[2023] JMCA Crim 45

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00029

STEPHEN BLAKE v R

Mrs Ann-Marie Fuertado-Richards for the appellant

Miss Paula Llewellyn KC, Daniel Kitson-Walters and Ms Vanessa Campbell for the Crown

24 May 2022 and 13 October 2023

Criminal Law – Sentencing – Murder – Guilty plea – Sentence of life imprisonment – Consideration of the stipulation of a pre-parole period – Time spent on remand – The Offences against the Person Act, ss 2(2), 3(1)(b) and 3(1C)(b)(i) – The Criminal Justice (Administration) Act, ss 42A, 42E, 42F and 42H

BROOKS P

[1] On 22 January 2016, two men entered the Energy Nightclub in the parish of Trelawny, where Mr Meton Ferguson was one of the patrons present. They went directly to Mr Ferguson, pulled guns and fired several shots, killing him. They escaped, thereafter. Fortunately, the incident was recorded on closed-circuit television ('CCTV') and a police officer, who reviewed the CCTV footage, recognised the appellant, Mr Stephen Blake, as being one of the shooters. The officer recognised Mr Blake's face and a tattoo that he then wore.

[2] Mr Blake was arrested and charged with the killing. On 11 March 2019, he pleaded guilty in the Circuit Court for the parish of Trelawny, to the offence of murdering Mr Ferguson. Four days later, the learned judge, presiding in that court, sentenced Mr Blake

to imprisonment for life for the offence and ordered that he should serve 25 years' imprisonment before he would become eligible for parole.

[3] Mr Blake applied for permission to appeal against the sentence and proposed the following grounds of appeal:

> "1. **UnfairTrial:** That based on the facts as presented the sentence is harsh and excessive and cannot be justified when taken into consideration.
>
> 2. **Unfair Trial:** That the learned trial judge did not temper justice with mercy as my guilty [plea] was not taken into consideration." (Bold and underlining as in original)

A single judge of this court refused his application. He has, however, renewed the application before the court.

[4] The court, when it heard the renewed application, granted Mrs Feurtado-Richards, appearing for Mr Blake, leave to argue the following supplemental ground of appeal:

> "That in passing sentence for the offence of Murder, the period of life imprisonment with the stipulation that the Applicant serves twenty-five (25) years is manifestly excessive in all circumstances of the case."

The submissions

[5] Mrs Fuertado-Richards submitted that the learned judge erred in ignoring the relevant range of sentences that had previously been handed down in similar cases and also failed to place sufficient stress on the rehabilitation aspect of sentencing.

[6] Learned counsel did not complain about the learned judge's outline of the relevant law or that a life sentence was imposed. She argued, however, that the minimum period that Mr Blake is to serve before eligibility for parole ('the pre-parole period'), is manifestly excessive. She submitted that this court should intervene and reduce that period. She relied on several cases, including **Ian Gordon v R** [2012] JMCA Crim 11, **Lincoln Hall**

v R [2018] JMCA Crim 17, **Khoran Thomas v R** [2020] JMCA Crim 22 and **Troy Smith and others v R** [2021] JMCA Crim 9.

[7] Learned counsel for the Crown, Mr Kitson-Walters, supported the learned judge's sentence, as being consistent with sentences in previously decided cases. He argued that the learned judge did not err in either her outline or application of the law. Learned counsel submitted that this court has no authority to disturb the stipulated pre-parole period. To demonstrate the correctness of the pre-parole period, Mr Kitson-Walters posited an alternative sentencing exercise and arrived at a pre-parole period of just over 25 years. He, therefore, argued that the sentence that the learned judge imposed, is not manifestly excessive.

[8] In their very helpful submissions, counsel for both sides relied on a number of cases in common. These included **R v Ball** (1951) 35 Cr App Rep 164, **Meisha Clement v R** [2016] JMCA Crim 26, ('**Meisha Clement**'), **Daniel Roulston v R** [2018] JMCA Crim 20 and **Paul Brown v R** [2019] JMCA Crim 3.

Discussion and analysis

The approach to imposing a sentence for murder

[9] This court is authorised to substitute a sentence that was imposed at first instance if it considers that either the judge at first instance has erred in principle or otherwise has misdirected himself or herself, thereby resulting in the imposition of a sentence that is either manifestly excessive or inadequate. The legislative basis for that principle lies in section 14(3) of the Judicature (Appellate) Jurisdiction Act, which states:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

[10] The general approach, in practice, is reflected in case law (see **R v Ball** at page 165). The principle in **R v Ball** was expressly approved by this court in **R v Alpha Green** (1969) 11 JLR 283, and, more recently, in **Meisha Clement**, at para. [43].

[11] In circumstances such as in the present case, where a defendant pleads guilty to the offence of murder, charged pursuant to section 2(2) of the Offences against the Person Act ('OAPA'), there is an option to apply a statutory procedure. Generally speaking, sections 42E, 42F and 42H of the Criminal Justice (Administration) Act ('CJAA') govern the statutory approach to sentencing in those circumstances. As Morrison P indicated in **Lincoln Hall v R**, one of the principal benefits of the CJAA is "that it introduced for the first time a fixed range of allowable discounts [to sentences] for the guidance of trial judges" (para. [12]).

[12] Before citing sections 42E, 42F and 42H, it is appropriate, for this case, to refer to section 42A of the CJAA, which, among other things, defines the term, "first relevant date", that is used in section 42E, concerning the timing of a guilty plea. That term refers to the date on which a defendant has the first opportunity to enter a plea to a charge after having been provided with full disclosure by the prosecution, and being represented by counsel (or electing not to be so represented). A plea of guilty on that date allows a court to award that defendant with the maximum discount that the CJAA permits, as a reward for that plea.

[13] The next relevant provision of the CJAA is section 42E(1), which authorises the court to give a discount when a defendant pleads guilty to the offence of murder in circumstances that do not attract the death penalty. Thereafter, section 42E(2)(a), (3) and (4), are instructive. The relevant portions state:

> "(2) Pursuant to subsection (1), the Court may reduce the sentence in the following manner–
>
> (a) where the defendant indicates to the Court, **on the first relevant date**, that he wishes to plead guilty to

> the offence, the sentence **may** be reduced by up to thirty-three and one third *per cent;*
>
> …
>
> (3) Notwithstanding subsection (2), the Court shall not impose on the defendant a sentence that is less than the prescribed minimum penalty for the offence as provided for pursuant to section 3(1)(b) of the *Offences Against the Person Act*.
>
> (4) In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as may be relevant." (Italics as in original, emphasis supplied)

The word "may", which was emphasised in the extract, indicates that the court is not obliged to give the discount indicated in the provision. It is also helpful to note that the minimum period to which section 42E(3) refers, is, at present, 15 years.

[14] Before quoting section 42H, to which section 42E(4) refers, it is important to refer to section 42F of the CJAA, which provides that, in considering substituting a determinate sentence for a life sentence, a court must treat a life sentence as being a term of 30 years. Section 42F states:

> "Where the offence to which the defendant pleads guilty is one for which the Court may impose a sentence of life imprisonment, **and the Court would have imposed that sentence had the defendant been tried and convicted for the offence**, then, **for the purpose of calculating a reduction of sentence in accordance with the provisions of this Part**, a term of life imprisonment shall be deemed to be a term of thirty years." (Emphasis supplied)

It is to be noted that life imprisonment may also be imposed for offences other than murder.

[15] This court has, in previous judgments, analysed the provisions of section 42F. In **Gawayne Thomas v R** [2022] JMCA Crim 11, Laing JA (Ag) pointed out, in para. [18],

that a sentencing judge is not restricted to using a period of 30 years if he or she decides against imposing a life sentence after the entry of a guilty plea. He said:

> "…However, it should be noted that [section 42F] does not prohibit the imposition of a sentence of imprisonment of more than 30 years…."

That statement in **Gawayne Thomas v R** must be considered in the context that a sentence of life imprisonment is not to be considered as a sentence of 30 years. A sentence for life is, in practice, treated as one of "uncertain duration" (see Halsbury's Laws of England 3rd Edition, Vol 30 page 589). A sentence of imprisonment for life is only to be considered as being 30 years for the purposes of applying section 42F of the CJAA, namely, for calculating the reduction of a sentence in the context of that part of the CJAA.

[16] **Gawayne Thomas v R** confirms that a sentencing judge is not obliged to impose a life sentence but may sentence the offender to a term of years, which may be any number of years. If the sentencing judge does not consider that a life sentence would have been appropriate if the offender had been tried and convicted, then section 42F is inapplicable. Laing JA (Ag) applied that principle in **Gawayne Thomas v R**. He said, in part, in para. [23]:

> "…At no point in the [sentencing judge's] sentencing remarks did she state that she would have imposed life imprisonment on the appellant if he had been tried and convicted. In such circumstances, section 42F of the CJAA has no applicability to the imposition of the sentence of 35 years' imprisonment."

[17] When a sentencing judge decides to impose a sentence of life imprisonment, despite a guilty plea, as occurred in this case, other considerations arise. Among them is that section 42F is inapplicable to deciding on the sentence, because there is no reduction of the sentence of life imprisonment, despite the guilty plea. That section and section 42H are strictly only applicable to cases where the sentence would have been imprisonment for life, had there been a trial, but it is considered that there should instead be, a shorter, determinate sentence because of a guilty plea. That consideration will be

analysed later in this judgment. Mr Blake is not challenging the imposition of the life sentence. It is an appropriate sentence in the circumstances of this case. The life sentence, having been decided upon, the next consideration is the pre-parole period.

Determining the pre-parole period

[18] Section 3(1C) of the OAPA requires a sentencing judge, who imposes a sentence of life imprisonment or a sentence of a determinate period, to stipulate a period that the offender must spend in confinement before being eligible for parole. Parole has always been considered a privilege rather than a right, an executive, rather than a judicial function. That executive function is carried out by the parole board (section 3 of the Parole Act).

[19] In **Power v The Queen** (1974) 131 CLR 623, the High Court of Australia provided a rationale for parole. It said, in part, at page 629, that the legislative intention of parole was:

> "…to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence."

[20] In determining the pre-parole period, the court may place more stress on retribution, deterring others from committing that offence, and the length of detention the offender would need to be prevented from reoffending, as opposed to effecting rehabilitation and reintegration. The learned authors of Parole Politics and Penal Policy, QUT Law Review Volume 18, General Issue 1, pp. 191–216, Arie Freiberg, Lorana Bartels, Robin Fitzgerald and Shannon Dodd, opined on page 193, that "[t]he High Court [of Australia] ultimately determined in **Power v The Queen** that the whole sentence of imprisonment should be regarded as a punishment for the crime and the non-parole period was the 'minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention'". These must,

however, be matters left to the sentencing judge and the particulars of the case before him or her.

[21] The legislative structure in Australia is not uniform throughout the various states in that country and, in some cases, is "markedly different" from that in this jurisdiction (see para. [45] of **Sanjay Splatt v R** [2022] JMCA Crim 39). Admittedly, however, there is no established practice in this jurisdiction for determining the pre-parole period.

[22] Like for sentencing, there is more than one purpose for parole. They include reducing reoffending, rehabilitating the offender, or providing the opportunity to reform, protecting the community, supporting reintegration into the community, providing an incentive for good behaviour in custody, enabling risk management and reducing the costs of imprisonment and prison overcrowding. Parole serves the interests of both the offender and the community. Like some other jurisdictions, the legislature of this country, has, in recent times, been more inclined toward the protection of the interests of the community than promoting the purposes of parole. This it has shown by increasing the pre-parole periods and restricting the discretion of judges and the parole board.

[23] Foster-Pusey JA, in **Sanjay Splatt v R**, carefully explained the distinction between a sentence and the pre-parole period. The learned judge of appeal said at paras. [49]-[51]:

> "[49] Section 2 of the Parole Act defines parole as '…the authority granted to an inmate under the provisions of this Act to leave the adult correctional centre in which he is serving a sentence **and to spend a portion of the period of that sentence outside of the adult correctional centre**'.
>
> [50] Section 3(1C) of the OAPA provides:
>
> > 'In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for parole, as if those provisions had been substituted for section 6(1) to (4) of the Parole Act-

(a) …

(b) where, pursuant to subsection (l)(b), a court imposes- (i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or (ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years, which that person should serve before becoming eligible for parole.'

[51] As is reflected in the OAPA, in the case of a defendant sentenced to life imprisonment for murder pursuant to sections 2(2) and 3(1C)(b) of the OAPA, he must serve a period of 15 years before he is eligible for parole. If, on the other hand, a defendant is sentenced to a determinate sentence, the minimum of which is 15 years, he must serve a minimum of 10 years before he is eligible for parole…." (Emphasis supplied)

[24] The distinction between a sentence and a pre-parole period was also considered by this court in **R v Keith Carnegie and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 44/2000, 43/2001 and 46/2001, judgment delivered 20 November 2003. Forte P stated on page 9 of the judgment in that case:

"From the advent of section 3A of the amended [OAPA], judges where there is a conviction for non-capital murder before them, have gone through a "sentencing process". This involves looking at the antecedents of the convicted person, including social enquiry reports, and hearing of character evidence, and submission on mitigation of sentence, **in order to determine what is an appropriate period of sentence to be served before the particular convict could be considered for parole**. In cases where judge concludes that a period of seven years['] imprisonment is sufficient, no order is made as to a required period." (Emphasis supplied)

[25] It is undoubtedly true that the imposition of a pre-parole period is often referred to as "the sentence", or at least, a part of the sentence. For example, there have been appeals against sentence, such as the present case, when the sole complaint is that the

pre-parole period is manifestly excessive. The distinction, however, must be borne in mind for the purposes of this assessment.

[26] Although, in cases where life imprisonment has been imposed, section 42F is not relevant to deciding a sentence, this court has, in some cases, found it useful in determining the pre-parole period. That approach may be termed "the statutory approach". This court's method of determining the pre-parole period, has, admittedly, not been uniform. Some cases have used the statutory approach (notably **Lincoln Hall v R**). It must be stressed, however, that the statutory approach was not designed for fixing the pre-parole period. Other cases have used, what has been described as, "the **Meisha Clement** approach". The statutory approach may be said to be less case-specific than the **Meisha Clement** approach. Each of these approaches will be detailed below.

[27] In using the statutory approach, to arrive at the pre-parole period, the period of 30 years, stipulated in section 42F, is discounted by a percentage, as guided by section 42E, after considering the provisions outlined in section 42H. In determining the appropriate percentage discount for the guilty plea, the court must consider the type of offence, the timing of the guilty plea, and, in the case of murder and other offences, which may attract a life sentence, the statutorily imposed minimum period of incarceration that the offender is to serve.

[28] The factors that are outlined in section 42H of the CJAA then become relevant. Section 42H states:

> "Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made by a defendant within a particular period referred to in … 42E(2), the Court shall have regard to the following factors namely–
>
> (a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;

(b) the circumstances of the offence, including its impact on the victims;

(c) any factors that are relevant to the defendant;

(d) the circumstances surrounding the plea;

(e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;

(f) whether the defendant has any previous convictions;

(g) any other factors or principles the Court considers relevant."

[29] Morrison P ventilated the statutory approach in paras. [18] through [22] of **Lincoln Hall v R**. It is important to note that Morrison P, having determined that the sentence of life imprisonment was appropriate in that case, was, at that stage, no longer treating with the sentence but with the pre-parole period. It is not entirely clear that that was appreciated at that time. As mentioned above, but repeated here for emphasis, the imposition of the life sentence, despite the guilty plea, means that section 42F is, strictly speaking, not applicable, and there can be no reduction in the "sentence", as opposed to the pre-parole period. Although Morrison P used the term "sentence" in the paragraphs to be quoted below, it must be appreciated that he was considering the pre-parole period.

[30] After he acknowledged the provisions of the CJAA, Morrison P said, in paras. [18] and [19], that where section 42F of the CJAA applies, there will be no methodical identification of a range of "sentences" or application of the starting point, aggravating factors or mitigating features, using those terms (the **Meisha Clement** approach). His reasoning was that section 42F determines the duration of a life sentence, and therefore the starting point, when calculating the reduction of the pre-parole period for a guilty plea. He said:

"[18] In the case of a sentence of life imprisonment, this naturally begs the question of how to approach the calculation

> of the actual level of discount for the guilty plea. This is the very question which section 42F seeks to address:
>
> …"

After quoting section 42F, Morrison P continued:

> [19] So the problem of calculation of a percentage of a sentence of indeterminate duration is resolved by resort to a deeming provision, essentially a statutory fiction by which something is decreed to be other than it is for some particular purpose (see **R v Verrette** [1978] 2 SCR 838, per Beetz J at page 845). **It follows from this that, for this purpose at any rate, no issues can arise with respect to the identification of a starting point and the assessment of the impact of aggravating and mitigating factors with a view to arriving at the appropriate sentence**." (Emphasis supplied)

[31] Having identified the appropriate approach, Morrison P applied it to the circumstances of that case. After confirming that a life sentence was appropriate, he continued in para. [20]:

> "…Accordingly, as it seems to us, the required approach to the calculation of the reduction in the appellant's sentence on account of his guilty plea would have been to treat the term of life imprisonment which the sentencing judge had in mind as though it were a sentence of 30 years' imprisonment."

And followed in para. [21] with a description of the calculation of the applicable discount, as circumscribed by section 42H of the CJAA:

> "[21] That having been done, the next step is to determine the actual percentage by which the sentence should be reduced within the range indicated in section 42E(2)(b). In this regard, section 42H requires the court to have regard to the following factors:
>
> [quoting section 42H]."

[32] **Tyrone Gillard v R** [2019] JMCA Crim 42 was also a case in which the sentence of life imprisonment was affirmed, and the consideration of the reduction of the period

of incarceration was in respect of the pre-parole period. F Williams JA, writing for the court in that case, made it clear that the court was considering the duration of the pre-parole period, but nonetheless used the term "sentence" in the context. He categorised Morrison P's approach in **Lincoln Hall v R** as a "two-step process". That process, based on paras. [20] and [21] of **Lincoln Hall v R**, is, undoubtedly:

> a. "to treat the term of life imprisonment which the sentencing judge had in mind as though it were a sentence of 30 years' imprisonment" (para. [20] of **Lincoln Hall v R**); and
>
> b. "'to determine the actual percentage by which the [pre-parole period] should be reduced within the range indicated' in the [CJAA] depending on the offence, having regard to the factors outlined in section 42H" (para. [13] of **Tyrone Gillard v R**).

[33] Despite being used in **Lincoln Hall v R** and **Tyrone Gillard v R** for determining the pre-parole period, as has been mentioned before, the statutory approach would not have been strictly applicable to those cases, since the life sentence was not disturbed. As Morrison P explained in **Lincoln Hall v R**, the statutory approach is different from the **Meisha Clement** approach and that used in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). The Sentencing Guidelines closely resemble the **Meisha Clement** approach. Foster-Pusey JA explained the difference between the statutory approach and the **Meisha Clement** approach in para. [31] c. of **Sanjay Splatt v R**:

> "In light of the statutory fiction of 30 years, there is no need to look at a starting point or an assessment of aggravating and mitigating factors [as set out in **Meisha Clement v R**] with a view to arriving at the sentence which would have been imposed had the defendant been tried and convicted[.]"

[34] The **Meisha Clement** approach has been accurately tabulated in **Daniel Roulston v R** [2018] JMCA Crim 20, in para. [17], where McDonald-Bishop JA stated:

> "Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
>
> a. identify the sentence range;
> b. identify the appropriate starting point within the range;
> c. consider any relevant aggravating factors;
> d. consider any relevant mitigating features (including personal mitigation);
> e. consider, where appropriate, any reduction for a guilty plea;
> f. decide on the appropriate sentence (giving reasons); and
> g. give credit for time spent in custody, awaiting trial for the offence (where applicable[)]."

[35] A few cases, involving sentencing on a plea of guilty to murder, have followed the statutory approach, including the faithful adherence to sections 42E, 42F and 42H of the CJAA in **Sanjay Splatt v R**. Importantly, however, **Sanjay Splatt v R** did not involve a sentence of life imprisonment. Foster-Pusey JA carefully applied the statutory approach in paras. [37] – [39] of the judgment in **Sanjay Splatt v R** to determine the discount to be applied in arriving at the determinate sentence in that case. After considering each of the provisions of section 42H of the CJAA in the context of the facts of that case, the learned judge of appeal said, in para. [39]:

> "As an overarching principle in these matters, the court must ensure that any reduction of the sentence on account of the guilty plea is neither disproportionate to the seriousness of the offence, nor so inappropriate that it would shock the public conscience (section 42H(a) of the Act)….His good social enquiry report and seeming excellent potential for rehabilitation could, when also taken into account, however, justify a discount of 27% or a reduction of eight years and one month from the 30-year fiction representing life imprisonment, resulting in a term of 21 years and 11 months. From this, the time the appellant spent in custody which was

> said to be approximately two years, if deducted, would lead to a sentence [of] 19 years and 11 months…."

The court, thereafter, went on to consider the pre-parole period in that case, within the context of the minimum periods mandated by the OAPA.

[36] The statutory approach, according to Morrison P, has the benefit of avoiding the first four steps of the **Meisha Clement** approach. This is the interpretation of his statement in para. [19] of **Lincoln Hall v R**, which has been quoted above. He said that, in deciding on a sentence of indeterminate duration no issue can arise with respect to identifying the starting point or assessing aggravating and mitigating factors.

[37] It is noted, however, that with the exceptions of paras. (a), (b) and (e) of section 42H, the matters to be considered under that section are very similar, though not identical, to the matters to be considered under the **Meisha Clement** approach. For example, both paras. (c) and (d) of section 42H, in speaking to "the circumstances of the offence, including its impact on the victims" and "any factors that are relevant to the defendant", require the consideration of aggravating and mitigating factors that are mentioned in the **Meisha Clement** approach. This view, respectfully, does not conflict with the view expressed at para. [19] of **Lincoln Hall v R**, where Morrison P stated that "no issues can arise with respect to … the impact of aggravating and mitigating factors with a view to arriving at the appropriate sentence". Any apparent difference arises from the use of different terminology. Applying aggravating and mitigating factors, the discount, and then determining the appropriateness of the sentence, before reducing the sentence for the time spent on remand, would necessarily have satisfied all the considerations set out in section 42H except for para. (e), which is whether the defendant has pleaded guilty to all the charges laid against him or her. The statutory approach and the **Meisha Clement** approach could not both be completely applied to any one case as that would risk double counting the aggravating or the mitigating factors or both. It would necessarily be one approach or the other.

[38] McDonald-Bishop JA pointed out, in **Quacie Hart v R** [2022] JMCA Crim 70, that the **Meisha Clement** approach may be used for either settling on a determinate sentence or, where a life sentence is imposed, deciding on the pre-parole period (see para. [28] of **Quacie Hart v R**). It is undoubtedly true that there will be some cases where a sentencing judge uses the **Meisha Clement** approach to fix a determinate sentence and is thereafter faced with the spectre of having to repeat the exercise to decide on a pre-parole period. It may be said that the result is unavoidable, if just "picking a figure" is to be avoided. The **Meisha Clement** approach was used in **Gawayne Thomas v R** to consider both the determinate sentence and the pre-parole period. As was mentioned above, the aims of setting a pre-parole period may be different from that in considering a sentence.

[39] Despite that knotty point, the **Meisha Clement** approach has been used in several cases in determining the pre-parole period. That is especially so when the sentence of life imprisonment is imposed. With that approach, there is no stretching of statutory principles to fit an external situation. Therefore, it is considered that the **Meisha Clement** approach is preferable in cases such as the present one. The **Meisha Clement** approach also has the benefit of a high probability of consistency with pre-parole periods in similar cases.

[40] In **Quacie Hart v R**, this court maintained the life sentence that was imposed on Mr Hart, on his guilty plea to murder. Indeed, he did not challenge the life sentence, but only the length of the pre-parole period. The court, having determined that the first-instance judge had erred in principle in the sentencing exercise, was obliged to determine the appropriate pre-parole period. McDonald-Bishop JA applied the **Meisha Clement** approach to that exercise. Two important principles may be drawn from the judgment in **Quacie Hart v R**. They are:

> a. "…in murder cases, where life imprisonment is imposed, [this] court has used the Sentencing Guidelines and the arithmetical methodology

introduced by case law to assist it in arriving at an appropriate minimum pre-parole period as it would in determining a [fixed-term] sentence. This ensures adherence to the proportionality and parity principles and aims at preventing arbitrariness." (Para. [28])

b. The statutory fiction of 30 years imposed by section 42F of the CJAA must be used as the reference point toward stipulating the pre-parole period, where a life sentence has been imposed. The starting point for calculating the pre-parole period must be less than the period deemed to be the sentence as the pre-parole period cannot be equal to or greater than its associated sentence. (Para. [45])

[41] **Quacie Hart v R**, in using section 42F of the CJAA as a reference point for determining the upper limit to the starting point for the pre-parole period, is to be considered as introducing an element of the statutory approach to the **Meisha Clement** approach.

[42] Having outlined the relevant principles and considered the alternative approaches to determining the pre-parole period in any particular case, it is considered that the **Meisha Clement** approach should be used in this case in setting the pre-parole period. The circumstances of this case will be considered in that context. The learned judge's approach, will, however, first be outlined.

The learned judge's approach

[43] Mr Blake pleaded guilty on the first relevant date, as defined in section 42A of the CJAA. That plea of guilty triggered the learned judge's use of section 42E of the CJAA.

[44] She carried out a comprehensive and accurate review of the relevant law concerning sentencing for murder. In explaining that law to Mr Blake, the learned judge:

1. reviewed the circumstances of the killing and the identification of Mr Blake as the killer;
2. explained the four purposes of sentencing: retribution, deterrence, rehabilitation and prevention, the last of which she appeared to refer to as, "protection of the public";
3. explained the impact of the seriousness of the offence;
4. considered the individual characteristics of the offender and the aggravating and mitigating factors;
5. highlighted the prevalence of the offence in the country and the need to impose a sentence that corresponds with the serious nature of the offence;
6. explained the manner of assessing the seriousness of the offence, citing as authority, the United Kingdom Criminal Justice Administration Act, and pointing particularly to the aspects of culpability and the Offences against the Person Act; and
7. stated that the offence of murder is "the most egregious of all crimes".

[45] In applying those principles to this case, the learned judge found, not necessarily in the following order:

1. that the sentence prescribed for this type of killing allowed is either life imprisonment or a prescribed sentence, which should not be less than 15 years;
2. a high degree of culpability on Mr Blake's part, based on the circumstances of the killing;
3. there were aggravating features of the offence, particularly that, when he killed Mr Ferguson, Mr Blake

was on bail for the offences of illegal possession of a firearm and shooting with intent (for which he was later convicted);

4. that he had not taken full responsibility for the offence;
5. that the offence was prevalent;
6. the offence was egregious in nature bearing in mind the number of shots pumped into Mr Ferguson, particularly to his head and in the vicinity of his mouth;
7. that his relatively young age should be taken into account; and
8. the individual mitigating features for Mr Blake included the facts that he was:
    a. seeking an opportunity to raise his children in the right way;
    b. remorseful; and
    c. asking for leniency.

[46] After those considerations, the learned judge commenced applying the principles to Mr Blake's sentencing by correctly acknowledging that she was empowered to grant him a discount of up to 33⅓% (pursuant to section 42E of the CJAA) because he had pleaded guilty on the first relevant date. She is recorded as having said this on page 27, lines 3-10 of the transcript:

> "… By section 42(e) [sic] I can reduce the sentence by 33 and a third percent. Where as [sic], in this case you have indicated on the first relevant date that you wish to plead guilty; the first relevant date is defined in section 42 (a) [sic] of the Criminal Justice Act as the first [date] on which you had counsel and adequate disclosure."

[47] Although she resolved to impose a life sentence, the learned judge said that section 42F of the CJAA was applicable to Mr Blake's case and treated the sentence of

life imprisonment as 30 years and used it as "a first reference point". She is recorded as having said this on page 27, lines 10-15 of the transcript:

> "…As a sentence of life imprisonment is being imposed, section 42 (f) [sic] provides that life imprisonment is deemed in these circumstances to be 30 years. Therefore any discount in your sentence would result in finding a starting point in the case used in [sic] 30 years as a first reference point."

[48] It is noted that the learned judge, having decided to impose a life sentence, nonetheless went on to treat the determination of the pre-parole period as if she were considering a sentence. Her mention of a discount could not be applied to a life sentence. That aside, however, she noted that in determining the percentage discount, she was to consider the factors outlined in section 42H of the CJAA. She said on page 27, line 16 to page 28, line 4 of the transcript:

> "However, sir, in determining the percentage by which, if any, I should reduce the sentence I would otherwise have imposed – – am required to have regard to any relevant factors outlined in section 42 (h) [sic]. Section 42 (h) [sic] provides that I should consider among other things whether the reduction of your sentence would be so disproportionate to the seriousness of the offense [sic] or so inappropriate that it would shock the public [conscience]. I am also to consider, sir the circumstances of the offense [sic] and any factor [sic] that are relevant to you. The circumstances surrounding your plea and whether you have any previous convictions and any other factor or principles I consider relevant."

[49] She demonstrated her application of section 42H of the CJAA and reasoned that a reduction of 33⅓% would be "inappropriate and disproportionate" in the circumstances of this case. She then ruled that she would credit Mr Blake with a discount of 10% for his guilty plea. She is recorded as having made these remarks on page 28, line 5 to page 29, line 4 of the transcript:

> "In the circumstances of this case, it is my view, inappropriate and disproportionate to reduce your sentence by 33 percent as a result of your guilty plea. Why do I say

> this? Mr. Blake, while you were awaiting trial in this matter, you were convicted of another offense [sic] of violence and this too was with the use of a firearm. In fact, this offense [sic] before the Court was committed while you were on bail in that matter. In this matter, you were caught on video committing the act. In other words, you were caught red-handed. The evidence against you is overwhelming. Your actions in pumping so many bullets in the deceased some aimed in the region of his head [were] so blatantly egregious and public that it significantly represents a total disregard for the law, for the rule of law and a 33 and a third percent [sic] discount as [a] result of your guilty plea in light of the substantial evidence, offence, you and all I have said, would shock the public [conscience], as this would bring the starting point of your sentence below 20 years. This would be most inappropriate. Instead, as your plea of guilty [has] in fact saved the [court's] time, you will be credited ten percent discount."

[50] In addition to applying the route of the statute, in determining the percentage discount, the learned judge also used the **Meisha Clement** approach. Starting with a figure of 30 years, and after deducting the 10% for the guilty plea, she assessed that the pre-parole period was 27 years. That was essentially the statutory approach. But she then went on to apply a further discount for a letter of remorse that Mr Blake had written to the court. She then added three years for the aggravating factors. Her reasoning is recorded on page 30, line 24 to page 31, line 14 of the transcript:

> "Having credited you ten percent for your guilty plea, sir the starting point for the period to be spent before parole is 27 years… the aggravating features which I spoke of earlier attracts an increase from the 27 years to 30 years. In taking your mitigating features into account, and am going to treat your guilty plea separate from the letter. Your guilty plea attracts a discount of three years which is ten percent. Your letter attracts a further discount because in the letter you have expressed a level of remorse which is a bit more than just the guilty plea. What you have done there is indicated that you really want to change. So I have taken that into account, sir."

[51] She again mentioned mitigating features before arriving at the sentence and subtracted five years for the mitigating features, on page 32, lines 7-14 of the transcript:

> "…What I have done instead, sir, is I have taken into account the mitigating features. I have taken into account, sir your age, the remorse. I have taken into account the need for you to be rehabilitated because of your age and I have taken all of those things, sir. I sentence you to life imprisonment with a minimum period of 25 years to be served before parole."

[52] In those circumstances, the learned judge erred as she did not properly apply the statutory approach. She did not restrict herself to that approach as she also used the **Meisha Clement** approach. That was not necessarily fatal since a hybrid approach was used in both **Troy Smith v R** and **Quacie Hart v R**. As stated above, the challenge is that both approaches may not be completely applied. In applying the **Meisha Clement** approach, however, it is plain that the learned judge double counted the aggravating features in the course of her analysis. She erred when she considered the egregious nature of the offence during her assessment of the factors under section 42H of the CJAA and again considered it during her discussion of the aggravating factors. That error merits this court's intervention.

[53] One of Mrs Fuertado-Richards' complaints is that the judge did not place sufficient stress on the rehabilitation aspect of sentencing. The complaint is unfounded. The judge took this issue into account. She said on page 24, lines 14-19:

> "Now sir the way I will sentence you will give you an opportunity because you are still a relatively young man to be changed and to return to the society and still function as a productive citizen…."

She also said on page 26, lines 14-19:

> "…I also take note of your age and that you are a young man who deserved [sic] to be given an opportunity to be rehabilitated. In light of this, sir your sentence should not be so long as to prevent you from returning from prison as a functioning and productive member of society…."

And finally, on page 32, lines 10-12, she said:

> "…I have taken into account the need for you to be rehabilitated because of your age and I have taken all of those things, sir…."

Calculating the pre-parole period

[54] This court adopts the learned judge's imposition of a life sentence. This murder warrants that sentence. As a result, there can be no discount applied to the sentence. The issue to be analysed hereafter is the pre-parole period. As mentioned above, this will be determined by using the **Meisha Clement** approach. The imposition of a pre-parole period has its genesis in the OAPA.

[55] Mr Blake, having pleaded guilty to "non-capital" murder, section 2(2) of the OAPA is applicable. It provides that:

> "Subject to subsection (3), every person convicted of murder other than a person–
>
> (a) convicted of murder in the circumstances specified in subsection (1)(a) to (f); or
>
> (b) to whom section 3(1A) applies,
>
> shall be sentenced in accordance with section 3(1)(b)."

[56] Section 3(1)(b) of the OAPA stipulates the minimum. It reads:

> "3. – (1) Every person who is convicted of murder falling within –
>
> (a)…
>
> (b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years."

[57] Section 3(1C)(b) of the OAPA provides that, pursuant to section 3(1)(b), where the court imposes a sentence of life imprisonment, it must state a period of not less than

15 years before the defendant becomes eligible for parole. Where it imposes any other sentence, the court must specify a period not less than 10 years.

The range

[58] McDonald-Bishop JA in **Quacie Hart v R**, opined, based on her examination of previous decided cases, that the pre-parole period for Mr Hart should be between 15 and 25 years (see paras. [33] and [48]). In **Troy Smith v R**, Edwards JA, at para. [145] opined that the upper range for the circumstances of that case was between 25 and 30 years. In **Gawayne Thomas v R** Laing JA (Ag) stipulated a range of between 18 and 29 years (see para. [36]).

[59] For the offence of murder falling within the context of section 2(2) of the OAPA, the minimum for the range for the pre-parole period has been set at 15 years (section 3(1C)(b) of the OAPA) and the maximum, based on **Troy Smith v R** and **Gawayne Thomas v R**, would be 30 years (section 42F of the CJAA).

The starting point

[60] **Paul Brown v R** is helpful in determining the starting point. In that case, Mr Brown was convicted of a murder that was committed when he opened gunfire at Mr Linval Murray and, thereafter, chased after him while continuing to fire at him. Mr Murray died from gunshot wounds. This court sentenced Mr Brown to imprisonment for life and, pronounced a pre-parole period. In determining the latter, it used a starting point of 26 years. For all the reasons pointed out by the learned judge, that would be an appropriate starting point for considering Mr Blake's pre-parole period. Using the minimum period of 15 years would not be appropriate in this case.

The aggravating factors

[61] The aggravating features of the case were well rehearsed by the learned judge and have been outlined above. They need not be repeated here. It is sufficient to say, in determining the pre-parole period, that the aggravating factors of this case, especially the fact that Mr Blake committed this offence while he was on bail for the offences of

illegal possession of a firearm and shooting with intent (for which he was later convicted), justify stress on the elements of retribution, deterring others from committing that offence, and preventing him from reoffending. The learned judge reckoned that the aggravating factors merited an addition of three years. That seems overly generous for those aggravating factors. A figure of four years is more appropriate. Adding that figure would take the pre-parole period to 30 years.

The mitigating factors

[62] The mitigating factors applicable to Mr Blake, including his letter of remorse addressed to the learned judge, were also set out above, and will not be repeated. It must be noted, however, that the aggravating features outweigh them. In all, although the learned judge did not specifically so state, she subtracted five years for the mitigating factors. That too is much too generous. A period of three years would be more appropriate. Subtracting three years would take the pre-parole period to 27 years.

The discount to be applied to reflect the guilty plea

[63] In cases falling under section 2(2) of the OAPA, section 42E(2) of the CJAA prescribes levels of discount where a determinate sentence has or will be imposed. It does not apply to the case where a life sentence has been imposed, but may be used as a reference in setting the pre-parole period. Sentencing judges are, therefore, not obliged to use the provisions of section 42E when sentencing an offender, if that offender is sentenced to life imprisonment.

[64] The learned judge decided that the level of discount of 10% was appropriate in the circumstances. Her reasoning in that regard cannot be faulted and will be adopted. Applying that level of deduction would reduce the pre-parole by approximately two years and eight months, to 24 years and just under four months. This will be rounded down to 24 years and three months, although there is no obligation to so do. Following the guidance of **Power v The Queen**, this is the minimum period of detention that is appropriate in light of the circumstances of this crime while recognising the need for

mitigation of Mr Blake's punishment due to his guilty plea as well as his potential for rehabilitation.

Comparing the resultant pre-parole period

[65] The validity of the pre-parole period that results from that exercise may be assessed by comparing it to that in some previously decided cases. In **Paul Brown v R**, the court, after reviewing numerous authorities decided on a pre-parole period of 20½ years. In **Danny Walker v R** [2018] JMCA Crim 2, Mr Walker drove up beside a group of men standing on a sidewalk. He stopped, pointed a gun and fired in the direction of the men, killing one of them. He was convicted after a trial and sentenced to life imprisonment. He was ordered to serve 25 years' imprisonment before becoming eligible for parole. It appears that the trial judge, in imposing the sentence, took into account the pre-trial remand period of five years. She, however, did not specifically mention the period of the remand. The sentence was not disturbed on appeal as it was found to be within the usual range of sentences for murder, and not found to be excessive.

[66] In **Kevin Young v R** [2015] JMCA Crim 12, Mr Young was found guilty of murder after a trial. He shot a man, then stood over him and fired more shots into his body. When he was challenged by the police he fired at the police and fled, making good his escape. On appeal, Mr Young recanted, confessed his guilt, and expressed remorse for his actions. This court affirmed Mr Young's life sentence but reduced his pre-parole period to 20 years.

[67] In **Khoran Thomas v R**, Mr Thomas was one of three men who chased and shot a man in the street. The man later died. Mr Thomas, after a trial, was sentenced to life imprisonment and was ordered to serve 18 years before becoming eligible for parole. Unlike Mr Blake, Mr Thomas had no previous conviction. It is also notable that although this court found that Mr Thomas' pre-parole period was "very, very generous" in all the circumstances, the court did not disturb it.

[68] In **Christopher Thomas v R** [2018] JMCA Crim 31, Mr Thomas shot and killed a police officer who had, just before, shot a resident of the area in which Mr Thomas lived. Mr Thomas was convicted after a trial and, in considering his appeal, this court conducted a review of sentences for murder. Morrison P, concluded on that review, at para. [93]:

> "This limited sample of recent sentences imposed after trial for murder seems to us to suggest a usual range of 20 to 40 years' imprisonment, or life imprisonment with a minimum period to be served before becoming eligible for parole within a similar range."

[69] The court ruled that the appropriate sentence for Mr Thomas was one of 28½ years' imprisonment with a stipulation that he should serve a period of 20 years before becoming eligible for parole.

[70] Those cases all involved convictions after a trial. Some of those offenders received shorter periods of pre-parole incarceration than Mr Blake. The circumstances of his case, including the previous conviction for a similar offence must be considered a significant distinguishing factor.

[71] **Ian Gordon v R** [2012] JMCA Crim 11, which was cited by Mrs Fuertado-Richards does not assist this analysis. In that case, Mr Gordon was convicted for killing two men who were inside a small wooden house. The death sentence that was imposed on Mr Gordon was commuted to life imprisonment by the Governor-General in the exercise of the prerogative of mercy. However, the commuting instrument did not specify a pre-parole period. On appeal, this court noted the circumstances of the killing and stated that they should attract a severe penalty. The court imposed a pre-parole period of 30 years.

[72] Some guidance may also be gleaned from cases involving guilty pleas.

[73] In **Quacie Hart v R**, Mr Hart stabbed to death a 14-year-old student, who was travelling aboard a public passenger bus. He pleaded guilty to the offence and on appeal to this court, the sentence of life imprisonment was affirmed but the pre-parole period

was adjusted to 23 years. Three years were, thereafter, deducted as credit for the time he had spent on remand.

[74] In **Lincoln Hall v R**, Mr Hall entered a dwelling house and shot and killed a man therein. Like Mr Blake, Mr Hall pleaded guilty to the offence and, like Mr Blake, he was serving another sentence at the time of his guilty plea. The judge, in that case, sentenced Mr Hall to life imprisonment and ordered that he should serve 30 years before becoming eligible for parole. This court was satisfied that that sentence was appropriate but reduced the pre-parole period by one year to reflect the time that Mr Hall had spent on pre-trial remand.

[75] Set out below are the pre-parole periods in other cases in which the appellants/applicants, at first instance, pleaded guilty to murder, some of which counsel cited:

NAME OF CASE	SUMMARY OF FACTS	STARTING POINT (PRE-PAROLE)	PRE-PAROLE PERIOD STIPULATED
Troy Smith and others v R	Rifle shot to the head in daytime during robbery of a chain from the victim.	25 years	24 years and four months before eligibility for parole - after application of a remand period of three years and nine months the final sentence was 20 years and five months

Demar Shortridge v R [2018] JMCA Crim 30	Home invasion early in the morning- Someone whom the appellant had asked to accompany him to the house fired two shots, hitting the victim and her father.		25 years before becoming eligible for parole. The period to be served before parole was reduced by one year for time he spent in custody.
Sanjay Splatt v R	The appellant shot and killed a man whom he had held hostage.		15 years before being eligible for parole.
Gawayne Thomas v R	The appellant murdered the victim by way of decapitation after being contracted to kill him.	29 years (range said to be 18-29 years)	25 years and six months before being eligible for parole.

[76] The period of 24 years and three months, identified as appropriate for Mr Blake, is, therefore, within the range to be identified from those cases.

Time spent on remand

[77] The general rule in relation to time spent on remand is that full credit is to be awarded for time spent in custody. Mr Blake spent time in custody, however, for all that time, he was also in custody for another offence. The learned judge, quite correctly, did not reduce his sentence for any part of that period (see para. [18] of **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ) and para. [10] of **Callachand and Another v The State** [2009] 4 LRC 777).

The previously imposed sentences

[78] Mr Kitson-Walters initially submitted that because the learned judge did not stipulate that the sentence that she imposed would run concurrently with the sentences

that Mr Blake was already serving, his sentence for this killing should run consecutively to those sentences. Learned counsel, however, candidly, and quickly accepted that the sentences should run concurrently unless otherwise stated. He agreed that section 14 of the CJAA mandates such an approach. The section states:

> "Whenever sentence shall be passed for any offence, on a person already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced."

In the absence of a stipulation by the learned judge that the sentences should run consecutively, section 14 of the CJAA would not apply.

Conclusion

[79] The learned judge applied her mind to the relevant provisions of the CJAA, however, she fell into error when she applied both the statutory approach and the **Meisha Clement** approach. This court intervened and conducted its own sentencing exercise, using the approach outlined in **Meisha Clement**. The court's independent sentencing exercise has revealed that the learned judge's imposition of a life imprisonment sentence was not manifestly excessive. A re-consideration of the pre-parole period, however, revealed that the pre-parole period was a few months less than that which the learned judge stipulated. The learned judge's figure, although objectively not manifestly excessive, should nonetheless be reduced, based on the reconsideration exercise.

Apology

[80] Before parting with this judgment, the court recognises the long delay in its production and apologises for the delay.

Order

[81] Based on the foregoing, the court orders:

1. The application for leave to appeal against the sentence is granted.
2. The hearing of the application for leave to appeal is treated as the hearing of the appeal.
3. The appeal is allowed in part. The sentence of imprisonment for life is affirmed, but the minimum period that the appellant should serve before becoming eligible for parole is set aside and the period of 24 years and three months is substituted therefor.
4. The sentence shall be reckoned as having commenced on 15 March 2019 and shall run concurrently with any other sentence that the appellant was serving as at that date.