when applying the proviso.

[40] Section 7 of the Constitution provides that no person "*shall be subjected to torture or to inhuman or degrading punishment or other treatment".* The appellant who was 19 years old at the time of the murder had two minor convictions which were considered as irrelevant. This was brought to the trial judge's attention at the time of the sentencing. However, the trial judge was bound to impose life imprisonment pursuant to section 106(1) of the Criminal Code despite the appellant's personal circumstances.

[41] The meaning of "inhuman or degrading punishment" has been discussed in several cases. See **Patrick Reyes's** decision at page 30 where the Board said:

"Despite the semantic difference between the expressions "**cruel and unusual treatment or punishment"** (as in the Canadian Charter and the constitution of Trinidad and Tobago) and "cruel and unusual punishments" (as in the eighth amendment to the United States constitution) and "inhuman or degrading treatment or punishment" (as in the European Convention), it seems clear that the essential thrust of these provisions, however expressed, is the same, and their meaning has been assimilated: see, for example, *Lauriano v Attorney-General [1995] 3 Bz LR 77* at 85; *Guerra v Baptiste [1996] AC 397 at 409-410.* In *R v Smith (Edward Dewey) [1987] 1 SCR 1045* at 1072 Lamer J said:

> "I would agree with Laskin CJ in Miller and Cockriell v The Queen [1977] 2 SCR 680, where he defined the phrase 'cruel and unusual' as a 'compendious expression of a norm'. The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of section 12 of the Charter is, to use the words of Laskin CJ in Miller and Cockriell, supra, at p. 688, **'**whether the punishment prescribed is so excessive as to outrage standards of decency'. In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate."

[42] The court in the **Patrick Reyes** judgment considered the mandatory nature of the death penalty, a capital case. In the instant case, the Court has to consider whether the mandatory life sentence imposed on the appellant is "inhuman or degrading punishment or other treatment" within the meaning of section 7 of the Belize Constitution. The learned Director's position is that the minimum sentence of life imprisonment for the offence of murder does not violate the prohibition on torture, inhuman or degrading punishment or other treatment.

[43] The case of **Whelan and Lynch** relied upon by the Director can be distinguished from the instant case. In Ireland, when a person is convicted of murder and sentenced

to life imprisonment, there are possibilities for that accused to be released. There is legislative provision for the temporary release of prisoners which is regulated by the Criminal Justice Act 1960, (Temporary Release of Prisoners) Act 2003. There is a Parole Board and its principal function is to advise the Minister in relation to long term prisoners which include those serving life sentences. For life sentences, the Parole Board considers the initial application after the prisoner has served only seven years. There are subsequent reviews which are conducted at intervals of no more than three years. Further, as shown by the appeal decision at the ECHR, the statistics on temporary release is very favourable for accused persons serving life sentences. At paragraph 19, the Court said that "as of 31 July 2013, there were 297 persons serving a mandatory life sentence for murder, with another 18 persons serving discretionary life sentences for other very serious offences. On the same date there were 78 persons with a life sentence who were on supervised release in the community. In the period 2005 to 31 July 2013, a total of 29 persons sentenced to life imprisonment were granted temporary release. The average duration of their imprisonment was 18 years."

[44] In Belize there is no parole for prisoners serving life sentences. Further, there is no provision for temporary release of prisoners or supervised release in the community. Despite the very harsh words by the court in relation to murder and the inapplicability of the principles of proportionality, the statistics show that the 29 prisoners who were granted release served on average only 18 years imprisonment. In Belize the only possibility for release is for the exercise of prerogative of mercy and the statistics in Belize as shown by the evidence from Mrs. Chung is that no prisoner serving a life sentence has ever been granted a pardon. This court is therefore, not persuaded by the **Whelan and Lynch** authority that proportionality does not apply to those persons convicted of murder.

*The principle of proportionality as laid down in the Zuniga case*

[45] The principle of proportionality was discussed in the case of **Zuniga** relied on by the appellant, a case from Belize, where the CCJ considered section 7 of the Belize

Constitution and the manner in which a Court should approach the issue whether a mandatory minimum sentence would violate the section. It was not a case which dealt with an accused person. It was a case of a pre-emptive challenge to the mandatory minimum penalty prescribed by a new law even before there has been a conviction under this law. It was an amendment to the Supreme Court of Judicature Act which in substance created the offence of knowingly disobeying or failing to comply with an injunction and it prescribed severe penalties for persons convicted of this offence and this included mandatory minimum penalties. The Court considered hypothetical cases as no one had been charged, convicted or sentenced. The Court assessed whether the mandatory minimum punishment set out in the law would be grossly disproportionate in its application to likely offenders. At paragraph 57 of its judgment, the Court gave guidance on the approach that should be taken where a sentence had already been imposed:

> "[57] One of the unusual circumstances of the inquiry under this point is that this is not a case where the party challenging the validity of the penalty has already been tried and is now arguing the unconstitutionality of a particular sentence that has been handed down. The court is not here dealing with the application of particular punishment to a specific offender. In a case like that a court is well positioned to consider all the relevant factors that contribute to an assessment of proportionality. The court could, for example, **weigh the sentence imposed against the facts of the specific case, taking account of the gravity of the offence, the manner in which it was committed, the degree of participation and motivation of the accused and all the personal characteristics and antecedents of the particular offender before the court."**(emphasis added)

[46] The CCJ in considering the mandatory minimum fine of $50,000.00 or alternatively a five-year mandatory minimum term of imprisonment compared the case with that of the Canadian case of **R v Smith** where the Supreme Court held that the

provision in a statute imposing a minimum sentence of seven years' imprisonment on conviction of importing narcotics into Canada was incompatible with section 12 of the Charter … which resulted with the severance of the provision from the statute.

[47] At paragraphs 61 and 62 of its judgment, the CCJ discussed "**grossly disproportionate**" sentences and the role of judges in sentencing. Their Lordships said:

> "It is a vital precept of just penal laws that the punishment should fit the crime. The courts, which have their own responsibility to protect human rights and uphold the rule of law will always examine mandatory or mandatory minimum penalties with a wary eye. If by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime. As stated by Holmes JA in State v Gibson, a mandatory penalty —unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person. This is precisely one of the circumstances that justifies a court to regard a severe mandatory penalty as being grossly disproportionate and hence inhumane. A variety of expressions has been utilised to define —grossly disproportionate in this context. It is said to refer to a sentence that is beyond being merely excessive. In *Smith v R,* where the seven year mandatory minimum sentence was invalidated, Wilson J characterized such a sentence as one where —**no one, not the offender and not the public, could possibly have thought that that particular accused's offence would attract such a penalty. It was unexpected and unanticipated in its severity …**
>
> Ultimately, it is for judges, with their experience in sentencing, to assess whether a severe mandatory sentence is so disproportionate that it should be

characterized as inhumane or degrading punishment. In this case the mandatory minimum fines of $50,000 plus a daily rate of $100,000 are well beyond the ability of the average Belizean to pay and so are grossly disproportionate. Equally, the imposition of a mandatory minimum fine of $50,000.00 or a sentence of imprisonment for at least a stretch of five years on anyone convicted of any of the offences in question (save those whose sentences fall within mitigating criteria fashioned not by the court but by Parliament) is grossly disproportionate. It bears no reasonable relation to the scale of penalties imposed by the Belize Criminal Code for far more serious offences and for that reason it is also arbitrary**. In our view, the mandatory minimum sentences here should indeed be characterized as being grossly disproportionate, inhumane and therefore unconstitutional for contravening section 7 of the Constitution. …"**

[48] The consequences of this finding was discussed at paras 86 – 100 of the judgment. The court found that the mandatory minimum penalties were invalid and made a declaration that the mandatory penalties were invalid. (See para 86). It ruled at para 88 under the heading of 'Severance', that in "mandating a law inconsistent with the Constitution is void *to the extent of its inconsistency,* the Constitution sanctions the principle of severance and encourages its exercise where possible." In so doing, the CCJ ruled that the legislation is constitutionally valid except for the mandatory minimum regime. The Court therefore severed the mandatory provisions from the particular amended section.

[49] Their Lordships in **Zuniga** applied the principles discussed by Lamer J in **R v Smith.** In that case, the court looked at the issue of whether the mandatory minimum sentence of seven years prescribed by s. 5(2) of the *Narcotic Control Act,* R.S.C. 1970, c. N-1 is contrary to, infringes, or denies the rights and guarantees contained in the Canadian Charter of Rights and Freedoms and the rights contained in sections 7, 9, and 12. Lamer J regarding section 12 of the Canadian Charter said that "though the state may impose

punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate. At pages 1072 – 1073 Lamer CJ said:

> "… In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. …"

*Application of the principle of proportionality to the present case*

[50] The appellant had been convicted of a Class B murder. He was given a sentence of a mandatory life imprisonment. There is no possibility of parole in Belize where a life sentence has been imposed on an accused for murder. The question is whether his sentence is grossly disproportionate thereby breaching his constitutional rights pursuant to **section 7** (inhuman or degrading punishment) of the Belize Constitution.

[51] The court will consider the factors as laid down in **Smith** as follows:

*(i) Gravity of the offence*

There is no doubt that this was a very serious offence where an old man was stabbed to death as shown at paragraph 4 above.

*(ii) Personal characteristics of the appellant*

*(a) The appellant was 19 years old at the time of the crime and 24 years old at the time he was convicted;*

*(b) The appellant had two minor offences which were considered as irrelevant;*

*(c) The appellant co-operated with the police during the investigation;*

*(d) Appellant had a good character as shown by the witnesses during the sentencing;*

*(iii) Particular circumstances of the case*

*(a) The appellant had been drinking on the night of the murder;*

*(b) Appellant purchased marijuana from the premises where the murder occurred;*

*(c) Appellant had an altercation with persons at the premises and threatened to return;*

*(d) There was no eyewitness to the murder. The trial and conviction was based on purely circumstantial evidence;*

*(e) The forensic of blood stain on the T-shirt, and tennis shoe was weak. The shoe print impression was also very weak.*

[52] In considering the above factors, the Court took cognizance of paragraph 61 of the **Zuniga** judgment, where the CCJ discussed the role of the legislature and the role of the courts, and consequences of grossly disproportionate sentences.

[53] The Director referred the Court to the latter part of paragraph 61 of the **Zuniga** judgment in order to make a contrast with the appellant's case, that is, his sentence was not severe. This is where the CCJ relied on **Smith** and Wilson J had this to say about the seven year sentence: "

> … "no one, not the offender and not the public, could possibly have thought that that particular accused's offence would attract such a penalty. It was unexpected and unanticipated in its severity…"

[54] Despite the appellant in the present appeal was convicted of murder which is not a minor offence as in the case of *Smith*, a person knowing of the personal characteristics of the appellant, such as him being 19 years old at the time of the offence, he had no previous convictions and the circumstance of the case, including that there is no possibility for parole, could very well say that the sentence imposed on the appellant was grossly disproportionate. These factors were not considered by the trial court before sentencing because of the mandatory nature of the minimum sentence. Since this opportunity was not given to the appellant, in order to seek to persuade the court that to sentence him to life imprisonment would be disproportionate, this amounts to a denial of his rights under section 7 of the Constitution. Further, the life imprisonment without the possibility of parole violates section 7 of the Constitution. In the view of the Court, the mandatory minimum life sentence imposed on the appellant is grossly disproportionate, inhumane and therefore, unconstitutional for contravening section 7 of the Constitution. It follows that in so far as **section 106(1)** of the **Criminal Code** provides for a mandatory sentence for Class B murder, it is to that extent void.

***Violation of section 6 of the Belize Constitution***

[55] Section 6 of the Belize Constitution provides for an accused person to have a fair hearing. The right to a fair trial was discussed in the case of **Poonoo.** This case shows that where a court is bound to impose the mandatory minimum sentence then the appellant cannot be afforded a fair trial.

[56] **Poonoo** is an appeal from a decision of the Constitutional Court on the constitutionality of section 27A(1)(c)(i) and section 291(a) of the Penal Code which imposes a mandatory minimum penalty of 5 years' imprisonment upon any person found guilty for the offence of burglary. The appellant in **Poonoo** stood trial for breaking and entering and also for stealing. The appellant's defence was that his involvement was limited to buying a pair of shoes from those who had committed the burglary. The Magistrate found him guilty although she found that he may not have been the one who opened the window of the Indian shop that was burglarized but he met with others near

the Indian shop and she found him guilty because of his presence on the scene. The reasoning of the Magistrate before she handed down the sentence showed that the mitigating circumstances were irrelevant because of the minimum sentence of 5 years imprisonment. The appellant appealed to the Constitutional Court which held that the mandatory minimum provision in the circumstances of the case did not contravene the Constitution, that it constituted a valid law and the appellant was correctly convicted and sentenced to 5 years' imprisonment. The appellant appealed that decision.

[57]The Appeal Court stated that the issues considered in the Constitutional Court could only have been argued and decided on the particulars facts of the case rather than on general principles relating to the mandatory minimum sentences. The Appeal Court said that there are two aspects of the actual sentencing process which should be noted. That is, (a) The Magistrate felt bound by the mandatory minimum sentence of 5 years by stating that "*accused is a first offender which is a mitigating circumstance…. almost irrelevant;* (b) *The fact that he is a first time offender stands only to be considered to the extent whether he should be given a term above the 5 years prescribed.*

[58] The Appeal Court analyzed the decision of the Constitutional Court which relied on several authorities from various jurisdictions on mandatory minimum sentences, namely Seychelles law, Mauritian law, English law and Commonwealth law, to hold that the mandatory minimum inserted by the legislature was not a breach of the constitution. These cases included the Mauritian decisions of ***State of Mauritius v Khoyratty*** **[2006] UKPC 13** and ***Philibert & Ors v State of Mauritius*** **[2007] SCJ 274.**

[59] The Appeal Court said that **Khoyratty** which dealt with bail and **Philibert** which dealt with 45 years imprisonment were relevant **not for the facts but for the legal principles**. *Bail like sentencing is a matter for the Courts and not for the legislature so that the principle enunciated in* ***Khoyratty*** *applies to sentencing as it applies to bail.* On this issue the Appeal Court further said:

> "Just as the granting of bail is an intrinsically judicial matter so is sentencing an offender who is before the Court. That is more than an analogy. It is an axiom.

While the legislature is concerned in a general way with the penalty that should attach to an offence, the Court is concerned in a case to case basis the actual sentence that should be meted out to the particular offender. There is a difference between the preoccupations of the legislature in legislating a penalty provision and the pre-occupations of the court in sentencing a particular offender. …( page 7 of the decision)

…Sentencing involves a judicial duty to individualize the sentence tuned to the circumstances of the offender as a just sentence.

We, … had the advantage of making use of *Aubeeluck* which had given judicial approbation to *Bhinkah* and put *Khoyratty* and *Philibert* in their proper perspective. With the benefit of those decisions, the Constitutional Court would have found that the question of constitutionality or unconstitutionality of a mandatory provision in an Act of Parliament occurs at three levels (a) the gravity of the sentence in the text of the law itself; (b) the manner in which the court deals with it; and (c) the right afforded to the citizen to challenge the mandatory sentence in the particular circumstances of his case…

…Fair hearing includes fair sentencing under the law but includes individualization and proportionality."

[60] The **Poonoo** decision therefore shows that the legislature is concerned in a general way with penalty and the court is concerned on a case to case basis. The issues have to be decided on the particular facts of the case. Also fair hearing includes fair sentencing under the law and this includes individualization and proportionality. The case of **Nur** relied upon by the appellant offers further guidance on the principle of proportionality. In **Nur,** the Supreme Court of Canada said at para 44:

"**Mandatory minimum sentences, by their very nature, have the potential to depart from the principle of proportionality in sentencing**. They emphasize denunciation, general deterrence and retribution at the expense of what is a fit

sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality. **They modify the general process of sentencing which relies on the review of all relevant factors in order to reach a proportionate result. They affect the outcome of the sentence by changing the normal judicial process of sentencing**."

*Trial judge bound by legislature*

[61] In the instant case, the learned trial judge applied the principles in **Agripo Ical** and sentenced the appellant to life imprisonment. He was bound to do so by the legislature. (See also **Godwin Santos,** where Justice Moore stated clearly that she had no other option but to impose the mandatory life imprisonment). In the appeal of **Agripo Ical, counsel** for the appellant complained that the sentence of life imprisonment imposed was harsh and excessive. He referred the Court to the **Adolph Harris** case where the court imposed on the appellant a determinate term of imprisonment of 20 years for the offence of murder, as authority for the proposition that a mandatory life imprisonment is contrary to the Belize Constitution. This Court, in its judgment said that counsel did not direct the court to any passage in the judgment which might be said to constitute such authority and further, the counsel in **Harris** had not advanced such position. As a result, the Court rightly pointed out that at the final paragraph:

"Without the benefit of full argument on the point, we are not prepared to regard this judgment of the Court below as containing more than *obiter dicta* on the subject- matter of this ground. We consider, in these circumstances, that the sentence of life imprisonment, being one fixed by law, was rightly imposed on the appellant."

[62] Conteh CJ (as he then was) in the **Harris** case had granted relief to the accused on the authority of **subsection (2)** of **section 20** of the **Belize Constitution** which empowers the court "to make such declarations and orders ... and give such directions as it may consider appropriate for the purpose of enforcing … any of the provisions", which relates to human rights and fundamental freedoms. (There was no challenge in **Harris** case to the proviso of section 106 of the Criminal Code on the basis that it breaches section 6 and 7 of the Belize Constitution). At paragraphs 33 and 34 the Chief Justice said:

> "I must say that it is not necessarily axiomatic or automatic that a sentence of life imprisonment ought always to be imposed upon every convicted murderer who is not sentenced to death. Each case depends on its own special circumstances and features. Life imprisonment can only be regarded as just one of the several options open to the sentencing judge. Sentencing is a matter quintessentially for the Courts with a particular sentence falling within the range of punishment allowed by statute. Mercy or commutation or pardon and respite are, of course, matters for the Executive…
>
> It cannot, of course, be disputed that the imposition of sentence is part of the trial of an accused. The equal protection of the law provision in section 6 of the Constitution requires, in my view, that on conviction, whether for murder or any other offence, the imposition of sentence on the convict should be the responsibility and duty of the trial court, which, as stipulated in the Constitution, should be "an independent and impartial court established by law." This position was graphically explained by the Supreme Court of Ireland in **Deaton v The Attorney General and The Revenue Commissioners (1963) IR 170** at 182 - 183, when it stated:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case … The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts … the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive …"

[63] In **Reyes** the mandatory nature of the death sentence was unsuccessfully challenged. However, since that decision, there has to be a sentencing hearing whether the murder is classified as Class A or Class B. The position however, is that a trial judge, despite a sentencing hearing, is bound by the legislation (section 106(1) of the Criminal Code) to impose a life sentence for a conviction for murder (for Class A murder where the death penalty is not imposed) for Class B murder. The legislature states the general rule and does not prescribe the penalty to be imposed on a case to case basis. Fair hearing includes fair sentencing under the law and this includes individualization and proportionality. See **Poonoo, Nur, Harris** and **Deaton**. Lucas J was bound by the mandatory minimum life sentence imposed on the appellant as prescribed by the legislature despite the mitigating factors shown at paragraph 51 above, which includes the age of the appellant, no previous convictions and the particular circumstances of the case. This is a clear violation of section 6 of the Constitution which provides for a fair trial. As such, the Court finds that the mandatory nature of the minimum life sentence imposed on the appellant is unconstitutional as the proviso to section 106 violates section 6 of the Constitution.

***Irreducibility of the sentence***

[64] Learned senior counsel, Mr. Courtenay further argued that the appellant's life sentence is irreducible and therefore, violates both sections 6 and 7 of the Constitution.

He relied on the case of **Vinter v United Kingdom** to further bolster his argument that the imposition of a life sentence may constitute a violation of the prohibition on inhuman and degrading treatment.Senior counsel submitted that the life sentence imposed on the appellant in the present appeal is equivalent to a Whole Life Order (WLO) which was imposed on offenders in the United Kingdom and considered by the European Court of Human Rights (ECHR).The Grand Chamber in **Vinter** held that an irreducible life sentence may raise an issue under Article 3 of the European Convention on Human Rights, which concerns the prohibition of inhuman and degrading treatment. The Court said that "in order for a life sentence to remain compatible with Article 43, there must be both a **prospect of release and a possibility of review." ……**

[65] The appellants also relied on the case of **de Boucherville v The State of Mauritius,** whereas similar conclusion was reached by the Privy Council. In that case the appellant had been sentenced to death but following the abolition of the death penalty in Mauritius, his sentence was commuted to a mandatory life sentence. The Board examined the constitutionality of the sentence. It declared that the sentence passed on the appellant was unconstitutional.

[66] It was argued before the Board for the accused that the mandatory life sentence permitted no account to be taken of the remorse of an accused or prospects of his rehabilitation. Further, that a "hearing which gave the court no scope to mitigate such a sentence was not a fair hearing, and a penalty so inflicted was inhuman and degrading punishment or other treatment." The Crown, in its main response relied on the decision of the Grand Chamber of the European Court of Human Rights in Kafkaris **v Cyprus** (Application No. 21906/04, 12 February 2008), where the Court considered whether the sentence of life imprisonment imposed on the appellant had removed any prospect of his release. The Court concluded by a majority of ten votes to seven that there had been no violation of Article 3of the convention which provides for the prohibition of inhuman or degrading treatment. The Crown in **de Boucherville** applying **Kafkaris,** relied by analogy on the existence, under section 75 of the Constitution of Mauritius, the prospect of release by the exercise of prerogative of mercy.

[67] In **Kafaris** the accused had caused the death of a father and his two children by detonating an explosive device under their car. He was convicted for their murder and had been sentenced to mandatory life imprisonment for each count. The accused/applicant's primary complaint made under article 3 of the convention which provides for the prohibition of inhuman or degrading treatment, was that the "whole or a significant part of the period of his detention for life was a period of punitive detention that exceeded the reasonable and acceptable standards for the length of a period of punitive detention as required by the Convention." The Crown submitted that the **applicant had not** been sentenced to an irreducible life sentence with no possibility of an early release. The Court therefore, determined whether the life sentence imposed on the applicant had removed any prospect of his release. In reaching its decision the Court applied the **release provisions**, namely (a) Article 53(4) of the Constitution of Cyprus which empowered the President with the concurrence of the Attorney General "to remit, suspend or commute any sentence passed by a Cypriot court and **(b)** conditional release of a prisoner under section 14(1) of the Prison Law 1996. The Grand Chamber found that the sentence imposed on the applicant "did not leave him without any hope or possibility of intermediate release. Thus the safeguards obtaining in Cyprus were held to be sufficient to save an otherwise disproportionate and arbitrary sentence."

[68] The Court in **de Boucherville** said that there was no such safeguards (as in **Kafaris**) that is, release provisions in the State of Mauritius for lifelong incarceration. As such, the Board considered such a sentence to be 'manifestly disproportionate and arbitrary' contrary to section 10 of the Mauritius Constitution (the right to a fair hearing). Although the court made a declaration that the sentence passed was unconstitutional, it made no other order (in particular, in relation to inhuman or degrading punishment) but to invite the applicant to make an application to the Supreme Court under section 5 of the Criminal Procedure (Amendment) Act. The Parliament of Mauritius had created this Act to empower the Supreme Court to undertake a judicial sentencing exercise on an application by a prisoner who is a victim of an unconstitutional sentencing.

[69] The learned Director submitted that in **Vinter** the Grand Chamber was not called upon to consider the issue of proportionality. (She also relied on **Attorney General's Reference** which confirmed the principles in **Vinter).** The Court agrees with this position as the appellants in that case had not sought to argue that their WLO was grossly disproportionate. The ECHR considered whether the whole life orders were in violation of the Article 3 of the Convention on other grounds. The Court said at paragraph 110 that there are a number of reasons why, for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review. It was on this basis that the appellant has relied on **Vinter.** In the instant case, life sentence was imposed on the appellant and there is no possibility for parole. Further, the appellant argued that there is no real possibility of release pursuant to the BAC Rules which provides for the exercise of prerogative of mercy.

[70] The Director submitted that **Attorney General's Reference (No. 69/2013)** confirmed the principles in **Vinter** that the sentence itself is not unconstitutional but that it may be at some point in the detention, whereby it becomes offensive if there is no prospect of release. She applied these principles to the appellant's case and submitted that there is prospect for release as provided by the Constitution which allows the exercise of prerogative of mercy. The Director distinguished **de Boucherville** since parole and remission did not apply. In **de Boucherville** the whole life order on the appellant was a violation of section 10 of the Mauritian Constitution, which secured the right to the protection of law and the right to a fair trial. The Director further contended that in the present appeal there is a prospect of release for the appellant which allows for the exercise of prerogative of mercy.

[71] It follows from the above arguments raised that the question that has to be determined by this Court (under the heading of 'irreducibility of the sentence') is whether the appellant has a real possibility of release by an exercise of prerogative of mercy.

*Is there a prospect of release for the appellant?*

[72] There is a possibility for a prisoner serving a life sentence in Belize to have his sentence remitted by the Governor General pursuant to **section 52** of the **Belize Constitution**. An appellant who desires the Governor General to exercise the prerogative of mercy in his favour has to make an application pursuant to Rule 14(1) of the Belize Advisory Council (Procedure) Rules. The appellant's position is that these rules are unfair. It is without a doubt that the BAC Rules are problematic as shown by the Rules itself and the evidence of Mrs. Chung. The Director's position is that the BAC is trying to function but has not finally determined any application.

[73] The Court has considered and accepted the evidence of Mrs. Chung which shows that the BAC has never recommended (at least from 2000 – 2015) to the Governor General that the sentence of life imprisonment be remitted for any convicted prisoner serving a life sentence. Further, although there had been six applications made to the BAC for remission, there was no deliberation upon them because further information was required from the Superintendent of Prisons.

[74] Further, the BAC, as shown by Mrs. Chung's evidence has no clear understanding of the meaning of the term "special or exceptional circumstances" appearing in Rule 14(1) (d) of the BAC Rules. There is no definition for the said term referred to in Rule. A prisoner making an application would have to speculate as to what is required of them in order to convince the BAC to consider and determine their application. Rule 14(1) as shown above states that, "*Every person in a non-capital case who desires the Governor-General in special or exceptional circumstances to consider the exercise of the prerogative of mercy in his favour shall submit a written application ...*"

[75] Also, when applications are made, the Director and the Superintendent of Prisons are required to make comments pursuant to Rule 15(1) of the Rules. There is no provision for the applicants to receive the comments made by the two officials. Further, as shown by Rule 16, the prisoner is not entitled to see and comment on the BAC's recommendations to the Governor General, nor make representations at an oral hearing. The BAC is not obliged to grant an oral hearing to the applicant.

[76] In the view of the Court, the procedure for the exercise of prerogative of mercy is far from being satisfactory. Mrs. Chung's evidence shows the difficulty with this process and the lack of clarity of the rules. Senior counsel, Mr. Courtenay argued that because of the lack of clarity as to when the BAC may make a recommendation to the Governor General that the prerogative of mercy should be exercised means that this power cannot be viewed as saving an unconstitutional statute, that is, the proviso to section 106 (1).We agree with this position for reasons to follow.

[77] The decisions further relied upon by the appellant show that the exercise of prerogative of mercy from a body such as the BAC cannot cure a constitutional defect in the sentencing process. In the case of **Reyes**, the Privy Council said at paragraph 44:

> "… It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function and the Advisory Council is not an independent and impartial court within the meaning of section 6(2) of the constitution. Mercy, in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility. Appropriately, therefore, the provisions governing the Advisory Council appear in Part V of the constitution, dealing with the executive. It has been repeatedly held that not only determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions. Such was the effect of the decisions in Hinds v The Queen [1977] AC 195 at 226(D); R v Mollison (No. 2) (unreported) 29 May 2000, Appeal No. 61/97, 29 May 2000); Nicholas v The Queen (1998) 193 CLR 173, paras. 16, 68, 110,112. The opportunity to seek mercy from a body such as the Advisory Council cannot cure a constitutional defect in the sentencing process: see **Edwards v Bahamas**,

above, paras. 167-168; **Downer and Tracy v Jamaica**, above, paras. 224-226; **Baptiste v Grenada**, above, paras. 117-119." (emphasis added).

[78] The Court respectfully adopts the principles in **Reyes.** See also the statement made by Conteh CJ (as he was then) in the decision of **Harris** where he said that, "*Sentencing is a matter quintessentially for the Courts with a particular sentence falling within the range of punishment allowed by the statute. Mercy or commutation or pardon and respite are, of course, matters for the Executive.*" It is for this reason that Conteh CJ did not accede to the request by the Crown in that case to impose a life sentence on Mr. Harris. He imposed a sentence of 20 years on him and did not leave it to the Governor General to decide the length of time he should further serve in prison.

[79] It is the view of the Court, that the evidence of Mrs. Chung shows that the appellant does not have a real possibility of release by an exercise of prerogative of mercy. In the case of **Kafkaris** there was sufficient safeguard (release provisions). The safeguards in Belize (application to the BAC) is not sufficient to save a disproportionate sentence. Further, the principles in **Reyes** show that the exercise of prerogative of mercy cannot be considered as part of the sentencing process since this is exercised by the Executive and it cannot cure any constitutional breach. To be clear, the life sentence itself is not unconstitutional. The argument by the appellant is that the mandatory nature of the life sentence is unconstitutional as the trial judge was bound by the mandatory minimum sentence set by the legislature and was unable to take into account factors concerning the circumstances of the case and the circumstances pertaining to the appellant when he imposed the life sentence on the appellant.

**Conclusion**

[80] Accordingly, the Court finds that the mandatory minimum sentence of life imprisonment imposed on the appellant without the possibility of parole prescribed in the proviso to section 106(1) of the Criminal Code, violates both sections 6 and 7 of the Constitution, to the extent that the proviso to section 106(1) of the Criminal Code is mandatory in nature. It follows that the life sentence imposed on the appellant is therefore unconstitutional.

**The good character direction point**

[81] The second issue remitted to this Court is whether the trial judge erred in failing to make a good character direction. As shown in the facts above, the appellant made a dock statement and raised a defence of *alibi.* At the trial he did not call any witnesses. The defence counsel in his closing submissions did not raise the issue of the need for a good character direction. The trial judge in his summing up to the jury did not give a good character direction.

[82] Learned senior counsel, Mr. Courtenay contended that it was implicit in the appellant's unsworn statement from the dock that he intended to rely on his good character for several reasons, namely: (a) the accused was a law abiding citizen ready and willing to assist the police since he contacted the police when he learned they were looking for him and was willing to assist in the investigation; (b) He waited at his home until the police arrived to arrest him; (c) During the sentencing hearing the defence counsel informed the court that the appellant's criminal record was clean except for two minor non-violent offences in 2006 and 2007 and it was counsel's view that the offences ought not to have appeared on the record at all.

[83] It was submitted for the appellant that at the very least, the 19 year old appellant was entitled to a direction on propensity making it clear to the jury that he had not in the past committed any similar offence. This was particularly relevant since there was no eyewitnesses to the murder. Further, a crucial piece of evidence which was relied upon by the Crown was witness identification of the appellant in the vicinity of the scene of the murder at a time when the appellant said he was at home. Senior counsel referred this court to the trial judge's summing up where he stated to the jury that, "*The case against the accused depends to a large extent on the correctness of the identification of him by Terrick Garbutt which the accused alleges to be mistaken."*

[84] It was further submitted for the appellant that the judge directed the jury as to the potential unreliability of identification evidence, but no direction was given regarding the

likelihood of the truth of the appellant's defence. Accordingly, the trial judge erred in failing to give a direction regarding the appellant's previous good character and its relevance to the issues in the trial.

[85] Senior counsel, Mr. Courtenay also contended that the defence counsel for the accused had alleged concoction of the evidence by the police and that there was evidence to support such contention. It was submitted that the appellant's clean record was of acute relevance, particularly given the evidence from the family and friends of the deceased that the appellant had behaved violently during the evening prior to the alleged offence. As such, it was contended for the appellant that the need for a good character direction was acute and the failure to give one rendered the appellant's conviction unsafe.

[86] Learned senior counsel relied on several authorities namely: **Harrisv The Queen, Criminal Appeal No. 3 of 2010; Brownv Trinidad and Tobago [2012] UKPC 2; Torres v The Queen Criminal Appeal No. 4 of 2002; Muirhead v The Queen [2008] UKPC 40; Teeluck& Anor v The State (Trinidad and Tobago) [2005] UKPC 14; R v Vye[1993] 1 WLR 471; R v Gray [2004] 2 Cr. App. R 30**;

*Respondent's arguments*

[87] The learned Director contended that the statement made by the appellant from the dock was not legally sufficient to raise the issue of good character direction at the trial. She relied on the authorities of **Teeluck** at paragraph 33(i) and **Torres** at paragraph 41.

[88] The Director further submitted that the appellant did not assert that he was a 'law abiding citizen' as contended by counsel for the appellant. But, in fact, commenced his statement from the dock by saying that he went to the Robinson's residence to 'buy marijuana'. She further contended that the fact that the appellant contacted the police and waited for them at his house so that they could arrest him for murder, does not, by itself, cross the threshold to trigger the good character direction.

[89] Alternatively, the learned Director contended that even if the statement from the dock was capable of raising the issue, the appellant would not have been entitled to the first limb of good character direction, the credibility limb, since he had not given sworn evidence. She also submitted that this issue has never been conclusively determined by this Court. She referred to the cases of **Norman Shaw v The Queen, Criminal Appeal No. 9 of 1997; Torres;** and **Marlon Harris v The Queen, Criminal Appeal No. 3 of 2010.**

[90] The Director also relied on the case of **Vaughn Thomas v The State [2007] CCJ 2** (AJ) and submitted that this issue (as far as she is aware) has not been determined by the Caribbean Court of Justice. (See para 47 of that judgment).

[91] She further contended that the **Brown** decision is not an authority for the proposition that the credibility limb of the direction need not be given when an accuse makes a statement from the dock, since that appeal originated from Trinidad and Tobago where statements from the dock are not permissible.

[92] However, the Director submitted that the issue is now settled in Jamaica that where an accuse makes a statement from the dock, he is not entitled to the credibility limb. She referred the Court to the case of **Michael Reid v R SCCA No. 113/2007** and **Horace Kirby v R [2012] JMCA Crim 10.**

[93] She further submitted that since the trial judge would have been prepared to treat the appellant as being of effective good character, she accepts that the appellant was entitled to the propensity limb of the direction. As a result, she made submissions on the effect of the failure to give that direction, bearing in mind, *"the question if not whether the jury would probably have convicted but whether they would inevitably have done so*" as shown in the case of **Paulino Assi v The Queen Criminal Appeal No. 6 of 2011,** at paragraphs 16 and 35.

[94] The learned Director contended that the absence of the propensity direction did not affect the fairness of the trial and the safety of the appellant's conviction based on

the evidence led by the Crown in proof of the case as shown at paragraphs 3 to 55 of the judgment of the Court in **Gregory August v The Queen, Criminal Appeal No. 22 of 2012.** The Director further relied on the decision of **Hunter and Others v The Queen [2015] EWCA Crim 631,** where the court reviewed the law as it relates to good character direction. She relied on the principles in that case and submitted that even if a propensity direction had been given by the trial court, it was inevitable that the jury would have returned the same verdict.

**Principles to be applied to good character directions**

[95] The principles of good character directions have been discussed in numerous decisions. The approach by this Court is to commence with the most recent decisions which was relied upon by the parties during the hearing of the appeal, in order to save valuable time. There is no need to go back to the older cases which had been adequately discussed in the more recent decisions.

[96] In the recent decision of **Hunter** cited by the learned Director, the appeals of five defendants were heard together as they each raised the same issue, that is, the extent and nature of the good character direction. The court addressed the development of the law relating to good character directions and reached some general conclusions. The court considered the relevant principles to be derived from the authorities, in particular **R v Vye; R v Wise; R v Stephenson [1993] 3 All ER 241** (**Vye)** and **R v Aziz [1995] 3 All ER 149 (Aziz)** and the application of those principles to the main categories of case where good character was an issue. The court held that in some respects the law had taken a wrong turn and that the court remained bound by principles it derived from **Vye** and **Aziz**. The conclusion reached by the court on the impact of **Vye** and **Aziz** at paragraphs 68 and 69 are:

> "**Impact of Vye and Aziz**
>
> 68. We return therefore to the principles we derive from ***Vye*** and ***Aziz*** and by which we remain bound.

a) The general rule is that a direction as to the **relevance of good character to a defendant's credibility is** to be given where a defendant has a good character **and has testified** or made pre-trial statements. (credibility limb)

b) The general rule is that a direction as to the **relevance of a good character to the likelihood of a defendant having committed the offence charged** is to be given where a defendant has a good character **whether or not he has testified** or made pre-trial answers or statements. (propensity limb)

c) Where defendant A, of good character, is tried jointly with B who does not have a good character, a) and b) still apply.

d) There are exceptions to the general rule, for example, where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give directions in accordance with ***Vye*****.** The judge then has a residual discretion to decline to give a good character direction.

e) A jury must not be misled.

f) A judge is not obliged to give absurd or meaningless directions.

69. It is also important to note what ***Vye*** and ***Aziz*** did not decide:

a) that a defendant with no previous convictions is always entitled to a full good character direction whatever his character;

b) that a defendant with previous convictions is entitled to good character directions;

c) that a defendant with previous convictions is entitled to the propensity limbof the good character directions on the basis he has no convictions similar or relevant to those charged;

d) that a defendant with previous convictions is entitled to a good character direction where the prosecution does not seek to rely upon the previous convictions as probative of guilt;

e) that the failure to give a good character direction will almost invariably lead to a quashing of the conviction.

[97] The court in **Hunter** also looked at the categories of good character and the directions that is appropriate in each case. At paragraphs 77 to 80 the court said:

"**(c ) Categories**

(i) *Absolute good character*

77. We use the term "absolute good character" to mean a defendant who has **no previous convictions** or cautions recorded against them and no other reprehensible conduct alleged, admitted or proven. We do not suggest the defendant has to go further and adduce evidence of positive good character. This category of defendant is entitled to both limbs of the good character direction. The law is settled.

78. The first credibility limb of good character is a positive feature which should be taken into account. The second propensity limb means that good character may make it less likely that the defendant acted as alleged and so particular attention should be paid to the fact. What weight is to be given to each limb is a matter for the jury. The judge must tailor the terms of the direction to the case before him/her …

*(ii) Effective good character*

> 79. Where a defendant **has previous convictions** or cautions recorded which are old, minor and have no relevance to the charge, **the judge must make a judgment as to whether or not to treat the defendant as a person of effective good character.** It does not follow from the fact that a defendant has previous convictions which are old or irrelevant to the offence charged that a judge is obliged to treat him as a person of good character. In fairness to all, the trial judge should be vigilant to ensure that only those defendants who merit an 'effective good character' are afforded one. It is for the judge to make a judgment, by assessing all the circumstances of the offence/s and the offender, to the extent known, and then deciding what fairness to all dictates. The judge should not leave it to the jury to decide whether or not the defendant is to be treated as of good character.
>
> 80. If the judge decides to treat a defendant as a person of effective good character, the judge does not have a discretion whether to give the direction. S/he must give both limbs of the direction, **modified as necessary to reflect the other matters** and thereby ensure the jury is not misled."

*Was the* appellant *of effective good character?*

[98] In the appeal before the Court, the parties were satisfied that the appellant was of effective good character based on his previous minor convictions. The appellant had two minor non-violent offences in 2006 and 2007. This fact was pointed out to the trial judge during the sentencing hearing that the offences ought not to appear on the record at all. Lucas J stated at the sentencing stage that, *"The prisoner has no criminal record. These minor convictions I will not take into account in sentencing the prisoner."* It can be seen that Lucas J treated the appellant as someone with an effective good character and the Court agrees with this position. See **Hunter** above.

*Applicable good character directions for the appellant*

[99]The appellant had an effective good character but he did not testify. He made an unsworn statement from the dock. Therefore, he was not entitled to a direction on the credibility limb of the direction. The appellant was however, in the view of the Court, entitled to the second limb (the propensity limb) of good character directions. The general rule derived from **Vye** and **Aziz** as shown in the recent decision of **Hunter** is that a direction as to the '**relevance of a good character to the likelihood of a defendant's having committed the offence charged'** is to be given where a defendant has a good character whether or not he has testified. The appellant has not testified.

[100] Mr. Courtenay relied on the cases of **Brown** and **Harris** in relation to the issue as to when the propensity limb of the direction had not been given. The learned Director contended that the decision of **Brown** is not an authority for the proposition that the credibility limb of the direction need not be given when an accuse makes a statement from the dock, since the appeal originated from Trinidad and Tobago where statements from the dock are not permissible. In the view of the Court, when the principles were laid down in **Brown**(in which the court relied on the principles in **Gray** and **Teeluck)** the court looked at the previous convictions of the accused which were considered as of no significance and did not go on to consider whether the appellant had testified or not. The **Hunter** decision in our view, clearly shows that the first limb is given when an accused testified and the second limb has to be given whether an accused testified or not.

[101] To be clear, the learned Director had not argued against a propensity limb direction. However, she relied on the Jamaican cases of **Michael Reid v R SCCA No. 113/2007** and **Horace Kirby v R [2012] JMCA Crim 10,** to argue that an accused who makes a statement from the dock is not entitled to the credibility limb of the direction. This Court is in agreement with the principles as laid down in **Reid** and **Kirby** which we find helpful in clarifying any misunderstanding of the correct position when an accused

has not testified or has made an unsworn statement from the dock. In **Kirby**, Brooks JA said at paragraph 11:

> "The second principle to be recognized is that where an accused does not give sworn testimony or make any pre-trial statements or answers which raise the issue of his good character, but raises the issue in an unsworn statement, there is no duty placed on the trial judge to give the jury directions in respect of the credibility limb of the good character direction. The accused is still entitled, however, to the benefit of a direction as to the relevance of his good character as it affects the issue of propensity. That was set out by Morrison JA in Michael Reid as principle (iii) on pages 26 - 27 of the judgment of this court…"

[102] In the decision of **Reid,** Morrison JA (as he then was) discussed several authorities on good character directions and at paragraph 44 of the judgment, principle (iii), he said:

> (iii) Although the value of the credibility limb of the standard good character direction may be qualified by the fact that the defendant opted to make an unsworn statement from the dock rather than to give sworn evidence, such a defendant who is of good character is nevertheless fully entitled to the benefit of the standard direction as to the relevance of his good character to his propensity to commit the offence with which he is charged (Muirhead v R, paragraphs 26 and 35).

[103] Morrison JA made it crystal clear that a defendant who is of good character and has made an unsworn statement from the dock is entitled to the second limb of the good character direction, that is, the propensity limb. We respectfully adopt this position. The Court is of the view**,** that the appellant was entitled to the propensity limb of the good character direction. But, this can only be done if it was raised at the trial. The trial judge cannot be faulted for not giving a

propensity direction if there was no evidence brought out through cross-examination of prosecution witnesses or from the appellant's unsworn statement.

**Impact of failure to give a direction on the appellant's lack of propensity on the fairness of the trial**.

[104] The law is absolutely clear that before the court can give a good character direction it has to be raised by the appellant during his testimony or unsworn statement from the dock or through cross-examination of the prosecution witnesses. The Court therefore, will consider the unsworn statement of the appellant and whether defence counsel raised the appellant's character at the trial.

Unsworn statement

[105] Mr. Courtenay contended that the appellant raised his good character in his unsworn statement when he said the following:

> "… my sister informed me that one of the police just tell ah that they want me for a homicide. Soh I just pick up the phone, call the police station and tell they that I deh right ya, willing fi assist uno ena any investigation or anything…"

[106] In the view of the Court, the above shows that the appellant was willing to cooperate with the police and did in fact cooperate with them by staying home and giving the police permission to search his residence. He did not object to the police taking a white T shirt from his home and his tennis shoe.

[107] Senior Counsel contended that from the unsworn statement it was implicit that the appellant was a law abiding citizen. The Director disagreed since the appellant opened his dock statement by saying that he went to "*the Robinson's (deceased) residence, me and two other friends gone buy marijuana about 8:30…"*

[108] On the one hand the appellant cooperated with the police in the investigation and on the other hand he admitted to the purchasing of marijuana. In the view of the Court, taking the dock statement as a whole the appellant had not impliedly raised his good character. This is not a case as in **Torres** where evidence was given by a witness who said the appellant was a nice man which the court interpreted to mean that he was a good man.

Failure of defence counsel to raise good character issue

[109] The evidence in this case, showed that counsel at trial had not raised the good character of the appellant. The appellant's counsel submitted to this Court that counsel who represented the appellant at the trial, is now deceased. As such, the Court cannot be satisfied of any good reason for not raising the appellant's good character. The Court agrees with this position.

*Was there a miscarriage of justice?*

[110] The court must examine whether the lack of propensity direction affected the fairness of the appellant's trial and the safety of his conviction. In the case of **Nigel Brown,** counsel in that case had failed to raise the appellant's good character at the trial. Lord Kerr delivering the judgment of the court said:

> "[32] The failure of counsel can therefore bring about an unsafe verdict. But it should not be automatically assumed that the omission to put a defendant's character in issue represents a failure of duty on the part of counsel. ……., there might well be reasons that defence counsel in the present case decided against that course. In the absence of an explanation from counsel, however, as to why he did not raise the issue of the defendant's good character, the Board considers that it is necessary to examine whether the lack of a propensity direction has affected the fairness of the trial and the safety of the appellant's conviction, on the basis that such a direction should have been given.

[33] It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction: *Singh v State*[2005 UKPC 35, … As Lord Bingham of Cornhill said in *Singh v State*[2006] 2 LRC 409 at [25]'Much may turn on the nature of and issues in a case, and on the other available evidence.' Where there is a **clash of credibility** between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute …

[35] …There will, of course, be cases where it is simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference... But there will also be cases where the sheer force of the evidence against the defendant is overwhelming. In those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case comes within one category or the other will **depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues and evidence.** It is therefore difficult to forecast whether it will be rarely or frequently possible to conclude that a good character direction would not have affected the outcome of a trial. As Lord Bingham observed in *Singh*[2006] 2 LRC 409 at [25], hard, inflexible rules are best avoided in this area.

[36] It will be necessary in due course to examine the strength of the evidence against the appellant and the nature of the issues in the trial as they bear on the question of the significance of a good character direction….."

[111] In the appellant's case, there was clash of credibility between the prosecution and the defence in relation to the witness for the prosecution on the identification

evidence as against the appellant's defence of *alibi.* This was a case which was largely circumstantial as there was no eyewitness to the killing of the deceased.

[112] The evidence led by the Crown in proof of the case is set out in the judgment of **Gregory August,** at paragraphs 3 to 55. The appellant had displayed mean and aggressive behaviour at the drink up earlier on the night of the murder of the deceased, at the Majil's residence. The testimony of the witness Marlon is that appellant had issued threats to one Andrew and at Tyrone, a grandson of the deceased on the said night when he departed the Majil's residence. Mr Garbutt saw the appellant later on the same night at the back of his land.

[113] There is also the evidence of PC Witty who examined the appellant's tennis shoe and his white T-shirt and found blood which was the same blood group of the deceased. PC Witty also gave evidence that a shoeprint found near to the 'man-made pool' matched one of the two tennis shoes taken by him. In the opinion of Mrs. Bol Noble, the shoe print could have been made by the said tennis shoe.

[114] Mr. Garbutt's recognition of the appellant was strong and the trial judge had given proper directions on identification evidence. The trial judge, had also pointed out the inconsistencies in the shoe print evidence and that the blood analysis did not assist the Crown since it could not be proven beyond a reasonable doubt that the blood was that of the deceased. The trial judge properly directed the jury, that they could only convict if they found that the evidence pointed to the appellant. The jury, rejected the unsworn statement of the appellant and his defence of *alibi*, and accepted the evidence of the Crown. In the view of the Court, the evidence shows that even if a propensity limb, good character direction had been given by the trial judge, it would have been inevitable that the jury would have returned the same verdict.

**Sentencing**

[115] This Court was not directed by the Caribbean Court of Justice to consider the issue of an appropriate sentence in the event the Court finds in favour of the appellant. The Court considered that in the interest of saving valuable court time, the issue as to an appropriate sentence should be addressed by the parties by written submissions. On the 15 July 2015, after the hearing of the appeal, the Court ordered that the parties shall have 30 days from the date of the hearing to file and deliver their submissions on an appropriate sentence in the event the appellant succeeds on the constitutional issues. Senior counsel, Mr. Courtenay filed his submissions on 17 August 2015 and the Director filed her submissions on 20 August 2015.

[116] The finding of the Court is that the mandatory minimum life sentence imposed on the appellant without the possibility of parole is unconstitutional. The Court therefore, has a discretion to impose either a life sentence or a fixed determinate term of imprisonment on the appellant. The Court will now consider the submissions from the parties as to an appropriate sentence.

[117] Mr. Courtenay submitted that this is not an appropriate case for the imposition of life imprisonment, but one for a fixed term, taking into consideration the appellant's antecedents, the nature of the offence and the possibility of his reform.

[118] Senior counsel relied on the case of **Alexander Don Juan Nicholas et al v The State Cr. App. Nos. 1-6 of 2013,** where the Court of Appeal in Trinidad and Tobago considered when it would be appropriate for a life sentence to be imposed for the offence of murder. In reviewing several authorities from the Eastern Caribbean, P. Weeks JA at paragraphs 36 and 37 said:

> "The judges of the Eastern Caribbean Supreme Court, in the aforementioned cases, in considering the imposition of a sentence of life imprisonment, have taken the into account: 1) the seriousness of the conduct of the appellant; 2) the expression of genuine remorse; 3) probation reports to gauge whether the appellant is fit for social re-adaptation; 4) the antecedents of the appellant; and 5)

the presence of pre-meditation. Therefore, a life sentence is inappropriate where on a consideration of all these circumstances, the balance is tipped in favour of the appellant.

Apart from the circumstances of the offence, what must loom large in considering whether a life sentence is appropriate is the possibility or likelihood of the appellant being rehabilitated to the extent that he could be safely returned to society. Where there is evidence or information to suggest that this goal is achievable, a court must be slow to incarcerate an appellant for the rest of his natural life."

[119] Senior counsel also relied on the decision of **Harris** supra, where Conteh CJ (as he then was) said at paragraph 33 that life imprisonment is not to be imposed on everyone convicted of murder as each case should depend on its own special circumstances.

[120] Mr. Courtenay referred to the circumstances of the appellant's case, the evidence of which has not revealed any motive for the offence. In relation to mitigation, it was submitted that given the length of time that has passed since the sentencing of the appellant and the principles enunciated in **Nicholas,** the appellant intends to request that the matter be remitted to the lower court for sentencing to allow for update mitigation evidence.

[121] Nevertheless, the appellants made submissions on the evidence before the court which shows that at the time of the offence the appellant was 19 years old and he is presently 27 years old. He has two minor previous offences. At the sentencing hearing, two witnesses provided good character evidence on his behalf, namely, Ms. Avis Williams and Ms. Rosilia Almendarez, both of whom gave evidence that they knew the appellant for approximately 15 years and that he was not a "troublemaker."

[122] Senior counsel relied on the case of **Harris** where the appellant was convicted of murder, sentenced to death and following a constitutional challenge, his sentence was commuted to a fixed term of 20 years. He relied also on the case of **Bowen and Jones v The Attorney General, Claim 214 of 2007,** where both appellants were convicted of murder regarding separate murders. At the time of the offence, Jones was 16 and Bowen was 17 years old. They were both sentenced to life imprisonment which were constitutionally challenged and Conteh CJ (as he was then) commuted both sentences to a fixed term of 25 years imprisonment.

[123] The appellant relied on the sentences in those cases and submitted that a term of imprisonment of **20 to 25** years is just with deduction of the time already spent in prison. See **Romeo Da Costa Hall v The Queen [2011] CCJ 6 (AJ).**

*Submissions of the respondent*

[124] The Director maintained her argument that the only proper sentence to be imposed on a person convicted of the offence of murder, in a case which does not warrant the death penalty, is imprisonment for life. Further, the circumstances of this case, the aggravating factors, warrant the imposition of a life sentence.

[125] Nevertheless, the Director made arguments on a fixed term sentence, in the event the appellant succeeds in his appeal. She also referred to the decision of **Harris** and the decision of **Bowen** and **Jones,** (relied upon by the appellant) which were the only two decisions in Belize in which the appellants were convicted of murder but given fixed term sentences after their sentences were constitutionally challenged.

[126] The Director referred the court to three borderline cases of murder, namely: (1) **Enrique Soberanis v The Queen** (2) **Raymond Flowers v The Queen** and (3) **Gregorio Osorio v The Queen, Criminal Appeals No. 10, 11 and 12 of 1996**, in which there was a single judgment. The appellants pleaded guilty to the offence of manslaughter and each appellant received a sentence of 25 years. They appealed on the ground that their sentences were manifestly excessive. The appeal was dismissed

and the Court said at paragraph 10 of the judgment that these were "*very bad cases of manslaughter, on the borderline of murder."* The reason being that there was a clear inference of an intention to kill without any element of provocation. As such, the appellants were fortunate to have the State accept their *'plea of guilty of manslaughter'.* See also **Logan, Codrington and Williams**, **Criminal Appeal No. 3 of 1993; Deon Cadle v The Queen; The Queen v Hilberto Hernandez –** all cases borderline of murder**.**

[127] The learned Director submitted that the proposed range for a fixed term sentence for murder, should begin at 25 years. She relied on the judgments of **Harris**, and **Bowen** and **Jones** and also the borderline cases of murder referred to above. She further relied on the case of **Hernandez,** where it is said at paragraph 14, that if a guilty plea entitles an offender to an automatic one third reduction, then the proper sentence "was a figure in excess of 371/2 years." The Director suggested that the upper end of the range is 35 years. After considering the mitigating and aggravating factors in this case, she concluded that the sentence, if it were to be a fixed term should fall in the upper end of the range, the range being 25 to 35 years.

*Discussion*

[128] The Court is in agreement with the appellant that the circumstances of this case, does not require the imposition of a life sentence, for reasons already discussed under the constitutional challenge.

[129] In relation to the **Nicholas** judgment, relied upon by the appellant, the Court is in no position to apply all of the factors to the present case since the Court does not have a probation report to gauge whether the appellant is fit for social re-adaption. Nevertheless, the Court is of the view, that since the appellant had only two minor previous convictions, there is the possibility or likelihood of him being rehabilitated to the extent that he could safely return to society.

[130] The appellant's position is that a fixed term of 20 to 25 years is just in the present case. The Director's position is that the range of sentences should be 25 to 35 years and the upper end of the range is just in this case.

[131] In the **Harris** decision, the appellant had spent 11 years on death row. The appellant in this case is not on death row. This is a distinguishing factor in considering the imposition of the 20 years imprisonment on appeal (total imprisonment being 31 years). In **Bowen** and **Jones** the appellants were both minors at the time of the offence, 16 and 17 when on appeal a sentence of 25 years were imposed upon them. The appellant in this case was not a minor at the time of the offence. The Court therefore, has a difficulty in accepting a range of 20 to 25 years.

[132] The Court has considered the mitigating and the aggravating factors in the instant case and is of the view, that a sentence in the range of 25 to 35 years is more appropriate. In the opinion of the Court, a fixed determinate sentence of 30 years imprisonment is appropriate for the appellant less the time he has already served.

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SIR MANUEL SOSA P

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HAFIZ BERTRAM JA