

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 30/93

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN	ALBERT HUNTLEY	APPELLANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	1ST RESPONDENT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	2ND RESPONDENT

Dr. Lloyd Barnett, Richard Small and
Allan Wood for the appellant

Douglas Leys and Lackston Robinson
for the 1st respondent

Lloyd Hibbert, Deputy Director of Public
Prosecutions, for the 2nd respondent

October 4, 5, 6, 7 and November 29, 1993

WRIGHT, J.A.:

By section 2 of the Offences against the Person Act (the principal Act), an Act passed in 1864, the crime of murder was made punishable by a mandatory death sentence. That punishment for murder was preserved by section 4(1) of the Jamaica (Constitution) Order in Council, 1962, which provides that:

"All laws which are in force in Jamaica before the appointed day shall...continue in force on and after that day..."

The Constitution of Jamaica took effect on August 6, 1962 (the appointed day) and so the punishment for murder remained unchanged. However, because of an ambivalent attitude towards the death penalty adopted by successive governments in which they were aided and abetted by certain international organisations speaking in the name of Human Rights the death penalty was held in abeyance. In the meantime, as a result of the

frightening increase in cases of murder, there was an embarrassing accumulation of over two hundred persons convicted of murder on death row. In an effort to alleviate this situation, the legislature passed an amendment to the Offences against the Person Act, Act 14 of 1992 (the Act) which came into effect on October 14, 1992. The purpose of that Act was to devise a scheme whereby the number of persons who would be amenable to the death penalty would be reduced. This appeal arises out of proceedings which took place in pursuance of the Act but it should be carefully noted that there is no challenge to the constitutionality of the Act.

To achieve the purpose of the Act, section 2 thereof repealed section 2 of the principal Act and provided a substitute therefor in subsection 2(1) whereby a list of fifteen circumstances is given in which murder will attract the death penalty. That type of murder is named capital murder. By subsection 2(3) of the Act murder not falling within subsection (1) is non-capital murder. An additional instance of capital murder is provided for by an amendment (in section 3 of the Act) which becomes subsection 1A of section 3 of the principal Act as follows:

"(1A) Subject to subsection (5) of section 3B, a person who is convicted of non-capital murder shall be sentenced to death if before that conviction he has--

- (a) whether before or after the date of commencement of the Offences against the Person (Amendment) Act, 1992, been convicted in Jamaica of another murder done on a different occasion; or
- (b) been convicted of another murder done on the same occasion."

There will, therefore, be sixteen categories of capital murder for which the sentence is death (section 3 of the principal Act as amended by section 3 of the Act). For non-capital murder the sentence is imprisonment for life (section 3A inserted into the principal Act by section 4 of the Act). But since the pressure which resulted in these changes in the law was not created by any difficulty in prosecuting murder

indictments but by the need to take action concerning the death row convicts a machinery had to be fashioned to bring them within the new provisions. Section 7 of the Act created that machinery. That section provides as follows:

"7--(1) Subject to the provisions of this section, with effect from the date of commencement of this Act the provisions of the principal Act as amended by this Act shall have effect in relation to persons who at that date are under sentence of death for murder as if this Act were in force at the time when the murder was committed and the provisions of this section shall have effect without prejudice to any appeal which at that date, may be pending in respect of those persons or any right of those persons to appeal.

(2) For the purposes of subsection (1), the case of every person referred to in that subsection shall be reviewed by a Judge of the Court of Appeal with a view to determining--

(a) whether the murder to which the sentence relates is classifiable as a capital or non-capital murder in accordance with the principles set out in the principal Act as amended by this Act;

(b) whether sentence of death would in any event be warranted having regard to the provisions of section 3(1A) of the principal Act as amended by this Act (repeated and multiple murders); and

(c) whether, and if so to what extent, a specified period should elapse before the grant of parole in a case where murder is classifiable as non-capital murder,

and shall determine the appropriate sentence in accordance with the principles set out in the principal Act as amended by this Act.

(3) Where, pursuant to subsection (2), a Judge of the Court of Appeal classifies a murder as capital murder, he shall by notice in writing to the person convicted of the murder, inform that person of the classification and of the rights conferred by subsection (4).

(4) A person who is notified pursuant to subsection (3) shall--

- "
- (a) have the right to have the classification reviewed by three Judges of the Court of Appeal designated by the President of that Court and to appear or be represented by counsel; and
 - (b) within twenty-one days of the date of receipt of the notice indicate in writing his desire for such review,

and any written representations in support of a change in that classification shall be made within the period of twenty-one days aforesaid.

(5) The Judges of the Court of Appeal referred to in subsection (4) shall review the classification referred to in that subsection and shall make the appropriate determination specified in subsection (2) and their decision shall be final."

This appeal finds its genesis in the review conducted by a Judge of the Court of Appeal in keeping with section 7(2) (supra).

The appellant was convicted for the murder of Teacher Patten on 29th November, 1980, and sentenced to death. The circumstances in which the murder was committed, as revealed by the record of the court, were that at about 3:30 a.m. on 29th November, 1980, the appellant and another man with whom he was jointly tried broke down the victim's door, and entered the house demanding "Christmas money." Both were armed with guns and one threatened "Come we shoot the man" when the victim said he had no money. The other intruder wanted to leave but a shot was then fired hitting the victim in his chest and neck. The room was later found ransacked. The appellant was classified as the one who fired the shot.

Murder committed in those circumstances is classifiable as capital murder under section 2(1)(d)(i) and (ii), which provides:

"2--(1) Subject to subsection (2) murder committed in the following circumstances is capital murder, that is to say--

...

" (4) any murder committed by a person
in the course or furtherance of--

(1) robbery;

(11) burglary or housekeeping;"

However, the records show that the murder was classified as capital murder under section 2(1)(a)(i) on the ground that the murder was committed in the course of a robbery. In accordance with the provisions of section 7(3) (supra) notice of the classification was sent to the appellant. The notice bears date 17. 12. 92 but omitted to state the section under which the classification was made. This fact has been relied on as cause for complaint. But, in my opinion, this is not a serious omission since the appellant knows the circumstances of the charge presented against him and if he is thereby embarrassed in any way that matter can be redressed in representations before the three Judges of the Court of Appeal.

The appellant sought constitutional redress by Notice of Motion dated 22nd January, 1993, before the Supreme Court for a -

"...Declaration that sections 13 and 30 (sic) thereof have been contravened by the determination or decision made by a Judge of the Court of Appeal that the murder to which the sentence of death passed on him on the 13th day of July, 1983 relates is classifiable as capital murder on the grounds that -

(1) the said decision or determination was arrived at and made in contravention of his fundamental right to the protection of law and a fair hearing in that -

(a) he was not given the opportunity to be heard in the proceedings in which the said decision or determination was made;

(b) he was not given the opportunity to be represented by a legal representative of his choice;

(c) he was not informed of the facts, material or questions considered in the making of the said decision or determination; and

- " (2) the proceedings in or by which the said decision or determination was made were not held or conducted in public.

AND FOR an Order that the said decision or determination by which the offence for which the applicant was convicted was classified as Capital Murder is unconstitutional, null and void and be set aside."

This appeal is from the dismissal of that motion in respect of which seven grounds of appeal were filed and argued, which are as follows:

"1. The learned Judges of the Supreme Court erred in law in holding that although the determination by the single Judge of Appeal exercising powers under 2.7(2) was a judicial determination the Appellant was not entitled:

- (a) to be given the opportunity to be heard in the proceedings in which the said decision or determination was made;
- (b) to be given the opportunity to be represented by a legal representative of his choice;
- (c) to be informed of the specific statutory category under which the Judge was considering the classification of this offence as capital murder or to be provided with a copy of the Order or reasons for decision of the Judge who made the order;
- (d) to be informed of the factual findings upon which the Judge was minded to make the said classification or to be afforded an opportunity to make representations thereon;
- (e) to be informed of the facts, material or questions considered or the standard and burden of proof or other principles applied in the making of the said decision or determination;
- (f) to be heard on the issues and findings of capital murder which entailed the determination of issues which:
 - i. were not issues which fell to be determined in the trial,
 - ii. were not necessary to the determination of the jury's verdict of murder,

and where there was no basis, material or evidence upon which

" a Judge could or could fairly, reasonably or properly come to the said decision or determination.

In so holding, the Court erred in denying the Appellant important attributes, incidents, protections and provisions which are essentials of a judicial determination and required under the Constitution.

2. The learned Judges of the Supreme Court erred:

- (a) In failing to hold that the constitutional protection sought applied at all stages of the judicial determination, whether preliminary, appellate or in relation to sentence only.
- (b) By inferring into the legislation a curtailment of the Appellant's constitutional right to the protection of the law and a fair hearing.
- (c) In failing to hold that the legislature could not remove the constitutional protections of the individual by ordinary legislation.
- (d) By finding that the Act was only prospective in nature and did not have the effect of altering the status and sentence of persons convicted prior to the 14th October, 1992.

3. The learned Judges of the Supreme Court erred in holding that the Applicant:

'but for the exercise of the royal prerogative of mercy has no legal rights. Such rights as the Applicant may have possessed and as guaranteed by chapter 3 of the Constitution have already been exhausted by way of due process of law.'

They also erred in holding that:

'after the amending act came into operation (the Appellant) was a person convicted of murder and under a sentence of death.'

They further erred in holding that:

'the Applicant was not possessed of or entitled to any lawful rights as such rights had ceased upon conviction.'

4. The learned Judges of the Supreme Court erred in failing to recognize that like the classification of a person as a non-capital offender, the classification of a person as a

"capital offender was a determination to be made dependent on findings of fact.

5. The learned Judges of the Supreme Court erred in failing to hold that in a determination as to what is an appropriate sentence, the Applicant was entitled to the full protection of the Constitution.

6. The learned Judges of the Supreme Court erred in holding that there was a 'marked similarity' between the determinations made by a Judge of Appeal under 8.7 of the Act and the duties of a Judge of Appeal in determining whether to grant leave to appeal under the Judicature (Appellate) Jurisdiction Act.

7. The learned Judges of the Supreme Court erred in failing to consider whether and to hold that the Proceedings in or by which the said decision or determination of the Judge of the Court of Appeal was made should have been held and conducted in public."

The merest reading of these grounds of appeal reveals that these complaints ignore the fact that the Act does not contemplate another series of trials but is designed to rectify the unhappy situation which was occasioned by the delay in carrying out the sentences which had resulted from trials conducted with due regard for the constitutional protection to which an accused person is entitled. Accordingly, section 20(1) of the Constitution has no application to the proceedings under contemplation. That section states:

"Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Clearly, that section deals with the manner in which a criminal charge is to be disposed of, viz., by a fair hearing within a reasonable time or by being withdrawn. The requirements of a fair trial apply to those proceedings. The proceedings under the Act do not require the finding of any fact. Consequently, those proceedings do not require any standard or burden of proof to be observed. These are not adversarial proceedings. They are in essence administrative but are performed by a judicial officer.

It is significant to bear in mind that the constitutionality of the Act is not in question. Therefore, if the provisions of the Act are complied with *cadit quaestio*. There is no warrant for invoking provisions which are concerned with ensuring that a person charged is convicted only after there has been due process of law. The single judge acting under section 7(2) of the Act does not determine any issues of fact in the sense of making decisions as to the appellant's guilt. All he does is to ascertain from the record of the trial whether the murder was committed in any of the circumstances listed in the Act and on that basis classify the murder as capital or non-capital. The Act stipulates the sentence according to the classification. The judge merely applies to each classification the sentence which the Act has determined shall apply. In so doing the requirements of the Act (section 7(2)) are fulfilled. Note again what the Act says:

"7--(2) For the purposes of subsection (1), the case of every person referred to in that subsection shall be reviewed by a Judge of the Court of Appeal with a view to determining--

...

and shall determine the appropriate sentence in accordance with the principles set out in the principal Act as amended by this Act."

[Emphasis supplied]

The sentence of imprisonment for life for non-capital murder, though mandatory, is a benefit and, accordingly, is not subject to debate. Understandably, therefore, the Act does not provide for any participation by the convicted persons thus benefitted. Neither does the Act provide for any participation in the exercise carried out by the single judge by those convicted of capital murder because it is not possible to tell into which classification any murder would fall until the judge has ascertained the circumstances in which each murder was committed. It is when the classification has been made that the Act provides for those classified as capital murderers to have a hearing before three Judges of the Court of Appeal at

which they are given the right to appear or be represented by counsel. The alternative would have been to accord to all persons who come within the ambit of section 7(1) the right of audience which is contrary to the clear provisions and intentment of the Act. Submissions in that behalf are, therefore, ill-conceived.

Particularly because of the amendment affecting the doctrine of common design in murder cases, introduced by section 2(2) of the Act, as well as any other factor which the circumstances of the murder which a person convicted of capital murder may be able to urge it is desirable to allow such persons the opportunity of making representations affecting their classification. Section 2(2) of the Act provides:

"If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (e) of that subsection), two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

Under this subsection there can be accommodation for submissions which enure to the benefit of one classified as being guilty of capital murder. None is available to the non-capital murderer.

This judgment, for reasons which I have stated, is necessarily confined to a consideration of the provisions of the Act. Nevertheless, for the sake of completeness, I will just state that no submissions were made before the court regarding section 14 of the Constitution. In so far as section 13 thereof is concerned it is sufficient to state that the protection of the law provided for by that section (section 13(a)) was observed by the process and the tribunal by which the appellant's guilt was determined. The Act, as I have shown, accords him no protection which has been violated.

Reference was made to several cases during the course of counsel's submission but because it is my opinion that they relate to issues which are not relevant to the question seeking solution I have for that reason alone not referred to them. However, since at the core of the contention is the question whether justice has been done to the appellant by excluding him from participation in the initial stage of the classification, exercise it is important to emphasize what I have said already that since the constitutionality of the Act is not being challenged then the appellant can claim no more than the Act affords. And this is no novel proposition. In the House of Lords' decision in Wiseman v. Borneman [1971] A.C. 297 at pages 308 to 309 Lord Morris of Borth-Y-Cest, dealing with a not altogether dissimilar situation, had this to say:

"My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situations or set of circumstances, are right and just and fair. Natural justice, it has been said, is only 'fair play in action.' Nor do we wait for directions from Parliament. The common law has abundant riches: there may we find what Byles J. called 'the justice of the common law.' (Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. 180, 194)."

That, to my mind, is a sufficiently authoritative statement of the law on which to end this judgment. The appeal fails and the judgment of the Full Court is affirmed. There will be no order as to costs.

FORTE, J.A.

On the 14th October, 1992, an act to amend the Offences against the Person Act came into effect. The main purpose of the amendment was aimed at classifying the offence of murder into two categories i.e. non-capital and capital murder. A conviction for capital murder retains the death penalty as its sentence, but a conviction for non-capital murder is now made punishable by mandatory life imprisonment. The enactment came after years of lobbying by various human rights groups both international and national for the ~~abolishment~~ of the death penalty. It is reasonable to imply therefore, that the legislation compromisingly adopted a middle course, retaining the death penalty for the more offensive murders which it defines in section 2. At the time the amendment came into effect, there were nearly three hundred (300) convicted murderers in the condemned cells, some of whom had been there for many years for various reasons, not the least of which was the apparent reluctance of the Government to carry out the executions in the face of such strong international lobbying. The amendment, therefore, by virtue of its section 7, sought to deal with those prisoners, in order to, as it were, give its provisions re the classification of the offence of murder, a retroactive effect, so that those prisoners who had been convicted prior to the amendment, for murder which after the amendment would amount to non-capital murder, would benefit in that their offence would no longer be punishable by death. It provides:

"7(1) Subject to the provisions of this section, with effect from the date of commencement of this Act the provisions of the principal Act as amended by this Act shall have effect in relation to persons who at that date are under sentence of death for murder as if this Act were in force at the time when the murder was committed and the provisions of this section shall have effect ...".

In order to determine the beneficiaries, the Amendment provided by Section 7 (2):

"7(2) For the purposes of subsection (1), the case of every person referred to in that subsection shall be reviewed by a Judge of the Court of Appeal with a view to determining -

(a) whether the murder to which the sentence relates is classifiable as a capital or non-capital murder in accordance with the principles set out in the principal Act as amended by this Act;

(b) whether sentence of death would in any event be warranted having regard to the provisions of section 3(1A) of the principal Act as amended by this Act (repeated and multiple murders); and

(c) whether, and if so to what extent, a specified period should elapse before the grant of parole in a case where murder is classifiable as non-capital murder,

and shall determine the appropriate sentence in accordance with the principles set out in the principal Act as amended by this Act."

Section 7 (2) therefore puts the burden of determining the classification, on a single judge of appeal who is required to review the case of each prisoner, and by that process thereafter to conclude whether the prisoner would nevertheless be subject to the death penalty.

It is that process that is now the subject of this appeal.

The appellant is a prisoner convicted for the offence of murder and was at the time of the commencement of the amending Act, awaiting the execution of the sentence of death already passed on him. In accordance with the provisions of the Act, his offence has been classified as capital murder by a Judge of Appeal, and he was so informed in accordance with section 7 (3) which will be dealt with subsequently. Admitted on both sides are the following:

- (i) At the time his case was reviewed by the Judge of Appeal, he had not been notified of the time and place that the review would occur.
- (ii) He was not permitted to attend the review.
- (iii) He was not given an opportunity to have legal representation at the review.
- (iv) The review was not done in public and
- (v) He was not allowed to call witnesses or to be heard.

As a result of being informed of his classification, the appellant, invoking section 25 of the Jamaica Constitution, by motion, sought constitutional redress, before the Constitutional Court alleging breaches of his rights.

He asked for the following:

"For a declaration that the process and manner by which a Judge of the Court of Appeal purported to determine under Section 7(2) of the Offences Against the Person (Amendment) Act 1992 ('the Act') that the offence of murder of which the Applicant was convicted on the 13th day of July, 1983 was 'capital murder', contravened Sections 13, 14 and 20 of the Constitution of Jamaica in relation to the Applicant. AND FOR an Order that the said decision or determination by which the said offence was classified as capital murder is unconstitutional, null and void and shall be set aside."

In support of his motion he alleged that the said decision or determination was arrived at and made in contravention of his fundamental right to the protection of law and a fair hearing in that:

- "(a) he was not given the opportunity to be heard in the proceedings in which the said decision or determination was made;
- (b) he was not given the opportunity to be represented by a legal representative of his choice;

- "(c) he was not informed of the specific statutory category under which the Judge was considering the classification of this offence as 'capital murder', nor was he provided with a copy of the Order or reasons for decision of the Judge who made the Order;
- (d) he was not informed of the factual findings upon which the Judge was minded to make the said classification nor afforded an opportunity to make representations thereof;
- (e) he was not informed of the facts, material or questions considered or the standard and burden of proof or other principles applied in the making of the said decision or determination; and
- (f) the hearing and finding of 'capital murder' entailed the determination of issues which:
 - (i) were not issues which fell to be determined in the trial;
 - (ii) were not necessary to the jury's verdict of murder;and there was no basis, material or evidence upon which a Judge could, or could reasonably and properly, come to the said decision or determination.

2. The proceedings in or by which the said decision or determination was made were not held or conducted in public."

On the hearing coming on before the Constitutional Court, it was ordered that the motion be dismissed. It is from that order that the appellant now appeals to this Court.

Put in summary form, it is apparent that though there are many complaints by the appellant alleging constitutional breaches, the one real contention, in which all others are necessarily subsumed is that at the review conducted by the Judge of Appeal, the appellant was deprived of his right to natural justice. He has however, presented his case on the basis that sections 13 and 20 of the Constitution have been breached. There is no doubt that

the right to the protection of law declared in section 13 is a right to which all persons including prisoners are entitled. Also the provisions of section 20 are clear in its terms, and do declare that a person charged with a criminal offence is entitled to all those requirements which would ensure that he is dealt with fairly and justly.

The first question that therefore arises for decision is whether the appellant in his peculiar circumstances is entitled to the rights expressed in section 20. The relevant provisions of that section are as follows:

"20(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. ...

(3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or other authority, shall be held in public. ...

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:

Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

(6) Every person who is charged with a criminal offence -

(a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;

(b) shall be given adequate time and facilities for the preparation of his defence;

- (c) shall be permitted to defend himself in person or by a legal representative of his own choice;
- (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; ...".

The section commences in ss (1) with clear words as to the class of persons to whom the section applies i.e. "a person charged with a criminal offence". The remaining subsections referred to above, provide for procedures which protect the right of such a person, to the "fair hearing" referred to in ss (1). The section endows the person charged with the presumption of innocence, and among other things gives him adequate time for the preparation of his defence, the right to be represented by a legal representative and the opportunity to question prosecution witnesses, and to call his own witnesses. The whole context and nature of the section is related to the trial of a person charged with a criminal offence. The respondents, on the basis that the appellant is a person already tried and convicted of the offence, contend that he is no longer "a person charged," and consequently cannot avail himself of these provisions.

Dr. Barnett, for the appellant, however maintains that the Amending Act having repealed section 2 of the principal Act (which is the section under which the appellant was sentenced to death,) created a situation in which at the time of the coming into effect of the Amending Act, the appellant would no longer be subject to the death penalty, and had to await the determination of the Judge of Appeal, in order to know what his sentence would be thereafter.

In those circumstances, he contends, the appellant would be entitled to be treated as "a person charged with a criminal offence" and therefore entitled to all the protections provided by section 20 of the Constitution.

Without any necessity to refer to any of the cases cited to support these converse contentions, it appears unambiguously from the words of section 20 that the section, is aimed at guaranteeing to a person who is charged with a criminal offence, all the necessary safeguards in ensuring that he is dealt with fairly. Can it be said that in the peculiar circumstances of this case, the appellant, though already convicted still remained for the purposes of the section "a person charged etc."

It is perhaps necessary to note, that the process in a criminal trial, in the absence of an acquittal, is not complete until a conviction is entered, and the sentence has been passed. The rights guaranteed under section 20, in so far as they can apply would be applicable, not only to the process leading to a conviction, but also to the post-conviction process leading up to sentence e.g. - the convicted person would still have the right to be present, the right to be heard, the right to call witnesses in mitigation where the sentence is not mandatory and the right to have legal representation. Though I find difficulty in accepting the contention of Dr. Barnett, that the effect of the repealing of section 2 of the principal Act is to abolish the sentence already passed on the appellant, there must be a concession that that penalty, must at least be held in abeyance, as no action could be taken in respect of it until the Judge of Appeal had determined the classification of the murder for which he has been convicted. Nevertheless, the exercise which the single judge is empowered to undertake under section 7(2) does not relate to a determination of the sentence as the sentence has already been determined at trial. The sentence remains in abeyance only to

determine through the review process whether the offence for which the condemned person has been convicted, is classified as non-capital murder so that he can be the beneficiary of a sentence of life imprisonment - instead of the death penalty.

In my view, therefore, the provisions of section 20 of the Constitution do not apply to these peculiar circumstances.

In spite of this view, however, it is necessary to determine whether the classification by the single judge breached the common law rules of natural justice.

Natural justice, in my view, does not involve any complex or difficult theory, and requires simply that a person, who can be affected adversely by any judicial decision must before that decision is finally made be dealt with fairly and justly. This opinion is consistent with the following dicta of Lord Morris of Borth-Y-Gest in the case of Wiseman v. Borneman [1971] A.C. 297 at page 308-9:

"My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair."

Again, the following observations of Ormrod L J in Norwest Holst v. Department of Trade & Ors [1978] 3 All E.R. 280 (p. 294), and which were cited with approval by this Court in the unreported case of Virgo Enterprises Ltd et al v. Newport Holdings Ltd et al Miscellaneous Appeal Nos: 1, 2 & 3/89 dated 15th May, 1989 are in keeping with my own views. These are the words of Ormrod L J:

"The phrase 'the requirements of natural justice' seems to be mesmerising people at the moment. This must, I think, be due to the apposition of the words 'natural' and 'justice'. It has been pointed out many times that the word 'natural' adds nothing except perhaps a hint of nostalgia for the good old days when nasty things did not happen... If, instead we omit it and put the question in the form stated: in Fisher v. Keane [1878] 11 Ch. D 353: have the ordinary principles of justice been complied with? it at once becomes much more realistic and even mundane."

In the instant case, what has to be decided is whether the classification done by the single judge was done in breach of the rules of natural justice. As already stated, both sides agree that the appellant was not given an opportunity to be heard nor to be legally represented. In fact it is agreed that the appellant was not given an opportunity to participate in any way in the process, and became aware of the classification only when he was so notified by the Registrar of the Court. The appellant's counsel, in advancing the arguments in the appeal, did not challenge the constitutionality of the Amendment. Instead, the real contention relates to the manner in which section 7(2) was applied. This subsection (*supra*) is silent as to the appellant having a right to be present or to any of the requirements of the rules of natural justice. The appellant, however submitted that the section ought to be read, so that it is consistent with the appellant's constitutional rights and consequently the single judge dealing as he was with a judicial matter, which would affect the liberty

and/or life of the subject, and which would be a final decision, should have adhered to the rules of natural justice. What the appellant asks, therefore, is that the Court infers that Parliament would not legislate for procedures which would be in breach of the rights, guaranteed in the Constitution, and consequently though section 7(2) is silent as to the application of the rules of natural justice, the court should import those rules into the application of the section. However, in coming to any such decision an examination of the circumstances, and the totality of the section as it applies to those circumstances must be undertaken. The words of Lord Reid in Wiseman v. Borneman (supra) is of significant relevance. He said thus:

"Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation." [Emphasis mine]

The appellant's submission is on the basis that section 7(2) ought to be read on its own, and is a separate and distinct process from that which the section provides for in section 7 (3) & (4) which read as follows:

" (3) Where, pursuant to subsection (2), a Judge of the Court of Appeal classifies a murder as capital murder, he shall by notice in writing to the person convicted of the murder, inform that person of the classification and of the rights conferred by subsection (4).

"(4) A person who is notified pursuant to subsection (3) shall

(a) have the right to have the classification reviewed by three Judges of the Court of Appeal designated by the President of that Court and to appear or be represented by counsel; and

(b) within twenty-one days of the date of receipt of the notice indicate in writing his desire for such review,

and any written representations in support of a change in that classification shall be made within the period of twenty-one days aforesaid."

Though conceding that the review by the three Judges provided for in subsection (3) would not be an Appeal, Dr. Barnett maintains that the determination of the single judge is a separate process and is therefore subject to the rules of natural justice. He contends, that the appellant ought to have had the opportunity to be present, to be legally represented, and the right to be heard, and to call witnesses if he so desires.

In my view, the intention of section 7(2) of the Amending Act is without doubt to discover which of the prisoners, awaiting execution of the death penalty already passed, would be entitled, on the basis of the circumstances surrounding the murder for which they were convicted, to a sentence of life imprisonment had they been convicted after the amendment came into effect. The section after declaring in subsection (1), the retroactive aspect of the legislation, sets out in subsection (2) to (4) the process by which the determination is to be done. Read as a whole these sections first allow for a review of the single judge to determine on the basis of the evidence upon which the prisoners had been convicted whether the murder should be classified as capital or non-capital murder. If the murder is classified as capital the sentence of death will be confirmed, but subsection (3) gives to the prisoner, if he so desires a right of review by three Judges of Appeal. If he signifies that he wishes a review, then subsection

(4) provides that he would be entitled to the application of the rules of natural justice being applied i.e. in these circumstances, he would be entitled to appear or be represented by counsel. In circumstances such as this where the legislation is clear in its terms as to the right of the prisoner to be heard, and be represented, before the matter is finally determined, then there is no necessity to read into section 7 (2) those same principles.

In this regard, the following words in the speech of Viscount Dilhorne in the case of Pearlberg v. Varty [1972] 1 W.L.R. 534 at 546 is consistent with my own views:

"I agree with Lord Donovan's view (Wiseman v. Borneman [1971] A.C. 297, 316) that it cannot be said that the rules of natural justice do not apply to a judicial determination of the question whether there is a prima facie case, but I do not think they apply with the same force or as much force as they do to decisions which determine the rights of persons. It would clearly be contrary to natural justice for a judicial determination affecting a person's rights and liabilities to be made without his having an opportunity of being heard or of making written representations with regard thereto. In some cases the right to make written representations may not suffice.

Where the person affected can be heard at a later stage and can then put forward all the objections he could have preferred if he had been heard on the making of the application, it by no means follows that he suffers an injustice in not being heard on that application."
[My emphasis]

I would therefore conclude that the review done by the single judge classifying the appellant's offence as capital murder was not done in breach of the rules of natural justice.

I would dismiss the appeal.

WOLFE, J.A.:

On the 14th October, 1992, An Act to Amend the Offences against the Person Act was promulgated into law. Primarily the Act was concerned with creating a distinction between capital and non-capital murder for purpose of sentence. Section 2 of the principal Act enacted as follows:

"Whosoever shall be convicted of murder shall suffer death as a felon."

Section 2 of the Amending Act has enacted as follows:

"Section 2 of the principal Act is repealed and the following substituted therefor--

2--(1) Subject to subsection (2), murder committed in the following circumstances is capital murder, that is to say--

...

(3) Murder not falling within subsection (1) is non-capital murder."

Section 3 of the Amending Act has further enacted:

"Section 3 of the principal Act is amended--

(a) in subsection (1)--

(i) by deleting the words 'Upon every conviction for murder' and substituting therefor the words 'Every person who is convicted of capital murder shall be sentenced to death and upon every such conviction';"

This amendment indubitably retains the death penalty as the sentence in respect of capital murder.

The principal Act is further amended by inserting after section 3 the following sections:

"3A--(1) Subject to the provisions of this Act, every person who is convicted of non-capital murder shall be sentenced to imprisonment for life.

(2) Notwithstanding the provisions of section 6 of the Parole Act, on sentencing any person convicted of non-capital murder to imprisonment for life, the Court may specify a period, being longer than seven years, which that person should serve before becoming eligible for parole."

Prior to the date of commencement of this Act there were a number of persons on death row who had been convicted of murder and sentenced to death. The question of capital punishment as the sentence in respect of persons convicted of murder has sparked great debate in the society. The legislature, no doubt in response to the debate, enacted section 7 of the Amending Act to deal with the treatment of existing convictions for murder. Section 7 states:

"(1) subject to the provisions of this section, with effect from the date of commencement of this Act the provisions of the principal Act as amended by this Act shall have effect in relation to persons who at that date are under sentence of death for murder as if this Act were in force at the time when the murder was committed and the provisions of this section shall have effect without prejudice to any appeal which at that date, may be pending in respect of those persons or any right of those persons to appeal."

Having so enacted, the legislature set up a regime to review the cases of those persons convicted and sentenced to death prior to the coming into effect of the Amending Act. Sections 7(2)(a)(b)(c), (3), (4)(a)(b) and (5) state:

"7--(2) For the purposes of subsection (1), the case of every person referred to in that subsection shall be reviewed by a Judge of the Court of Appeal with a view to determining--

- (a) whether the murder to which the sentence relates is classifiable as a capital or non-capital murder in accordance with the principles set out in the principal Act as amended by this Act;
- (b) whether sentence of death would in any event be warranted having regard to the provisions of section 3(1A) of the principal Act as amended by this Act (repeated and multiple murders); and
- (c) whether, and if so to what extent, a specified period should elapse before the grant of parole in a case where murder is classifiable as non-capital murder,

"and shall determine the appropriate sentence in accordance with the principles set out in the principal Act as amended by this Act.

(3) Where, pursuant to subsection (2), a Judge of the Court of Appeal classifies a murder as capital murder, he shall by notice in writing to the person convicted of the murder, inform that person of the classification and of the rights conferred by subsection (4).

(4) A person who is notified pursuant to subsection (3) shall--

(a) have the right to have the classification reviewed by three Judges of the Court of Appeal designated by the President of that Court and to appear or be represented by counsel; and

(b) within twenty-one days of the date of receipt of the notice indicate in writing his desire for such review,

and any written representations in support of a change in that classification shall be made within the period of twenty-one days aforesaid.

(5) The Judges of the Court of Appeal referred to in subsection (4) shall review the classification referred to in that subsection and shall make the appropriate determination specified in subsection (2) and their decision shall be final."

The appellant Albert Huntley was on the 13th July, 1983, convicted and sentenced to death in the Home Circuit Court for the offence of murder committed on the 29th November, 1980. At the time, therefore, of the commencement of the amending statute he was a person affected by section 7 of the Offences Against the Person (Amendment) Act, 1992. In accordance with section 7(2) his case was reviewed by a Judge of the Court of Appeal and classified as capital murder. The requisite notice, under section 7(3), was sent to the appellant whereupon he moved the Full Court of the Supreme Court seeking constitutional redress under section 25 of the Constitution of Jamaica.

He prayed the court for the following:

"For a declaration that the process and manner by which a Judge of the Court of Appeal purported to determine under section 7(2) of the Offences against

"the Person (Amendment) Act 1992 ('the Act') that the offence of murder of which the Applicant was convicted on the 13th day of July, 1983 was 'capital murder', contravened sections 13, 14 and 20 of the Constitution of Jamaica in relation to the Applicant.

And for an Order that the said decision or determination by which the said offences (sic) was classified as capital murder is unconstitutional, null and void and shall be set aside."

The declaration and relief were sought on the following grounds:

"1. The said decision or determination was arrived at and made in contravention of his fundamental right to the protection of law and a fair hearing in that:

- (a) he was not given the opportunity to be heard in the proceedings in which the said decision or determination was made;
- (b) he was not given the opportunity to be represented by a legal representative of his choice;
- (c) he was not informed of the specific statutory category under which the Judge was considering the classification of this offence as 'capital murder', nor was he provided with a copy of the Order or reasons for decision of the Judge who made the Order;
- (d) he was not informed of the factual findings upon which the Judge was minded to make the said classification nor afforded an opportunity to make representations thereon;
- (e) he was not informed of the facts, material or questions considered or the standard and burden of proof or other principles applied in the making of the said decision or determination; and
- (f) the hearing and finding of 'capital murder' entailed the determination of issues which:
 - (i) were not issues which fell to be determined in the trial;
 - (ii) were not necessary to the jury's verdict of murder;

and there was no basis, material or evidence upon which a Judge could, or could reasonably and

" properly, come to the said decision or determination.

2. The proceedings in or by which the said decision or determination was made were not held or conducted in public."

The Full Court of the Supreme Court comprising Zacca, C.J., Chester Orr, J. and Bingham, J. on the 23rd April, 1993, ordered that the motion be dismissed and refused the declaration and reliefs claimed. It is from this decision that the appellant has now appealed.

The burden of the appellant's complaint is that he was denied a hearing in the review process before the single Judge of Appeal. He contends that he had a right to be heard and the denial of that right is a breach of natural justice and the decision arrived at was, therefore, unconstitutional in the light of section 20 of the Jamaica Constitution. Section 20 of the Jamaica Constitution enacts:

"(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

It is my considered view that section 20 of the Jamaica Constitution is of absolutely no relevance in this matter. The words "whenever any person is charged" must of necessity refer to a person who has been charged with a criminal offence and whose guilt or innocence has not yet been determined by a court of competent jurisdiction. In the case of the appellant the due process of law had been completed in respect of the offence with which he was charged. A court of competent jurisdiction had adjudicated upon the matter and a verdict of guilty returned. He pursued his right of appeal to the Court of Appeal and his application for leave to appeal was dismissed.

**RIGHT TO BE HEARD BEFORE THE
SINGLE JUDGE**

The appellant contends that he has a right to be heard before the single judge makes a determination as to whether or not his offence is to be classified as capital or non-capital.

murder. The argument in support of this contention runs to this effect. The single judge is required by statutory provisions to make a determination which involves identifying principles of law and fact and then applying the principles of law to the facts identified before making the necessary classification. Further, it is urged that the review process by the single judge may import additional matters into the review. Consequently, the review ought not to be done without giving the party an opportunity to be heard. This argument is wholly untenable. The tenor of section 7(2)(a) does not permit the single judge making any finding of fact or taking into consideration any matter not contained in the evidence adduced at the trial. The function of the judge, as prescribed by section 7(2)(a) of the Act, is limited to making the classification "in accordance with the principles set out in the principal Act as amended by this Act." The principles referred to are those set out in section 2 of the amending statute. All the judge is empowered to do is to look at the circumstances of the offence to see which of the categories of section 2 the offence falls in, whether it falls in the capital or non-capital section.

This view is fortified by the fact that the Act gives no right of a further review to a person whose offence is categorised as non-capital. This is clearly so because he has benefitted under the act in having his sentence commuted from death to life imprisonment.

However, section 7(3) mandates that where an offence is classified as capital murder the convicted person shall be so notified and further must be informed of the rights conferred by subsection (4).

It is at this stage that the legislature stipulates that a person notified pursuant to subsection (3) shall:

"(a) have the right to have the classification reviewed by three Judges of the Court of Appeal designated by the President of that Court and to appear or be represented by counsel."

[Emphasis supplied]

Worthy of note is the fact that the Act is silent at the single judge stage of the proceedings as to the right to appear in person or by counsel. The legislature by so enacting clearly did not intend the appellant or any other person so affected to be heard at that stage of the procedure. It has been argued that the single judge stage and the review by Judges of Appeal are separate and distinct procedures but in my view it is one procedure. The single judge's role is nothing more than a winnowing exercise. What the legislature is clearly saying is you do not have to be heard at the single judge stage because if the offence is adjudged as non-capital there is nothing to complain about. However, if it is adjudged as capital then the real process now begins where the rules of natural justice must be observed, hence a panel of three judges, the right to appear or be represented by counsel.

In determining whether or not the rules of natural justice have been vitiated in the classification procedure one must look at the legislation globally to see whether it provides the opportunity for the appellant to be heard. It cannot, in my view, be successfully contended that the opportunity to be heard has not been provided to the appellant.

Several cases were cited in argument but I need only to refer to the dictum of Lord Morris of Borth-Y-Gest in Wiseman v. Borneman [1971] A.C. 297 at pages 308 to 309:

"My Lords that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must in various divergent situations be done. The principles and procedures are to be applied which in any particular situation or set of circumstances are right and just and fair. Natural justice it has been said is only 'fair play in action.'

"Nor do we wait for directions from Parliament. The common law has abundant riches: there may we find what Byles, J. called 'the justice of the common law'."

The legislative procedure laid down for the classification is, in my view, "fair play in action."

In the circumstances, I would, therefore, order that this appeal be dismissed.