

Sentencing in Capital Cases

Joe Middleton
Amanda Clift-Matthews

WITH

Edward Fitzgerald QC



In association with:



Acknowledgements

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Foreword

Over the past few decades, common law courts, especially those in the Caribbean and some parts of Asia and Africa, have constrained legislative and executive action that facilitated or permitted capital punishment. The jurisprudence reflects the growing concern of humankind with execution as a form of punishment. It is a concern that is well demonstrated in treaties and conventions, and in the judgments of international courts and tribunals.

The recent trend among national courts also marks an increasingly robust and enlightened role in the enforcement of specific fundamental rights – such as the rights to life, humane treatment, a fair trial and due process – and the observance by such courts of core constitutional values, including the rule of law and the separation of powers.

The emerging body of case law reflects the dynamism of constitutional and human rights interpretation. For example, it has been judicially determined that it is inhumane to keep a prisoner indefinitely on death row, with a view, perhaps, to executing him when the local murder rate is out of hand, and it is felt necessary to demonstrate that the government of the day is tough on crime. Another example is the finding that, where an unincorporated treaty permits a convicted murderer to petition an international tribunal to complain about his conviction or sentence, it would be a violation of due process to execute the prisoner while the petition remains pending. Mandatory, or automatic, death penalties for murder have been declared inhumane and an affront to the doctrine of the separation of powers, which itself has been given independent constitutional force such that its infringement could yield appropriate redress for an affected litigant.

One of the consequences of these determinations is that judges in many countries are now responsible for exercising discretion in the sentencing of those convicted of murder. In the case of *August*,¹ recently decided by the Caribbean Court of Justice, I noted that:

'Murder is a very serious offence. Society at large and the relatives of the deceased are entitled to expect that the murderer will serve a stiff sentence befitting the seriousness of the crime and the blameworthiness of the perpetrator. Civilisation has, however, long progressed beyond a brand of justice that is more in keeping with Hammurabi's legal code. It plainly does not follow that, because in every crime of murder human life is lost, the sanction to be pronounced by the court on the offender after trial must always be the exact same ... Modern penology does not conflate the consequence to the victim with the culpability of the offender.'

While, generally speaking, the exercise of discretion in the imposition of a sentence is a task to which judges are accustomed, in sentencing those convicted of murder there are added dimensions to this new responsibility. Judicial legitimacy and the rule of law require that the sentences given in capital cases should be appropriately justified, be convincingly explained and follow some common, logical approach. What then are the factors that should guide judges and advocates?

In clear and simple language this book, like its predecessor, provides welcome guidance on the vast variety of matters that should be taken into account by sentencers in capital cases. These include factors touching on the offence itself and those having to do with the offender. The reader is also provided with

commentary on the safeguards and procedural directions that are needed to protect the right to a fair sentencing hearing in capital cases.

The authors are to be complimented for the manner in which the material has been systematised and supported by relevant cases. The book is a wonderful asset for all those in the common law world who must grapple with the problems involved in discretionary capital sentencing.

The Honourable Mr Justice Adrian Saunders
President of the Caribbean Court of Justice
August 2018

¹ *August & Anr v R*, Criminal Appeals No. 22 of 2012 and 23 of 2013, Caribbean Court of Justice, para. 144

Editors' preface

In 2007, we published *A Guide to Sentencing in Capital Cases*, authored by leading human rights barristers Edward Fitzgerald QC and Keir Starmer QC. The publication was commissioned after the abolition of the mandatory death penalty by the courts in the Caribbean, Uganda and Malawi. It addressed a critical need among judges, prosecutors and defence lawyers, and others working within the criminal justice system, for practical assistance on the application of discretionary sentencing principles in capital cases. The guide set out the appropriate legal tests, relevant factors to be considered in the sentencing exercise and procedural issues arising as a result of the discretion now vested in the courts.

Since publication of the guide in 2007, courts in other jurisdictions around the world have followed the reasoning previously established and ruled that mandatory death sentences are incompatible with fundamental human rights protections. Most recently, in 2017, the Supreme Court of Kenya held that the mandatory death penalty was in violation of the Bill of Rights enshrined in the Kenyan Constitution and, in 2018, the Caribbean Court of Justice struck down the mandatory death penalty in Barbados. These latest decisions reflect and reinforce a growing consensus that the mandatory death penalty is a cruel and inhuman punishment, which violates the right to life and the right to a fair trial by depriving defendants of the opportunity to have their sentence determined by the courts. New discretionary sentencing systems have been introduced that limit the circumstances in which the death penalty can be imposed.

This new book supersedes the earlier guide, bringing the text up to date with the latest legal developments. Its scope has significantly expanded to give commentary on the range of approaches adopted by the courts and key contemporary legal questions and issues. It provides a resource to assist legal professionals working in capital jurisdictions in navigating discretionary sentencing systems, with reference to comparative international practice. When addressing the issue of mental disorder at the sentencing stage, it should be read in conjunction with the *Handbook on Forensic Psychiatric Practice in Capital Cases* and the accompanying *Casebook on Forensic Psychiatric Practice in Capital Cases*, which we commissioned and published in 2018.

The abolition of the mandatory death penalty has drastically reduced, in most countries, the number of death sentences imposed. This is because the courts, having regard to the circumstances of the offence and offender, will frequently find the death penalty to be an excessive or inappropriate punishment. However, even reforming the law to permit the discretionary use of capital punishment cannot remove arbitrariness and cruelty in the administration of the death penalty. An element of subjectivity is inevitable in the decision-making of prosecuting authorities in deciding when the death penalty should be pursued and by judges (and in some jurisdictions, juries) in deciding whether the sentence should be imposed.

Whether the death penalty is mandatory or discretionary, the punishment is incompatible with fundamental human rights protections. The vast majority of the world's nations have recognised that the only solution is to remove the death penalty from their statute books completely.

Saul Lehrfreund and Parvais Jabbar
Co-Executive Directors
The Death Penalty Project
August 2018

Authors' acknowledgments

This short book draws on our shared experience of cases fought and won, and occasionally lost, across the common law world. In presenting our observations on discretionary capital sentencing we pay tribute to our colleagues who have acted in those cases. It has been our privilege to collaborate with many of these advocates in advancing written and oral arguments, developing ideas and strategies and, we hope, contributing to evolving jurisprudential principles. It is also right to recognise the many judges who have lent their authoritative insights and analysis to this process.

We gratefully acknowledge the work done by Sir Keir Starmer QC MP, who with Edward Fitzgerald QC appeared as counsel in some of the leading cases in this area and co-authored the original version of this text (*A Guide to Sentencing in Capital Cases*, 2007).

Chapter 6 includes a summary of the capital resentencing process in Malawi following the abolition of the mandatory death penalty in *Kafantayeni*. We are grateful to Sandra Babcock, Faculty Director at the Center on the Death Penalty Worldwide, Cornell Law School, for providing the data on which our summary is based. The Death Penalty Project assisted with the resentencing of the surviving *Kafantayeni* plaintiffs. The much larger cohort of prisoners who had already been sentenced to death when *Kafantayeni* was decided were resentenced in a collaboration between various organisations: Cornell Law School; Reprieve; the Malawi Human Rights Commission; the Law Society; Legal Aid; and the Paralegal Advisory Services Institute. Together they assisted more than 150 prisoners and provided remedies for some egregious miscarriages of justice, in many cases helped by members of the Malawi Bar acting *pro bono*. This model may provide inspiration in other common law jurisdictions facing the challenge of rectifying the unconstitutional imposition of mandatory death sentences.

Two other individuals deserve particular recognition. The first is Emile Carreau, a volunteer lawyer who served for many months as researcher, facilitator and general midwife for the post-*Kafantayeni* resentencing process in Malawi. His enduring commitment and dedication to this task had an enormous impact on its outcomes. The second is Andrew Novak, whose masterly exposition of the decline of the mandatory death penalty – particularly in Africa – is the subject of excellent academic publications.

This book would not have been possible without the support and patience of the executive directors of The Death Penalty Project, Parvais Jabbar and Saul Lehrfreund, and their colleagues. Any errors in the text are, of course, our sole responsibility.

Edward Fitzgerald QC CBE

Joe Middleton

Amanda Clift-Matthews

CHAPTER 1

Introduction



- 1.1. This book has been written for judges, defence lawyers, prosecutors and other participants in the criminal justice system. It provides a thematic resource for sentencing in discretionary capital cases, drawing on the experience of the courts in numerous common law jurisdictions where the mandatory death penalty has been replaced by a discretionary sentencing process.

The decline of the mandatory death penalty in common law jurisdictions

- 1.2. The original version of this book (*A Guide to Sentencing in Capital Cases*, 2007) was published more than a decade ago, shortly after the High Court of Malawi held in the *Kafantayeni* case that the mandatory death penalty was unconstitutional.² By that point the incompatibility of the mandatory death penalty with fundamental rights was well-established in the common law world. A consensus on this issue had emerged, based on constitutional challenges in the highest courts of the United States of America (US), India and common law jurisdictions in the Caribbean and Africa.
- 1.3. The principal finding in these cases was that the mandatory and automatic imposition of the death penalty amounted to cruel and inhuman punishment. It was cruel and inhuman to impose the ultimate sanction of death whenever a person is convicted of a particular offence (usually murder), with no possibility of mitigation by reference to the specific circumstances of the individual offence or the individual offender. In some cases the mandatory death penalty was also found to be incompatible with the right to life (including the right not to be arbitrarily deprived of life), the right to a fair trial and access to justice (including the right to a fair sentence and to an appeal against sentence) and the separation of powers.
- 1.4. In their judgments on the mandatory death penalty, the national courts often recognised that the imposition of a death sentence itself was protected from constitutional challenge, because the constitution in question contained an express qualification to the right to life in relation to the imposition of lawful punishment. But in all these cases the courts held that the mandatory imposition of death for a particular type of offence was neither protected from constitutional challenge nor compatible with the rights enshrined in the constitution.
- 1.5. These decisions were reinforced and supported by international courts and tribunals, with a series of decisions concluding that the mandatory death penalty was incompatible with international and regional human rights treaties. These domestic and international developments are addressed in more detail in the next chapter.

Developments since 2007

- 1.6. Since the original version of this book was published in 2007, this flow of constitutional challenges and determinations by domestic and international tribunals has continued in a broadly consistent direction. The decision in *Kafantayeni* was confirmed by the Supreme Court of Appeal, Malawi's highest court, later in the same year.³ In 2009, the Supreme Court of Uganda upheld the

² *Kafantayeni & Ors v Attorney General* [2007] MWHC 1, 46 ILM 566

³ *Twoboy Jacob v Republic*, MSCA Criminal Appeal No. 18 of 2006

Constitutional Court's earlier decision striking down the mandatory death penalty in the *Kigula* case, a class action brought by all 417 prisoners on death row in Uganda.⁴

- 1.7. The following year the Court of Appeal of Kenya, which at that time was Kenya's highest court, adopted a similar line of reasoning in *Mutiso*.⁵ A different bench of the same court took the opposite view in 2013,⁶ which left the status of the mandatory death penalty in Kenya unsettled for several years.
- 1.8. The uncertainty in Kenya has now been authoritatively resolved by the Supreme Court, which is Kenya's highest court under the 2010 Constitution. At the end of 2017, the Supreme Court held that the mandatory death penalty was 'out of sync with the progressive Bill of Rights enshrined in our Constitution', and was a 'colonial relic that has no place in Kenya today' (*Muruatetu & Mwangi v Republic, Death Penalty Project & Ors Intervening*⁷). The Court concluded that the mandatory death penalty for murder was incompatible with the broad principle of the rule of law⁸ and a number of specific clauses in the Bill of Rights:

*'We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.'*⁹

- 1.9 In Ghana, the Supreme Court chose to depart from the established consensus in 2011 and upheld the constitutionality of the mandatory death penalty.¹⁰ But this left Ghana in breach of its obligations in international law, in particular its obligation to ensure respect for the right to life under article 6 of the International Covenant on Civil and Political Rights. So held the United Nations (UN) Human Rights Committee in 2014, when it upheld a complaint brought by the unsuccessful appellant in the Supreme Court proceedings.¹¹
- 1.10. In 2012, the Supreme Court of India extended its previous jurisprudence by finding that the mandatory death penalty for homicide using prohibited arms was unconstitutional.¹² And in 2015, the Supreme Court of Bangladesh held that the mandatory death penalty resulted in the deprivation of life without due process of law, and therefore violated the right to life as enshrined in the Constitution of Bangladesh.¹³

⁴ *Kigula & Ors v Attorney General* [2005] UGCC 8 (Constitutional Court); *Attorney General v Kigula & Ors* [2009] UGSC 6 (Supreme Court)

⁵ *Mutiso v Republic* [2011] EALR 242. The case was decided on 30 July 2010. Kenya's new (2010) Constitution created the Supreme Court as the new highest court standing above the Court of Appeal. It entered into force on 27 August 2010.

⁶ *Mwaura & Ors v Republic*, Criminal Appeal No. 5 of 2008

⁷ Petitions No. 15 & 16 of 2015, paras 64 and 67

⁸ See para. 58 of the judgment.

⁹ See para. 59 of the judgment. Section 204 of the Penal Code imposes the mandatory death penalty for murder. The cited constitutional articles protect the right to a fair trial, respect for human dignity, access to justice, a fair hearing before an independent tribunal and an appeal to a higher court. As the Court of Appeal observed in *Mutiso*, the same principled analysis applies to robbery with violence and attempted robbery with violence, for which the death penalty is also mandatory in Kenya. In his submissions in *Muruatetu & Mwangi*, the Director of Public Prosecutions of Kenya acknowledged that the mandatory death penalty was unconstitutional for all offences, not just murder (see para. 15 of the Supreme Court's judgment). This is important because robbery with violence accounts for the vast majority of death sentences imposed in Kenya.

¹⁰ *Johnson v Republic* [2011] 2 SCGLR 601

¹¹ *Johnson v Ghana*, Communication No. 2177/2012, CCPR/C/110/D/2177/2012

¹² *State of Punjab v Dalbir Singh* [2012] INSC 84a

¹³ *BLAST & Ors v State*, 1 SCOB [2015] AD 1

- 1.11. Elsewhere in Asia, in particular in Malaysia and Singapore, the mandatory death penalty has experienced both regressive and progressive developments in recent years. Judicial challenges to the mandatory death penalty have been unsuccessful, but legislative reforms have introduced limited discretion for sentencing in drug trafficking cases, and in Singapore the mandatory death penalty for murder has been confined to cases in which the offender intended to cause death. These developments are addressed in more detail in the next chapter.
- 1.12. Most of the judicial challenges to the mandatory death penalty were brought in murder cases, so the sentencing principles summarised in this book are focused on sentencing for murder. Subject to any specific statutory provisions or sentencing guidelines, the same principles will be applicable to other capital offences.

The purpose of this book

- 1.13. As a result of the successful constitutional challenges to the mandatory death penalty, judges imposing sentences for capital offences are now confronted with a discretion over sentence, where previously it was thought that death was the only lawful penalty. The introduction of discretionary sentencing helps to achieve sentences that are not only constitutional but also more just and proportionate. But the new sentencing regimes impose novel and difficult burdens on judges and other participants in the sentencing process. The importance of rising to these challenges is underscored in capital cases by the unique severity of the death penalty and its inevitable irreversibility.
- 1.14. In the new discretionary sentencing context, judges and advocates now need to address the following questions: ‘When is an offence eligible or ineligible for the death penalty?’; ‘What is the applicable test for imposing a death sentence?’; ‘What matters are relevant to the exercise?’; and ‘What special procedural steps are needed?’.
- 1.15. This book offers some suggested answers to those questions, based on the case law and practice in those jurisdictions where the courts have been grappling with these issues in recent years. It is intended to be a practical resource for professional participants in the capital sentencing process and draws widely on the case law from all the relevant jurisdictions.
- 1.16. The remaining chapters address the following topics:
- Chapter 2 provides a brief outline of the decline of the mandatory death penalty in the national law of common law jurisdictions and its parallel decline in international law
 - Chapter 3 summarises the three broad approaches to discretionary capital sentencing
 - Chapter 4 addresses the relevant mitigating and aggravating factors in the capital sentencing exercise
 - Chapter 5 focuses on mental disorder as a specific and particularly complex mitigating factor, which has potential significance in any capital case
 - Chapter 6 addresses the specific principles applicable to resentencing in capital cases. These considerations typically arise where the offender is being resented following the quashing of a previously imposed unlawful mandatory death sentence

- Chapter 7 considers the specific procedural requirements and evidential issues arising in the discretionary capital sentencing process
- 1.17. Of the three broad approaches to discretionary capital sentencing summarised in Chapter 3, the ‘rarest of the rare’ approach is by far the most common. This is also the only approach to have been developed in the recent common law jurisprudence, and this was the approach that was addressed in the original version of this book. The underlying principle is that there is a strong presumption in favour of life, and the death penalty must be reserved for the most exceptionally severe cases of the offence in question. But this is not the only approach. In some countries the position is more neutral, and there is no particular presumption either way: aggravating and mitigating circumstances are considered together. And in others there is, in principle at least, a presumption in favour of death, which is only avoided where the offender can establish extenuating circumstances. By addressing all three of the possible approaches to discretionary sentencing, this book aims to provide a more complete account of the different approaches adopted in different jurisdictions.
- 1.18. Chapter 5 addresses mental disorder as a relevant consideration in the capital sentencing process. Such emphasis is undoubtedly justified by the potential relevance of mental illness at the sentencing stage, and by the fact that the manifestations and significance of mental disorder are much neglected throughout the common law world. This issue is addressed in much greater detail in the latest edition of the *Handbook of Forensic Psychiatric Practice in Capital Cases* and the accompanying *Casebook*.¹⁴
- 1.19. This book is based on developments in those common law jurisdictions that have retained the death penalty. Different approaches are applied in civil law and other jurisdictions outside the common law world, including those that have adopted Sharia law. Capital sentencing is no less important an issue in those countries, but the practices and principles deployed there are beyond our expertise.

Legality and legitimacy of the death penalty

- 1.20. Finally, nothing in this book should be viewed as endorsing the death penalty, or accepting that the death penalty is a legitimate punishment when imposed in accordance with certain principles or procedures. In our view the death penalty is abhorrent and has no place in a society that values justice and humanity. But it continues to be a fact of life, albeit in a dwindling number of countries. If the death penalty is imposed at all, then pending its complete abolition, it is better that it is imposed as consistently as possible, with constitutional safeguards and international legal principles rather than in violation of them. The rigorous examination of the circumstances of the offence and the offender, the evaluation of all relevant mitigation, and the application of appropriate evidential burdens and judicial procedures may help to protect a death sentence from a finding of illegality. But even measures of that kind, applied with the fullest rigour of the law, cannot detract from the conclusion that the deliberate taking of life is invariably a cruel, inhuman and illegitimate form of punishment.

¹⁴ *Handbook of Forensic Psychiatric Practice in Capital Cases* (2nd ed.), Nigel Eastman, Sanya Krljes, Richard Latham, Mark Lyall, The Death Penalty Project, 2018; *Casebook of Forensic Psychiatric Practice in Capital Cases*, Nigel Eastman, Sanya Krljes, Richard Latham, Mark Lyall, The Death Penalty Project, 2018. Both titles can be downloaded from The Death Penalty Project website (www.deathpenaltyproject.org).

CHAPTER 2

The decline of the mandatory death penalty in national and international law



- 2.1. In every country where judges are developing new discretionary capital sentencing practices, the need to do so is the result of successful constitutional challenges to the mandatory death penalty. This process provides a striking illustration of how common law principles can develop and advance between different common law countries, with the courts in each jurisdiction refining the principles that have evolved elsewhere. At the same time, a succession of decisions by international and regional tribunals applying international law has reinforced the proposition that the mandatory death penalty is fundamentally incompatible with respect for human life and dignity. This chapter provides a brief outline of these developments in national and international law.¹⁵
- 2.2. Further details on the evolution of the three approaches to discretionary sentencing in the case law of national courts are provided in the next chapter.

Abolition of the mandatory death penalty by domestic courts

- 2.3. The abolition of the mandatory death penalty through judicial development of the common law, and in particular through the courts' interpretation of constitutional protections, began in the US. This trend was followed in India and progressed through numerous common law jurisdictions in the Caribbean and Africa. To a much more limited extent the mandatory imposition of the death penalty has also been eroded in Asia. At the time of writing, only nine out of 52 Commonwealth nations retain a mandatory death penalty, and of those, only three continue to execute sentenced offenders.¹⁶
- 2.4. As early as 1937, the US Supreme Court recognised that the Eighth Amendment to the US Constitution, which prohibits cruel and unusual punishments, required that all criminal sentences should be individualised.¹⁷ By 1963, in all states where murder had carried a mandatory capital sentence the law had been amended to give juries a discretion on the death sentence. In *Woodson v North Carolina*¹⁸ this led the Supreme Court to conclude that the mandatory imposition of the unique and irrevocable punishment of death was an impermissible departure from 'contemporary standards of decency'. As the Court observed:

*'The history of the mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offence has been rejected as unduly harsh and unworkably rigid.'*¹⁹

- 2.5. Elsewhere in the common law world, the harshness of mandatory death sentences had been softened by the introduction of an exception, namely where there were 'extenuating circumstances' justifying a lesser sentence. This approach was adopted in South Africa and Southern Rhodesia from 1935, in Swaziland from 1938, in Lesotho from 1959 and in Botswana from 1964. As the Privy Council observed in the case of *Bowe v R*, the Board was unaware of any jurisdiction in

¹⁵ For a detailed and authoritative analysis see *The Global Decline of the Mandatory Death Penalty*, Andrew Novak, Routledge, 2014; *The Death Penalty: A Worldwide Perspective* (5th ed.), Roger Hood and Carolyn Hoyle, OUP, 2015. Many of the legal developments noted in this chapter and the Introduction post-date these texts.

¹⁶ These are Malaysia, Nigeria and Singapore. The other countries are Brunei, Ghana, Sierra Leone, Sri Lanka, Tanzania and Trinidad and Tobago, none of which have carried out an execution for more than a decade. Kenya is omitted from this list because although the death penalty continues to be prescribed as the mandatory sentence for murder, robbery with violence and other offences, its unconstitutionality has now been decisively confirmed by the Supreme Court: see para. 1.8 above. In June 2018, the Caribbean Court of Justice struck down the mandatory death penalty in Barbados: *Nervais & Anr v R* [2018] CCJ 19 (AJ). The Court overturned an older Privy Council ruling that such punishment was inhuman and degrading but was protected from constitutional invalidation by the savings clauses in the Barbados Constitution: *Boyce v R* [2005] 1 AC 400.

¹⁷ *Pennsylvania ex rel. Sullivan v Ashe*, 302 US 51 (1937)

¹⁸ 428 US 280 (1976)

¹⁹ 428 US 292

which, by 1973, 'the mandatory death sentence was retained and it was considered just to execute all who were convicted: by one means or another, the harshness of the old common law rule was mitigated'.²⁰

- 2.6. In India the death penalty has long been discretionary for most murders, but from the adoption of the 1860 Penal Code it was mandatory when committed by an offender serving a life sentence.²¹ In 1983 the Supreme Court of India held in *Mithu v State of Punjab*²² that the mandatory death penalty for all such offences was unconstitutional. There was no rational justification for denying sentencing discretion for such offenders and the punishment was therefore arbitrary and incompatible with the right to life and equality before the law. The Court struck down the mandatory death penalty for other offences in its subsequent decisions.²³ The case law in India featured prominently in the reasoning of the Supreme Court of Bangladesh when it found the mandatory death penalty to be unlawful in 2015.²⁴
- 2.7. In the common law Caribbean jurisdictions, the breakthrough on this issue came not from the Privy Council but from the Eastern Caribbean Court of Appeal. In 2001, in the case of *Spence & Hughes v R*,²⁵ the Court of Appeal struck down the mandatory death penalty in St Vincent and The Grenadines and Saint Lucia on the basis that it amounted to inhuman and degrading punishment. It held that the sentencing court must have a discretion to take into account the individual circumstances of the offender and the offence 'if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process'.²⁶ As Sir Dennis Byron CJ observed:

*I am satisfied that the requirement of humanity in our Constitution does impose a duty for consideration of the individual circumstances of the offense and the offender before a sentence of death could be imposed in accordance with its provisions.*²⁷

In reaching this conclusion the Court took into account the approaches in other common law jurisdictions and state obligations under international law, including the jurisprudence of the Inter-American Commission on Human Rights.²⁸

- 2.8. Saint Lucia appealed against the judgment of the Eastern Caribbean Court of Appeal to the Privy Council. The appeal in that case²⁹ was heard at the same time as the appeals on the same issue from Belize (*Reyes v R*³⁰) and St Kitts and Nevis (*Fox v R*³¹). In its seminal judgment in *Reyes*, the Privy Council concluded that the mandatory death penalty was unconstitutional by reason of its fundamental inhumanity. As Lord Bingham explained:

[T]o deny the offender the opportunity, before sentence has been passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him

²⁰ [2006] UKPC 10, para. 35

²¹ See section 303 of the Indian Penal Code.

²² (1983) 2 SCR 690

²³ For a more detailed account see *The Global Decline of the Mandatory Death Penalty* (fn. 15 above), pp.38–41.

²⁴ *BLAST & Ors v State*, 1 SCOB [2015] AD 1

²⁵ Criminal Appeals No. 20 of 1998 (St Vincent & The Grenadines) & No. 14 of 1997 (St Lucia)

²⁶ *Spence & Hughes*, para. 43

²⁷ *Spence & Hughes*, para. 46

²⁸ See paras 2.18–2.22 below.

²⁹ *R v Hughes* [2002] UKPC 12, [2002] 2 AC 259

³⁰ [2002] 2 AC 235

³¹ *Fox v R* [2002] UKPC 13, [2002] 2 AC 284

*as no human being should be treated and thus to deny his basic humanity, the core right of which section 7 exists to protect.*³²

- 2.9. The Privy Council reached the same conclusion in appeals from several other Caribbean jurisdictions, including St Lucia,³³ St Kitts and Nevis,³⁴ Dominica³⁵ Barbados³⁶ Trinidad and Tobago,³⁷ Jamaica,³⁸ and The Bahamas.³⁹
- 2.10. In Africa, the first constitutional challenge to the mandatory death penalty was brought in Uganda, by all 417 prisoners who were then on death row. In 2005, the Constitutional Court ruled in *Kigula v Attorney General*⁴⁰ that all 417 sentences were unconstitutional, because there had been no opportunity for the offenders to mitigate their punishments. This amounted not only to the imposition of inhuman punishment and a breach of the right to life, but also a violation of their right to a fair trial. The Supreme Court rejected the Government's appeal and upheld the Constitutional Court's decision.⁴¹ In setting out their reasoning, both courts acknowledged the earlier common law jurisprudence from the Privy Council on the mandatory death penalty, summarised above, adapting it as appropriate for the Ugandan context.
- 2.11. The next challenge in Africa was brought in Malawi. In *Kafantayeni & Ors v Attorney General*⁴² the High Court held that the mandatory imposition of death for the offence of murder violated fundamental constitutional protections. It amounted to inhuman and degrading treatment or punishment, in violation of section 19(3) of the Constitution, and by denying judicial discretion on sentencing, it violated the right to a fair trial under section 42(2)(f). The Supreme Court of Appeal approved the High Court's decision that the mandatory death penalty is unconstitutional in *Twoboy Jacob v Republic*,⁴³ and in *Yasini v Republic*⁴⁴ it ordered that all murder convicts who had already been sentenced to the mandatory death penalty should be resentenced. The outcome of that resentencing process is summarised in Chapter 6.⁴⁵
- 2.12. Kenya followed in the footsteps of Uganda and Malawi and the preceding common law cases. The status of the mandatory death penalty was unsettled for several years, but the Supreme Court of Kenya has now resolved the uncertainty with a decisive ruling against the mandatory death penalty for murder in *Muruatetu & Mwangi v Republic, Death Penalty Project & Ors Intervening*.⁴⁶ Further details are provided in para. 1.8 above.

³² *Reyes v R* [2002] 2 AC 235, para. 43. Section 7 of the Belize Constitution is the clause prohibiting torture and other inhuman treatment: "No person shall be subjected to torture or to inhuman or degrading treatment or punishment".

³³ *R v Hughes* [2002] 2 AC 259

³⁴ *Fox v R* [2002] 2 AC 284

³⁵ *Balson v State* [2005] UKPC 2

³⁶ *Boyce v R* [2005] 1 AC 400. In both *Boyce v R* and *Matthew v State* [2005] 1 AC 433, the Privy Council held that although the mandatory death penalty was inhuman and degrading, its constitutionality was protected by specific savings clauses in the constitutions of Barbados and Trinidad and Tobago, respectively. The decision in *Boyce v R* has now been overturned by the Caribbean Court of Justice, which struck down the mandatory death penalty in *Nervais & Anr v R* [2018] CCJ 19 (AJ).

³⁷ *Matthew v State* [2005] 1 AC 433

³⁸ *Watson v R* [2005] 1 AC 472

³⁹ *Bowe v R* [2006] 1 WLR 1623

⁴⁰ *Kigula & Ors v Attorney General* [2005] UGCC 8

⁴¹ *Attorney General v Kigula & Ors* [2009] UGSC 6

⁴² [2007] MWHC 1, 46 ILM 566

⁴³ MSCA Criminal Appeal No. 18 of 2006

⁴⁴ MSCA Criminal Appeal No. 29 of 2005

⁴⁵ See paras 6.29–6.32 below.

⁴⁶ Petitions No. 15 & 16 of 2015, paras 64 and 67. Apart from the issue of the mandatory death penalty, the Supreme Court also considered the meaning of a sentence of life imprisonment as an alternative to the death penalty. The Court held that although this was a matter for Parliament to decide, as a matter of principle a life sentence should not necessarily preclude the possibility of eventual release: 'it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism' (*Muruatetu & Mwangi*, para. 95). The Court went on to recommend that the Attorney General and Parliament 'commence an enquiry and develop legislation on the definition of "what constitutes a life sentence"; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences' (para. 96). This accords with the approach adopted by the Supreme Court of Uganda in *Tigo v Uganda* [2011] UGSC 7. In that case the Court confirmed that a prisoner remains under a life sentence for the whole of his natural life, but that this does not preclude the possibility of his release from prison on account of remissions earned.

Different directions taken in Ghana, Singapore and Malaysia

- 2.13. The decline of the mandatory death penalty in common law jurisdictions has not been universal or uniform. As noted in the previous chapter, a constitutional challenge in Ghana was rejected by the Supreme Court of Ghana in 2011. The UN Human Rights Committee subsequently held that Ghana was in breach of its obligations in international law, in particular under the International Covenant on Civil and Political Rights (ICCPR).⁴⁷ But at the time of writing, Ghana had not taken steps to comply with its international obligations or give effect to the Committee's findings.
- 2.14. In Asia, both Singapore and Malaysia retain the mandatory death penalty for murder, although in Singapore the Penal Code has been amended to restrict it to cases in which the offender intended to cause death. Neither country is a signatory to the ICCPR and, unlike Ghana, both countries continue to carry out executions.
- 2.15. A constitutional challenge to the mandatory death penalty for drug trafficking in Singapore failed in 2010.⁴⁸ Since then, however, Singapore has introduced a limited restriction to the category of murders for which death remains the mandatory penalty.⁴⁹ And in both countries, legislation has been introduced to impose limited restrictions on the mandatory death penalty for drug trafficking, which accounts for most capital sentences and executions in both Singapore and Malaysia.⁵⁰
- 2.16. The restrictions on the mandatory death penalty for drug trafficking in Singapore raise obvious concerns of principle. This is because as a necessary condition for the exercise of judicial discretion not to impose the death penalty, the prosecution must have certified that the offender provided material assistance to the authorities.⁵¹ In no other common law jurisdiction does the prosecution have the power to tie the judge's hands in this way and prevent the exercise of discretion in capital cases. But the legislative amendments in both Singapore and Malaysia afford at least a degree of mitigation to the inhumanity of mandatory death sentences that has been rejected in the rest of the common law world.

The decline of the mandatory death penalty in international law

- 2.17. In parallel with the developing national case law outlined above, there is also an emerging consensus that the mandatory death penalty is incompatible with international and regional human rights law.

The position under the American Declaration and American Convention

- 2.18. All the common law jurisdictions in the Caribbean and Central America mentioned in this chapter are members of the Organisation of American States (OAS). As such, they are committed by the OAS Charter to respect the human rights enshrined in the American Declaration of the Rights and Duties of Man, which was adopted in 1948. In 2001, the Inter-American Commission on Human Rights held that the mandatory death penalty violates the right to life, the right to a fair

⁴⁷ See para. 1.9 above.

⁴⁸ *Yong Vui Kong v PP* [2010] SGCA 20

⁴⁹ The Penal Code (Amendment) Act 2012 amended s.302 of the Penal Code of Singapore, to the effect that death is mandatory only if the murder was committed with an intent to cause death, as distinct from any lesser intent.

⁵⁰ See the Misuse of Drugs (Amendment) Act 2012 (Singapore) and the Dangerous Drugs (Amendment) Act 2017 (Malaysia).

⁵¹ See s.33B(2)(b) of the Misuse of Drugs Act, as amended by s.14 of the Misuse of Drugs (Amendment) Act 2012.

trial and the right to due process under the American Declaration. This was in the case of *Edwards & Ors v The Bahamas*,⁵² in which the Commission recommended effective remedies including commutation, compensation and legislative amendments.

- 2.19. The Inter-American jurisprudence on the mandatory death penalty is much more developed under the American Convention on Human Rights, which has been in force since 1978. Unlike the American Declaration, the Convention is binding in international law, although most of the common law countries in the Caribbean and Central America have not ratified it.⁵³
- 2.20. Article 4(1) of the Convention enshrines the right to life and prohibits arbitrary deprivation of life, and Article 4(2) permits the imposition of the death penalty only ‘for the most serious crimes’. Both the Inter-American Commission and the Inter-American Court of Human Rights apply a narrow and restrictive interpretation of these provisions. The unequivocal position of both bodies is that these provisions preclude the imposition of the mandatory death penalty.
- 2.21. The Commission has described the mandatory death penalty as ‘inherently antithetical’ to the protections under the American Convention.⁵⁴ For both the Commission and the Court, the concept of ‘the most serious offenses’ cannot extend to all criminal acts falling within the legal definition of murder, even though all murders are undoubtedly very serious offences. The Convention requires a further degree of discrimination within the category of murder, by reference to the individual facts of both the offence and the offender. The Court has held that capital punishment is intended to be applied only in ‘truly exceptional circumstances’, and that:

*‘The text of Article 4 as a whole reveals a clear tendency to restrict the scope of the death penalty both as far as its imposition and its applicability are concerned.’*⁵⁵

- 2.22. The Inter-American Commission went further in *McKenzie & Ors v Jamaica*, when it spoke of a dynamic development in the region towards the restriction and eventual abolition of the death penalty:

*‘Article 4 of the Convention... should be interpreted as imposing restrictions designed to delimit strictly the scope and application of the death penalty, in order to reduce the application of the penalty to bring about its gradual disappearance.’*⁵⁶

The irrelevance of the prospect of executive clemency

- 2.23. In its analysis of the mandatory death penalty the Inter-American Commission has found that the existence of a right to seek pardon or commutation, which is an additional right under Article 4(6) of the Convention, does not cure other breaches of the Convention.⁵⁷ This reflects the position adopted in domestic constitutional challenges⁵⁸ and the approach taken by the Human Rights Committee under the ICCPR (see below).

⁵² Case 12.067, Report No. 48/01, OEA/Ser.L/V/II.111, doc. 20 (2000)

⁵³ Of the common law Caribbean countries that retain the death penalty, Barbados, Dominica, Grenada and Jamaica have ratified the Convention. Trinidad and Tobago ratified it in 1991 but denounced it in 1998.

⁵⁴ See *Baptiste v Grenada*, Case 11.473, Report No. 38/00, OEA/Ser.L/V/II.106 doc. 3 (1999), para. 93. See also the Commission’s thematic report on the death penalty published in 2011, *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, paras 77–78.

⁵⁵ See the Court’s *Advisory Opinion: Restrictions on the Death Penalty*, OC-3/83, 4 HRLJ 352, paras 54 and 57.

⁵⁶ See *McKenzie & Ors v Jamaica*, Case 12.023, Report No. 41/00, OEA/Ser.L/V/II.106 doc. 3 (2000), para. 209.

⁵⁷ See *Sewell v Jamaica*, Case 12.347, Report No. 76/02, Doc. 5 rev. 1 at 763 (2002), para. 101.

The position under the International Covenant on Civil and Political Rights

- 2.24. The developments in the Americas outlined above have been reflected in the jurisprudence of the UN Human Rights Committee (HRC). The HRC provides authoritative interpretations of the ICCPR, which like the American Convention is a source of binding obligations in international law. Nearly all common law countries have acceded to the ICCPR, although as noted above, Singapore and Malaysia are two of the few exceptions.
- 2.25. Article 6(1) of the ICCPR enshrines the right to life, and like Article 4(2) of the American Convention, Article 6(2) of the ICCPR limits the death penalty to ‘the most serious crimes’. In its *General Comment* on Article 6 the HRC notes that ‘the expression “most serious crimes” must be read restrictively to mean that the death penalty should be a quite exceptional measure’.⁵⁹ And in its findings (views) on communications submitted by individuals who have been mandatorily sentenced to death, the HRC has consistently held that imposing such a sentence for all offences of a particular category is incompatible with Article 6, for reasons similar to those adopted by the Inter-American Commission and Court.⁶⁰ In short, the HRC has found in all of these cases that a system of mandatory capital punishment deprives the offender of the most fundamental of rights, the right to life, without considering whether this most drastic and final form of punishment is appropriate in all the circumstances of the case.
- 2.26. Like the Inter-American Commission, the HRC has held that the availability of a right to seek pardon or commutation, which is protected as a specific right under Article 6(4) of the ICCPR, is no substitute for the exercise of judicial discretion in the imposition of the death penalty.⁶¹ This reflects para. 7 of *General Comment No. 6*, which notes that the rights set out in Article 6 of the ICCPR ‘are applicable in addition to the particular right to seek pardon or commutation of the sentence’.

The approach of the African Commission and African Court on People’s and Human’s Rights

- 2.27. The African Commission has repeatedly encouraged the abolition of the death penalty for all its member states. In Resolutions 42 of 1999 and 136 of 2008 it urged state parties that retained the death penalty to limit its imposition to only the most serious crimes and further invited those countries to consider establishing a moratorium on executions, with a view to abolishing the practice of capital punishment entirely.
- 2.28. The compatibility of the mandatory death penalty with the African Charter on People’s and Human Rights has not yet been litigated in the African Commission or the African Court on People’s and Human’s Rights, although at the time of writing a case on this issue was pending before the Court.

⁵⁸ See, for instance, *Muruatetu & Mwangi v Republic*, Petitions No. 15 & 16 of 2015, where the Supreme Court of Kenya rejected the Attorney General’s argument that the petitioners should rely on the prospect of pardon or remission by executive intervention. The petitioners were entitled to a remedy for the breach of their constitutional rights from the judiciary, not the executive: see paras 101-102 of the judgment.

⁵⁹ *CCPR General Comment No. 6: Article 6 (Right to Life)*, HRI/GEN/1/Rev.9 (Vol. 1), p.177, para. 7. The issue is addressed in more detail in a draft superseding General Comment on Article 6, General Comment No. 36 (CCPR/C/GC/R.36/Rev.4), which at the time of writing was pending approval by the HRC.

⁶⁰ See *Lubuto v Zambia*, Communication No. 390/1990, CCPR/C/55/D/390/1990/Rev.1 (1995); *Thompson v St Vincent and The Grenadines*, Communication No. 806/1998, CCPR/C/70/D/806/1998 (2000); *Kennedy v Trinidad and Tobago*, Communication No. 845/1998, CCPR/C/74/D/845/1998 (2002); *Carpo v The Philippines*, Communication No. 1077/2002, CCPR/C/77/D/1077/2002 (2003); *Johnson v Ghana*, Communication No. 2177/2012, CCPR/C/110/D/2177/2012 (2014).

⁶¹ See *Thompson v St Vincent and The Grenadines* (above), para. 8.2; *Kennedy v Trinidad and Tobago* (above), para. 7.3.

2.29. In the light of the challenges brought in other courts and tribunals on this issue, there are obvious questions about the compatibility of the mandatory death penalty with the fundamental rights protected under the African Charter, including Article 4, which enshrines the right to life and prohibits the arbitrary deprivation of life, Article 5, which prohibits inhuman or degrading punishments, and Article 7, which enshrines the right to a fair trial. In *Forum of Conscience v Sierra Leone*, 223/98, the African Commission held that the implementation of a sentence of death imposed after an unfair trial breached the prohibition of arbitrary deprivation of life under Article 4. A similar analysis lends itself to the assessment of whether imposing a mandatory sentence of death is compatible with Articles 4, 5 and 7 of the Charter.

The position under other regional and international instruments

- 2.30. The Association of Southeast Asian Nations (ASEAN), of which both Malaysia and Singapore are members, set up the ASEAN Intergovernmental Commission on Human Rights in 2009 and universally adopted the ASEAN Human Rights Declaration in 2012. Article 14 of the Declaration prohibits inhuman and degrading punishment, but ASEAN has yet to adopt an express position on the application of the death penalty, or its mandatory application for specific offences.⁶²
- 2.31. In Europe, the death penalty only continues to be used in Belarus, which is not a member of the Council of Europe and is not a party to the European Convention on Human Rights. The death penalty itself is not expressly prohibited under the European Convention, which was drafted more than 60 years ago when the death penalty was not considered to violate international standards. But by 1989, it was clear from the case of *Soering v United Kingdom*⁶³ that the mandatory imposition of the death penalty would violate the prohibition of inhuman punishment under Article 3 of the Convention. This flows from the exclusion of consideration of the personal circumstances of the offender and the arbitrariness and disproportionality that are implicit in the mandatory death penalty.⁶⁴
- 2.32. Other than in Belarus, no one has been executed in Europe for many years, and since *Soering* was decided, the member states of the Council of Europe have achieved almost complete abolition of the death penalty in law. They have all signed Protocol No. 6 to the Convention, which recognises that the death penalty has been abolished, and all but Russia have ratified it.
- 2.33. In 2010, the European Court of Human Rights reiterated in *Al-Saadoon v United Kingdom* that the Convention is 'a living instrument which must be interpreted in the light of present-day conditions'.⁶⁵ The Court also noted the evolution towards the complete abolition of the death penalty in Council of Europe member states.⁶⁶ These developments were 'strongly indicative' that Article 2 of the Convention, which protects the right to life, had been amended so as to prohibit the death penalty in all circumstances. It followed that Article 2 could no longer be regarded, as it was in *Soering*, as excluding the death penalty from the prohibition of inhuman punishment under Article 3.⁶⁷

⁶² Article 11 of the Declaration recognises a qualified right to life, which may be deprived 'in accordance with law'.

⁶³ (1989) 11 EHRR 439

⁶⁴ See *Soering*, para. 104.

⁶⁵ *Al-Saadoon v United Kingdom* (2010) 51 EHRR 9, para. 119. The Convention's status as a 'living instrument' has been consistently recognised by the Court since its judgment in *Tyler v United Kingdom* (1979-80) 2 EHRR 1.

⁶⁶ See *Al-Saadoon*, para. 120.

⁶⁷ *Ibid.*

Status of international human rights obligations under domestic law

2.34. Most of the countries identified in this chapter have entered into binding international and regional human rights treaties, albeit with limited enforcement capabilities. Common law jurisdictions generally apply a dualist approach to international treaty law. It follows that national courts cannot rely on international law as binding authority for the interpretation of the constitution and other domestic laws. But the rejection of the mandatory death penalty in international law, as reflected in the cases discussed above, has exercised a tangible influence on national courts in their assessment of whether such a penalty is compatible with national constitutions. This is because wherever the interpretation of domestic law is uncertain, a nation's international treaty obligations provide a legitimate source of persuasive guidance.⁶⁸ That argument is particularly powerful where the normative standards, such as the right to life or the unequivocal prohibition of inhuman or degrading punishments, feature both in the domestic constitution and in an international human rights treaty to which the country in question has acceded.

2.35. There are many examples of this approach in the common law jurisprudence:

- In *Spence & Hughes v R*,⁶⁹ the Eastern Caribbean Court of Appeal recognised the experience of other domestic courts, states' obligations under international law, and the jurisprudence of international human rights bodies, all of which provide a legitimate guide to constitutional interpretation. As Sir Dennis Byron CJ observed:

*[T]his is an area of law where it is important to identify and consider the international legal norms affecting this issue while ensuring that the words of the Constitution are given their full force and meaning.*⁷⁰

Saunders JA (Ag) reinforced the point in the following terms:

[I]t is for this court and not the Inter-American Court to interpret the Constitutions at hand... But equally, this court should give great weight to the jurisprudence of the Inter-American Court...

*'... In my view we would be embarking upon a perilous path if we began to regard the circumstances of each territory as being so peculiar, so unique as to warrant a reluctance to take into account the standards adopted by humankind in other jurisdictions. Section 5 [of the Constitutions in question, prohibiting inhuman or degrading punishment] imposes upon the State an obligation to conform to certain "irreducible" standards that can be measured in degrees of universal approbation. The collective experience and wisdom of courts and tribunals the world over ought fully to be considered.'*⁷¹

- In numerous cases the Privy Council has sought to interpret constitutional human rights provisions consistently with international human rights standards, thereby integrating and embedding contemporary international norms into domestic legal systems. In the landmark judgment of *Reyes v R*,⁷² Lord Bingham observed that when Belize adopted its own constitution

⁶⁸ See, for instance, *R v Secretary of State for Home Department, ex p. Brind* [1991] 1 AC 696, in which the House of Lords dealt with the status of the European Convention on Human Rights in the UK before the Convention was incorporated into domestic law by the Human Rights Act 1997.

⁶⁹ Criminal Appeals No. 20 of 1998 (St Vincent & The Grenadines) & No. 14 of 1997 (St Lucia)

⁷⁰ See para. 9 of the judgment.

⁷¹ See paras 213-214 of the judgment.

⁷² [2002] 2 AC 235

it adopted and gave primacy to the fundamental rights enshrined in the European Convention of Human Rights. By doing so, it cannot have been intended to diminish the rights that the people of Belize had previously been entitled to enjoy:

It is open to the people of any country to lay down rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does.'

- In the Ugandan case of *Kigula*,⁷³ the Supreme Court recognised the importance of the African Charter and the ICCPR as part of the contextual guidance to the interpretation of the Constitution of Uganda.
- In Malawi, where consideration of international law and comparable foreign law jurisprudence is enshrined in the Constitution, the High Court acknowledged in *Kafantayeni* that the provisions of the ICCPR were relevant to the status of the mandatory death penalty under Malawi's Constitution:

*'We accept and recognise that the Covenant forms part of the body of current norms of public international law and in terms of section 11(2) of the Malawi Constitution courts in Malawi are required to have regard to its provisions in interpreting the Constitution.'*⁷⁴

- And in Ghana, the dissenting Justice of the Supreme Court in *Johnson* relied in part on the relevant provisions in the ICCPR and the jurisprudence of the Human Rights Committee for his conclusion that the mandatory death penalty was unconstitutional.⁷⁵

⁷³ *Attorney General v Kigula & Ors* [2009] UGSC 6

⁷⁴ *Kafantayeni & Ors v Attorney General* [2007] MWHC 1, p.9, 46 ILM 566, p.570. Article 11(2) of the Constitution of Malawi provides: 'In interpreting the provisions of this Constitution a court of law shall - ... (c) where applicable, have regard to current norms of public international law and comparable foreign case law.'

⁷⁵ *Johnson v Republic* [2011] 2 SCGLR 601: see the judgment of Dr Date-Bah JSC (Presiding). The other Justices of the Supreme Court made no mention in their judgments of Ghana's obligations under international law.

CHAPTER 3

The 'rarest of the rare' test and other approaches to discretionary capital sentencing



- 3.1. The evolving consensus towards the abolition of the mandatory death penalty is based on a simple premise: no one should be sentenced to the ultimate and irreversible penalty of death without a meaningful opportunity to put forward mitigation, whether arising from the circumstances of the offence, the offender, or both. While this principle is shared in those jurisdictions with discretionary capital sentencing, its implementation is not. This chapter summarises the three different approaches to discretionary sentencing adopted in those jurisdictions.
- The first approach is a strong presumption in favour of life: capital punishment may only be imposed in the most exceptionally serious cases, *the 'rarest of the rare'* – this is by far the most common approach
 - The second approach involves considering aggravating and mitigating circumstances together, with no express presumption in favour of life or death
 - The third approach involves a presumption in favour of death, which is the mandatory sentence unless there are extenuating circumstances
- 3.2. South Africa provides a striking case study of all three approaches evolving in the same country. When the mandatory death penalty was abolished in South Africa in 1935 the relevant legislation introduced an 'extenuating circumstances' test (a presumption in favour of death). The legislation was amended again in 1990 to introduce what appeared to be the middle approach, with a weighing of both aggravating and mitigating features. But by 1995, when the Constitutional Court abolished the death penalty altogether, South Africa's courts had established a very strong presumption in favour of life, reserving the death penalty for the most exceptional cases.⁷⁶
- 3.3. Each of the three approaches to discretionary capital sentencing is analysed below. We also address the test applied in Singapore, where the courts have developed a specific approach that is unique to that jurisdiction.

The first approach to discretionary capital sentencing: a strong presumption in favour of life (the 'rarest of the rare' or 'worst of the worst' approach)

The presumption in favour of life

- 3.4. The first approach to sentencing in discretionary capital cases is that the ultimate penalty of death must be reserved for exceptional cases, the exceptionally serious offences of a particular category or the 'rarest of the rare' cases. This approach involves a strong presumption in favour of life. It recognises that execution is the ultimate penalty, which extinguishes the most fundamental constitutional right, the right to life itself, allowing for no corrections of errors or miscarriages of justice.
- 3.5. The 'rarest of the rare' test has been adopted by the judiciary in India, Bangladesh (albeit inconsistently),⁷⁷ Belize, throughout the Commonwealth Caribbean (with approval from both

⁷⁶ See *S v Makwanyane & Anr* [1995] ZACC 3, para. 46.

⁷⁷ In several cases the High Court Division of the Supreme Court of Bangladesh has endorsed the 'rarest of the rare' doctrine as formulated by the Supreme Court of India. See, for example, *State v Mir Hossain alias Mira & Ors*, 56 DLR (AD) (2009) 108. The doctrine has also been endorsed by the Appellate Division of the Supreme Court: see *State v Anwar Hossain Pinto*, 61 DLR (AD) (2009) 108. But the doctrine has not been applied consistently, and in recent decisions of the Appellate Division of the Supreme Court, the Court has referred to a presumption in favour of death unless there are extenuating circumstances. See, for example, *Begum v The State*, 4 SCOB [2015] (AD) 25.

the Eastern Caribbean Court of Appeal and the Privy Council), and in Uganda and Malawi. It was also applied in South Africa until the death penalty was abolished in 1995.

The appearance and development of the 'rarest of the rare' test in India

- 3.6. The 'rarest of the rare' test can be traced to a decision of the Supreme Court of India in 1980, *Bachan Singh v State of Punjab*.⁷⁸ The death penalty has long been discretionary for most murders in India,⁷⁹ but the absence of sentencing standards led to a series of constitutional challenges. In 1980 the Supreme Court of India sought to redress this problem by finding, in *Bachan Singh*, that the death penalty in discretionary murder cases must be reserved for the 'rarest of rare cases'. The Court held that the death penalty was compatible with India's Constitution, but only if it was reserved for the most exceptionally serious offences. In a detailed analysis of constitutional principles, it concluded:

*A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.*⁸⁰

- 3.7. Although the Supreme Court identified no specific criteria for the 'rarest of rare cases' in *Bachan Singh*, in subsequent cases it has emphasised that the offence must be one that is truly exceptional. As the Court observed in *Santosh Bariyar v State of Maharashtra*:

*'To translate the [Bachan Singh] principle in sentencing terms, firstly, it may be necessary to establish [a] general pool of rare capital cases. Once this general pool is established, a smaller pool of rare cases may have to be established to compare and arrive at a finding of rarest of rare case.'*⁸¹

- 3.8. Concerns remain, however, about the development of the 'rarest of the rare' test in Indian sentencing practice and the extent to which the concept has been understood in public discourse. As the Supreme Court jurisprudence makes clear, the doctrine should not be applied in a way that suggests that the rarity of the offence is the qualifying factor for the death penalty, with death being appropriate simply because the offence is unusually brutal, and is in that sense 'rare'. As noted in a recent study on judicial perceptions in Indian capital cases:

*Judges tasked with sentencing are supposed to be presented with a far more comprehensive and nuanced task, which goes far beyond merely determining whether the crime before them is "rare".*⁸²

- 3.9. Judges should firstly identify and balance aggravating factors (relating to the crime) and mitigating factors (relating to the circumstances of the accused). In doing so, *Bachan Singh* requires the sentencing judge to give a 'liberal and expansive construction' to mitigating factors, but not to aggravating factors. As part of the examination of mitigating factors, the state must also show that the accused is beyond the possibility of reformation. The sentencing framework in *Bachan*

⁷⁸ (1983) 1 SCR 145

⁷⁹ The colonial Penal Code introduced in 1860 remains in force, albeit with many amendments. Section 302 provides: 'Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to a fine.' Section 303 provides an exception where the offence is committed by a person under sentence of life imprisonment, for which death is stated to be mandatory. But as noted in Chapter 2, the mandatory element of s.303 was struck down in *Mithu v State of Punjab*. For a fuller account see *The Global Decline of the Mandatory Death Penalty* (fn. 15 above), pp. 36-37.

⁸⁰ See para. 207 of the judgment.

⁸¹ (2009) 6 SCC 498, p.32

⁸² See *Matters of Judgment*, Centre on the Death Penalty, National Law University, Delhi, October 2017, p. 5352. Available on the websites of Project 39A (formerly the Centre on the Death Penalty), www.project39a.com, and The Death Penalty Project, www.deathpenaltyproject.org.

Singh then requires judges to impose the death sentence in the ‘rarest of rare’ cases (‘rare’ in the sense of numerical rarity⁸³), when the alternative option of life imprisonment is unquestionably foreclosed.

- 3.10. This more nuanced approach can be seen in a series of Supreme Court decisions, including *Machin Singh v State of Punjab*,⁸⁴ *Ronny v State of Maharashtra*,⁸⁵ *Manohar Lal alias Mannu v State (NCT of Delhi)*,⁸⁶ and *Mohammed Chaman v State*.⁸⁷ As these cases illustrate, the presence of any significant mitigating factor justifies exemption from the death penalty, even in the most gruesome cases. The *Manohar Lal* case provides a particularly clear example of this.
- 3.11. Despite the guidance provided by the Supreme Court in these cases, the ‘rarest of the rare’ principle has not been applied consistently in India. In 2009 the Supreme Court felt compelled to reiterate that the death penalty was only potentially appropriate in truly exceptional cases of extreme culpability, but that even in such cases the sentence must also reflect the circumstances of the offender. In *Santosh Bariyar v State of Maharashtra*,⁸⁸ the Court noted that appellate courts had not been consistently considering both aspects, the offence and the offender, and that many death sentence confirmations focused only on the brutality of the offence. But in its more recent decisions, there has been no consistency in the Supreme Court’s practice when considering the prospect of reform as a mitigating factor in capital cases.⁸⁹
- 3.12. The problem of inconsistency and arbitrariness in Indian capital sentencing practice led to the Indian Law Commission’s recommendation in 2015 that the death penalty should be abolished for all offences other than those involving terrorism.⁹⁰ The Law Commission concluded that India’s discretionary system for restricting the imposition of the death penalty was so flawed in practice, with capital sentencing having become a judge-centric phenomenon, that capital punishment was being ‘arbitrarily and freakishly imposed’.⁹¹

The approach in South Africa

- 3.13. In South Africa, an approach of strict exceptionality developed in the years prior to 1995, when the death penalty was abolished completely in *S v Makwanyane*. As the Constitutional Court observed in that case, referring to the practice in South Africa up to that point:

*‘The death sentence has been reserved for the most extreme cases, and the overwhelming majority of convicted murderers are not and, since extenuating circumstances became a relevant factor 60 years ago, have not been sentenced to death in South Africa.’*⁹²

It had also become a prerequisite to the imposition of the death penalty that the offender had no reasonable prospect of reform: see paragraph 3.17 below.

⁸³ Ibid., p.54

⁸⁴ (1983) 3 SCC 470

⁸⁵ (1996) 4 SCC 148

⁸⁶ (2000) 2 SCC 92

⁸⁷ (2000) 2 SCC 28

⁸⁸ (2009) 6 SCC 498

⁸⁹ See *Matters of Judgment* (fn. 81 above), p.71.

⁹⁰ See *Report No. 262, The Death Penalty*, Law Commission of India, August 2015, paras 7.1.5, 7.1.5, 7.2.4.

⁹¹ See ‘The inevitability of arbitrariness: another aspect of victimisation in capital punishment laws’, Saul Lehrfreund and Roger Hood, in *Death Penalty and the Victims*, Ivan Šimanović (ed.), United Nations, 2016, pp. 150–152.

⁹² [1995] ZACC 3, para. 126

Development of the 'rarest of the rare' test in the Caribbean

- 3.14. The 'rarest of the rare' approach has been adopted in all the Caribbean jurisdictions in which the mandatory death penalty has been abolished in recent years. A significant early step in this direction was taken by Sir Dennis Byron, Chief Justice of the Eastern Caribbean Court of Appeal, who held in *Spence & Hughes v R*:

*'It is only if the offense is of an exceptionally depraved and heinous character and constitutes on account of its design and the manner of its execution a source of grave danger to the society at large the court may impose the death sentence.'*⁹³

- 3.15. A similar approach, adopting a very strong presumption in favour of life, was adopted by the Chief Justice of Belize in *R v Reyes*, in which Conteh CJ held that there the discretion in capital sentencing was a discretion '*in favorem vitae*, for not imposing the death penalty... [I]t is the imposition of the death penalty rather than its non-imposition for murder that requires special justification'.⁹⁴

- 3.16. The stringency of this approach is further illustrated by cases such as *Trimmingham v R*.⁹⁵ The murder in that case was found to be 'brutal', 'disgusting' and 'revolting', involving the cold-blooded killing by decapitation of an elderly man in the course of a robbery and the mutilation of his body. But the Privy Council held that the offence was not one of the 'rarest of the rare' offences of murder. It did not appear to have been planned or premeditated and, although the manner of the killing was gruesome and violent, there was no torture of the deceased, nor was he subjected to prolonged trauma or humiliation prior to his death. And in *White v R*, where the victim was shot repeatedly in the course of a robbery, the Privy Council held that the offence was callous and serious but came 'nowhere near' meeting the 'rarest of the rare' criteria.⁹⁶

The emergence of a second element in the 'rarest of the rare' approach: the prospect of rehabilitation

- 3.17. In addition to restricting the death penalty to the exceptionally serious offences of murder, a further and additional requirement emerged in South African case law: death should only be imposed 'where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence'.⁹⁷ The Supreme Court of India acknowledged this separate element as a component of the 'rarest of the rare' test in *Santosh Bariyar v State of Maharashtra* (above): the death penalty is a penalty of last resort, and there must be clear evidence that the offender is not fit for any kind of scheme for reform or rehabilitation.⁹⁸ But in the Court's more recent decisions there has been no consistency in considering the prospect of reform as a mitigating factor in capital cases: see paragraph 3.11 above.

⁹³ Criminal Appeals No. 20 of 1998 (St Vincent & The Grenadines) & No. 14 of 1997 (St Lucia), para. 33

⁹⁴ [2003] 2 LRC 688, paras 18, 20

⁹⁵ [2009] UKPC 25

⁹⁶ [2010] UKPC 22, para. 16

⁹⁷ See *S v Makwanyane & Anr* [1995] ZACC 3, para. 46.

⁹⁸ See *The Global Decline of the Mandatory Death Penalty*, Andrew Novak, Routledge, 2014, pp.37-38.

- 3.18. The relevance of prospective rehabilitation in this sentencing approach is entrenched in the case law of the common law Caribbean jurisdictions and the Privy Council. In 2009 the Privy Council observed in *Trimmingham v R* that:

Judges in the Caribbean courts have in the past few years set out the approach which a sentencing judge should follow in a case where the imposition of the death sentence is discretionary...

*It can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, "the worst of the worst" or "the rarest of the rare" ... The second principle is there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled.'*⁹⁹

- 3.19. The Privy Council returned to this issue in *Lockhart v R*,¹⁰⁰ and in doing so made a compelling argument for the preparation of a psychiatric report in every discretionary capital case. Without one, the sentencing court cannot hope to form a properly informed view on whether there is a reasonable prospect of reform. We return to this point in Chapter 7.¹⁰¹

The relevance of societal context

- 3.20. In determining whether an offence is the 'rarest of the rare', it should be judged in the context of the society within which the offence was committed. The Court of Appeal of Trinidad and Tobago expressed the point as follows:

*'[S]ome attention must be paid to the sensibilities of the particular society or community in which the offence was committed. It is perhaps ironic that, for the purpose of the imposition of the discretionary death penalty, the more depraved and brutish the society, the more heinous the behaviour needed to warrant it. Each set of circumstances must be measured against the experiences and sensibilities of the relevant jurisdiction.'*¹⁰²

In other words, the more violent a society, the less a death sentence will be justified for what might elsewhere be regarded as very serious crimes.

The irrelevance of public opinion

- 3.21. The common law does not permit judges to subvert their function as arbiters of the law to what they perceive to be the requirements of public opinion. That broad principle is no less relevant in matters of capital sentencing than to any other area of judicial activity. As Justice Powell observed in *Furman v Georgia*, however one might try to assess 'the amorphous ebb

⁹⁹ [2009] UKPC 25, paras 20–21

¹⁰⁰ [2011] UKPC 33

¹⁰¹ See para. 7.15 below.

¹⁰² *Nicholas v State of Trinidad and Tobago*, Criminal Appeals No. 1–6 of 2013, para. 19

and flow' of public opinion, 'the assessment of popular opinion is essentially a legislative, not a judicial function'.¹⁰³ And in *West Virginia State Board of Education and Barnette*, the Court noted that:

*'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'*¹⁰⁴

- 3.22 These cases were cited by the Constitutional Court of South Africa in its consideration of the constitutionality of the death penalty itself. In *S v Makwanyane* the Court declared that:

*'This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.'*¹⁰⁵

- 3.23 In the specific context of discretionary capital sentencing this point has been made in clear and persuasive terms by the Supreme Court of India. In *Bachan Singh v State of Punjab* the Court explicitly prohibited judges from attempting to determine the demands of public opinion or the 'collective conscience' of society as a sentencing consideration in specific capital cases:

'... Judges should not take upon themselves the responsibility of becoming oracles or spokesmen of public opinion...

*'... The perception of "community" standards or ethics may vary from Judge to Judge. In this sensitive, highly controversial area of death penalty, with all its complexity, vast implications and manifold ramifications, even all the Judges sitting cloistered in this Court and acting unanimously, cannot assume the role which properly belongs to the chosen representatives of the people in Parliament, particularly when Judges have no divining rod to divine accurately the will of the people.'*¹⁰⁶

The irrelevance of previous convictions

- 3.24. There is broad agreement that an offender's previous convictions should not be held against him as a justification for concluding that an offence is the 'rarest of the rare', even if the previous convictions are very serious. This is addressed further in the next chapter.¹⁰⁷

The impact of the 'rarest of the rare' test in the Caribbean

- 3.25. The net result of the emergence of discretionary capital sentencing in the Caribbean is that sentences of death are very rarely imposed. And even when imposed in very serious and gruesome cases, death sentences have been quashed on appeal because the stringent 'rarest of the rare' criteria have not been met.

¹⁰³ 408 US 238, 443

¹⁰⁴ 319 US 624, 638

¹⁰⁵ [1995] ZACC 3, para. 89

¹⁰⁶ (1980) 2 SCC 684, paras 125, 176. See also *Santosh Bariyar v State of Maharashtra* (2009) 6 SCC 498, para. 80.

¹⁰⁷ See paras 4.53–4.58 below.

Adoption of the ‘rarest of the rare’ test in Uganda

3.26. In Uganda, general Sentencing Guidelines (including guidelines for capital cases) were issued by the Chief Justice in April 2013.¹⁰⁸ These are the first and, at the time of writing, the only sentencing guidelines in East Africa that specifically address sentencing in capital cases.

3.27. Paragraph 17 of the guidelines confirms that the ‘rarest of the rare’ test applies to all capital sentencing in Uganda:

‘The court may only pass a sentence of death in exceptional circumstances in the “rarest of the rare” cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate.’

3.28. Paragraph 18 of the guidelines lists examples of the ‘rarest of the rare’ offences, including:

- Planned or ‘meticulously premeditated and executed’ offences
- Murder of a law enforcement officer during the performance of their functions
- Causing death while committing or attempting to commit rape, robbery or other capital offences
- Offences committed in the furtherance of a common purpose or conspiracy

But the mere fact that an offence falls within the ‘rarest of the rare’ list in para. 18 does not mean that death is the appropriate sentence. If a case does fall within that list, the judge will need to consider whether the circumstances are exceptional and whether ‘the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate’ (para. 17). In doing so they should have regard to the aggravating and mitigating features set out in paragraphs 20–21 of the guidelines.¹⁰⁹

3.29. The final stage of the capital sentencing process is to fix a sentence within the guideline sentencing ranges.¹¹⁰ The guideline range for all capital offences in Uganda, including murder, rape, robbery and treason, is the same. The starting point is a determinate sentence of 35 years’ imprisonment and the maximum is death, with life imprisonment implicitly included as a further option.¹¹¹

3.30. Nothing in the Ugandan guidelines purports to remove judicial discretion in individual cases and, as the Court of Appeal has confirmed, that is not their effect. The guidelines are not binding, and they ‘do not take away the discretion of the court in sentencing a convicted offender. They are simply guidelines’.¹¹²

3.31. With these observations in mind, it is clear that the label ‘rarest of the rare’ is used in the Ugandan guidelines differently than it is used by the Privy Council or by the Supreme Court of India. As noted earlier in this chapter, in the Privy Council cases the decision that an offence is the ‘rarest of the rare’ encompasses an assessment of all aggravating and mitigating features, in relation to both the offence and the offender, in order to determine whether the murder is one of the

¹⁰⁸ The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, available on the website of the Justice Law and Order Sector (www.jlos.go.ug).

¹⁰⁹ See paras 19(2) and 24(2) of the Guidelines.

¹¹⁰ See the Third Schedule to the Guidelines.

¹¹¹ See para. 24(1) of the Guidelines.

¹¹² *Nazirwa v Uganda* [2014] UGCA 28, p. 18. The same point was made by the Supreme Court of Kenya when it gave guidance on relevant mitigating features in *Muruatetu & Mwangi v Republic, Death Penalty Project & Ors Intervening*, Petitions No. 15 & 16 of 2015, para. 72: ‘... these guidelines in no way replace judicial discretion. They are advisory and not mandatory’.

worst offences; there is then the separate consideration of whether the offender is beyond hope of reformation (see para. 3.18 above). In India, the decision that the offence is the 'rarest of the rare' requires the judge to identify and balance aggravating and mitigating factors, including the obligation (on the state) to show whether the accused is beyond the possibility of reformation and then proceed to determine that the alternative option of life imprisonment is unquestionably foreclosed (see paragraph 3.9 above).

- 3.32. In Uganda, the assessment of whether an offence is the 'rarest of the rare', as described in the Sentencing Guidelines, is merely a starting point for the sentencing process. It focuses exclusively on the circumstances of the offence and ignores the circumstances of the offender. If an offence is aggravated within the terms of paragraph 18 of the guidelines (see para. 3.28 above), or perhaps if there are other reasons to regard the offence as the 'rarest of the rare', the judge proceeds to consider any relevant mitigating features and any other aggravating features before reaching a decision on the appropriate sentence.
- 3.33. On this analysis the Ugandan guidelines do not permit a broad interpretation of the 'rarest of the rare' test, and they respect the fundamental proposition that the death penalty should be reserved for the most exceptionally serious cases having regard to all relevant mitigation. This is illustrated by a number of recent decisions, such as *Uganda v Twebaze & Julius*.¹¹³ In that case, the victim had died a 'cruel and painful death' at the hands of the first appellant, who was given a determinate sentence of 30 years' imprisonment (taking account of five years spent on remand). His co-accused was sentenced to six years' imprisonment for compassionate reasons.¹¹⁴

Adoption of the 'rarest of the rare' test in Malawi

- 3.34. The abolition of the mandatory death penalty in Malawi (as elsewhere) has led to a significant reduction in the number of death sentences imposed in capital cases. Although the 'rarest of the rare' approach was not expressly articulated in either *Kafantayeni*¹¹⁵ or *Twoboy Jacob*¹¹⁶ (in which the Supreme Court of Appeal approved *Kafantayeni*), it has been explicitly adopted in subsequent cases.¹¹⁷ In *Republic v White* the High Court underlined the very restricted circumstances in which a capital sentence might be appropriate:

*'The offence must have been occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and that the convict is highly likely to offend again ... The motive for the killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live. I may put deliberate mass murders and serial killers in this category.'*¹¹⁸

These comments were made in relation to an offender who was being sentenced for murder for the first time. As will be seen in Chapter 7, the High Court has adopted an even more restrictive

¹¹³ [2013] UGHCCRD 44

¹¹⁴ Another example is *Uganda v Gule* [2014] UGHCCRD 31, where the offender was convicted of five murders but was sentenced to life imprisonment, the principal mitigation being his youth. And in *Uganda v Nakalyango & Berocan* [2014] UGHCCRD 32, the offence was found to be meticulously planned and premeditated and was committed in furtherance of a common purpose. On both counts it fell within the 'rarest of the rare' criteria, but having regard to the mitigating and aggravating features, the judge imposed sentences of 20 and 30 years.

¹¹⁵ *Kafantayeni & Ors v Attorney General* [2007] MWHC 1, 46 ILM 566

¹¹⁶ MSCA Criminal Appeal No. 18 of 2006

¹¹⁷ See, for instance: *Republic v White*, Criminal Case No. 74 of 2008; *State v Charles Fred & Anr*, Criminal Case No. 163 of 2012; *Republic v Makolija*, Sentence Rehearing Cause No. 12 of 2015.

¹¹⁸ Criminal Case No. 74 of 2008, p.2

approach in cases where offenders have been resentenced following the earlier imposition of unconstitutional mandatory sentences of death.

The position in Kenya

3.35 In Kenya, both the Court of Appeal in *Mutiso v Republic*¹¹⁹ and the Supreme Court in *Muruatetu & Mwangi*¹²⁰ cited the leading common law authorities on the incompatibility of the mandatory death penalty with fundamental rights, as summarised in Chapter 2. Both cases thereby lend implicit approval to the application of the ‘rarest of the rare’ test in Kenya. No doubt the position will be clarified in the sentencing and resentencing processes that will follow from the Supreme Court’s ruling.

Further observations on the ‘rarest of the rare’ approach

- 3.36. The following further observations can be made on the ‘rarest of the rare’ approach.
- 3.37. Firstly, with the exception of Singapore, which is addressed further below, the ‘rarest of the rare’ test is the only approach to discretionary capital sentencing to have been adopted in recent years.
- 3.38. Secondly, this is the only approach that has been developed as a common law principle through authoritative case law and judicial guidelines. The other two approaches summarised in this chapter were created by statute.
- 3.39. Thirdly, although the broad principle under this approach is shared – that death should be imposed only in exceptional cases for the most serious offences within a particular category of offence – the application of the principle as between jurisdictions and even within the same jurisdiction has not been identical. As noted above (see paragraph 3.8), India has faced particular problems with inconsistent sentencing practices. The potential for inconsistent sentencing obviously underscores the value of adopting sentencing guidelines for discretionary capital cases.
- 3.40. Fourthly, as one would expect, where the ‘rarest of the rare’ approach has been introduced it has led to a significant reduction in the number of death sentences imposed. The example of Malawi has already been mentioned, and Belize is another case in point. Since the Privy Council’s decision in *Reyes v R*, holding that the mandatory death penalty was inconsistent with Belize’s Constitution, not one sentence of death has been pronounced. Similar effects have been seen elsewhere in the Caribbean.
- 3.41. Fifthly, and importantly, this approach is the most consistent with principles of international law. In particular, it is consistent with the reservation of the death penalty exclusively for the ‘most serious crimes’ under Article 6 of the ICCPR, Article 4 of the American Convention and the Resolutions of the African Commission. In contrast, the other two approaches considered below do not treat the imposition of death as an exceptional penalty.

¹¹⁹ [2011] EALR 242

¹²⁰ Petitions No. 15 & 16 of 2015

The second approach to discretionary capital sentencing: aggravating and mitigating circumstances are considered together, with no express presumption in favour of life or death

3.42. In some jurisdictions with discretionary capital sentencing there is no express presumption in favour of either life or death. The broad approach is that the sentence depends on the weighing of both aggravating and mitigating factors. Examples of this approach can be found in the federal criminal justice system of the US, in the individual states of the US that have retained the death penalty, and in Swaziland and Zimbabwe.

The United States of America

3.43. In the US, the procedures and relevant considerations for imposing the death penalty are set out in either federal or state legislation. In Arizona, for example, where the death penalty is imposed only for first degree murder, state legislation addresses both aggravating and mitigating circumstances.¹²¹ The list of aggravating features is exhaustive but the list of mitigating features is not. This follows a ruling of the US Supreme Court that there must be no closed categories of potentially mitigating features in capital cases.¹²²

Swaziland

3.44. In Swaziland, legislation continues to mandate the death penalty for murder and treason in the absence of 'extenuating circumstances' (the third approach, considered below).¹²³ But in 2009, the High Court held that the 'extenuating circumstances' analysis is obsolete and the court has a discretion to substitute a lesser sentence in every case.¹²⁴ This conclusion flowed from section 15(2) of the 2005 Constitution, which unequivocally prohibits mandatory death sentences: 'The death penalty shall not be mandatory.' The Court summarised the position by reference to an earlier judgment:

*'Whereas the position before the advent of the Constitution was that where there are no extenuating circumstances in a capital offence, the Court "shall" impose the death penalty, the post-Constitution scenario is that the Court is at large to exercise a discretion, even where there are no extenuating circumstances and decide whether in all the circumstances of the case, both mitigating and aggravating, taken individually and/or cumulatively, it is proper to impose the irreversible supreme penalty.'*¹²⁵

Zimbabwe

3.45. Until recently, death was the mandatory sentence for murder in Zimbabwe in the absence of extenuating circumstances.¹²⁶ This was changed by section 48(2) of the 2013 Constitution, which envisages a law limiting the death penalty to aggravated murder and underscores the court's sentencing discretion in all such cases:

¹²¹ Arizona Revised Statutes §§13-751, 13-752

¹²² *Lockett v Ohio*, 438 US 586 (1978)

¹²³ See s.296(1) of the Criminal Procedure and Evidence Act, 1938.

¹²⁴ *R v Dlamini* [2009] SZHC 151, para. 39

¹²⁵ *R v Ngubane & Ors*, Criminal Case No. 46 (2002), quoted in Dlamini at para. 39.

¹²⁶ See s.47 of the Criminal Law (Codification and Reform) Act and s.337(a) of the Criminal Procedure and Evidence Act, as enacted.

'48(2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and (a) the law must permit the court a discretion whether or not to impose the penalty...'

The remaining provisions in section 48(2) include a complete prohibition on the imposition of the death penalty on women. They also limit its imposition to men aged 21 or above at the time of the offence and aged 70 or lower at the time of sentence.

- 3.46. The law anticipated in the opening words of section 48(2) is the General Laws Amendment Act, 2016. This amends section 47 of the Criminal Law (Codification and Reform) Act to provide a non-exhaustive list of aggravating features in murder cases.¹²⁷ This includes where the offence was committed in the course of certain other offences, such as terrorist acts, sexual assault or robbery, or where the offence was one of a series of murders committed by the offender.
- 3.47. As in Swaziland, the courts in Zimbabwe have interpreted the Constitution to displace any presumption in favour of death, even in the case of a particularly 'bad murder'.¹²⁸ It is also clear that the presence of aggravating features is a necessary but not sufficient condition for the imposition of a death sentence. This is implicit from the constitutional requirement for sentencing discretion, even where aggravating circumstances are present. It is also consistent with the practice of the High Court prior to the 2016 amendments.

Application of the second approach in practice

- 3.48. Even without an express presumption in favour of life or death in the relevant statutory provisions, the application of this second approach to discretionary capital sentencing has in practice created a presumption in favour of life.
- 3.49. In Arizona, for instance, capital sentences are only imposed if two requirements are met. Firstly, at the 'aggravation phase' the prosecution must prove the presence of at least one statutory aggravating circumstance, such as where there were multiple victims or the defendant was paid for the killing. The aggravating circumstance must be proved beyond reasonable doubt, and the jurors must be unanimous on which aggravating factor they find to be present.
- 3.50. Secondly, at the 'penalty phase' the jury may impose a death penalty only if they find that 'there are no mitigating circumstances sufficiently substantial to call for leniency'. Any finding that there are no such circumstances must be unanimous. It is for the defendant to prove the existence of mitigating features, but they must do so by a preponderance of the evidence (a lower standard of proof akin to the balance of probabilities).¹²⁹

¹²⁷ See Schedule 8(2), Part XX of the General Laws Amendment Act, 2016.

¹²⁸ See, for instance, *State v Tsumele* [2015] ZWHHC 559. The High Court described the offence in that case as a 'bad murder', the offender having murdered his child from an adulterous relationship in order to conceal her existence. The judge nonetheless imposed a sentence of 30 years' imprisonment rather than death, having weighed the aggravating and mitigating features of the offence. And in *State v Malundu* [2015] ZWHHC 68, the Court imposed a 10-year sentence for a 'brutal and callous' murder, even though the aggravating features 'far outweighed' the mitigating features. In part the sentence reflected the offender's previous good character and the fact that he had spent six years awaiting trial, albeit on bail.

¹²⁹ Arizona Revised Statutes §§13-751, 13-752. As to burden of proof to be applied when weighing mitigating and aggravating circumstances, see para. 7.39 below.

- 3.51. The stringency of this approach reflects the US Supreme Court's observations that a death sentence is 'an extreme sanction, suitable to the most extreme of crimes',¹³⁰ and that:

*'Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" whose extreme culpability makes them "the most deserving of execution".'*¹³¹

In other words, although the 'rarest of the rare' test is not articulated in any of the relevant state or federal legislation in the US, or in sentencing guidelines or guideline cases, in practice there is a clear presumption in favour of life in US capital sentencing. The very narrow approach to exceptionality adopted by the Privy Council is not mirrored in the practice of the US courts, but the difference is one of degree.¹³²

- 3.52. In Swaziland too, although judges are required to weigh aggravating and mitigating factors, in practice the death penalty is rarely imposed, even where aggravating factors outweigh mitigating ones.¹³³ Instead the courts have tended to reserve the death sentence for what is described as 'depraved and evil conduct'.¹³⁴ And as noted above, in Zimbabwe the courts have imposed non-capital sentences even where the aggravating features outweighed mitigating features.

The need for clearly and narrowly defined aggravating circumstances

- 3.53. While mitigating factors are generally unlimited, defining relevant aggravating features can be problematic. If aggravating factors are not defined at all, there is a risk that the death penalty is 'wantonly and ... freakishly imposed'.¹³⁵ And if they are defined too broadly virtually all murders will qualify as capital murders, which is incompatible with an approach to capital sentencing that imposes no presumption in favour of death.
- 3.54. The breadth of definition of aggravating circumstances was a key issue for the US Supreme Court in *Gregg v Georgia*.¹³⁶ In that case the petitioner challenged a statutory provision that made a murder death-eligible if it was found to be 'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim'. The petitioner's complaint was that this description was so broad that it could apply to any offence of murder, and the provision was therefore unconstitutional. The Court rejected that argument. It accepted that all murders involve some form of depravity or aggravated battery, and that the courts must apply sentencing processes that avoid 'standardless' discretion; there must be a 'meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not'.¹³⁷ But it found that in practice the statutory language had been narrowed by judicial construction, so this provision in Georgia's legislation was not inherently unconstitutional.

¹³⁰ *Gregg v Georgia*, 428 US 187 (1976)

¹³¹ *Roper v Simmons*, 543 US 568 (2005), citing *Atkins v Virginia*, 536 US 319 (2002).

¹³² The Singapore Court of Appeal has suggested that the 'rarest of the rare' principle applies in the US: *PP v Kho Jabing* [2015] SGCA 1, para. 27. This may overstate the position, but the similarities of approach are greater than the differences.

¹³³ See, for example, *R v Dludu* [2012] SZHC 236.

¹³⁴ *Simelane v R* [2012] SZSC 54

¹³⁵ *Furman v Georgia*, 408 US 310 (1972)

¹³⁶ 428 US 153 (1976)

¹³⁷ Quoting *Furman v Georgia*, 408 US 313.

- 3.55. Just four years after its ruling in *Gregg* the US Supreme Court concluded that the practice of the courts in Georgia no longer survived constitutional scrutiny. In *Godfrey v Georgia*¹³⁸ it accepted that the inferior courts were not applying a restrictive interpretation to the ‘vile, horrible or inhuman’ test, and that the death penalty had therefore been imposed in breach of the petitioner’s constitutional right to protection from cruel or unusual punishment. As the Court observed:

*‘[I]f a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State’s responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates “standardless [sentencing] discretion”... It must channel the sentencer’s discretion by “clear and objective standards” that provide “specific and detailed guidance”, and that “make rationally reviewable the process for imposing a sentence of death”.’*¹³⁹

- 3.56. The Court also reiterated its dictum in *Furman v Georgia* that capital sentencing regimes must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not.¹⁴⁰
- 3.57. The Supreme Court’s judgment in *Godfrey* provides a compelling argument that aggravating criteria in capital cases should be narrowly defined. If not, there is an inherent risk of arbitrary and thereby inhuman capital sentencing practices.

The third approach to discretionary capital sentencing: a presumption in favour of death, which is mandatory unless there are extenuating circumstances

- 3.58. The third approach to capital sentencing involves a presumption in favour of death, but this approach has almost disappeared. In those few jurisdictions that retain it, the presumption is imposed by statute and is displaced only if there are ‘extenuating circumstances’. As noted earlier, this was the position in South Africa in the years after the abolition of the mandatory death penalty in 1935. But the test a defendant had to meet was not particularly exacting:

*‘[N]o factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused’s moral blameworthiness in committing it, can be ruled out from consideration.’*¹⁴¹

- 3.59. Although the ‘extenuating circumstances’ approach has long been displaced in South Africa and more recently in Swaziland and Zimbabwe, it continues to be applied by some of their neighbours, namely Botswana, Lesotho and Zambia, with varying degrees of rigour. In some cases in Botswana and Lesotho, the courts have applied a somewhat less restrictive approach to recognising extenuating circumstances.
- 3.60. The definition of extenuating circumstances in Botswana, Lesotho and Zambia is drawn from the South African case of *R v Letsolo*,¹⁴² and focuses on the notion of ‘moral blameworthiness’.

¹³⁸ 446 US 420 (1980)

¹³⁹ 446 US 422

¹⁴⁰ 408 US 313

¹⁴¹ *R v Fundakubi*, 1948 (3) SA 810 (AD), 818

¹⁴² 1970 (3) SA 476 (AD)

Extenuating circumstances are 'facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused as distinct from his/her legal culpability.'¹⁴³

- 3.61 In their assessment of 'moral blameworthiness' the courts continue to address the three questions set out in *Letsolo*:
- (a) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);
 - (b) whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;
 - (c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.'¹⁴⁴
- 3.62. As these questions suggest, the court will look for mitigation in the events and circumstances that drove the offender to commit the offence. Failed defences at trial, which if successful might have reduced murder to manslaughter, may be relevant: provocation, heat of passion or intoxication are obvious examples.¹⁴⁵ Impulsiveness, emotional conflict, a lesser role in the killing, belief in witchcraft and even the defendant's rage have also been cited as examples of extenuating circumstances.¹⁴⁶ But where this third approach is strictly applied, the court may disregard everything else, including the seriousness of the offence itself, the offender's previous good character, and anything emerging from events after the offence, such as evidence of remorse or capacity for rehabilitation.
- 3.63 Traditionally, the burden of proving the existence of extenuating circumstances (on the balance of probabilities) lies with the defendant. The harshness of this approach has been softened to some extent in Botswana and Lesotho but the orthodox approach has continued to apply in Zambia. This is addressed in more detail in Chapter 7.¹⁴⁷
- 3.64. Although there has been some softening of the extenuating circumstances doctrine in recent years, its traditional application has profound limitations. Firstly, by disregarding the seriousness of the offence itself, this approach ignores the proposition that the category of murder (for which most capital sentences are imposed) covers a wide range of offences. Some murders are far more serious than others, and this should be reflected in the choice of sentence.¹⁴⁸ As the Privy Council observed in *Reyes v R*: 'In a crime of this kind [murder by shooting] there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed.'¹⁴⁹ There is no such broad assessment of all relevant circumstances when the traditional extenuating circumstances test is applied.
- 3.65. Secondly, this approach ignores the broad range of mitigating features that are regarded as relevant in all other discretionary regimes, as outlined in Chapters 4 and 5, and it rejects the humane and

¹⁴³ *Letsolo*, p.476

¹⁴⁴ These questions were set out by the African Commission on Human and People's Rights, with minor amendments, in *Interights & Ors (on behalf of Mariette Bosch) v Botswana* (2003) AHRLR 55, para. 34. Paragraphs 32-35 of the Commission's decision in that case provide a concise, albeit orthodox summary of the extenuating circumstances test as it applies in Botswana.

¹⁴⁵ See *The Global Decline of the Mandatory Death Penalty*, Andrew Novak, Routledge, 2014, pp. 125-26.

¹⁴⁶ *Letuka v R* (CA), 1991-96 LLB & LB 346 (Lesotho)

¹⁴⁷ See paras 7.4241-7.4342 below.

¹⁴⁸ *Reyes v R* [2002] 2 AC 235, paras 11, 44

¹⁴⁹ *Reyes*, para. 43

compelling principle that there should be no closed categories of potentially relevant mitigation in capital cases. In these important respects the extenuating circumstances approach, at least in its traditional application, is out of step with capital sentencing in the rest of the common law world.

- 3.66. Thirdly, this approach creates real difficulties in achieving sentencing consistency. Wide sentencing disparities have emerged, in part because of the absence of sentencing guidelines and the lack of clarity as to what constitutes an extenuating circumstance, and in part because many judges are reluctant to sentence offenders to death by applying a presumption in favour of death.¹⁵⁰
- 3.67. As long as the extenuating circumstances test is set out in legislation the courts are obliged to apply it. But the way they do so is a matter for the courts to decide, because the legislation does not define the scope of extenuating circumstances. The orthodox interpretation of the test described above is a common law construct derived from developments in South Africa in the 1930s.¹⁵¹ South Africa abandoned the extenuating circumstances test nearly 30 years ago, and Zimbabwe and Swaziland have moved on from this approach in the light of more recent constitutional developments. This leaves Botswana, Lesotho and Zambia, where the courts have an opportunity, if not an obligation, to develop the common law to reflect evolving standards of humanity. This may explain why, in some respects, the extenuating circumstances doctrine has been softened in recent years, at least in Botswana and Lesotho. There is plenty of scope for this process to continue to develop along principled lines in all three jurisdictions, whether through appellate court rulings, the adoption of suitable sentencing guidelines, or both.

The approach in Singapore

- 3.68. Until recently Singapore's Penal Code imposed a mandatory death sentence for all offences of murder. This changed in 2012, when a discretionary death sentence was introduced for murders where the offender did not intend to cause death.
- 3.69. The relevant legislation does not prescribe any particular approach to sentencing in these discretionary capital cases, but the position was clarified by the Court of Appeal in *PP v Kbo Jabing*.¹⁵² In that case the Court held that none of the three approaches considered above was applicable in Singapore. It expressly rejected the 'rarest of the rare' test and held that the death penalty should not be restricted to the most extreme and serious cases.¹⁵³ The Court advanced its own test:
- Death would be appropriate if the offender's conduct was so serious as to 'outrage the feelings of the community'
 - The assessment of such outrage required consideration of whether the offender had acted in a way that exhibited 'a blatant disregard for human life'
 - In turn, that assessment required consideration of the manner in which the offender acted and the savagery of the attack

¹⁵⁰ See *The Global Decline of the Mandatory Death Penalty*, Andrew Novak, Routledge, 2014, p.126.

¹⁵¹ Novak, *op. cit.*, p.127

¹⁵² [2015] SGCA 1

¹⁵³ See paras 41-43.

- 3.70. The significance of such factors will vary, and all circumstances must be considered, including the motive and intention of the offender:

*‘While the offender’s regard for human life remains at the forefront of the court’s consideration, other factors such as the offender’s age and intelligence could well tilt the balance.’*¹⁵⁴

- 3.71. It is too early to say how broadly the courts will apply the new criteria for discretionary capital sentencing in Singapore, although a restrictive approach to their interpretation seems unlikely. The outright rejection of the ‘rarest of the rare’ approach was not lost on the Court in *PP v Garing & Imba*:

*‘The Court of Appeal [in Kho Jabing] was clearly of the view that the phrase “rarest of the rare” might lead judges at first instance to shove discretionary death penalty into a remote corner of legal material where it may rarely be heard of again. It therefore prefers a description that will admit more than the rare case.’*¹⁵⁵

But the judge’s comments in that case also underlined the open-ended nature of the ‘outraging the feelings of the community’ test:

*‘There is no scientific or mathematical formula that determines what conduct deserves the imposition of the death penalty. Linguistic descriptions can be helpful but can sometimes confuse and mislead. The court has to find the facts, and then decide whether on those facts the conduct of the accused and the circumstances of the case merit the punishment of death.’*¹⁵⁶

- 3.72. While there is obvious force in these observations, there remains a need for guided discretion, of one kind or another, if capital sentencing is not to be subjective, arbitrary and inconsistent.

- 3.73. In India the courts introduced a test that was similar to the ‘outraging the feelings of the community’ test used in Singapore. Cases that caused abhorrence to society or shocked the collective conscience were deemed to qualify as ‘rarest of the rare’ cases meriting the death penalty.¹⁵⁷ Although the Supreme Court of India has rejected the relevance of public opinion to the determination of sentences in capital cases,¹⁵⁸ the courts in India continue to invoke community reactions and public opinion as a basis for imposing the death penalty. In a recent review the Law Commission of India has rejected these ‘amorphous standards’ on the basis that they have contributed to arbitrary capital sentencing. As the Law Commission explained:

*Judges are likely to substitute their own assumptions, values and predilections in place of the perceptions of society, because even if one were to assume that society has determinate, stable and shared preferences in these matters, judges have no means of determining these preferences.’*¹⁵⁹

The same principled criticism might be levelled against the approach now emerging in Singapore.

¹⁵⁴ *Kho Jabing*, para. 51(d)

¹⁵⁵ [2015] SGHC 107, para. 10

¹⁵⁶ *Ibid.*

¹⁵⁷ *Macbhi Singh v State of Punjab* (1983) 3 SCC 470, para. 32

¹⁵⁸ See para 3.23 above.

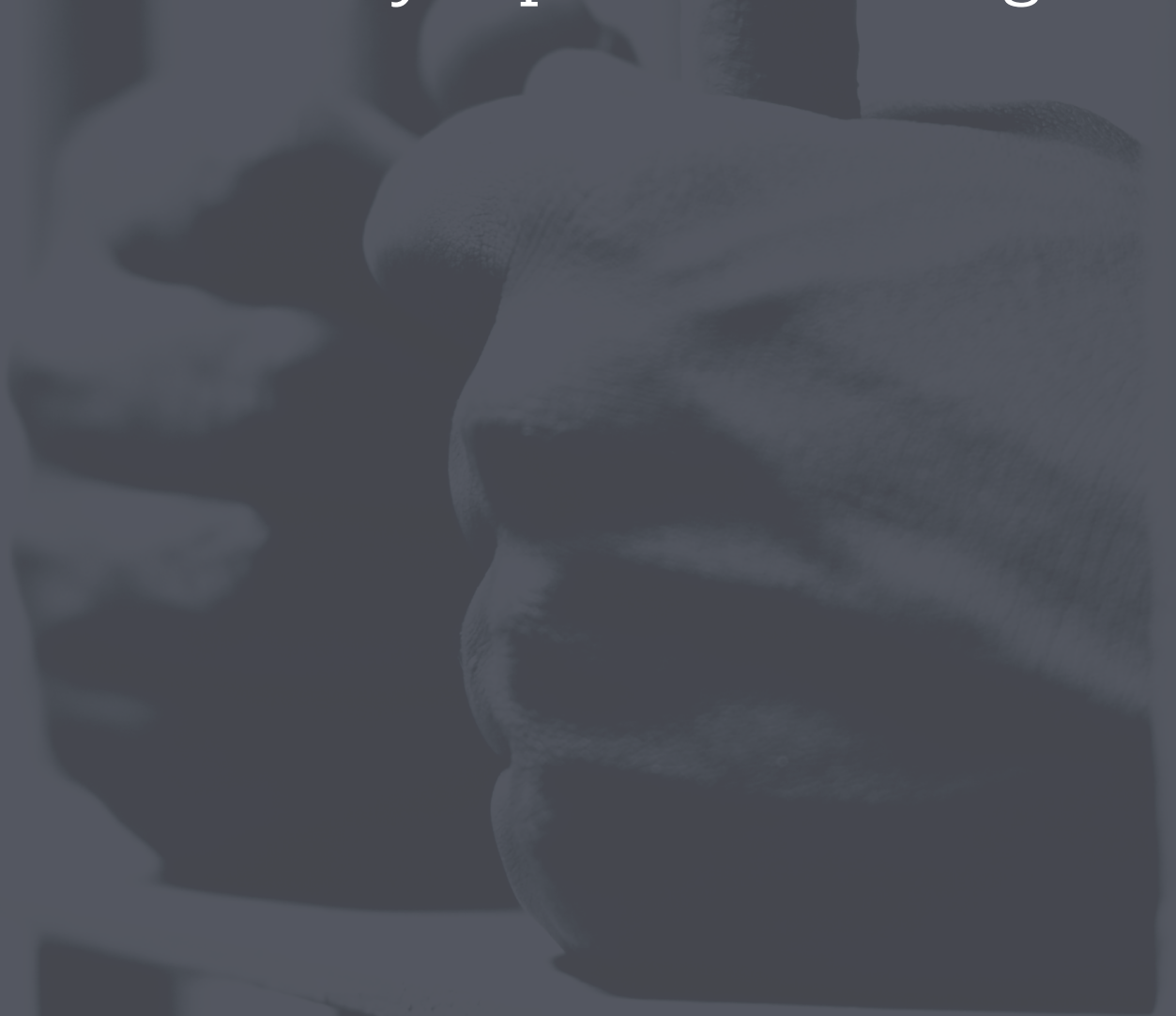
¹⁵⁹ See *Report No. 262, The Death Penalty*, Law Commission of India, August 2015, para. 5.2.23. See also paras 5.2.17, 5.2.23, 7.1.4.

Conclusions on the three approaches to discretionary capital sentencing

- 3.74. Our analysis of the three main approaches to discretionary capital sentencing shows a clear global trend away from the imposition of the death penalty, with its use restricted to the most extreme cases where there are no significant mitigating factors. This reflects the growing international emphasis on respect for the right to life and the prohibition of inhuman punishments as fundamental human rights. Even where the courts are required to balance aggravating and mitigating circumstances without a presumption in favour of life or death, or impose death in all capital cases unless there are extenuating circumstances, the imposition of the death penalty in practice is exceptional.
- 3.75. The ‘rarest of the rare’ test, with its strong presumption in favour of life, is most closely aligned with international human rights treaties, and it is this approach that has been favoured in countries that have abolished the mandatory death penalty in recent years. This approach also fosters consistent sentencing practices, particularly where discretion is guided by sentencing guidelines. But as the problems with capital sentencing in India have demonstrated, no system of discretionary sentencing can avoid entirely the risk of subjectivity, based on the personal predilections of the judges. Nor can it remove the inherent element of arbitrariness when determining which offences fall within the ‘rarest of the rare’ category and which do not. The clear articulation of relevant mitigating and aggravating features cannot remove the risk of subjectivity and arbitrariness, but it provides an important step towards more coherent and consistent sentencing. This is the topic of the next chapter.

CHAPTER 4

Factors to be considered in
discretionary capital sentencing



- 4.1 Careful evaluation of aggravating and mitigating factors is a crucial part of the sentencing process. Without it, and without examination of the circumstances of both the offence and the offender, judges cannot hope to impose a sentence that fits the crime.
- 4.2 The importance of investigating aggravating and mitigating circumstances in capital sentencing is particularly acute, for obvious reasons. Life itself is at stake, and the death penalty is as irreversible as it is categorical. So even when resources are scarce, there is an exceptionally strong onus in capital cases to ensure that all relevant sentencing issues are explored and addressed.
- 4.3 As we saw in the last chapter, the articulation of aggravating and mitigating factors is an explicit part of both the first approach to discretionary capital sentencing (a strong presumption in favour of life, with death reserved for the 'rarest of the rare' cases), and of the second (no express presumption either way). In practice it also has an important role in the application of the third approach (a presumption in favour of death).
- 4.4 In some jurisdictions potential aggravating and mitigating circumstances in capital cases have been addressed in authoritative judgments, guidelines and practice directions. This includes India,¹⁶⁰ Lesotho,¹⁶¹ Malawi¹⁶² and Uganda.¹⁶³ The guidance that these sources provide to sentencing judges is informative for judges elsewhere, and the observations in this chapter are drawn from many of these judgments and guidelines.
- 4.5 There are two broad elements to the examination of aggravating and mitigating factors. The first involves consideration of the offence-based circumstances, including the way in which the offence was carried out, the consequences and the harm caused by the offence, and the offender's role in committing it. The second examines the offender-based circumstances, in particular the personal circumstances and characteristics of the offender at the time of the offence and the imposition of sentence. Each of these components is considered below.
- 4.6 Like the rest of this book, the observations in this chapter focus on sentencing for murder, because murder accounts for most discretionary capital sentences in the common law world.¹⁶⁴

The limited range of aggravating circumstances

- 4.7 In most common law jurisdictions with discretionary capital sentencing, aggravating circumstances are identified in the decisions of the higher courts and sentencing guidelines. Although there are differences of detail, there is a broad consensus on the features that aggravate an offence of murder. These include such factors as where there was more than one victim, the offender inflicted deliberate suffering, the victim was a police officer killed in the line of duty, or the offence was committed in the course of a robbery or other serious offence. In most cases the aggravating circumstances are self-evident and raise no conceptual difficulties.

¹⁶⁰ *Bachan Singh v State of Punjab*, (1983) 1 SCR 145; *Machhi Singh v State of Punjab* (1983) 3 SCC 470

¹⁶¹ *Letuka v R*, 1991-96 LLB & LB 346

¹⁶² See *Republic v Makolija*, Sentence Rehearing Cause No. 12 of 2015 and *Republic v Bagala*, Confirmation Case No. 24 of 2011.

¹⁶³ *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013*, available on the website of the Justice Law and Order Sector (www.jlos.go.ug).

¹⁶⁴ The exceptions include Kenya, where most death sentences are imposed for robbery with violence or attempted robbery with violence; Sierra Leone where many death sentences are imposed for rape and robbery with aggravation; and Singapore and Malaysia, where most death sentences are imposed for drug offences.

- 4.8. In the US and in a few other jurisdictions such as the Bahamas and Singapore, specific aggravating factors are identified in state and federal statutes. A common feature of those laws is that the statutory lists are closed. The prosecution must prove beyond reasonable doubt the existence of at least one of the aggravating features set out in the legislation. If not, no other aggravating feature will suffice to make the offence ‘death-eligible’.¹⁶⁵ Moreover, the statutory aggravating circumstances must be narrowly construed.¹⁶⁶

No closed lists of mitigating circumstances

- 4.9. The status of mitigating features is different. In no common law jurisdiction has there been any attempt to prescribe closed lists of mitigating circumstances for capital sentencing purposes. On the contrary, there is a firmly established principle that the categories of mitigating considerations are never closed. Four examples from the common law jurisprudence illustrate this proposition:

- In *Lockett v Ohio* the US Supreme Court held that there could be no exhaustive list of features that:

*[P]recluded [the sentencer] from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.*¹⁶⁷

- In *Mithu v State of Punjab*, the Supreme Court of India held:

*‘The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death.’*¹⁶⁸

- In *R v Makolija*, the High Court of Malawi enumerated a broad range of sentencing considerations and emphasised that the list was not closed:

*‘Needless to say, the list of circumstances, mentioned by counsel, that are aggravating or mitigating is not exhaustive. I see no reason why other factors such as remorse, lack of clear motive, childhood deprivation and abuse, good conduct in prison, effect on the victim..., likelihood of committing further acts of violence, sense of moral justification and, in appropriate cases, socioeconomic status, cannot be taken into account.’*¹⁶⁹

- And in *Muruatetu & Mwangi v Republic*,¹⁷⁰ the Supreme Court of Kenya gave guidance on potential mitigating features in capital cases. These broadly overlap with those set out in this chapter and include ‘the possibility of reform and social re-adaptation of the offender’. But the

¹⁶⁵ See para. 4.19 below.

¹⁶⁶ See paras 3.53–3.57 above.

¹⁶⁷ 438 US 586 (1978), p.604

¹⁶⁸ (1983) 2 SCR 690

¹⁶⁹ Sentence Rehearing Cause No. 12 of 2015, p.6. These observations followed a detailed review of the Malawi case law on homicide sentencing and mitigation generally. A fuller extract from the judgment is provided in para. 4.95 below.

¹⁷⁰ Petitions No. 15 & 16 of 2015, paras 64 and 67

Court also confirmed that in addition to the mitigating factors identified in its guidance, the sentencing judge should also consider ‘any other factor that the Court considers relevant.’¹⁷¹

- 4.10. The same open and unrestricted approach applies to the identification of extenuating circumstances, where such circumstances are required to displace a presumption in favour of death. When that assessment is being made, no factor that impacts on the moral blameworthiness of the offender at the time of the offence can be ignored.¹⁷²

Offence-based circumstances

- 4.11. The following factors touching on the offence itself are particularly important:

- The nature and seriousness of the offence
- The offender played a lesser role in the offence
- Lack of premeditation or significant planning
- Partial excuses
- The impact of the offence on victims and the views of the victims on sentence

Each of these is now considered in turn.

The nature and seriousness of the offence

- 4.12. One of the most important considerations in the exercise of capital discretion is the nature and seriousness of the offence, or its type and gravity. There are differences of approach on this issue depending on which of the three tests outlined in the previous chapter is applied.

Applying the first sentencing approach (the ‘rarest of the rare’ test)

- 4.13. When the ‘rarest of the rare’ test is applied in murder cases, it is a necessary precondition for the imposition of the death penalty that the particular offence is an exceptionally grave or heinous example of murder. All murders are grave and heinous, but the death penalty must be reserved for the most exceptionally serious cases of murder. In this sense, the suitability of the death penalty is influenced more by what the offence is not, rather than what it is.
- 4.14. In *White v R* (Belize) the Privy Council recognised that the offence in that case was callous and serious and the offender had behaved in a ‘revolting fashion’. But there was no element of sadism, torture or humiliation, the case was not comparable with the worst cases involving sadistic killings, and the ‘rarest of the rare’ test was not met.¹⁷³
- 4.15. In *Machhi Singh v State of Punjab* the Supreme Court of India identified five categories in which the nature of a murder might be so serious and exceptional as to satisfy the ‘rarest of the rare’ test.
- The first category was where the offence was committed ‘in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the

¹⁷¹ See para. 71(g)-(h) of the Supreme Court’s judgment.

¹⁷² *Letuka v R*, 1991-96 LLB & LB 346 (Lesotho)

¹⁷³ [2010] UKPC 22, para. 16

community'. The Court gave examples of where the victim was killed by subjection to inhuman acts of torture, or was dismembered in a fiendish manner.

- The second was where the offence was committed for a motive evincing 'total depravity and meanness', such as where an assassin murdered for reward.
- The third was where the offence was aggravated by its socially abhorrent nature, such as bride burning.
- The fourth was where the offence was aggravated by its magnitude and enormity of proportion, such as where many members of the same family were murdered.
- The fifth category was where the offence was aggravated by the status of the victim, such as a person rendered helpless by old age or infirmity.¹⁷⁴

*None of this is to suggest that the death penalty will be appropriate if such indicia of seriousness are met, but it might be, depending on the strength of countervailing mitigating features: 'Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".'*¹⁷⁵

- 4.16. In *Republic v White*¹⁷⁶ the High Court of Malawi described the exceptional circumstances that might justify the death penalty as follows:

*'The offence must have been occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and ... [the convict must be] highly likely to offend again ... The motive for the killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such a human being does not qualify to live. I may put deliberate mass murders and serial killers in this category.'*¹⁷⁷

- 4.17. In another case from Malawi the Court held that the circumstances would be 'decrepit and gruesome' where the victim's body had been dismembered or mutilated, where there had been torture or sadism prior to the murder, the victim was murdered in furtherance of or escape from another serious felony, or where the victim was particularly vulnerable, such as a child under the age of 12.¹⁷⁸
- 4.18. Even when the court is confronted with an exceptionally grave or heinous offence the presumption in favour of life continues to operate, and the death penalty can only be imposed where there is no significant mitigation and no reasonable prospect of reform. This principle finds expression in all the jurisdictions in which the 'rarest of the rare' approach applies. The position in India has been mentioned above. In Uganda, the sentencing guidelines identify various circumstances that mitigate against a death sentence, such as where death resulted from a single isolated act, there was an element of self-defence or provocation, the offence was committed while the offender was intoxicated, or the defendant played a minor role in the killing.¹⁷⁹ These points are addressed in more detail later in this chapter.

¹⁷⁴ (1983) 3 SCC 413, 431-32. The Court confirmed death sentences for three men who had killed 17 members of a single family over the course of a single evening as they slept in their homes.

¹⁷⁵ See p.414, citing *Bachan Singh v State of Punjab*, (1983) 1 SCR 145.

¹⁷⁶ Criminal Case No. 74 of 2008

¹⁷⁷ See p.2.

¹⁷⁸ *Republic v Bagala*, Confirmation Case No. 24 of 2011 (Supreme Court of Appeal)

¹⁷⁹ Part IV, para. 21

Applying the second sentencing approach (no express presumption in favour of life or death)

- 4.19. As for those countries where there is no express presumption in favour of life or death, in some there are closed lists of aggravating circumstances that go to the seriousness of the offence, and at least one such factor must be proved to make the offence 'death-eligible'. The example of Arizona was given in the last chapter.¹⁸⁰ In capital trials in Arizona, the offence is only death-eligible if one of the statutory aggravating factors is proved at the aggravation phase of the sentencing process. The statutory list is exhaustive. If at least one of these factors has been proved the case proceeds to the penalty phase, and the death penalty can only be imposed if 'there are no mitigating circumstances sufficiently substantial to call for leniency'. So the penalty phase is focused on mitigation only, and to that extent the list of aggravating features is closed, albeit that the list is extensive. But the potential categories of mitigating circumstances are not closed: 'The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death...'¹⁸¹
- 4.20. In Zimbabwe, there are now specified statutory aggravating factors that make an offence of murder eligible for the death penalty.¹⁸² But the statutory factors in Zimbabwe are not exhaustive, and other common law aggravating factors can be weighed in the balance, in the exercise of the judge's discretion.
- 4.21. Other jurisdictions rely on traditional common law aggravating features entirely. An example is the case of *State v Mlambo*,¹⁸³ which was heard before the statutory aggravating factors (above) were introduced in Zimbabwe. In that case the aggravating features found to weigh in favour of death were that the killing occurred in the course of a robbery and the defendant had fired shots indiscriminately at members of the public. And in Swaziland the death penalty can only be applied in exceptional cases of 'depraved and evil conduct'.¹⁸⁴
- 4.22. In all these cases the fact that aggravating features have been established does not create a presumption that the death penalty will be imposed. Mitigating circumstances must always be considered, and if they outweigh the aggravating circumstances, a lesser penalty will be appropriate. The example of Arizona was considered above. In the US federal system, the jury must weigh all the relevant aggravating and mitigating circumstances in order to decide on whether the death penalty is justified.¹⁸⁵

Applying the third sentencing approach (presumption in favour of death unless extenuating circumstances are established)

- 4.23. Where the death penalty is mandatory in the absence of extenuating circumstances, the court need not concern itself with the aggravating features going to the seriousness of the offence. This is because the presence of such features is not a prerequisite for the imposition of the death penalty: all murders are capital offences if extenuating circumstances have not been established. But the absence of aggravating factors can be an extenuating factor in its own right. For example, in *Masono*

¹⁸⁰ See paras 3.43 and 3.49–3.50 above.

¹⁸¹ Arizona Revised Statutes §13-751G

¹⁸² See s.47 of the Criminal Law (Codification and Reform) Act, as amended in 2016.

¹⁸³ [2015] ZWHHC 351

¹⁸⁴ See *Simelane v R* [2012] SZSC 54, which was a case of serial killing.

¹⁸⁵ 18 US Code §3593(c)

v State (Botswana),¹⁸⁶ the Court observed that the absence of premeditation would normally be an extenuating circumstance.

Singapore

4.24. In Singapore, the type and gravity of the offence is particularly important when it comes to non-intentional murders, for which the death penalty is discretionary. As we saw in the last chapter, this is because the primary concern of the court is whether the offender showed ‘a blatant disregard for human life’ such as to ‘outrage the feelings of the community’. The courts’ approach to this relatively new test is addressed in the previous chapter.¹⁸⁷

The offender played a lesser role in the offence

4.25. The fact that an offender played a lesser role in a joint enterprise is a mitigating factor in sentencing generally, and usually justifies a distinction in sentencing between the participants. This is no less true in capital sentencing, at least in those jurisdictions where the first two discretionary tests are applied. In those countries a lesser level of participation can, by itself, justify the non-imposition of a death sentence. For example, a ‘minor’ role is a statutory mitigating factor under the United States Code and in various states, including Arizona.¹⁸⁸ Other examples can be found in St Kitts and Nevis,¹⁸⁹ Lesotho¹⁹⁰ and Singapore¹⁹¹ (see below).

4.26. This factor does not apply to the third approach to discretionary sentencing (the extenuating circumstances test), at least in its traditional application. Under that test, the only factors that are capable of amounting to extenuating circumstances are those relating to the offender’s state of mind at the time of the offence. The role of the offender as compared with other participants is irrelevant.

4.27. In Singapore the offender’s level of participation may be relevant. Each case turns on its facts. In *PP v Garing & Imba*¹⁹² the trial judge sentenced Garing, who inflicted the fatal blows on the deceased, to death. But Imba, who played a lesser role in the attack, was sentenced to life imprisonment. His relatively minor role in the offence did not demonstrate such ‘blatant disregard for human life’ to justify the death penalty. The Court of Appeal rejected appeals against both sentences. In Imba’s case he would have been equally culpable, despite his lesser role, if he had been acting in accordance with a preconceived plan to inflict a brutal attack of the kind inflicted on the deceased. But in the absence of such a plan, and given the lesser role played by Imba, there was no reason to disturb the judge’s decision to impose a life sentence.¹⁹³

Lack of premeditation or significant planning

4.28. In all the tests for the discretionary death penalty the presence of premeditation or any meticulous planning can be an aggravating factor. Conversely, the lack of such premeditation or planning

¹⁸⁶ 2000 (1) BLR 46

¹⁸⁷ See paragraphs 3.68–3.71 above.

¹⁸⁸ 18 US Code §3592 (a)(3); Arizona Revised Statutes §13-751G(3)

¹⁸⁹ *Mitcham & Ors v DPP*, Criminal Appeals No. 10, 11 and 12 of 2002

¹⁹⁰ *Letuka v R*, 1991-96 LLB & LB 346

¹⁹¹ *PP v Garing & Imba* [2015] SGHC 107

¹⁹² *PP v Garing & Imba* [2015] SGHC 107

¹⁹³ *Garing v PP; PP v Imba* [2017] SGCA 07, paras 61-62

provides important mitigation or extenuation. Whichever test is applied, lack of premeditation can be sufficient reason of itself to avoid the death penalty. In *Masono v State*, for example, the Court of Appeal of Botswana held:

*'The crime committed by the appellant was both callous and cruel. It is difficult to understand how anyone, especially someone who, like the appellant is herself a mother, could destroy the life of a defenceless child. However, the crime of murder was not premeditated. The absence of premeditation, as the court itself correctly says, is normally an extenuating circumstance... The appellant should therefore have been convicted of murder with extenuating circumstances.'*¹⁹⁴

- 4.29. Similarly, in the case of *White v R* (Belize) the Privy Council described the offence as 'callous and serious' and found that the appellant behaved in a 'revolting fashion'. But the killing did not appear to have been planned or premeditated, and this was a major reason for the Board's conclusion that a death sentence was inappropriate.¹⁹⁵

Partial excuses

- 4.30. Where the facts of the offence are on the borderline of provocation or duress or other recognised defences, or an element of a defence is present, this may provide significant mitigation. This is so even if the offender did not advance the defence in question at trial, or did so unsuccessfully.
- 4.31. For example, where there is some evidence of provocation but not enough to reduce an offence of murder to manslaughter, this is firmly established as mitigation warranting a penalty other than death. This, for instance, was the position adopted by the High Court of Grenada in *R v Ogilvie*,¹⁹⁶ where the offender had been the victim of protracted sexual abuse at the hands of the deceased. In *Uladi v Republic*¹⁹⁷ the offender was provoked because he believed his victim had tried to steal a window. This was one of several matters that led the Supreme Court of Appeal of Malawi to conclude that a death sentence was inappropriate. And in *R v Nelson*¹⁹⁸ the High Court of Antigua and Barbuda took into account as a mitigating factor a rejected claim of self-defence. The evidence was insufficient to establish a complete defence, but it was sufficient to justify the imposition of a lesser sentence than death.
- 4.32. Similarly, where the extenuating circumstances test applies, a borderline case of provocation or self-defence can amount to an extenuating circumstance sufficient to displace the presumption in favour of death.¹⁹⁹
- 4.33. The same approach applies to intoxication. Even if the defendant's intoxication was not so extensive as to negate a necessary element of the *mens rea*, the fact that the offender had been drinking at the time of the incident may be treated as a mitigating factor or extenuating circumstance.²⁰⁰

¹⁹⁴ 2000 (1) BLR 46, p.5

¹⁹⁵ [2010] UKPC 22, para. 16

¹⁹⁶ Unreported, 14 July 2004

¹⁹⁷ Criminal Appeal No 5 of 2008, cited in *R v Makolija*, Sentence Rehearing Cause No. 12 of 2015, p.8.

¹⁹⁸ ANUHCRCR 2008/0037, para. 21

¹⁹⁹ See, for example: *Lowani v State*, Criminal Appeal No. 2 of 1984 (Botswana); *Simusokwe v People* [2002] Zam LR 63 (Zambia).

²⁰⁰ See, for example: Part 4, para. 21(n) of the Uganda Sentencing Guidelines; *Republic v Wilson Mkandawire*, Sentence Rehearing Cause No. 13 of 2015 (Malawi); *Republic v Ngulube*, Criminal Appeal No. 35 of 2006 (Malawi), *Chisoma v State*, Criminal Appeal No. 48 of 1984 (Botswana); *Ksanga v People* [2012] ZMHC 26 (Zambia).

- 4.34. Where there is an element of duress or pressure to commit the offence that is ‘unusual or substantial’ but not a defence to the charge, this must be considered as a mitigating feature when determining whether the imposition of a death sentence would be justified under the US Criminal Code.²⁰¹ Similar considerations will apply in other jurisdictions.

The impact on victims and the views of the victims on sentence

Victim impact statements

- 4.35. As a general sentencing principle the impact of an offence on its victims is relevant to the seriousness of the offence. Victim impact statements are sometimes obtained to inform the court’s assessment of the appropriate sentence. They provide victims with an opportunity to explain how they have been affected by the crime, thereby allowing the court to determine the extent of the harm caused.²⁰²
- 4.36. On this issue, as with many others, specific considerations apply in capital cases. In most common law jurisdictions the court is usually dealing in capital cases with murder, so the direct victim is deceased. Those close to the victim, typically members of the immediate family, may be given the opportunity to make victim impact statements or family impact statements. But it is in the nature of a murder that the offence will have a profound and distressing impact on family members. So in capital cases, victim impact statements are unlikely to affect the assessment of whether the death penalty would be appropriate. The court may nonetheless seek to give a voice to the victims of capital offences before passing sentence. The scope for considering their impact statements has procedural implications: see paragraph 7.20 below.

The opinions of victims on whether the death penalty should be imposed

- 4.37. There is an important distinction between a victim’s description of the impact of an offence on the one hand, and the victim’s opinions about an appropriate sentence on the other. As noted above, as a general sentencing principle the impact of an offence, which is a matter of fact on which victims may be invited to give evidence, is potentially relevant to the seriousness of the offence, and so might be a legitimate consideration in determining the appropriate exercise. But with one caveat, a victim’s opinion about the appropriate sentence, and in capital cases their view on whether death should be imposed, is not relevant to sentence. This proceeds from the fundamental proposition that the determination of sentence lies within the exclusive prerogative of the sentencing judge, having regard to all the factual circumstances of the case, not to the opinions of others:

‘The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victim. The opinions of the victim or the victim’s close relatives as to what the sentence should be are therefore not relevant, unlike the consequences of the offence on them.’²⁰³

²⁰¹ 18 USC §3592 (a)(2)

²⁰² See, for instance, *R v Perkins* [2013] EWCA Crim 323, Criminal Practice Direction VII Sentencing F: Victim Personal Statements (England & Wales) and Archbold Criminal Pleadings 2018, para. 5-120.

²⁰³ *Criminal Practice Direction VII Sentencing F: Victim Personal Statements* (England & Wales), para. F.3(e). See also *R v Perkins* [2013] EWCA Crim 323.

- 4.38. The same principled approach undoubtedly applies in capital cases. Where a person has suffered a violent death, it is understandable for family members to seek vengeance and even the death of the perpetrator, but that has no bearing on the dispassionate process of criminal sentencing. There is no common law jurisdiction in which sentencers are permitted to consider a family member's desire for the death penalty to be imposed as a consideration in the capital sentencing exercise.

An exception to the general rule

- 4.39. The caveat to the preceding observations arises in those rare cases where the victims of a capital offence express the view that the death penalty should not be imposed. In those cases, the overarching importance of considering any significant mitigating factor in capital cases justifies reliance on this circumstance as a reason not to impose a sentence of death. This proposition is supported by a series of decisions by the English Court of Appeal. These are to the effect that while the views of victims are generally irrelevant to the sentencing process, exceptions would be made either where the likely sentence would aggravate the victim's distress, or where a victim's forgiveness provided evidence that their suffering was much less than would normally be the case.²⁰⁴ In capital cases either or both of those considerations may arise if family members invite the court to impose a sentence less than death.
- 4.40. It follows that in those rare cases where family members of the victim in a capital case urge the court to show mercy, there is a principled basis for the court to adopt the exceptional approach of taking those views into account as a justification for not imposing a sentence of death.

Offender-based circumstances

- 4.41. There are many potential circumstances pertaining to the offender that may be relevant to the capital sentencing process, whichever of the three sentencing approaches is applied. As noted above, the categories of potential mitigation are not closed, but they may include the following:

- A capacity for reform or rehabilitation
- Mental disorder
- A guilty plea
- Young age
- Remorse
- Previous good character
- Significant delay in the criminal proceedings
- Harsh prison conditions

All but one of these points is addressed in turn in the rest of this chapter. The exception is mental disorder, which raises particularly complex issues and is addressed separately in the next chapter.

²⁰⁴ See *R v Perks* [2001] 1 Cr App R (S) 19 and the cases referred to in *Archbold Criminal Pleadings 2018*, para. 5-119.

A capacity for reform or rehabilitation

- 4.42. In most common law jurisdictions an offender's capacity for reform is a compelling if not decisive argument in favour of imposing a penalty less than death. The general assessment of capacity for reform may include specific consideration of the offender's previous good character, young age at the time of the offence, a guilty plea, or evidence of remorse – or the sentencer may address those matters as separate mitigating features. Those issues are considered separately in the following sections of this chapter.

The 'rarest of the rare' test and the offender's capacity for reform

- 4.43. In the application of the 'rarest of the rare' test the capacity for reform is not merely an important mitigating feature in assessing the appropriate sentence. Even where the facts of the case are exceptionally serious, the prospect of reform is a compelling argument in its own right in favour of imposing a sentence less than death.
- 4.44. The importance of rehabilitative potential was underscored by the Constitutional Court of South Africa in *S v Makwanyane*. The Court noted that the practice of the courts in South Africa was to reserve the death penalty for 'the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence'.²⁰⁵ The Privy Council adopted a similar approach in *R v Trimmingham*.²⁰⁶
- 4.45. The emphatic importance of capacity for reform has also been recognised in Malawi, as illustrated by the case of *Republic v William Mkandawire*.²⁰⁷ The High Court noted the aggravating factors in that case, including the use of a dangerous weapon and the absence of provocation. Its finding that the death penalty was nonetheless inappropriate turned on its conclusion that:

*'[T]he convict is a young man with no previous conviction who has tremendously reformed during his 11 years of incarceration such that there is a high probability of him seamlessly re-integrating into society upon his release ...'*²⁰⁸

Further illustrations of this approach can be found in the case law of the Eastern Caribbean Court of Appeal²⁰⁹ and the Supreme Court of Belize.²¹⁰

- 4.46. The Privy Council has mandated that evidence from a mental health professional must be obtained in every capital case for sentencing. The rationale is that a sentencing court would need professional advice, and without expert psychiatric and/or psychological evidence, a judge cannot be expected to reach a properly informed view as to whether the accused has a reasonable prospect of reform (see Chapter 7 below at para. 7.14).

²⁰⁵ [1995] ZACC 3, para. 46

²⁰⁶ [2010] UKPC 22. See in particular the passage quoted in para. 3.18 above.

²⁰⁷ Sentence Rehearing Cause No. 20 of 2015

²⁰⁸ See p.7.

²⁰⁹ *Wilson v R*, Criminal Appeal No 30 of 2004 (St Vincent and the Grenadines); *Moise v R*, Criminal Appeal No 8 of 2003 (St Lucia)

²¹⁰ *R v Reyes* [2003] 2 LRC 688

- 4.47. In India, however, expert evidence is rarely considered by the courts when addressing the individual's capacity for reform. As noted in Chapter 3, whether the prospect of reform is relevant at all has become unclear as a result of inconsistent sentencing approaches in recent capital cases: see paragraph 3.11 above.

The offender's capacity for reform when balancing aggravating and mitigating factors

- 4.48. The capacity for rehabilitation is also a potentially relevant mitigating feature in jurisdictions where mitigating features are weighed against aggravating features. In Arizona, for instance, a death sentence cannot be imposed unless the trier of fact (usually a jury) has unanimously concluded that the death penalty is appropriate, and it must not do so unless there are 'no mitigating circumstances sufficiently substantial to call for leniency'.²¹¹ So positive evidence of capacity for reform may justify the imposition of a sentence less than death, by itself or when considered with other features of the case.

Capacity for reform and the extenuating circumstances test

- 4.49. The position in jurisdictions applying the extenuating circumstances test is different. Where that test is applied in its traditional and orthodox form, the court is only concerned with the offender's state of mind at the time of the offence. So strictly speaking, capacity for reform or rehabilitation at the date of sentence cannot amount to an extenuating circumstance (see paragraph 3.62 above). But the prospect of rehabilitation may be implicitly relevant in other ways. For instance, an offender who was intoxicated at the time of the offence might be more responsive to reform than someone who acted in cold blood or for gain. Intoxication is considered as a separate factor above (see paragraph 4.33).

Previous convictions, continuing dangerousness and the risk of re-offending

- 4.50. For most sentencing purposes an offender's previous good character or criminal convictions will operate as a mitigating or aggravating feature, respectively, at the sentencing stage. Specific considerations apply in death penalty cases.

Good character applying the 'rarest of the rare' test

- 4.51. Where the court is applying the 'rarest of the rare' test, a lack of previous convictions is almost invariably a definitive basis for imposing a sentence other than death. This is because a person whose offence was committed against a background of previous good character is likely to have a significant prospect of rehabilitation.
- 4.52. There are numerous cases in which the lack of prior offending contributed to the non-imposition of a death sentence. In the *Reyes* resentencing case in Belize, for example, the Chief Justice found that the offender's good character and capacity for reform provided compelling reasons for not

²¹¹ Arizona Revised Statutes §§13-752H, 13-751E

imposing the death penalty, even though the offence was a double murder by shooting. The Chief Justice observed:

*[F]rom the testimony of the various witnesses I have summarized earlier, there would appear to be present in the prisoner's favour, additional extenuating circumstances to justify this Court not to impose the death penalty. There is evidence of the prisoner's good character; his good standing in his community and reputation for help and kindness and an exemplary family man; his profound remorse and absence of future dangerousness. All these impel me to believe that the shooting by the prisoner was quite out of character.'*²¹²

Bad character applying the 'rarest of the rare' test

- 4.53. An offender's bad character is almost invariably irrelevant when applying the 'rarest of the rare' test. This is for the reasons identified by the Court of Appeal of St Vincent and the Grenadines in *Trimmingham v R*:

*'It has to be fundamental that a person cannot be sentenced to death for anything other than the offence for which he has been convicted and for which he is before the court for sentencing. Therefore, the "awful" character of the appellant should not have operated against the appellant to assist the case for the death penalty. In considering the imposition of the death penalty the character and record of the appellant can only work in his favour, if good, and cannot work against him if bad.'*²¹³

This statement of principle was approved by the Privy Council in the same case²¹⁴ and applied by the Court of Appeal of Jamaica in *Dougal v R*.²¹⁵

- 4.54. In *White v R*²¹⁶ the Privy Council reiterated the 'apparently absolute prohibition on taking into account against the offender his bad character and any other relevant circumstances that may weigh against him', but added an exceptional caveat to the prohibition:

*'There may be cases where an offender's previous offending is so bad and the previous offences are so similar to the index offence that they are relevant to its gravity. An example might be where the index offence is the latest in a series of sadistic murders.'*²¹⁷

- 4.55. The exceptionality of this caveat was confirmed by the Court of Appeal of Jamaica in *Dougal v R*:

*'The actual example given by the Board in White ("...where the index offence is the latest in a series of sadistic murders"), serves... to emphasise the highly exceptional nature of the cases that might fall within this category.'*²¹⁸

- 4.56. There may even be cases where bad character provides an indication of relevant mitigation. An offender's bad character or reputation may have its roots in a troubled and disadvantaged start in life, and conceal grounds for mitigation. In the notorious St Kitts case of 'Mr Shit' (David

²¹² *R v Reyes* [2003] 2 LRC 688, para. 34

²¹³ Criminal Appeal No. 32 of 2004, para. 30

²¹⁴ *Trimmingham v R* [2009] UKPC 25. See para. 21 of the Privy Council judgment, set out in para. 3.18 above.

²¹⁵ [2011] JMCA 13

²¹⁶ [2010] UKPC 22

²¹⁷ See para. 14 of the judgment.

²¹⁸ [2011] JMCA 13, para. 108

Wilson) in 1998, the offender might not perhaps have been hanged if he had benefitted from a discretionary sentencing exercise and a social inquiry report. Wilson had acquired his unfortunate nickname at the orphanage where he was brought up, because he had been found as a baby in a latrine, where he had been abandoned by his mother. If the court in that case had exercised a discretion on sentence, it might have concluded that the neglect and cruelty that the offender had suffered from the very outset of his life gave rise to significant mitigation, and it might have imposed a sentence less than death.²¹⁹

Evidence of continuing dangerousness applying the ‘rarest of the rare’ test

- 4.57 There are some capital cases in which the court is presented with positive evidence of the offender’s continuing dangerousness and a high risk of re-offending. This might be because the offender has a very bad history of previous serious offences (see above), or the risk might be identified by a psychiatrist or other expert. Far from offering the hope of rehabilitation, the evidence may suggest that the offender poses a serious continuing danger to the public.
- 4.58. On the face of it, such evidence might seem to be an aggravating feature weighing in favour of the death penalty in a discretionary sentencing process. But the weakness of that argument can be seen in cases such as *Trimmingham v R*.²²⁰ In that case the Court of Appeal of St Vincent and the Grenadines acknowledged the importance of public protection as a sentencing objective. But in capital cases the need for public protection does not justify the imposition of the death penalty, because the objective can be met by other means – by lengthy incarceration rather than execution. As the Court observed, ‘Imposing a sentence of life imprisonment can attain the objectives of keeping the appellant out of society entirely.’²²¹ Moreover, evidence of continuing dangerousness does not necessarily nullify a capacity for reform. In time, rehabilitative programmes may reduce an offender’s future threat to the public.

Weight of past character in the balance of aggravating and mitigating factors

- 4.59. Where the second approach to discretionary capital sentencing is applied, previous convictions may be relevant if they are specified to be an aggravating factor in the relevant legislation. For example, an offence is ‘death-eligible’ under US federal law if the defendant ‘has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute’.²²²
- 4.60. The position is not the same in all the relevant jurisdictions. In Zimbabwe, for instance, previous convictions are not a statutory aggravating feature in capital cases.²²³
- 4.61. As for good character, a lack of previous convictions is highly relevant under this sentencing regime, and is expressly underlined in the relevant legislation.²²⁴

²¹⁹ The offender, David Wilson, was hanged in 1998.

²²⁰ Criminal Appeal No. 32 of 2004

²²¹ See para. 33 of the judgment.

²²² 18 USC §3592(c)(3)

²²³ See para. 4.19 above.

²²⁴ See, for instance: 18 US Code §3592(a)(5); §3593(e); Arizona Revised Statutes §13-751G.

Continuing dangerousness in the balance of aggravating and mitigating factors

- 4.62. In nearly all jurisdictions where mitigating factors are weighed against aggravating factors, evidence of the offender's continuing dangerousness is not regarded as a factor weighing in favour of a death sentence. This has not been identified as an aggravating feature in Zimbabwe or Swaziland, and in the US, only two of the 32 states retaining the death penalty (Texas and Oregon²²⁵) allow an offender's continuing threat to society to play a role in capital sentencing. None of the other states allow any evidence on this issue.

Previous convictions applying the 'extenuating circumstances' test

- 4.63. Previous character, good or bad, may be regarded as irrelevant where the 'extenuating circumstances' test is applied. This is because previous character would not normally be treated as falling within the category of 'facts bearing on the commission of the crime' that reduce the offender's moral blameworthiness.²²⁶ But as we have seen, some flexibility has emerged in the application of this sentencing approach in practice. If the offender is of previous good character, a sentencing judge may be more amenable to concluding that there are circumstances pertaining to the commission of the crime that justify a sentence less than death.²²⁷

The offender's age

- 4.64. The young age of an adult offender at the time of committing the offence is an important consideration in all three of the discretionary sentencing regimes. This is not least because younger offenders are understood to show greater levels of impulsivity and lack of self-control, which reduces their overall blameworthiness, but also because younger offenders show a greater capacity for change as they mature. In *Uganda v Gule*,²²⁸ for example, the defendant was convicted of five murders and the prosecution called for the death penalty. But the Court sentenced the offender to life imprisonment rather than death, largely because of his young age and lack of prior offending.
- 4.65. In the US, in some death penalty states the defendant's age is a statutory mitigating factor that the jury must consider when they consider whether leniency is justified.²²⁹
- 4.66. The fact that an offender is particularly old may also be relevant to sentence, having regard to the potentially harsher effect that punishment may have on older prisoners.²³⁰

Guilty plea

- 4.67. A plea of guilty has been long recognised as justifying a substantial reduction of sentence for all non-capital offences. If the principle that a guilty plea should attract a substantial discount is applied to capital cases, then this should clearly be a ground for not imposing the death penalty, even where it would otherwise be regarded as merited by the sentencing judge.

²²⁵ See Texas Code of Criminal Procedure §37.071(2)(b)(1) and Oregon Revised Statutes §163.150(1)(b)(B).

²²⁶ See para. 3.60 above and *Kelaletswe v State*, 1995 BLR 100 (Botswana).

²²⁷ See para. 3.67 above.

²²⁸ [2014] UGHCCRD 31

²²⁹ See, for instance, Arizona Revised Statutes §13-751G(5).

²³⁰ See the extract from *R v Makolija* in para. 4.95 below.

- 4.68. In the US, where plea bargains are common, the prosecution may agree not to seek the death penalty in return for a guilty plea. But outside the US, guilty pleas to murder are extremely unusual. A rare example was *Nicholas & Ors v State of Trinidad and Tobago*.²³¹ In that case the Court of Appeal was considering appropriate sentences where the offenders had pleaded guilty to felony murder. In Trinidad and Tobago, the death penalty for felony murder (unlike murder *simpliciter*) is discretionary. The Court of Appeal recognised that in such cases, if the offender pleaded guilty it was all but certain that a sentence less than death would be appropriate:

*'Consideration of the imposition of the death penalty ought to be reserved for cases in which there has been a finding of guilt and the circumstances are especially egregious and a flagrant assault on the sensibilities of all right thinking persons in the society. This is not to deny the discretion of a judge to impose such a sentence in a case in which there has been a plea of guilty, but that would apply only in the most egregious circumstances.'*²³²

- 4.69. The possibility of a guilty plea in capital cases may raise difficult questions for defence advocates. Ordinarily an advocate is likely to raise the prospect of a guilty plea in cases where the evidence against the offender is strong. But in a discretionary capital case, advocates will need to proceed with caution, particularly if the risk of a death sentence is significant because there are serious aggravating features and few if any mitigating features. In such cases, before discussing the possibility of a guilty plea with the defendant the advocate will need to seek a clear indication from the judge, and ascertain whether a guilty plea will be treated as a ground for not imposing the death penalty.

Remorse

- 4.70. The presence of remorse is undoubtedly an important mitigating factor, whether in its own right or as an indication that the offender has a capacity for reform and rehabilitation (see above). Remorse played a significant mitigating role in cases such as *R v Reyes* (Belize),²³³ *Uganda v Bwenge*,²³⁴ and *Losike v Uganda*.²³⁵
- 4.71. The absence of remorse is not generally regarded as an aggravating feature in capital cases. This is because inflicting a more severe punishment on an offender who has failed to express remorse at the end of his trial would undermine the substance of the right to appeal. An authoritative statement of principle to that effect can be found in *Mattaka and Ors v Republic*, where the East Africa Court of Appeal held:

*'A person who has pleaded not guilty and has maintained his innocence throughout and who intends to appeal cannot be expected to express repentance, which would amount to a confession of guilt. A person who has been found guilty may believe himself innocent as a matter of fact or law, and that belief may be upheld by an appellate court. If, however, lack of repentance could be treated as an aggravating factor, the right of appeal would be fettered, because the convicted person would, in effect, be put to a choice, whether to risk a heavier sentence by maintaining his innocence or to abandon his right of appeal in the hope of leniency.'*²³⁶

²³¹ Criminal Appeals No. 1-6 of 2013

²³² See para. 11 of the judgment.

²³³ [2003] 2 LRC 688. See the Chief Justice's sentencing comments set out in para. 7.12 below.

²³⁴ HCT-03-CR-SC-190/1996

²³⁵ Criminal Appeal No. 22 of 2005

²³⁶ [1971] EA 495, 512

- 4.72. This passage from *Mattaka* was relied on more recently by the Supreme Court of Uganda, in *Busiku Thomas v Uganda*.²³⁷ In that case, as in *Mattaka*, the Court's conclusions on the significance of remorse were made in the specific context of capital sentencing, although they were of more general application. The Court's conclusion was unequivocal: 'Absence of repentance by an accused person should never be an aggravating factor in considering what sentence the trial court should impose.'²³⁸ This accords with the Ugandan Sentencing Guidelines,²³⁹ in which the presence of remorse is identified as a mitigating factor but its absence is not identified as an aggravating factor.²⁴⁰
- 4.73. There have been some exceptions to this approach in the case law. In the 'Cathedral Killings' case in St Lucia, the absence of remorse was held to be one of several factors that made the offence 'one of the worst cases of murder' justifying the death penalty.²⁴¹ But this was an unusual exception to the general rule, and there are no examples in the case law of the absence of remorse tipping the balance, by itself, between the death penalty and a lesser sentence.

Delay in the criminal proceedings

The link between delay and sentence generally

- 4.74. There is a broad consensus that significant delay in the criminal trial or appellate process should lead to a reduction of sentence. This flows from the right to a hearing (including any appeal process) within a reasonable time, a right that is recognised across the common law and is often enshrined as an explicit constitutional principle. Where that right has been violated the offender should be afforded a remedy. In relatively minor cases the payment of compensation might suffice, but in capital cases the only appropriate remedy is a reduction of sentence, and that can only mean that the death penalty is not imposed.
- 4.75. The link in criminal proceedings between delay and sentence has long been recognised. In *Attorney General's Reference (No 2 of 2001)* the House of Lords held:

*'If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant.'*²⁴²

- 4.76. In *Dyer v Watson & Anr*, the Privy Council noted that in the practice of the European Court of Human Rights:

*'[U]nreasonable delay does not automatically render the trial or sentence liable to be set aside because of the delay (assuming that there is no other breach of the accused's Convention rights), provided that the breach is acknowledged and the accused is provided with an adequate remedy for the delay in bringing him to trial (though not for the fact that he was brought to trial), for example by a reduction in sentence.'*²⁴³

²³⁷ [2015] UGSC 3, pp.9-10

²³⁸ [2015] UGSC 3, p.10

²³⁹ See para. 3.26 above.

²⁴⁰ See para. 21(i) of the Guidelines.

²⁴¹ *R v Phillip & John*, Case No. 27A of 2002, High Court of St Lucia. The convictions in that case were subsequently quashed. At their retrial the offenders pleaded guilty to manslaughter and were sentenced to life imprisonment.

²⁴² [2004] 2 AC 72, para. 24

²⁴³ [2004] 1 AC 379, para. 129

- 4.77. The application of this approach as a common law principle was more recently confirmed by the Privy Council in *Tapper v Director of Public Prosecutions (Jamaica)*.²⁴⁴
- 4.78. In principle, once the court has a discretion on sentence, delay will always be a relevant mitigating factor. Most of these cases involve pre-trial delay, but the issue also arises where there has been significant post-trial delay. This includes cases that have been sent back for resentencing by a superior court, which is an issue addressed in more detail in Chapter 6.

The link between delay and sentence in capital cases

- 4.79. There is a long-established link between delay in capital proceedings and the imposition or re-imposition of sentence. This proposition sometimes arises in relation to pre-trial delays, but the case law is much more developed in relation to delays in the appellate process and other aspects of post-trial delay in capital cases.
- 4.80. So far as pre-trial delay is concerned, the courts have not identified a fixed period of delay beyond which a death sentence cannot lawfully be imposed. Much will depend on the reasons for the delay. If a case cannot proceed because an offender has absconded the delay is unlikely to have an impact on sentence, but pre-trial delays attributable to the prosecution or the judicial system may well be relevant, either in their own right or taken in consideration with other mitigating features. In *Hilaire & Ors v Trinidad & Tobago*²⁴⁵ the applicants argued that unjustified pre-trial delays spent in appalling prison conditions, and taken in conjunction with significant post-trial delays, violated the right to a trial within a reasonable time under Article 8(1) of the Inter-American Convention on Human Rights. The Inter-American Court of Human Rights held that the delay in these cases was one of the grounds for directing that the death penalty should be commuted.
- 4.81. Delays occurring after the completion of a trial, including the imposition of sentence, may also be relevant. The issue may arise where there has been a long delay in the subsequent appeal process, where there is a delay pending a decision on the exercise of the prerogative of mercy, or where the offender is being resentenced following the previous imposition of an unlawful mandatory death sentence.
- 4.82. As for delays in the appeal process, the leading case in the common law jurisprudence is *Pratt & Anr v Attorney General of Jamaica*.²⁴⁶ In that case the Privy Council effectively imposed a five-year limit between the imposition of a capital sentence and its execution. Any longer period facing the anguish of death row would render the execution of sentence inhuman or degrading, and therefore unconstitutional:

*'To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment.'*²⁴⁷

- 4.83. The Privy Council rejected the government's argument that the delays in that case could be overlooked because they had been caused in part by the appellants exercising their right of

²⁴⁴ [2012] 1 WLR 2712, para. 12

²⁴⁵ IACHR Series C No. 9, IHRIL 1477

²⁴⁶ [1994] 2 AC 1, p.35G. See also *Mejia & Guevara v Attorney General of Belize* and the Indian authorities referred to therein.

²⁴⁷ See p.33E.

individual petition to international tribunals, because that right was protected by Jamaica's accession to international treaties and the appellants' applications could not be characterised as frivolous.²⁴⁸

- 4.84. In some of its earlier cases the Supreme Court of India sought to qualify this principle by suggesting that the gravity of a particular offence could weigh against a finding that protracted delay on death row justified commutation. Those indications were firmly rebuffed in *Shatrughan Chaughan & Anr v Union of India*, in which the Court observed that for these purposes, '[c]onsiderations such as the gravity of the crime, extraordinary cruelty involved therein or some horrible consequences for society caused by the offence are not relevant'.²⁴⁹
- 4.85. In *Pratt*, the Privy Council indicated that the entire domestic appeal process, including any appeal to the Privy Council itself, should be completed within two years to ensure compliance with the prohibition of inhuman punishment.²⁵⁰ Similar conclusions have been reached in other cases in the Eastern Caribbean and the Caribbean Court of Justice.²⁵¹
- 4.86. The issue of delay on death row featured prominently in the Ugandan challenge to the mandatory death penalty, *Kigula & Ors v Attorney General*.²⁵² In that case, the Constitutional Court adopted a different analysis from the test applied in *Pratt*, and its approach was approved by the Supreme Court.²⁵³ The test for delay in capital cases in Uganda is whether a period of three years has passed, but time runs from the confirmation of sentence by the Supreme Court, not the imposition of sentence by the trial judge. If, at the expiry of three years from confirmation of sentence, no decision has been made on exercising the prerogative of mercy, the death sentence is deemed to be commuted to life without remission.
- 4.87. Separate considerations apply where a case is remitted for resentencing because the offender was given a mandatory and therefore unconstitutional sentence. Those cases are likely to involve significant delay in any event, but the offender has a separate and powerful argument for the imposition of a non-capital sentence. This is because he has been unlawfully held on death row, facing the anguish of execution, based on an unconstitutional and therefore unlawful sentence. The particular position of offenders facing resentencing in capital cases is addressed further in Chapter 7.

Prison conditions

- 4.88. The conditions in which an individual has been detained both before and after trial may be relevant to sentence.
- 4.89. In *Hilaire v Trinidad & Tobago* the Inter-American Court held that the applicants had been held in 'grossly overpopulated and unhygienic' prison conditions, both before and after trial. The lack of sufficient ventilation, natural light, nutrition, medical services and recreation meant that the applicants had endured 'circumstances that impinge on their physical and psychological integrity',

²⁴⁸ See pp.29H, 33D.

²⁴⁹ (2014) 3 SCC 1, para. 57

²⁵⁰ [1994] 2 AC 1, p.34F

²⁵¹ See *Moise v R*, Criminal Appeal No. 8 of 2003, Eastern Caribbean Court of Appeal (St Lucia) and *AG & Ors v Joseph & Boyce*, Appeal No. CV 2 of 2005, Caribbean Court of Justice.

²⁵² *Kigula & Ors v Attorney General*, Constitutional Petition No. 6 of 2003, p.137

²⁵³ *Attorney General v Kigula & Ors* [2009] UGSC 6, p.63

amounting to cruel, inhuman and degrading treatment.²⁵⁴ This was one of the grounds for the Court's direction that the applicants should not be executed.

- 4.90. In *Thomas v Baptiste*²⁵⁵ the Privy Council held by a majority that keeping condemned men in 'appalling' conditions, which unlawfully breached the Prison Rules, did not by itself provide a basis for commutation of an existing death sentence:

*'Even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the applicants' constitutional rights, commutation of the sentence would not be the appropriate remedy.'*²⁵⁶

- 4.91. But the Board recognised that it was a matter of degree, and the position would have been different if the prisoners' mistreatment had been more extreme:

*It would be otherwise if the condemned man were kept in solitary confinement or shackled or flogged or tortured. One would then say: "Enough is enough". A state which imposes such punishments forfeits its right to carry out the death sentence in addition. But the present cases fall a long way short of this.'*²⁵⁷

- 4.92. The approach adopted by the majority of the Board in *Thomas* would not bind a court at the sentencing stage on the exercise of capital sentencing discretion. That is because in *Thomas*, the Board was considering whether a sentence of death should be set aside as a remedy for post-conviction constitutional breaches (including attempted execution while international applications were pending, delay and prison conditions) – and underpinning the judgment was the fact that the sentence of death was lawful when passed.

- 4.93. The question for a court sentencing at first instance is wholly different. It is not asking itself whether the prison conditions endured are so appalling as to justify setting aside an otherwise justified and lawful sentence of death. It is asking itself whether the case before it falls into the category of the 'rarest of the rare', such that the penalty of death may be imposed. The fact that the offender has endured appalling prison conditions is a mitigating factor weighing against the imposition of a death sentence, even if other aggravating factors might place the case into the 'rarest of the rare' category.

- 4.94. The issue of prison conditions may be particularly relevant when considered cumulatively with other mitigating features, including any significant delay in bringing the defendant to trial or in hearing his appeal. That was the position in *Hilaire v Trinidad & Tobago*, above.

The sentencing considerations set out by the High Court of Malawi in *Makolija*

- 4.95. Finally in this chapter, it may be helpful to provide the summary of sentencing considerations set out by the High Court of Malawi in the case of *R v Makolija*.²⁵⁸ In the absence of equivalent

²⁵⁴ See paras 84(m) and 169.

²⁵⁵ [2000] 2 AC 1

²⁵⁶ [2000] 2 AC 1, 28A

²⁵⁷ See p.28D. In his dissenting judgment, Lord Steyn held that: 'Given that Thomas was subjected to such inhuman treatment over a prolonged period the only effective redress is now to quash the sentence of death.' (p.39A).

²⁵⁸ Sentence Rehearing Cause No. 12 of 2015

guidance from the Supreme Court of Appeal of Malawi, these concise and authoritative dicta of Kenyatta Nyirenda J were relied on in many of the sentence rehearings held in 2015–2017. They continue to serve as a concise distillation of the key common law principles for discretionary capital sentencing:

‘Counsel for both sides were agreed on the general principles that should apply where a person has been convicted of murder. Firstly, the maximum punishment must be reserved for the worst of offenders in the worst of cases...

‘Secondly, Courts will take into consideration the age of the convict both at the time of committing the offence and at the time of sentencing. The law generally favours relatively young or old people to protect them from being in custody for longer periods...

‘Thirdly, Courts will always be slow at imposing long prison terms for first offenders. The rationale being that it is important that first offenders avoid contact with hardened criminals who can negatively affect the process of reform for first offenders...

‘Fourthly, Courts will have regard to the time already spent in prison by the convict and will usually order that the sentence takes effect from the date of the convict’s arrest thus factoring in the time already spent in the prison...

‘Fifthly, Courts have also to look into the personal and individual circumstances of the offender as well as the possibility of reform and social re-adaptation of the convict. Arguably, this may relate to the convict’s individual circumstances at the time of committing the offence and at the time of sentencing, that is, their ‘mental or emotional disturbance’, health, hardships, etc...

‘Sixthly, the Court may take into account the manner in which the offence was committed, that is, whether or not (a) the crime was planned, rather than impulsive, (b) an offensive weapon was used or not, (c) the convict was labouring under intoxication at the time of committing the offence even though intoxication was not successfully pleaded in defence: ...

‘Seventhly, duress, provocation and lesser participation in the crime may be mitigating factors in certain circumstances.

‘Needless to say, the list of circumstances, mentioned by counsel, that are aggravating or mitigating is not exhaustive. For example, I see no reason why other factors such as remorse, lack of clear motive, childhood deprivation and abuse, good conduct in prison, effect on the victim ..., likelihood of committing further acts of violence, sense of moral justification and, in appropriate cases, socioeconomic status, cannot be taken into account.’²⁵⁹

Conclusions

4.96. As will be clear, the potential issues calling for consideration in the discretionary capital sentencing exercise are wide-ranging. All parties to the proceedings will need to apply a critical and probing approach to identifying which of these issues is relevant on the facts of a particular case. Once the

²⁵⁹ See pp.4–6 of the judgment.

potential issues are clear, a separate process will be needed to gather appropriate evidence to assist the judge, including a social inquiry report, evidence on the offender's character and a psychiatric report. This means that apart from the general sentencing principles addressed above, there will be specific procedural and evidential issues at the sentencing stage in discretionary capital cases. These are addressed below in Chapter 7.

- 4.97. We first turn to some specific issues relating to mental disorder as a specific consideration at the sentencing stage.

CHAPTER 5

Mental disorder as a
consideration in discretionary
capital sentencing



Introduction

5.1. Of all the factors affecting discretionary capital sentencing, mental disorder is probably the most neglected and misunderstood. There are many potential pitfalls. The first is a lack of knowledge and exposure to the issue. Although the science and learning around mental disorder is well-developed, most lawyers, prosecutors and judges are relatively unfamiliar with the subject. Most have no training in identifying mental disorder, no expertise on the causes and manifestations of mental disorder and little understanding of the impact of mental disorder on an individual's behaviour.

5.2. The second potential pitfall is scepticism. Claims of mental disorder in criminal cases are sometimes treated with a degree of suspicion. In this respect lawyers and judges may reflect a more widely held belief that mental disorder is sometimes invoked as a spurious excuse for committing serious offences. The error in that approach was noted by the High Court of Malawi in *R v Langanyirwa*.²⁶⁰ In that case the Court noted the findings of a neuropsychiatrist that the offender suffered from a particular cognitive disorder, was of sub-average intelligence and was easily led and manipulated by others. The judge then observed:

*'We should take heed of doctors' advice all the time unlike the way we have overlooked them in the past, otherwise we miss something vital in our administration of justice at the crucial time of sentencing.'*²⁶¹

The judge went on to note that the offender was not a habitual criminal and deserved to be treated with compassion, even though his offence was committed as part of a group and 'in very gruesome circumstances'.

5.3. The third potential pitfall is a lack of resources, in terms of both funding and personnel. This problem is particularly acute in poorer countries, but it is a pervasive feature in all common law systems. Even where lawyers and judges are sensitised to mental health issues and forensic psychiatry, this may count for little if they are unable to obtain an appropriate expert report. This may be because funding is not available to pay for an expert's fees, a suitable expert cannot be found (forensic psychiatrists are often in short supply) or both. But in any jurisdiction where the state has chosen to retain the death penalty, it is incumbent on the state to provide the resources necessary to ensure a fair and properly informed sentencing assessment.²⁶²

5.4. In this book we refer to 'mental disorder' as a convenient generic expression to cover both mental handicap (formerly known to the law as 'idiocy') and mental illness (formerly known as 'lunacy').

5.5. Mental disorder is different from the other potentially mitigating factors in one important respect. Whichever approach to capital sentencing is applied, the presence of mental disorder will mean that even if the death penalty was lawfully imposed at the sentencing stage, it cannot be lawfully carried out. This distinction was particularly acute in a recent decision by the Privy Council (*Pitman & Anr v State of Trinidad & Tobago*), which is addressed in more detail below.

²⁶⁰ Sentence Rehearing Cause No. 34 of 2016

²⁶¹ See p.12 of the judgment.

²⁶² See para. 7.17 below.

The Handbook of Forensic Psychiatric Practice in Capital Cases

- 5.6. The following observations address the key legal principles on mental disorder in capital cases. A more detailed guide to forensic psychiatry and its relevance and application in capital cases can be found in the latest edition of the *Handbook of Forensic Psychiatric Practice in Capital Cases* and the accompanying *Casebook*.²⁶³ These are both companion resources for use with the present book.²⁶⁴

The potential relevance of mental disorder at different stages of the criminal process

- 5.7. The general principle is that the presence of mental disorder may operate at any stage of a capital case as a bar to trial or conviction, the imposition of a death sentence or the carrying out of a death sentence.
- Before or during a trial, mental disorder may preclude a conviction if the disorder is so severe as to amount to a defence of insanity under the *M'Naghten* rules or their equivalent
 - Mental disorder may also prevent a trial from proceeding if the accused is not fit to enter a plea or to stand trial
 - If it satisfies the tests for diminished responsibility, provocation or loss of control, mental disorder may operate as a partial defence to murder, resulting in a conviction for manslaughter
 - If an offender has been convicted of a capital offence, mental disorder should operate as a mitigating factor at the sentencing stage. If demonstrably present at the time of the offence or of sentence, it should bar the imposition of the death penalty
 - If a capital sentence has already been imposed, mental disorder is also relevant at the mercy stage (in an application for clemency or its equivalent), where the disorder is shown to have been present at the time of the offence or when the application for clemency is considered
 - Finally, even if a capital sentence has survived all the previous stages, mental disorder should operate as an independent bar to execution, as a matter of common law and constitutional principle, if it is present at the time of proposed execution. This applies even if the disorder was not present before
- 5.8. In this book we focus on the significance of mental disorder specifically at the sentencing stage. At that point any evidence of mental disorder before the trial would not have been such as to preclude a trial at all, and any evidence of mental disorder during the trial would not have been sufficient to preclude a conviction for murder.

The underlying common law principle

- 5.9. The underlying principle in the common law is firstly that nobody should be convicted of a capital offence, sentenced to death or executed if they were suffering from significant mental disorder at

²⁶³ Nigel Eastman, Sanya Krljes, Richard Latham, Mark Lyall, *Handbook of Forensic Psychiatric Practice in Capital Cases* (2nd ed.); *Casebook of Forensic Psychiatric Practice in Capital Cases*, The Death Penalty Project, 2018. Both titles can be downloaded from The Death Penalty Project's website (www.deathpenaltyproject.org). The *Handbook* was written by forensic psychiatrists and a forensic psychologist, mainly for use by psychiatrists and psychologists in their preparation and delivery of expert evidence in capital cases. But it also provides a practical resource for defence advocates, prosecutors and judges as a guide to the contribution that forensic psychiatry can provide in such cases. This in turn may help lawyers and the courts to prepare appropriate instructions for psychiatrists and psychologists in capital cases.

²⁶⁴ The *Handbook* includes a concise account of some of the most commonly encountered mental disorders, addresses the content of forensic psychiatric assessments and the process of preparing them and presenting them in court, and considers specific topics relating to sentencing, mercy hearings, fitness for execution, and ethical issues in capital cases. The accompanying *Casebook* provides a series of detailed case scenarios, a range of questions arising in such cases and some suggested approaches to dealing with them.

the time of the offence. And secondly, nobody should be sentenced to death or executed if mental disorder develops later and is present at the time of either sentence or execution.

- 5.10. This principle can be traced at least as far back as 1680, when the English jurist Edward Coke acknowledged the inhumanity of executing the mentally ill. His reasoning was that executing offenders served as a deterrence, or as he put it, was ‘for example’; but no useful example would be served by executing the mentally ill, and doing so would be grotesquely cruel. In Coke’s words:

[B]y intendment of Law, the execution of the offender is for example, ... but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others.’²⁶⁵

- 5.11. A more developed statement of the common law principle appeared in Blackstone’s *Commentaries* in 1756. Blackstone recognised the significance of mental disorder (as described in the language of his time) at different stages in the criminal process: at the time of the offence, the time of trial and sentence, and the time of prospective execution. At all those stages, the ‘humanity of the English law’ blocked the path to execution. Blackstone expressed the principle in the following terms:

In criminal cases idiots and lunatics²⁶⁶ are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.’²⁶⁷

- 5.12. In the intervening centuries the humanity that Coke and Blackstone referred to has become the shared humanity of the common law. As the US Supreme Court put it in *Ford v Wainwright*: ‘This ancestral legacy has not outlived its time.’²⁶⁸ But inevitably, the principle precluding execution of those who suffer from mental disorder has been applied with variations between different common law jurisdictions.

- 5.13. There are two broad reasons for not imposing or carrying out the death penalty on offenders suffering from mental disorder:

- Firstly, people suffering from mental disorder may be limited in their ability to process or appreciate the consequences or wrongfulness of their actions, to act logically, and/or to exercise self-control. This means that the penal goals of retribution and deterrence will not be served by the execution of such offenders
- Secondly, the way in which mental disorder is dealt with during the investigatory and trial process may have a bearing on the appropriate sentence. People with mental disorder are at a significant disadvantage as they proceed through the criminal justice process. This may manifest

²⁶⁵ Edward Coke, *Institutes of the Lawes of England* (6th ed.), p.6

²⁶⁶ As noted above, these terms were used to refer to those suffering from mental handicap (‘idiots’) and mental illness (‘lunatics’).

²⁶⁷ William Blackstone, *Commentaries on the Law of England*, Book 4, Chapter 2, p.24

²⁶⁸ 477 US 408 (1986), p.408

itself in a number of different ways. For example: they are vulnerable to giving false confessions; they are less able to assist their lawyers preparing their defence; they may be less articulate or presentable; or their words and behaviour in court may be interpreted by judges and the wider public as demonstrating a lack of empathy or remorse. It would be particularly inhuman to inflict capital punishment on an offender who has contended with such inherent disadvantages in the course of the criminal justice process

Mental disorder, mental illness and mental impairment: what kind of mental abnormality is relevant?

- 5.14. The degree and types of mental disorder that preclude the death penalty are not always clear. Dealing firstly with mental illness, it is well-established that an offender suffering from schizophrenia or other serious psychosis should not be executed: see, for instance, *Ford v Wainwright* (above) and *Chaughan & Anr v Union of India*.²⁶⁹
- 5.15. But even where an offender's mental illness is only moderately severe, it may well provide a cogent reason for not imposing the death penalty in a discretionary sentencing regime. For instance, in *R v Reyes*²⁷⁰ the Chief Justice of Belize held that a diagnosis of depressive illness justified a sentence other than death, even though a defence of diminished responsibility had been rejected by the jury at trial. The offence in that case arose from a long-running boundary dispute between neighbours, and the psychiatric evidence showed that the offender was suffering from a major depressive disorder, probably brought on by that dispute. As the Chief Justice observed:

*'This must have caused him to be unbinged, at least temporarily, to the extent that after shooting the deceased he turned the gun on himself in an attempted suicide, but only succeeded in inflicting serious wounds on himself, from which he still suffers today.'*²⁷¹

In these circumstances, sentences of life imprisonment were imposed instead of death.

- 5.16. Other examples are provided by the following cases:

- In *R v Berthill Fox*,²⁷² the High Court of St Kitts and Nevis declined to impose the death penalty because the offender had killed his partner and mother-in-law in a fit of anger when his powers of self-control were diminished by years of steroid abuse.
- In *R v James*,²⁷³ the fact that the defendant might well have been suffering from a form of mental illness at the time of the commission of murder was 'the singular but important mitigating factor' in the determination of sentence, and warranted a determinate sentence of imprisonment rather than death.
- In *Cannonier & Ors v DPP*,²⁷⁴ the Court of Appeal of St Kitts and Nevis accepted that the ringleader in the murder of an off-duty police officer was suffering from a personality disorder, although not from a mental illness as such. This was one of several grounds on which his death sentence was substituted with a sentence of life imprisonment.

²⁶⁹ (2014) 3 SCC 1

²⁷⁰ [2003] 2 LRC 688

²⁷¹ See para. 33 of the judgment.

²⁷² Criminal Case No. 43 of 1997

²⁷³ High Court of St Lucia, unreported, 2001

²⁷⁴ High Court Criminal Appeals No. 19 to 22 of 2008, paras 175-179

- In *R v Makolija*,²⁷⁵ the High Court of Malawi recognised the potential significance of an offender suffering from mental disorder either at the time of the offence or at the time of sentence. In that case the offender had been diagnosed with clinical depression and psychosis, but as the judge observed:

*'Evidence of "mental or emotional disturbance", even if it falls short of meeting the definition of insanity, may nonetheless make an offender less culpable on a murder charge and this should be considered in mitigation of sentence.'*²⁷⁶

- In *State v Taanorwa*,²⁷⁷ the Supreme Court of Zimbabwe held that some background of mental disturbance less than a formally diagnosed mental disorder could provide a reason not to impose the death penalty:

'A man may not be ... mentally disordered within the meaning of the criminal law, but nevertheless his mentality may be that of a man who suffers from a diminished sense of responsibility and such a condition, while it may not be relevant in considering verdict, may be very relevant indeed in determining whether or not, in a case such as this, a proper sentence should be the death sentence.'

- Similarly, in *Ndzombane v State*,²⁷⁸ which was decided under the 'extenuating circumstances' regime before Zimbabwe's 2013 Constitution came into force, the Court of Appeal found that even the possibility of diminished responsibility at the time of the offence, which had not been thoroughly investigated, acted as an extenuating circumstance justifying a sentence other than death.
- Finally, in *Tlali Serine v R*,²⁷⁹ the Court of Appeal of Lesotho held that the trial judge was wrong to find there were no extenuating circumstances where the appellant had been in a state of 'emotional turbulence'. He had been engaged in litigation with the deceased that threatened his livelihood, such that he must have been 'in an emotionally vulnerable condition with some impairment of his judgement and his capacity fully to discipline and control his emotions'.

5.17. Turning to mental impairment, there is an international consensus that IQ below a certain level merits a diagnosis of 'intellectual disability', such that imposing or carrying out the death penalty would be inhuman. Where the line should be drawn is not universally agreed.

5.18. Two of the most authoritative collections of psychiatric diagnostic criteria are provided in the World Health Organization's *International Classification of Diseases (ICD)* and the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM)*. Both these sources state that intellectual disability will usually be present in persons possessing an IQ of less than 70.²⁸⁰

5.19. In *Atkins v Virginia*²⁸¹ the US Supreme Court made several important findings on the issue of mental disorder. Firstly, it recognised that there was an international consensus that executing the

²⁷⁵ Sentence Rehearing Cause No. 12 of 2015

²⁷⁶ See p.10 of the judgment.

²⁷⁷ Quoting Beadle CJ in *S v Sulpisio* (unreported).

²⁷⁸ Criminal Appeal No. SC 240/13

²⁷⁹ [1992] LSCA 84, p.7

²⁸⁰ ICD-10, F70-79; DSM-5, pp.33-38

²⁸¹ 536 US 304 (2002)

mentally ill was inhuman. Secondly, it held that the prohibition on executing those who suffer from mental illness, which had been confirmed in *Ford v Wainwright*,²⁸² also extended to those who were suffering from intellectual disability, or ‘mental retardation’. And thirdly, it held that an IQ of 70–75 or lower provided a *prima facie* indication of mental retardation. The Court left the refinement of the legal test for mental retardation to individual states.

- 5.20. More recently, in *Pitman & Anr v State of Trinidad & Tobago*²⁸³ the Privy Council confirmed that executing offenders suffering from substantial mental impairment would violate the constitutional prohibition of cruel and unusual punishment.²⁸⁴ The *Pitman* case is addressed in more detail at the end of this chapter.

The position under international law

- 5.21. The approach summarised above reflects a broad consensus in the domestic law of common law jurisdictions, under which the death penalty is precluded where the offender is suffering from mental disorder at the time of sentence or at the time of prospective execution. It also encompasses both mental illness and mental impairment or disability. All these elements are reflected in UN standards. Since 1984 the UN has taken a succession of measures aimed at protecting mentally disordered persons from execution. In 1984, the General Assembly endorsed the prohibition on the execution of ‘persons who have become insane’. In 1989 that prohibition was expressly said to include ‘persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution’.²⁸⁵ Since then UN bodies have consistently stated that the imposition of a death sentence on the mentally disordered is forbidden by international law. More recently, in 2012 the UN Special Rapporteur on Torture observed:

*‘International law imposes severe restrictions on the death penalty and demands serious safeguards for it to be lawfully applied. It also outlaws it in some specific circumstances or with regard to specific groups of vulnerable persons... This conclusion originates from the fact that international law does not attribute a different value to the right to life of different groups of human beings, such as juveniles, persons with mental disabilities, pregnant women or persons sentenced after an unfair trial, but considers the imposition and enforcement of the death penalty in such cases as particularly cruel, inhuman and degrading and in violation of article 7 of the Covenant and articles 1 and 16 of the Convention against Torture.’*²⁸⁶

Mental disorder at the sentencing stage and the need for a psychiatric assessment in every case

- 5.22. As the cases discussed above show, significant mental disorder will preclude the imposition of a sentence of death when any of the three approaches to discretionary capital sentencing is applied. This has various evidential and procedural implications, of which the most important is that a psychiatric assessment is needed in every capital sentencing exercise. This is addressed in more detail in Chapter 7.²⁸⁷

²⁸² 477 US 399 (1986)

²⁸³ [2017] UKPC 6

²⁸⁴ See para. 50 of the judgment.

²⁸⁵ *Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty*, ECOSOC Res 1989/64, E/1989/91, p.51

²⁸⁶ *Interim report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 August 2012, A/67/279, paras 57–58

²⁸⁷ See para. 7.15 below.

The significance of mental disorder after the sentencing stage

- 5.23. There will be some cases where the lawfulness of executing an offender becomes an issue after a death sentence has been imposed. This might be because mental disorder was not identified at the time of sentence, or because the disorder developed thereafter. In either case the same principles apply: the existence of mental disorder is a bar to carrying out a previously imposed capital sentence.
- 5.24. Examples of cases in which mental illness developed after the imposition of a capital sentence, and thereby justified commutation to life imprisonment, include the US Supreme Court's ruling in *Ford v Wainwright*²⁸⁸ and the Indian Supreme Court's ruling in *Shatrughan Chaughan & Anr v Union of India*.²⁸⁹ In both those cases the petitioners had developed mental illness while on death row. In *Chaughan* the Court confirmed that the right to life under the Constitution of India protects offenders with mental disorder, and held:

*In view of the well-established laws both at national as well as international sphere, we are inclined to consider insanity as one of the supervening circumstances that warrants for commutation of death sentence to life imprisonment.*²⁹⁰

The Privy Council's ruling in *Pitman*

- 5.25. The case of *Pitman & Anr v State of Trinidad and Tobago*²⁹¹ raises unusual issues because of the history of the appeal and the particular constitutional savings clauses in Trinidad and Tobago. The key point in the Privy Council's ruling is the unequivocal finding that where an offender suffers from significant mental abnormality, it is unconstitutional to carry out a sentence of death.²⁹² The mental abnormality must be significant in the sense that it meets the level required to establish a defence of diminished responsibility. But the prohibition of execution applies whether or not diminished responsibility was raised at trial, and it may apply where it could not have been (see below).
- 5.26. The Board noted that for these purposes, an offender's low IQ may be highly relevant to a finding of significant mental abnormality, but it is not determinative.²⁹³
- 5.27. Where evidence of significant mental impairment at the time of the offence is produced after the trial, the issue may be raised in an appeal against conviction. And if it is produced at a later stage, it may be appropriate to seek an appeal against conviction out of time.²⁹⁴
- 5.28. The Board also recognised in *Pitman* that in some cases an appeal against conviction would not be the appropriate course, for instance where an offender's mental condition deteriorated significantly after the commission of the crime.²⁹⁵ The Board held that where an appeal against conviction is

²⁸⁸ 477 US 399 (1986)

²⁸⁹ (2014) 3 SCC 1

²⁹⁰ See para. 79 of the judgment.

²⁹¹ [2017] UKPC 6, para. 50

²⁹² See para. 50 of the judgment.

²⁹³ See paras 49 and 54 of the judgment.

²⁹⁴ See para. 48 of the judgment.

²⁹⁵ This is one of several reasons identified by the Board why mental abnormality might be relevant to the constitutionality of a capital sentence even though the issue was not raised at trial: see para. 46 of the judgment.

not appropriate, the correct course is to seek a remedy through the exercise of the prerogative of mercy, rather than an appeal against sentence.

- 5.29. This conclusion was reached with two significant provisos. Firstly, it was important that the exercise of the prerogative of mercy in Trinidad and Tobago is subject to judicial control through judicial review.²⁹⁶ And secondly, the prerogative must be exercised ‘in a way which takes proper account of the developing understanding of mental disability’.²⁹⁷
- 5.30. It follows that in jurisdictions where the prerogative of mercy is not amenable to judicial review, or where an application for the exercise of the prerogative of mercy has been made but has failed to secure redress, the offender will be entitled to seek a judicial remedy. In other words, a person suffering from significant mental abnormality must be afforded effective redress by one means or other to prevent the carrying out of a death sentence.

²⁹⁶ See *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, which provides authority for the analogous position in Jamaica.

²⁹⁷ See para. 50 of the judgment.

CHAPTER 6

Resentencing following a breach
of fundamental rights



The need for a replacement sentence

- 6.1. As we saw in Chapters 1 and 2, the mandatory death penalty has been struck down as a breach of fundamental rights in almost every jurisdiction where the issue has been litigated. This means that offenders convicted of capital offences in those jurisdictions now need to be sentenced with a full evaluation of aggravating and mitigating features before sentence can be passed, taking into account the matters explored in Chapters 4 and 5.
- 6.2. This chapter examines the considerations that arise when offenders need to be resentenced under a discretionary capital regime. The need for resentencing can arise in various scenarios:
- Where offenders were previously the subject of a mandatorily imposed (and therefore unlawful) death sentence
 - Where offenders have suffered a significant delay on death row
 - Where there have been other breaches of offenders' fundamental rights since the original sentence was imposed
 - Where there has been a combination of such breaches

Resentencing to provide a remedy for the previous imposition of an unlawful death sentence

- 6.3. The abolition of the mandatory death penalty has created historical challenges requiring corrective intervention by the courts. Offenders who have already been sentenced to death under a mandatory sentencing regime have been given unlawful and unconstitutional sentences, and therefore need to be given a new sentence that is lawful and constitutional. In recent years such resentencing has been effectively undertaken in Malawi and Uganda, and a similar process may unfold in Kenya following the Supreme Court of Kenya's decision to strike down the mandatory death penalty for murder.²⁹⁸
- 6.4. When resentencing takes place against the background of an unlawfully imposed death sentence, the resentencing assessment needs to reflect the aggravating and mitigating features that should have been considered when the offender was originally sentenced. But the new sentence must also provide a remedy for the fact that the offender has been given an unlawful and unconstitutional sentence, and that there has been a separate breach of their fundamental rights in that respect. Those rights include the right to a lawful sentence (in particular, the right not to be sentenced to death otherwise than in accordance with the constitution), and the right not to be imprisoned save in respect of a lawfully imposed sentence, all of which are implicit in the right to due process and a fair trial and the right to liberty.

Resentencing to provide a remedy for breaches of fundamental rights subsequent to the imposition of a lawfully imposed death sentence

- 6.5. The need for a replacement sentence is not limited to offenders whose original sentence was unlawful. In some cases there may be no challenge to the lawfulness of a death sentence as originally imposed, for instance because the death sentence was not mandatory, aggravating and

²⁹⁸ See para. 1.8 above.

mitigating features were explored, and there has been no successful challenge on appeal to the judge's assessment of the aggravating and mitigating features. But if there has been a fundamental breach of the offender's rights subsequent to the imposition of the original sentence, it may be unlawful to carry out that sentence.

- 6.6. Here the obvious example is where the offender has been detained for a prolonged period on death row in anticipation of execution. The issue might also arise where there have been other serious breaches of the offender's rights, such as the infliction of some other form of inhuman or degrading treatment while awaiting execution. In such cases there may be a compelling argument that the need to afford a remedy for breaches of constitutional rights precludes the execution of a lawfully imposed death sentence. This is addressed in more detail in Chapter 4.²⁹⁹

Resentencing to provide a remedy for a combination of breaches of fundamental rights

- 6.7. A third scenario is where the sentence needs to reflect a combination of a previously unlawful sentence and a breach of other rights, such as protracted detention on death row under an unlawfully imposed sentence. In such cases these are factors that should be weighed cumulatively in the determination of an appropriate sentence. For example, in *De Boucherville v Mauritius*³⁰⁰ the Privy Council declined to impose a new sentence for itself but gave the following direction to the resentencing court on its approach to the new sentence:

*It will bear in mind that the appellant was subject to an unconstitutional sentence of death, was kept on death row in breach of the constitution for nearly ten years and has more recently been subject to an unconstitutional sentence of penal servitude for life.*³⁰¹

- 6.8. The issue was addressed more recently by the High Court of Malawi in *Republic v John & Thobowa*:

*[T]he pronouncement of the unconstitutional death sentence then and the resultant long confinement under death row detention after declaring the death penalty unconstitutional, militate against the imposition at this stage of death or life imprisonment. This is sound reasoning on humanitarian grounds considering the pain and anguish, physically and emotionally suffered during all this long period, which could have been avoided if execution was carried out within reasonable time. As such a determinate term of imprisonment is preferred.*³⁰²

- 6.9. Other examples of the courts imposing reduced determinate sentences to reflect cumulative breaches of constitutional rights include: *R v Cornwall* (Antigua and Barbuda),³⁰³ *Harris v Attorney General of Belize*³⁰⁴ and *Republic v Mtambo (Malawi)*.³⁰⁵ In the last case, the President had commuted the defendant's death sentence to life imprisonment by exercising his prerogative powers. In imposing a fresh sentence, the High Court recognised that Mtambo had been mandatorily sentenced to death for an offence he had committed as a 16-year-old juvenile. The Court held that this 'starkly violated' his rights under the Penal Code, which prohibits the death penalty for offenders who were

²⁹⁹ See paras 4.81–4.87 above.

³⁰⁰ [2008] UKPC 37

³⁰¹ See para. 24.

³⁰² Sentence Rehearing Cause No. 13 of 2015, p.8. The offenders were resentenced to determinate periods of 24 and 20 years, including time already served.

³⁰³ High Court Case No. 50 of 1995, paras 64–74

³⁰⁴ Supreme Court Claim No. 339 of 2006

³⁰⁵ Sentence Rehearing Case No. 2 of 2015

below the age of 18 at the time of their offence. This, combined with the fact that the death penalty was in any event unconstitutional, justified a new sentence of 17 years, resulting in Mtambo's immediate release.³⁰⁶

Sentences available at the resentencing stage

- 6.10. Where the courts are imposing a new sentence to provide redress for a breach of constitutional violations, they are not limited to imposing the criminal penalties specified under statute for the offence in question. Instead, they are exercising their broad-ranging constitutional power to make any appropriate order to remedy the breach: see, for example, the cases of *Cornwall* and *Harris* cited above.³⁰⁷
- 6.11. For this reason, it would be wrong to assume that the only possible substitute for a death sentence is life imprisonment. Fixed terms of imprisonment are equally possible and might well be more appropriate if the offence was not of the most serious kind and was deserving of a punishment less than death at the outset. In cases of egregious breaches of rights or a combination of breaches, the only fair outcome might even be the imposition of a term of imprisonment that results in the defendant's immediate release. There have been many examples of this approach in the recent resentencing process in Malawi and Uganda.
- 6.12. The preceding observations are subject to any express statutory provisions dealing with resentencing in capital cases. But at the time of writing, no such provisions had been made in any of the jurisdictions addressed in this book.

Other relevant considerations for resentencing

- 6.13. Another relevant consideration for resentencing, particularly where offenders have been incarcerated for lengthy periods of time, is any rehabilitative progress they have made in prison. The courts have been receptive to reports from the prison authorities on this issue: a report from the prison superintendent, a senior prison officer, chaplain or other official with significant contact with the prisoner can provide the court with a helpful insight into their capacity to reform and the extent to which further detention may be necessary. Evidence of this kind has been relied on at the resentencing stage in various jurisdictions, including Belize,³⁰⁸ Antigua and Barbuda,³⁰⁹ Uganda³¹⁰ and Malawi.³¹¹
- 6.14. In the recent resentencing process in Malawi, the courts in a minority of cases held that they should not take the offender's post-conviction conduct into account. This is what happened, for instance, in *State v Njoloma*,³¹² where the court took the view that if it did so, it would be behaving as if it were conducting a parole hearing. But that restrictive approach was subsequently rejected in *Republic v Payenda*.³¹³ In that case the Court acknowledged its obligation to consider the personal

³⁰⁶ See pp.7-9 of the judgment.

³⁰⁷ See para. 16 of *Cornwall* and paras 30 and 33 of *Harris*.

³⁰⁸ *Harris v Attorney General*, Supreme Court Claim No. 339 of 2006

³⁰⁹ *R v Cornwall*, High Court Case No. 50 of 1995

³¹⁰ *Losike v Uganda*, Criminal Appeal No. 22 of 2005

³¹¹ *Republic v William Mkandawire*, Sentence Rehearing Cause No. 20 of 2015

³¹² Sentence Rehearing Cause No. 22 of 2015, p.4

³¹³ Sentence Rehearing Cause No. 18 of 2015

circumstances of the offender, such as their capacity for reform, at the time of committing the offence and at the time of sentencing. As the judge in that case observed:

*'... since one of the things that a Court does in arriving at a particular sentence is to predict the convict's capacity to, and prospects of, reform and social rehabilitation, when a sentence has been set aside after a significant passage of time as in the present case, the Court has the advantage of not simply predicting future post-conviction behaviour, but examining an existing significant post-conviction behavioural record of the convict.'*³¹⁴

Right to a lawful sentence not defeated by commutation of an unlawful death sentence

6.15. Where an offender has been mandatorily sentenced to death but the mandatory death penalty is subsequently held to be unconstitutional, it follows that the originally imposed sentence is unlawful and invalid. In virtually all common law jurisdictions the determination of sentence lies within the exclusive competence of a judicial officer.³¹⁵ So if an earlier sentence was invalid, the resentencing function must be provided by a judicial officer acting in a judicial process, not by government or executive order.

6.16. For this reason, correction of an unconstitutional sentence by executive commutation to life imprisonment is incompatible with the separation of judicial and executive powers, which is a basic constitutional principle in all common law jurisdictions.³¹⁶ The imposition of sentence and the exercise of the prerogative of mercy are two separate constitutional functions. The former is subject to defined legal criteria, scrutiny and appeal, but the latter is not. In other words, an executive act of clemency cannot defeat the right to a lawfully imposed sentence by commuting an unlawfully imposed death sentence. As Sir Dennis Byron CJ noted in *Spence & Hughes v R*:

*'[T]he granting of appropriate remedies to persons who complain of a violation of the right declared by section 5 (or of any of the other sections declaring fundamental rights and freedoms) is neither the duty of the executive nor the legislative branches of government. It is a specific, unqualified constitutional obligation of the judiciary. It would be equally remiss of the court to permit this task to be laid at the feet of the Advisory Committee on the Prerogative of Mercy or to sit back and await possible Parliamentary intervention.'*³¹⁷

6.17. Further applications of this principle in practice are provided by the following examples from Grenada, Malawi, Kenya and Uganda.

6.18. Firstly, in *Coard & Ors v Attorney General*, where unconstitutional mandatory death sentences had been commuted to life imprisonment in Grenada, the Privy Council held:

'[T]he validity of the life sentence substituted by the warrant of commutation is dependent upon the validity of the sentence of death. In the absence of such a sentence [i.e. a valid sentence of death], the

³¹⁴ See para. 62.

³¹⁵ The exceptions are to be found in the US, where juries make the key findings on aggravating and mitigating features that determine whether the death penalty is imposed: see para. 7.26 below. But this exception leaves untouched the principle that the executive branch must not usurp the role of the judicial branch in conducting criminal trials and imposing appropriate sentences.

³¹⁶ See, for instance, *Reyes v R* [2003] 2 LRC 688 (Belize), paras 44–47 and *Yasini v Republic*, MSCA Criminal Appeal No. 29 of 2005 (Malawi), p.11.

³¹⁷ Criminal Appeals No. 20 of 1998 (St Vincent & The Grenadines) & No. 14 of 1997 (St Lucia), para. 219. In both jurisdictions s.5 of the Constitution prohibits torture and inhuman or degrading punishment or treatment.

*Governor-General has no power to order that the appellants be imprisoned for life and the appellants therefore remain held in detention without lawful authority.*³¹⁸

- 6.19. When the *Coard* case was remitted for resentencing, the judge referred to these observations by the Privy Council and added:

*'The court is therefore left to consider two possibilities. These possibilities are firstly a sentence of life imprisonment and secondly a sentence of a term of years.'*³¹⁹

All the prisoners were resentenced to long determinate sentences.

- 6.20. Secondly, after the High Court of Malawi struck down the mandatory death penalty in *Kafantayeni & Ors v Attorney General*,³²⁰ all prisoners who had been mandatorily sentenced to death were included in the subsequent resentencing process, whether or not their death sentence had already been commuted to life imprisonment.³²¹ The outcomes of that process are summarised in paragraphs 6.29-6.32 below.

- 6.21. Thirdly, in *Mutiso and Muruatetu & Mwangi*,³²² the Court of Appeal of Kenya and the Supreme Court of Kenya, respectively, entertained constitutional challenges to the mandatory death penalty and granted relief by way of orders for resentencing, notwithstanding the fact that the litigants' death sentences had already been commuted to life imprisonment.

- 6.22. Fourthly, in Uganda the Constitutional Court adopted a somewhat different approach. In the *Kigula* case,³²³ which was a constitutional challenge brought by all 417 prisoners on death row in Uganda, the Court first concluded that the mandatory death penalty was unconstitutional. It then ordered the executive to consider within a two-year period the exercise of the prerogative of mercy in relation to those petitioners whose death sentences had been confirmed by the Supreme Court. Beyond that period the offenders would be entitled to return to court for redress.³²⁴ This was a pragmatic solution that may have been intended to divert prisoners from applying to be resentenced while the government considered the option of granting clemency. In any event, the vast majority of the affected prisoners returned to court in due course and were resentenced. Only a small minority were sentenced to life or had their death sentences confirmed. The rest were given determinate sentences or other disposals.³²⁵

Practical significance of the right to be resentenced after commutation of an unlawful death sentence

- 6.23. The right to be resentenced after commutation of an unlawful death sentence has important practical implications. This is because in various jurisdictions offenders in this situation have been resentenced to determinate prison sentences, the courts having concluded that an indeterminate

³¹⁸ [2007] UKPC 7, para. 28

³¹⁹ *R v Bernard & Ors*, Case No. 19 of 1984, para. 24

³²⁰ [2007] MWHC 1, 46 ILM 566

³²¹ See, for example, *Republic v Mtambo*, Sentence Rehearing Cause No. 2 of 2015.

³²² See paras 1.7-1.8 above.

³²³ See *Kigula & Ors v Attorney General* [2005] UGCC 8, upheld by the Supreme Court in *Attorney General v Kigula & Ors* [2009] UGSC 6.

³²⁴ See p.63 of the Constitutional Court's judgment.

³²⁵ See 'The death penalty in Uganda: obstacles to the adoption of the draft Protocol and strategies the civil society could undertake to mitigate them', Lucy 318 Peace Nantume, p.3, published by the 6th World Congress Against the Death Penalty (congres.abolition.fr).

life sentence was not the appropriate penalty. So it is not merely a question of the resentencing judge imposing a life sentence that had already been substituted by an act of executive commutation. The right to be resentenced after commutation therefore has very significant consequences, as recent practice in Malawi and Uganda has shown.

Dealing with cases where the case file has been lost

6.24. A final potential question when dealing with capital resentencing is how the court should proceed if the case file has been lost. This problem is more likely to arise where many years have passed since the offender was tried and convicted and exhausted any appeals process, and it featured in many of the cases dealt with in the resentencing process in Malawi.

6.25. Judges in Malawi have adopted a consistent and principled approach to this issue, and not only in capital cases. Firstly, as a general principle they have acknowledged that cases cannot be left in abeyance. Judicial redress must be afforded even if there is no case file, because the alternative would be a denial of due process for reasons that were beyond the offenders' control. In a case concerned with criminal appeals rather than capital resentencing, the judge observed:

*'[I]f it be insisted that their appeals only proceed on production of their records of appeal, then it will be as good as saying they should not exercise their right to appeal.'*³²⁶

6.26. The loss of the case file does not mean that the resentencing judge must operate in a complete vacuum. It may be feasible to obtain some basic information on the offence and the offender from the prison authorities, and if the resources can be found the defence may be able to provide background evidence from the offender's community and family, and even a mental health report. This is what happened in the *John & Thobowa* case, below. And in *Republic v James & Ors*, the judge noted:

*'The State states that after tireless efforts to find any record of the proceedings, the same could still not be found. Both parties agree however that through efforts by the parties involved, a reconstruction of the case has been done through what the defendants themselves had to say about what transpired during the proceedings, as well as other witnesses. The State on its part states that it was able to trace the relatives of the deceased who were able to furnish the State with the facts therein.'*³²⁷

6.27. Where the case file has been lost in capital resentencing cases there are two distinct and compelling reasons for not re-imposing the death penalty. The first is the general point addressed in para. 6.4 above, namely that this would deprive the offender of a remedy for previous breaches of fundamental rights. The second is that if the case file has been lost, the court has no basis on which to conclude at the resentencing stage that the offence fell within the 'rarest of the rare' exceptional category. The latter point was expressly recognised in *Republic v Dzimbiri*, where the High Court of Malawi held that:

*'[W]here the trial record is wholly or partially missing such that there is uncertainty as regards the circumstances of the commission of the offence it would be completely inappropriate to impose a death sentence.'*³²⁸

³²⁶ *Mtambo & Ors v Republic*, MSCA Criminal Appeal No. 1 of 2012, p.6.

³²⁷ Sentence Rehearing Cause No. 69 of 2015, para. 2

³²⁸ Sentence Rehearing Cause No. 4 of 2015, p.11

6.28. Similarly, in *Republic v John & Anr*, the High Court of Malawi noted:

*'One hurdle that this court has met is the fact that the trial record is missing and so the facts surrounding the crime are indeterminable, however, in these circumstances one cannot hold the offender responsible for the missing record, therefore the case cannot be considered to be "the worst of the worst or rarest of the rare" of homicides.'*³²⁹

Outcomes of the post-Kafantayeni resentencing process in Malawi³³⁰

6.29. The *Kafantayeni* ruling, which struck down the mandatory death penalty in Malawi, meant that a substantial resentencing process was needed. This applied not only to the surviving plaintiffs in *Kafantayeni*, but also to the prisoners who had already been sentenced to a mandatory death penalty prior to the *Kafantayeni* decision, even if their mandatory sentences had subsequently been commuted to life imprisonment.³³¹

6.30. The 'sentence rehearings' in these cases took place in 2015-2017. By the end of this process the High Court of Malawi had conducted rehearings and given judgment in relation to 154 prisoners. The outcomes and judgments in these cases convey a remarkable judicial achievement and an effective collaboration between the judiciary, the Directorate of Public Prosecutions, the Legal Aid Bureau and the Bar, many of whose advocates provided *pro bono* representation.

6.31. The arguments in these cases on both aggravation and mitigation reflect the broad range of considerations addressed earlier in this book, and many of the cited cases have been drawn from the Malawi resentencing process.

6.32. Of the 154 new sentences:

- In 112 cases, the new sentence resulted in the prisoner's immediate release. This was either because the court gave an order for immediate release, or it imposed a determinate sentence that, allowing for time served since the date of arrest, resulted in immediate release.
- In 41 cases, the new sentences were determinate sentences such that the prisoners had further time to be served in prison. At the time of writing, a significant proportion of that cohort had completed their sentences and been released.
- Where periods of determinate imprisonment were imposed, including those resulting in the prisoner's immediate release, most of the sentences were between 20 and 30 years. The shortest sentences were suspended sentences of three years' imprisonment³³² and the longest individual sentence was 42 years' imprisonment with hard labour.³³³
- In just one case the prisoner was resentenced to life imprisonment.

³²⁹ Sentence Rehearing Cause No. 13 of 2015, p.9

³³⁰ We are grateful to Sandra Babcock, Faculty Director at the Center on the Death Penalty Worldwide, Cornell Law School, for providing the data on which this summary is based. Cornell Law School and the Malawi Human Rights Commission have compiled a compendium of key cases from the Malawi sentence rehearings, comprising a summary of the key cases and the full text of selected judgments (*Malawi Capital Resentencing Project: Selected Jurisprudence*, 2017).

³³¹ See *Yasini v Republic*, MSCA Criminal Appeal No. 18 of 2006.

Conclusions on this chapter

- 6.33. The resentencing processes in Uganda and Malawi have allowed the courts to develop a rich body of jurisprudence on the principles that apply in the resentencing context. Of these principles, the most important is the right to have a resentencing hearing at all, even if the original capital sentence has been commuted to life imprisonment, and even if the case file has been lost.
- 6.34. The second core principle is that the new sentence should involve a wide-ranging examination of all relevant circumstances. This may well include the offender's conduct since the offence took place, because that is an issue that goes to the prospect of reform and rehabilitation, and that in turn is an issue with well-established relevance in the capital sentencing process.
- 6.35. And thirdly, there is an overarching need to ensure that the new sentence affords a remedy for previous breaches of fundamental rights. There is a very compelling argument that this precludes the re-imposition of the death penalty altogether, but it also means that in many – if not most – cases, only a determinate sentence rather than life imprisonment will be appropriate. That proposition has been fully reflected in the resentencing practice of the courts in Uganda and Malawi.

³³² The three-year suspended sentences were imposed in a case where the prosecution acknowledged that the prisoners should never have been convicted, but the Court's hands were tied because it was only dealing with sentence. Both prisoners were minors at the time of the offence and suffered a catalogue of egregious constitutional violations. One of them was sentenced to death aged 14, although 'all indications are that he had nothing to do with the crime'. See *R v James & Ors*, Sentence Rehearing Cause No. 69 of 2015, paras 18–28.

³³³ *R v Maonga*, Sentence Rehearing Cause No. 29 of 2015. The longest composite sentence comprised consecutive sentences of 23 and 25 years, but even in that case a long period of time already served in prison and the prospect of remission mean that the offender would be eligible for release in 2024: see *Khwatala v Republic*, Sentence Rehearing Cause No. 70 of 2015.

CHAPTER 7

Procedural and evidential issues
in the capital sentencing process



- 7.1. This chapter examines procedural issues in discretionary capital sentencing cases. It examines the safeguards and procedural directions that are needed to protect the right to a fair sentencing hearing in capital cases. It also considers the potential sources of evidence in such hearings and the applicable burdens and standards of proof.
- 7.2. The right to a fair trial includes all stages of the criminal process, including sentence and appeal. This proposition is well-established both as a common law principle in domestic law and in international law. Even if the right to a fair trial is not expressly guaranteed in the constitution, it is protected as an inherent component of the right to due process of law. In capital cases the obligation to ensure scrupulous fairness is paramount, and any denial of fairness at the sentencing stage will render the imposition of a death sentence liable to challenge.

The key procedural safeguards for discretionary capital sentencing

- 7.3. At a minimum, fairness in the conduct of discretionary capital proceedings requires the following procedural protections:
 - If the prosecution seeks the death penalty in a particular case they must give advance notice of that fact.
 - Where the prosecution gives such notice it should identify the grounds on which the death penalty is sought, and it should provide the defence with copies of all the materials it proposes to rely on at the sentencing hearing.
 - If the defendant is convicted, the court should adjourn for a separate sentencing hearing and make appropriate directions to give effect to the procedural safeguards.
 - The directions should provide for the preparation of any appropriate background reports, including a social welfare report and a psychiatric assessment in all cases.
 - The burden of proving any aggravating features lies with the prosecution and the standard of proof is beyond reasonable doubt.
 - The defence is entitled to challenge the prosecution evidence and present any mitigating factors, including the calling of witnesses where appropriate.
 - Full written reasons must be given for any decision to impose the death penalty, so as to record proper consideration of all relevant factors.

Guidance, practice directions and legislative safeguards

- 7.4. Guidance along the lines above have been given by the Chief Justice of Belize in *Reyes v R*,³³⁴ by the Chief Justice of St Kitts and Nevis in *Mitcham & Ors v DPP*,³³⁵ and by the Chief Justice of The Bahamas in a sentencing practice note.³³⁶ Similar guidelines have been approved elsewhere in the Caribbean and are used throughout the region. Procedural or due process obligations are imposed in guidance and legislation in other jurisdictions, including the US, India and Uganda, and must be complied with whenever the prosecution invites the court to impose a sentence of death.³³⁷

³³⁴ [2003] 2 LRC 688, para. 26

³³⁵ Criminal Appeals No. 10-12 of 2002, para. 2

³³⁶ Practice Note No. 1 of 2006: *Sentencing Procedures for Persons Convicted of Murder*, para. 6

³³⁷ An example of safeguards enshrined in legislation is provided by the United States' federal Code of Laws (18 US Code §3593)

- 7.5. The guidelines in Belize recognise the importance of the prosecution and defence seeking a broad range of material to assist the sentencing judge, such as evidence on the impact of the offence on the victim's family, comparative sentencing case law and information as to a defendant's family circumstances and dependants.
- 7.6. The importance of these procedural measures cannot be overstated, because their object is to ensure that a defendant is given every opportunity to present reasons why a death sentence should not be imposed. Failure to adhere to the procedural guidance can lead to a death sentence being set aside. This is what happened in *Mitcham & Ors v DPP* (above), where the prosecution failed to give adequate notice that they intended to seek the death penalty. And in *White v R*³³⁸ the Privy Council found that a failure to produce either a social enquiry or psychiatric report meant that the Belize Court of Appeal had insufficient information to pass a sentence of such finality. The Board held that it could not stress enough 'the importance of following the carefully drafted sentencing guidelines' provided by Conteh CJ in *Reyes*, above.³³⁹
- 7.7. In *Santosh Bariyar v State of Maharashtra*³⁴⁰ the Supreme Court of India underlined the importance of scrupulous compliance with procedural safeguards in capital cases. In particular, a separate pre-sentence hearing (a 'full fledged bifurcated hearing') is required, and can only be effective if all relevant information has been prepared for the hearing. The sentencing materials should address the nature, motive and impact of the crime and the offender's culpability. But the Court emphasised that this exercise must also produce information on the offender's characteristics and socioeconomic background (see below), which was 'sorely lacking in most capital sentencing cases'. Without a full complement of such information and rigorous compliance with procedural safeguards, the sentencing court cannot hope to identify the 'special reasons' that are required to be given whenever a capital sentence is imposed.³⁴¹
- 7.8. In Uganda the Sentencing Guidelines³⁴² do not yet contain procedural provisions relating specifically to capital sentencing. The general guidance includes a requirement that the court allows a reasonable period not exceeding seven days (implicitly, from conviction) to determine the appropriate sentence. Both the prosecution and the defence have a duty to provide information to the court about the offender's background and social status and the likelihood of reform. It is no doubt open to sentencing judges in capital cases to make appropriate adaptations to these guidelines in the interests of justice. For instance, such directions might allow more than seven days for the preparation of the sentencing hearing, allocate specific responsibility for the preparation of a social welfare report, and direct the preparation of specific evidence regarding the offender's physical and/or mental health.

The need for a social inquiry report in every case

- 7.9. In most jurisdictions with a discretionary death penalty the preparation of pre-sentence social enquiry reports in capital cases is either mandatory (in Jamaica and The Bahamas, for instance), or settled practice. Such reports are a convenient and efficient method of compiling information

³³⁸ [2010] UKPC 22 (Belize)

³³⁹ See *White v R*, para. 25.

³⁴⁰ (2009) 6 SCC 498

³⁴¹ The requirement to give special reasons for death sentences is set out in the Indian Code of Criminal Procedure, s.354(3).

³⁴² The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, available on the website of the Justice Law and Order Sector (www.jlos.go.ug).

about the defendant's past character, any previous history of offending, his conduct since the offence (usually in detention) and his reputation within the community. An assessment of whether the death penalty might be appropriate is virtually impossible without such evidence, unless the circumstances leave no doubt that a lesser sentence should be imposed.

- 7.10. As noted above, trial courts in India have been criticised for systemic failures to obtain background evidence of this kind. But judges in some cases have directed the prosecution to obtain a social inquiry report as evidence of the accused's conduct in prison, with a view to clarifying the offender's capacity for reform.³⁴³ While such a report may be able to address the accused's behaviour in prison, its ability to show that the accused has been involved in productive activities is inherently limited. This is because prisoners facing capital charges in India are not permitted to work or participate in rehabilitation programmes. They therefore have little chance to demonstrate a willingness or ability to engage in constructive activity, and thereby to demonstrate their capacity for reform.³⁴⁴
- 7.11. Such problems are not limited to India. In all jurisdictions with discretionary capital sentencing, the courts may need to find creative solutions for obtaining meaningful evidence of an offender's background and their capacity for reform.
- 7.12. A report that reveals past good character, or other types of positive disclosures, is obviously important mitigating evidence, but even evidence of bad character may provide an indication of relevant mitigation. These issues are addressed in detail in Chapter 4.³⁴⁵

The need for psychiatric and/or psychological evidence in every case

The need for psychiatric evidence in every case

- 7.13. In a series of appeals from the Caribbean the Privy Council has made a compelling argument that a psychiatric report is needed in every discretionary capital case, whether or not the offender exhibits obvious signs of mental disorder. As noted in Chapter 5, mental disorder is potentially relevant whichever of the three approaches to capital sentencing is being applied, and lawyers with no specialist training in mental health issues cannot be relied upon to identify or assess an offender's mental disorder.
- 7.14. The need for such evidence in every capital case is particularly clear in jurisdictions applying the 'rarest of the rare' approach, which is used in most common law countries that have retained the death penalty. This is because the offender's prospect of rehabilitation is a crucial element in the application of the 'rarest of the rare' test, and without a psychiatric and/or psychological report, the judge cannot hope to form a properly informed view on whether there is a reasonable prospect of reform. As the Privy Council observed in *Pipersburgh & Robateau v R*:

*It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings.*³⁴⁶

³⁴³ *Bharat Singh v State (NCT of Delhi)*, Death Sentence Ref. No. 1 of 2013, Delhi High Court

³⁴⁴ *State v Ravi Kapoor & Ors*, Death Sentence Ref. No. 1 of 2016, Delhi High Court

³⁴⁵ See paras 4.50-4.56 above.

³⁴⁶ [2008] UKPC 11, para. 33

- 7.15. This issue was addressed in greater detail in the subsequent case of *Lockhart v R*,³⁴⁷ where the Board noted that when contemplating the possible imposition of the death penalty, a sentencing court would need professional advice on whether the possibility of reform existed.³⁴⁸ The prosecution had argued in that appeal that it would be wrong to impose a requirement for a psychiatric report in every case, irrespective of the contribution that such evidence might make to the sentencing assessment. The Board provided a clear and principled rejection of the prosecution's position:

'That argument proceeds, of course, on the premise that there are circumstances in which a report from a consultant psychiatrist would contribute nothing to the debate as to whether the reasonable possibility of reform existed. This proposition is not easily sustained. How is a sentencing court to face the task of deciding whether it is satisfied that there is no reasonable prospect of reform unless it has some professional assistance which provides an insight into the character and psyche of the individual whose execution is being contemplated? Judgments can of course be made on the basis of such evidence as is available... But an exercise confined to an evaluation of the available material does not address the anterior question that the court must confront – is this material sufficient to establish whether there is or is not a reasonable prospect of reform?'³⁴⁹

The potential need for psychological evidence

- 7.16. In addition to a psychiatric report a sentencing judge may also need evidence from a psychologist, depending on the facts of the case. This was a further issue raised by the Privy Council in *Lockhart v R* (above), in which the Board provided the following explanation for the potential importance of psychological evidence in capital cases:

*'In some cases something more [than psychiatric evidence] will be required. In White v The Queen [2011] UKPC 33 at para 27 the Board adverted to the possibility that a report from a clinical psychologist might also be necessary. Psychology involves, among other things, the study of cognition, emotion, motivation, brain functioning, personality, behaviour, and interpersonal relationships. Many of these character traits can be assessed by the administration of psychometric tests and many may bear on the question whether an individual is capable of, and is likely to attempt to achieve, reform. Where, therefore, a sentencing court considers that it is impossible to decide whether the first aspect of the second principle in Trimmingham [prospect of reform] can be fulfilled without the assistance of a clinical psychologist, a report from such an expert will be indispensable to the proper consideration of that question.'*³⁵⁰

Funding and disclosure issues relating to psychiatric evidence

- 7.17. In various jurisdictions the courts have ruled that the state has a duty to ensure that funding is provided for a psychiatric assessment in capital cases. Such rulings have been made, for example, in the US³⁵¹ and St Kitts and Nevis.³⁵² Even in jurisdictions where no such rulings have been made, the constitutional duty to ensure that offenders are afforded a fair trial and sentencing process is a duty that lies with the state. And given the importance of psychiatric evidence in all capital cases,

³⁴⁷ [2011] UKPC 33

³⁴⁸ See para. 10 of the judgment.

³⁴⁹ See para. 11.

³⁵⁰ [2011] UKPC 33, para. 13

³⁵¹ *Ake v Oklahoma*, 470 US 68 (1985)

³⁵² *Mitcham & Ors v DPP*, Criminal Appeals No. 10-12 of 2002. See also *Pipersburgh & Robateau v R* [2008] UKPC 11, where the Privy Council emphasised the need for social enquiry and psychiatric reports in all capital sentence hearings, with the onus being on the state to fund the psychiatric evaluation.

that duty must encompass the specific duty to provide resources for such evidence, at least where offenders lack the means to do so themselves.

- 7.18. Psychiatric evidence in capital sentencing cases is often obtained at the court's direction. But whatever the procedural position may be, as a matter of principle the state has a positive duty to disclose to the defence any relevant records or information it has in its possession that may bear on the issue of mental disorder.
- 7.19. The same considerations on funding and disclosure would obviously apply where the court concludes that psychological evidence is needed for a proper sentencing assessment.

Victim, family and community impact reports

- 7.20. Recent years have seen a significant increase in the use of victim and family impact statements in common law jurisdictions. In some cases sentencers are also provided with reports on the impact of a serious crime on the victim's wider community. For instance, for all criminal offences in Uganda, the Sentencing Guidelines require the prosecution to provide relevant information on the impact of the crime on the victim, family members and the community.³⁵³
- 7.21. Material of this kind can serve a valuable function in giving a voice at the sentencing stage to the victims of crime. But there is an important distinction to be drawn between evidence on the impact of an offence, which goes to its seriousness, and any desire on the part of a victim or their family members for the death penalty to be imposed, which should form no part of the capital sentencing assessment. This issue is addressed further in Chapter 4.³⁵⁴

Resolution of factual disputes at the sentencing stage

- 7.22. In most common law jurisdictions the determination of sentence lies within the exclusive competence of the sentencing judge. If a jury has determined guilt, it does not determine or otherwise influence sentence, and it is for the judge to determine any factual disputes relevant to sentence.
- 7.23. Where factual disputes arise at the sentencing stage, judges can proceed in one of three ways.³⁵⁵ In a small proportion of cases factual disputes can be resolved by inference from the jury's verdict. In other cases the judge can hold a separate hearing (in England, a '*Newton* hearing') so that evidence can be called and tested before the judge determines the appropriate sentence. The third option is for the judge to deal with the matter on the basis of submissions by counsel, without hearing any further evidence. Where that option is adopted and there is a substantial conflict between the prosecution and defence, the defendant's version of the facts should be accepted. For this reason the prosecution may prefer to seek a separate hearing so that the defendant's version can be challenged.
- 7.24. The proposition that the disputed facts should either be resolved in the defendant's favour, or tested through the calling of evidence, is of general application, but it is particularly important in capital cases.

³⁵³ See para. 55(3)(a) of the Guidelines. The First Schedule of the Guidelines contains specimen forms for preparing victim and community impact statements.

³⁵⁴ See para. 4.38 above.

³⁵⁵ See *R v Newton*, 77 Cr App R 13 and *Archbold Criminal Pleadings 2018*, paras 5-110 – 5-111.

- 7.25. In a *Newton* hearing evidence is called in the ordinary way.³⁵⁶ Each side will call the witnesses it seeks to rely on and the judge should not put questions until counsel have completed their examination.³⁵⁷ The judge must then make a decision according to the applicable burdens and standards of proof (see below).
- 7.26. In the US there are specific state and federal provisions governing the capital sentencing process. At both state and federal levels the jury has a sentencing function that is unique in the common law world. The US Supreme Court has held that having decided guilt, it is the jury, not the judge, that should determine whether aggravating circumstances justifying the death penalty have been established.³⁵⁸ The jury's findings on the facts are binding on the sentencing judge, not merely the basis for a sentencing recommendation.

Burden and standard of proof

- 7.27. As for the burden and standard of proof in discretionary capital sentencing, there are differences of approach depending on which of the three sentencing tests is being applied.

Burden and standard of proof applying the 'rarest of the rare' test

- 7.28. In those jurisdictions applying the 'rarest of the rare' test, it is well-established that the burden is on the prosecution to prove the existence of any aggravating factors beyond reasonable doubt, and to disprove to the same standard the presence of mitigating factors relied on by the defendant.³⁵⁹ This approach reflects the fact that the penalty of death is reserved for the 'rarest of the rare' cases and can only be imposed where the strong presumption in favour of life has been conclusively rebutted.
- 7.29. This principle was reinforced and developed in the case of *Trimmingham v R*,³⁶⁰ where the Eastern Caribbean Court of Appeal emphasised that:

'22. The unqualified right to life that the cases affirm means that there is no mandatory death penalty. It means as well that there must be no implicit approach that a bad case of murder will attract the death penalty unless there are mitigating circumstances. The death penalty can only be imposed if the judge is satisfied beyond reasonable doubt that the offence calls for no other sentence but the ultimate sentence of death...'

'27. ... The appellant's right to life can only be forfeited if the case for doing so has been established beyond all reasonable doubt. On that approach, as against the aggravating features of the murder, the appellant is entitled to the benefit of all mitigating features, even those not raised by him. It is then the duty of the crown to show beyond a reasonable doubt that, notwithstanding these mitigating factors, the court should nonetheless impose the death penalty.'

³⁵⁶ *R v McGrath and Casey* 5 Cr App R (S) 460

³⁵⁷ *R v Myers* [1996] 1 Cr App R (S) 187

³⁵⁸ *Hurst v Florida*, 577 US ____ (2016). The case was remanded to the Supreme Court of Florida, which ordered a new sentencing hearing; *Hurst v State*, 202 So. 3d 40 (Fla. 2016). The Florida Supreme Court also struck down the provision in Florida law that permits jury decisions on capital sentencing to be made by a majority, rather than unanimously.

³⁵⁹ See, for instance, Sir Dennis Byron CJ's emphatic statement to that effect in *Mitcham & Ors v DPP*, Criminal Appeals No. 10 to 12 of 2002 (St Kitts and Nevis), para. 2.

³⁶⁰ Criminal Appeal No. 24 of 2004 (St Vincent & Grenadines)

- 7.30. Separate considerations arise if there are several defendants in capital cases with varying degrees of culpability. This could be significant if the offence itself is so exceptionally serious as to be capable of crossing the ‘rarest of the rare’ threshold. If the individual culpability of the defendants cannot be proven to the required standard, none of them can properly be said to fall within the ‘rarest of the rare’ category. This was the approach adopted by the Supreme Court of India in Ronny v State of Maharashtra:

*‘From the facts and the circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where, in a case like this, it is not possible to say as to whose case falls within the “rarest of the rare” cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment.’*³⁶¹

- 7.31. The procedure for proving aggravating and mitigating factors will not be precisely the same. For aggravating factors, these must be proven by the prosecution beyond reasonable doubt. For mitigating factors, it will usually be for the defendant to raise the issue and, if possible, to adduce evidence in support. But as noted above, once mitigation is raised, the onus is then on the prosecution to disprove the mitigating factors to the same stringent standard of beyond reasonable doubt. This is enshrined as a general sentencing principle in the Ugandan Sentencing Guidelines, which provide that: ‘The prosecution shall disprove beyond reasonable doubt any assertion made by the defence in mitigation.’³⁶²

- 7.32. Where there are clear mitigating circumstances, such as reduced involvement in the crime or previous good character, the prosecution may consider it appropriate to accept at the outset that it cannot discharge the burden and standard of proof required for the death penalty to be imposed.³⁶³

Burden and standard of proof where the court weighs aggravating and mitigating circumstances

- 7.33. The second test for discretionary capital sentencing involves the weighing of aggravating and mitigating factors, with no express presumption for or against the death penalty. In those jurisdictions where this test is applied there are differences of approach to both the burden and the standard of proof.

- 7.34. South Africa operated under this regime prior to the complete abolition of the death penalty in 1995. In *S v Nkwanyana*³⁶⁴ the Supreme Court of Appeal held that once it has been established that findings on the presence of mitigating or aggravating factors have to be made, this cannot be done unless there is a burden or onus of proof on one party or the other. The Court held:

‘It has been held that the use of the term onus in relation to factors relevant to sentencing is inappropriate; and that no rigid rules governing the degree of proof can be satisfactorily laid down... But the position created by the new s.277(2) [of the Criminal Procedure Act, which requires the judge to have due regard to the presence or absence of any mitigating or aggravating factors] calls for a different approach. A finding

³⁶¹ [1998] 3 SCC 625, 654

³⁶² See para. 59 of the Guidelines (footnote 342 above).

³⁶³ See, for example, *Maynard v R*, Criminal Appeal No. 12 of 2004 (St Kitts and Nevis).

³⁶⁴ [1990] (4) SA 735 (A)

*or findings on the presence or absence of mitigating or aggravating factors has to be made. There may be a dispute about this. In these circumstances it would be difficult if not impossible to make the necessary findings unless the incidence of onus operates.*³⁶⁵

- 7.35. The court in *Nkwanyana* was clear that if there was a reasonable possibility that mitigating factors existed, the onus on the prosecution to show that a death sentence was the appropriate sentence had not been discharged. Moreover, this was the case even where a mitigating factor depended on matters ‘peculiarly within the knowledge of the accused’, so long as they were genuinely raised: ‘What is required is a factual basis for the mitigating circumstance. A speculative one will not suffice.’³⁶⁶
- 7.36. In Zimbabwe the legislative framework on the death penalty has recently changed,³⁶⁷ but the new provisions are silent on the burden and standard of proof. It remains to be seen how the legislative amendments will be interpreted by the courts, but the pre-abolition case law in South Africa provides a helpful guide.

The approach in the US

- 7.37. In the US, where the minimum constitutional standards for the imposition of the death penalty are a matter of ongoing debate, the approach to the burden and standard of proof in capital sentencing is unsettled. As regards eligibility for the death penalty, there is general agreement that the burden is on the prosecution to prove one or more aggravating factors beyond reasonable doubt. The lesser standard of proof on a ‘preponderance of the evidence’, which was formerly applied in some states, is unconstitutional.³⁶⁸
- 7.38. It is also generally accepted that the burden is on the defence to prove mitigating features and that these should normally be proved on a preponderance of the evidence.³⁶⁹ Contentiously, however, in the state of Georgia there is a statutory burden on the defence to prove beyond reasonable doubt that a defendant is suffering from ‘mental retardation’ (intellectually disabled) and is thereby exempt from the death penalty.³⁷⁰ That approach may be ripe for challenge in the US Supreme Court.³⁷¹
- 7.39. There is broader controversy over the standard that a jury should apply when deciding whether the proven aggravating factors outweigh the mitigating ones. While some states such as Delaware³⁷² specify that the aggravating factors must outweigh mitigating factors beyond reasonable doubt, others do not. In Arizona, for example, the jury must find that there are ‘no mitigating circumstances sufficiently substantial to call for leniency’ in order to impose a death sentence.³⁷³ At the federal

³⁶⁵ See p.26–27 of the judgment, quoting the principle from Hoffman and Zefferl, *The South African Law of Evidence*: ‘Any rule of law which annexes legal consequences to a fact ... must, as a necessary corollary, provide for which party is supposed to prove that fact.’

³⁶⁶ See pp.30–31.

³⁶⁷ See paras 3.45–3.46 above.

³⁶⁸ See *Rauf v State*, No. 39, 2016, Supreme Court of Delaware, applying *Hurst v Florida*, 577 US ____ (2016). As noted earlier, the ‘preponderance of evidence’ standard in the US is equivalent to the ‘balance of probabilities’ standard in England.

³⁶⁹ See, for instance, the Arizona Criminal Code, §13-751C, and at the federal level, 18 US Code §3593(c).

³⁷⁰ *Hill v Humphrey*, 662 F3d.1335 (11th Cir. 2011)

³⁷¹ See the case note on *Hill v Humphrey* at (2012) 125 *Harvard Law Review* 2185, which warns that the federal courts’ ‘hyper-deferential posture’ in death penalty cases threatens the constitutional rights of mentally disordered offenders that *Atkins v Virginia* (see para. 5.19 above) was meant to protect (p.2185).

³⁷² *Rauf v State*, No. 39, 2016, Supreme Court of Delaware

³⁷³ Arizona Revised Statutes §17-751E

level a decision must be made as to ‘whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death’.³⁷⁴

- 7.40. As will be apparent, the weighing of aggravating and mitigating factors involves an evaluative judgment in each case. In some states this has prompted the courts to distance themselves from the notion of a standard of proof on which a jury must be satisfied that the aggravating factors outweigh the mitigating ones. For example, in *Borchardt v State* the Court of Appeals of Maryland observed that:

Mitigating circumstances do not negate aggravating circumstances, as alibi negates criminal agency or hot blood negates malice. The statutory circumstances specified or allowed under § 413(d) and (g) are entirely independent from one another – the existence of one in no way confirms or detracts from another. The weighing process is purely a judgmental one, of balancing the mitigator(s) against the aggravator(s) to determine whether death is the appropriate punishment in the particular case.’³⁷⁵

- 7.41. In any event, once a defendant becomes eligible for the death penalty, the decision on whether a death sentence will be imposed ultimately depends on the views of a particular jury, and how much weight jurors place on aggravating and mitigating factors. One of the criticisms of this discretionary death penalty system is that the lack of a uniform approach and the implicit dependence on the beliefs and attitudes of the jury leads to inconsistent application of the death penalty, and a marked contrast between different states in the number of death sentences passed.

Burden of proof when the death penalty is avoided only in the absence of extenuating circumstances

- 7.42. Traditionally, the burden of proving the existence of extenuating circumstances (on the balance of probabilities) lies with the defendant. This approach raised obvious concerns about ensuring a fair trial in capital cases, when life itself is at stake, because it ‘placed the greatest burden on the weakest link in the criminal justice system – that is, defense counsel – in a region that had only skeletal legal aid schemes for indigent defendants’.³⁷⁶ The harshness of this approach has been reversed, or at least significantly mitigated, in Botswana and Lesotho. In both those countries the appeal courts have indicated that judges should conduct their own inquiry into the existence of extenuating circumstances, whether the defendant raises them or not.³⁷⁷ The court must approach this exercise with ‘an anxiously enquiring mind’.³⁷⁸
- 7.43. In Zambia, however, the courts have not yet caught up with the sentencing practice of Botswana and Lesotho but continue to apply the orthodox approach of resting the burden of proving extenuating circumstances on the defendant.³⁷⁹

³⁷⁴ 18 US §3593(e). This determination is made by the jury or, if the defence and prosecution both agree, by the judge (§3593(b)). If made by the jury a decision to impose death must be unanimous (§3593(e)).

³⁷⁵ *Borchardt v State*, 786 A.2d 631 (2001), p.652, followed in *Oken v State* 835 A.2d 1105 (2003). The legislative provisions referred to (art. 27 of the Maryland Code, §413) set out the aggravating and mitigating features of first degree murder for the purpose of determining whether the death penalty should be imposed. Maryland subsequently abolished the death penalty, in 2013.

³⁷⁶ *The Global Decline of the Mandatory Death Penalty*, Andrew Novak, Routledge, 2014, p.126

³⁷⁷ *Kelatetswe & Ors v State*, 1995 BLR 100 (Botswana); *Letuka v R*, 1991-96 LLB & LB 346 (Lesotho)

³⁷⁸ See *Kelatetswe*, p.124.

³⁷⁹ *People v Musonda & Ors* [2012] ZMCH 30

CHAPTER 8

Some conclusions on
discretionary capital sentencing



- 8.1. There is no greater challenge for a judge in criminal proceedings than to decide whether to impose a sentence of death. It is hoped that this overview of recent developments in discretionary capital sentencing will help to inform that decision-making process. Judges will obviously have first recourse to any sentencing guidance in their own jurisdiction and their own professional skills and experience, but this review of comparative developments may provide an additional level of insight into how the particular difficulties of fixing sentences in capital cases have been addressed in different jurisdictions. Such comparative insights are an enduring feature of the common law and a legitimate source of potential inspiration in the development of judicial practice.
- 8.2. The decade that has elapsed since the original version of this book was published has seen the continuation of a worldwide movement towards the restriction of the death penalty and the imposition of ever tighter procedural safeguards before the death penalty can lawfully be imposed. The courts of the Commonwealth Caribbean, India, Africa and the US have all contributed to this development. So too have regional and international bodies and their respective courts and interpretive bodies.
- 8.3. The different national schemes for discretionary capital punishment span a continuum from a very strong presumption in favour of life to a presumption (in theory, at least) in favour of death. But the jurisdictions applying a very strong presumption in favour of life and the 'rarest of the rare' approach are not only in the majority but also most closely aligned with the global movement away from the death penalty and, where it survives, its highly restricted application under international law. And even in those jurisdictions that apply the other two approaches to capital sentencing (no presumption either way or a presumption in favour of death), judicial practice in recent years has seen ever greater reluctance to impose death sentences without giving full weight to relevant mitigating factors.
- 8.4. The significance in this process of mental disorder, a long-neglected issue often treated with unfounded scepticism, is now much better understood. This is the result of better-informed submissions by advocates, better use of appropriate expert evidence, and more confident reliance on such evidence by sentencing judges.
- 8.5. There has also been an increased tendency to particularise aggravating factors that might qualify a defendant for a death sentence, while the list of potential mitigating factors continues to be unequivocally open. The importance of procedural safeguards in order to maintain the legitimacy of capital punishment has also been increasingly recognised.
- 8.6. Most important of all is the willingness of the courts across the common law world to adopt an expansive approach to the enforcement of fundamental rights and ensure the strictest of interpretations is applied whenever those rights are threatened. Even in Singapore and Malaysia, where the mandatory death penalty has proven unusually resilient, its harshness has been ameliorated in recent years by judicial and legislative interventions.
- 8.7. All these trends are consistent with evolving standards of decency, which place an increasing value on human life and seek to restrict the application of the death penalty pending its complete abolition. No system of discretionary capital sentencing can erase subjectivity and arbitrariness altogether. But as illustrated by the cases cited in this book, a rigorous and structured approach to capital sentencing can reduce the risk of arbitrariness. Nothing less will suffice if the right to life, the most fundamental of rights, is to be afforded meaningful protection.

Authors biographies

Edward Fitzgerald QC CBE is joint head of Doughty Street Chambers and specialises in criminal law, public law and international human rights law. He has represented death row prisoners in the Caribbean at all levels and frequently appears in the Privy Council in death penalty appeals, cases involving the constitutions of the Commonwealth Caribbean, and extradition cases. He has won numerous important appeals in the House of Lords and the Privy Council establishing rights for life sentence prisoners and prisoners on death row. He has also appeared frequently in the European Court of Human Rights. He has been called to the Bar in numerous jurisdictions, including Belize, Grenada and St Vincent, and has been granted rights of audience to appear in cases in Hong Kong, Trinidad and Tobago, St Lucia, Bahamas and the British Virgin Islands. He gives frequent lectures and seminars and provides sentencing training to lawyers in the Caribbean. The winner of the Silk of the Year award in 2005 and *The Times* Justice Human Rights Award in 1998, he was named as Human Rights and Public Law Silk of the Year in 2013 and Legal Aid Lawyer of the year in 2009. In June 2008 he was awarded the CBE for services to human rights.

Joe Middleton has been a barrister at the Bar of England and Wales for 20 years. He has also been admitted to the Bar of Belize. He has been a member of Doughty Street Chambers in London since 1998. He has been working on issues related to the death penalty throughout his career and also practises in immigration and nationality law, extradition and other human rights, constitutional and international law challenges. He has appeared in the UK's domestic courts at all levels and has also taken cases in the European Court of Human Rights, the Judicial Committee of the Privy Council, the UN Human Rights Committee, the Caribbean Court of Justice and the African Court on Human and People's Rights. In collaboration with local counsel, he has acted in death penalty appeals and constitutional challenges in various jurisdictions in the Caribbean and in Africa, including three successful constitutional challenges to the mandatory death penalty in Africa. In 2015, he was awarded the Bar Pro Bono Award for his work on human rights and the death penalty.

Amanda Clift-Matthews is legal director of The Death Penalty Project and a barrister specialising in international human rights and criminal law, in particular: capital offences; serious miscarriages of justice; juveniles; the mentally disordered; and abused women who kill. Her notable cases before the Judicial Committee of the Privy Council include the lawfulness of the imposition of the death penalty on the mentally impaired, the treatment of juveniles in police detention and the constitutionality of life sentences. In addition, she has assisted local lawyers in Singapore, Malaysia, Zimbabwe, Kenya and Sierra Leone in connection with appeals and constitutional motions for prisoners facing the death penalty. She has also assisted local lawyers in numerous cases in the Caribbean region to correct serious miscarriages of justice. Her work before the Caribbean Court of Justice includes the constitutionality of mandatory life sentences and the lawful punishment for juveniles convicted of murder. She has been part-editor of *Archbold Hong Kong*, and has lectured on criminal law and written on contemporary legal issues.

About The Death Penalty Project

The Death Penalty Project is an international legal action charity, based in London, working to promote and protect the human rights of those facing the death penalty. We provide free legal representation to death row prisoners around the world, with a focus on Commonwealth countries, to highlight miscarriages of justice and breaches of human rights. We also assist other vulnerable prisoners, including juveniles, those who suffer from mental health issues and prisoners who are serving long-term sentences.

For more than three decades, our work has played a critical role in identifying miscarriages of justice, promoting minimum fair-trial guarantees in capital cases, and in establishing violations of domestic and international law. Through our legal work, the application of the death penalty has been restricted in many countries in line with international human rights standards. To complement our legal activities, we conduct capacity-building activities for members of the judiciary, defence lawyers and prosecutors, and commission studies on criminal justice and human rights issues relating to the death penalty.

We have brought and supported constitutional challenges to the death penalty in many jurisdictions in the Caribbean, Africa and Asia. Following successful legal challenges, we work with local lawyers and partners to provide training for legal professionals on the impact of the judgment, ensuring that the law is applied properly. We also engage members of the judiciary in dialogue around key issues and facilitate international exchange and knowledge-sharing. To accompany our capacity building initiatives we produce practical professional resources to assist those involved in capital cases, these include:

- *Handbook of Forensic Psychiatric Practice in Capital Cases* (Second Edition) (2018) by Nigel Eastman, Sanya Krljes, Richard Latham, Marc Lyall
- *Casebook of Forensic Psychiatric Practice in Capital Cases* (2018) by Nigel Eastman, Sanya Krljes, Richard Latham, Marc Lyall
- *A Guide to Sentencing in Capital Cases* (2007) by Edward Fitzgerald QC and Keir Starmer

These resources and other publications by The Death Penalty Project are available to view and download at www.deathpenaltyproject.org

This book on sentencing in capital cases provides a valuable resource for members of the judiciary, defence lawyers, prosecutors and others working within the criminal justice system. The authors examine the sentencing principles and procedures that have been adopted by the courts in different jurisdictions following the abolition of the mandatory death penalty, providing comparative analysis and expert critique throughout.

This book updates Edward Fitzgerald QC and Keir Starmer QC (2007), *A Guide to Sentencing in Capital Cases*, published by The Death Penalty Project.

“This much anticipated resource will provide essential comparative and authoritative reference material for all judges, defence lawyers and prosecutors involved in sentencing in capital cases.”

Sir Keir Starmer QC MP (former Director of Public Prosecutions for England and Wales)



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