JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 49 of 2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A
THE HON. MR. JUSTICE MORRISON, JA.
THE HON. MISS G. JUSTICE SMITH, J.A. (Ag.)

RODERICK FISHER V. R.

Mr. Jack Hines for the Appellant

Mr. John Tyme for the Crown

22nd September, November 3 and 21st November 2008

G. SMITH, J.A. (Ag.):

1. The appellant Roderick Fisher was convicted of three counts of murder and sentenced to death on the 6th June 2000. He was re-sentenced on 26th August 2006 to life imprisonment without the possibility of parole before forty years. He has now appealed against this sentence.

2. In dealing with this appeal, it is necessary to set out what can be regarded as a brief chronology of legal developments that are germane to a consideration of a sentencing matter of this nature:

(i) 1992- The Offences Against the Person Act amended to provide for degrees of murder. Section 3(1A) provided that a person guilty of multiple murders should be sentenced to death.

(ii) 1993- **Pratt and Morgan v. R.** (1993) 43 WIR 340, decided that if in any capital case execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment" within the meaning of section 17(1) of the Constitution.

(iii) 2005- Offences Against the Person (Amendment) Act 2005 was passed (as a consequence of the decision in **Lambert Watson v. R.** [2005] A.C. 472), repealing the mandatory death sentence in cases previously classified as capital murder and providing instead for the trial judge to have the discretion to impose sentence of death or imprisonment for life with restrictions on the eligibility for parole. Transitional provisions in section 8 of this Act to provide that death sentences passed before the commencement of the Act, but not carried out, are to be quashed and substituted by sentence passed in accordance with the provisions of this Act.

3. It is obvious from the above chronology that the appellant was sentenced to death pursuant to the 1992 amendments to the Offences against the Person

Act and was re-sentenced as a result of the decision in **Lambert Watson** (supra) and the consequential 2005 amendments in the Offences Against the Person Act. Likewise, it is equally clear that at the time of the re-sentencing, five years had passed since the sentence of death had been imposed with the result that the ruling in **Pratt and Morgan** (Supra) would have been applicable.

4. The sole ground of appeal filed on the appellant's behalf was as follows:

> "The learned trial judge erred in imposing a period of forty years imprisonment before the applicant is eligible to apply for parole, which period is excessive in the circumstances."

5. In support of this ground, Mr. Hines for the appellant submitted that:

(i) The learned trial judge should be mindful that the law that gives him the power to impose the period before being eligible for parole is the same law that provides the mechanism of parole.

(ii) Every convicted murderer is entitled to avail himself of the reformative and rehabilitative benefit of parole because the law that provides for parole does not discriminate between those who commit heinous crimes and those who do not.

(iii) As a result of (ii) above, the judge should temper or balance the reality or inclination and or need to imprison

those who commit heinous murders for a long time with the need not to destroy all possibilities that the individual can get parole.

(iv) In light of the above, it was necessary for the learned trial judge in determining the period before parole to be mindful that there are criteria and conditions which have to be fulfilled before parole can be granted. These criteria to be satisfied by the appellant included providing the following information:

(a) Where and with whom he will live.

(b) How he will take care of himself and his dependents.

(c) The name and address of anyone willing and able to employ him.

A consideration of these factors which relate to parole would ensure that the judge did not render the appellant's opportunity to obtain parole impossible by allowing the appellant the opportunity to apply for parole at an age where it is highly unlikely that the appellant will satisfy the above conditions.

6. Mr. Hines referred to The Parole Act, The Parole Rules and The Offences Against the Person Act in support of his submissions. s6(4) of The Parole Act states:

"Subject to subsection (5), an inmate –

(a) who has been sentenced to imprisonment for life; or

(b) in respect of whom-

(i) a sentence of death has been commuted to life imprisonment; and

(ii) no period has been specified pursuant to s5A -

Indeed, Mr. Hines is right in his contention that every murderer sentenced to life has the right to apply for parole regardless of the heinous nature of the crime as is evident from the use of the word "shall". However, this general rule is subject to the following qualification introduced in 2005 by s3(1C) of The Offences Against the Person Act:

7. The Act stipulates:

> "In the case of a person convicted of murder, the following provisions shall have effect with regard to the person's eligibility for parole, as if those provisions had been substituted for section 6(1) to (4) of the Parole Act-
>
> (a) where a court imposes a sentence of imprisonment for life pursuant to subsection (1) (a), the court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole;"

Persons who would be sentenced to life imprisonment pursuant to subsection (1)(a) include persons guilty of committing murder in the various circumstances

outlined in s2(1)(a) to (f) of the Act. For the purposes of this appeal, it is sufficient to note that these circumstances include murder committed in the course or furtherance of-

> "(i) robbery;
>
> (ii) burglary or housebreaking;
>
> (iii) arson in relation to a dwelling house; *or*
>
> (iv) any sexual offence."

Therefore, the fact that the appellant was convicted of murder means that he is only allowed to exercise this right to apply for parole after a minimum of twenty years of incarceration.

8. At the beginning of his argument, Mr. Hines conceded that the graver the evidence of the murder the greater the likelihood that the accused will be imprisoned for a longer period of time before being eligible for parole. This, in addition to his argument that the judge should temper the need to imprison for a long time, suggests that a judge usually focuses on the objectives of sentencing in order to determine the pre-parole period. This approach is recommended by Simmonds C.J. in the Barbados Court of Appeal in the case of **Mormon Scantlebury v. R.** Criminal Appeal No. 34/04 delivered on the 13th April 2005. In that case, His Lordship was concerned with sentencing a person under the age of eighteen (18) years to detention during the Court's pleasure. At page 13 of the judgment, he said:

"2. At the time of the imposition of such a sentence, the trial judge must state in open court what he/she considers to be the appropriate minimum sentence (the tariff) to be served. In making a determination of the minimum sentence the court must take into account:

(a) the penal objectives of retribution and general deterrence;

(b) the seriousness of the offence and the principle of proportionality in accordance with the criteria stated in sections 35 and 36 of the Penal System Reform;

(c) the principle of individualised sentencing;

(d) any aggravating or mitigating factors; and

(e) any other relevant matters.

3. The trial judge must state in open court, his/her reasons for making the order.

4. Aggravating factors relevant to a charge of murder include:-

(a) planning and premeditation;

(b) taking advantage of an elderly or disabled victim;

(c) causing torture or suffering to a victim before death;

(d) killing a person providing a public or security duty;

(e) treatment of the deceased after death.

5. Mitigating factors relevant to a charge of murder include:

(a) an intention only to do serious bodily harm;

(b) spontaneous action rather than premeditation;

(c) mental disability;

(d) provocation or some evidence of self-defence even though it was rejected by the jury;

(e) age of the offender."

9. The task of sentencing necessarily involves fitting the time to the crime. While it can readily be conceded that the objectives of punishment must be considered in resolving any issue relating to sentence, the question arises whether the same approach should apply equally to cases where the sentence has already been set and the pre-parole period is to be determined as it is to cases where no sentence has been set. This question becomes even more important when it is considered that in making a decision in the former case, the Judge is involved in a balancing exercise. In other words, the judge has two competing interests: carrying out the objectives of sentencing in the interests of the public and considering the interests of the offender by giving him the opportunity to access parole.

10. The case of **Scantlebury** (supra) aside, while the cases from the Commonwealth Caribbean jurisdictions have given guidelines in terms of matters

to be considered in sentencing, it appears that none has gone so far as to place these guidelines specifically within the context of determining a pre-parole period where a minimum pre-parole period has been stipulated. Useful guidance may, however, be obtained from other Commonwealth jurisdictions, particularly New Zealand that has a minimum pre-parole period of ten years. ss102 & 103 of the Sentencing Act of that jurisdiction states:

> "102 (1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.
>
> (2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so.
>
> 103 (1) If a court sentences an offender convicted of murder to imprisonment for life it must order that the offender serve a minimum period of imprisonment under that sentence.
>
> (2) The minimum term of imprisonment ordered may not be less than 10 years ..."

Although not referred to expressly as the minimum pre-parole period, the ten year period referred in the Act may be construed as the minimum pre-parole period. In **R. v. Howse** [2006] 1 NZLR 433, Tipping J. in the Court of Appeal gave the following guidelines concerning how to approach the task of deciding the length of time to be added to the minimum pre-parole period:

> "The primary focus of the sentencing court should be to compare the culpability of the case in hand with the culpability inherent in cases which are within the range of offending which attracts the statutory norm of ten years. The primary question is how much more than the statutory norm the instant offending requires in order to achieve the necessary additional punishment, denunciation and deterrence.
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> s103 of the Sentencing Act indicates that the statutory norm is designed for the ordinary range of offending of the particular kind. There are difficulties in determining the extent of that range ... In broad terms, a minimum period of 20 years implies that the culpability of that offending is twice that of the offending range. But, as was accepted on both sides in argument, it would be inappropriate for present purposes to adopt too mathematical an approach, whether by reference to number of victims or otherwise. Yet it is not entirely unreasonable to regard the number of victims as relevant to overall culpability. The greater the number of victims, the more people will usually be traumatised by the offending."

Later he said:

> "...while the instant case against datum comparison is the primary one, it is still necessary for there to be reasonable relativities between individual cases themselves. It would be wrong if one case could reasonably be regarded as seriously inconsistent with another.
>
> In short, the proper approach is to apply the primary comparison between instant offence and datum as the first step, and then to use any relevant individual comparators as a check..."

11. There seems to be merit in this approach as it starts with the premise that a person is entitled to parole after a minimum period. The next step is then to

decide how much this period should be increased by based on the degree of culpability; the degree of culpability would of course be determined by the circumstances of the crime. The circumstances of the crime would include the factors classified as aggravating and mitigating factors in **Scantlebury** (supra). This approach therefore has the advantage of providing for consideration to be given to both the right to apply for parole and the sentencing objectives/factors outlined in **Scantlebury** (supra). While the result may be the same as where the judge applies the approach of merely fixing a minimum term to be served before applying for parole, this approach has the advantage of ensuring that the sentencing judge is always mindful of the appellant's right to apply for parole.

12. It may well be that in adopting this approach, the appellant is eligible for parole at a time when he is quite unlikely to satisfy the parole conditions with the result that the argument is raised, as it was in this case, that such a result is unjust and is contrary to the spirit of the Act that an offender should have the opportunity to get parole. The obvious response to that would be that the judge started on the premise that there is a right to apply for parole after twenty years and this pre-parole period is increased to one that significantly delays the offender's opportunity to apply for parole only because the special circumstances of his case warrant this result. Further, it must be noted that the Act while imposing a minimum period before parole does not impose a maximum. The result of this then is that the maximum may very well be the rest of the offender's life. In **R. v. William Dwane Bell** Appeal No. 80/03 delivered 7th of

August 2003, the Court of Appeal of New Zealand had to consider whether a pre-parole period of thirty-three (33) years was manifestly excessive. At paragraph 6 of the judgment, in respect of the absence of a maximum pre-parole period in The Sentencing Act, the Court said:

> "In particular, there is the difficulty that although Parliament has fixed the minimum non parole period when life imprisonment is imposed for murder at 10 years (s103), there is no express maximum. Implicitly the maximum can only be the term of the offender's natural life."

13. It is also recognised that in some cases as in the instant case, the judge must first decide the sentence and then decide the pre-parole period to impose. It may well be argued that in such case, it is not necessary to adopt the approach recommended above because this would result in the trial judge engaging in the same process twice. However, it is my view that it is necessary to adopt this approach even in those instances so as to ensure that the exercise of this discretion is done on a principled and balanced basis. Of course, in those circumstances, the process of arriving at the pre-parole period is likely to be much shorter since in enumerating the factors to be taken into consideration for sentencing, the judge would have these factors fresh in his /her mind and be able to readily apply them to decide how much to increase the minimum time of twenty years by.

14. Applying then this approach in the Jamaican context, the first step would be to start with the premise that an offender who has been convicted of murder

and sentenced to life imprisonment is entitled to apply for parole after twenty years. Such a person would, as was mentioned previously, be regarded as representing the ordinary range of offending that would fall within the circumstances outlined in s2 (1)(a) to (f) of the Offences Against the Person Act. A period of forty years before parole would suggest that the offender has not only committed murder in those circumstances but the circumstances are of such a heinous nature that he can be regarded as twice as culpable as those who would be entitled to apply for parole after twenty years and deserving of spending twice as much time incarcerated. The question then is whether the circumstances of this murder fit such a description. Mr. Tyme for the Crown, in advancing that forty years was not excessive, submitted that the judge would have considered the following:

> "(i) the murder was premeditated;
>
> (ii) two of the deceased were unknown to the accused yet he had no reservations about shooting each of them in the head;
>
> (iii) the appellant had previously been guilty of an act of violence;
>
> (iv) the appellant had no psychiatric problems that could have provided an excuse for his actions."

In determining the sentence, the learned trial judge had this to say:

> "This is a situation where this accused man or this convict, went to the premises, he waited in a guard house until these persons returned from the stadium where these persons attended a football

> match and have all of them lie on their faces then robbed, and each was shot in the head."

15. It is clear that the offences committed by the appellant would fall within s2(1)(a) to (f) of the Offences against the Person Act as murders committed by a person in the course or furtherance of robbery. The facts outlined by both Counsel for the Prosecution and the learned trial judge leave no doubt that the murders were of so heinous a nature that the appellant should spend twice as much time incarcerated as one who simply killed while robbing. The shootings were deliberate acts carried out with the intention of taking the lives of the victims. An important consideration also is the fact that the trial judge was minded to sentence the appellant to death but he appreciated that there was no point in doing so because of the decision in **Earl Pratt and Ivan Morgan (Supra)** [1994] 2 A.C. 1. Accordingly, taking the gruesome circumstances of the murders, the number of victims, the fact that there are no mitigating circumstances, a pre-parole of forty years cannot be regarded as manifestly excessive.

16. The next step then is to use other decided cases to do a comparative analysis so as to ensure that the imposition of a pre-parole period of forty years would not be inconsistent with the period imposed in other cases. Mr. Hines in his submissions referred the court to a number of cases including **Lambert Watson** (supra) and **Kevin Mayne and Jeffrey Miller v. R.** S.C.C.A. 193/93 & 194/99 delivered on July 17, 2001, where a pre-parole period of twenty-five

years was imposed in each case. In the case of **Lambert Watson** (supra), the appellant was convicted of two counts of murder. Both deceased were the victims of a most ferocious and intense attack during which they were subjected to multiple stab wounds. At a resentencing hearing (similar to the instant case where five years had elapsed since the conviction on the capital offence) he was sentenced to a pre-parole period of twenty-five years. In the case of **Mayne and Miller** (supra) the appellants were convicted of a single murder but the victim had been stabbed twenty-two times and had suffered a dislocated neck. When the circumstances of **Mayne and Miller** (Supra) are compared with the instant case, it is clear that Mr. Hines' submission that the forty years should be reduced to twenty-five years cannot be accepted. The fact is that the appellant in premeditated circumstances single-handedly deprived three persons of their lives. That the number of victims is a significant factor is supported by **Howse** (supra), where the Court pointed out that the number of victims must also be a relevant consideration since this would directly relate to the retributive aspect of the period to be imposed.

17. Admittedly, when the brutal and callous circumstances surrounding the murders in **Lambert Watson** (Supra) are considered, it would seem that that case supports Mr. Hines' submission that the forty years be reduced. However, it is prudent to briefly analyse other cases that were not referred to by Mr. Hines in order to get an overall perspective. In **R. v. Oneil Lawrence and Carl James** S.C.C.A. 82 & 83/2003, delivered on July 30, 2004 the appellants were convicted

of murdering one person by shooting him eight times. This Court affirmed the sentence of thirty years before parole. In **R. v. Hall and Ors** S.C.C.A. 112, 115, 116 & 118/2004, the appellants were convicted of the murder of one person. The victim had died from six gunshot wounds. The pre-parole period in that case was twenty-five (25) years.

18. In light of the above cases, it is clear that the appellant in this case should not be allowed to have parole considered after twenty-five years. The cold-blooded circumstances surrounding the commission of this murder warrant a longer period to sufficiently achieve the additional punishment, denunciation and deterrence. It is my view that although somewhat at odds with the sentence imposed in **Lambert Watson** (supra), to order that the appellant spend at least forty years before parole would not be discrepant with the overall trend of pre-parole periods imposed in recent times. Of course, it is recognised that offenders are not automatically released upon an application for parole. This release will only be ordered where the Board is satisfied that they no longer constitute a significant risk to the safety of the community. As a consequence, the appellant may spend more than forty years before actually being released on parole. However, this cannot be a legitimate argument for reducing the sentence. The fact is that any considerations in favour of the appellant must be balanced against the interests of the public.

19. The only remaining issue to be addressed is what value should be placed on the argument that the judge should consider the parole conditions so as to ensure that the opportunity to apply for parole will not be rendered impossible. There is no basis in law for contending that a Court must consider what is properly to be regarded as falling within the purview of the parole board. A judge is obliged to consider the objectives of sentencing and the appellant's right to parole. If in applying these considerations, in substance the appellant is denied the opportunity to obtain parole, the appellant has only himself to blame. The fact is that the Act allows for the possibility that the offender may spend the rest of his natural life without parole in a particular case.

20. For the reasons given above, the appeal is dismissed.