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JAMAICA

IN THE COURT OF APPEAL

ON REFERRAL FROM THE GOVERNOR GENERAL

APPLICATION NO. 43/2006

SUPREME COURT CRIMINAL APPEAL NO. 193/1999

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.**

KEVIN MAYNE

V.

REGINA

Mr. C. Dennis Morrison, Q.C. instructed by DunnCox for the Applicant.

**Miss Meridian Kohler and Miss Anne-Marie Nembhard, Crown Counsel
for the Crown.**

May 1, 2, 3, 2006, June 25, 2007 and July 4, 2008

COOKE, J.A.

1. On the 15th November, 1999, the applicant/appellant and Jeffrey Miller were convicted of capital murder of the deceased Valerie Williams. They were each sentenced to suffer death in the manner authorized by law. On the 17th July, 2001 their appeals to our Court of Appeal were dismissed and the convictions and sentences affirmed. As a consequence of the decision of the Privy Council in **Pratt and Morgan v. Attorney General for Jamaica** delivered 2nd November, 1993 the sentences of death were commuted and at a

subsequent re-sentencing hearing in the Supreme Court on the 15th December, 2005 the applicant/appellant was sentenced to life imprisonment and it was ordered that he would not be eligible for parole until the expiry of twenty-five years from the date of conviction.

2. The judgment of the Court of Appeal (SCCA Appeal Nos. 193 and 194 of 99) helpfully summarises the relevant evidence in this case. This summary is now respectfully reproduced.

"The case for the prosecution consisted of evidence which was wholly circumstantial. It spoke to a series of events which commenced on October 30, 1997. On that date at about 10:30 a.m., the applicant Miller and another man were seen speaking to the deceased who was then seated in her taxi cab at Strachan's gas station in Christiana in the parish of Manchester. At about 11:00 a.m., at the same place, both applicants were seen to enter the deceased's motor car. Afterwards the car was driven away by the deceased with the applicants aboard in the direction of Coleyville from where the applicant Mayne hailed. In the afternoon of the same day the car collided into the rear of a motor car being driven by Mr. Steve McDonald, a businessman. At that time there were only two occupants of the car, both male, one of whom McDonald identified as the applicant Miller. According to McDonald the car was then being driven by the other man. Immediately following the collision, and at McDonald's request, Miller produced the papers for the car. These papers were contained in a pouch later identified to be the property of the deceased. Included among the contents of the pouch was a photograph of the deceased which was hastily extracted by Miller but not before McDonald had got sight of it. Thereafter Miller handed the pouch, minus the photograph, to McDonald who, having inspected the papers in it, retained the pouch and its contents. In reply to McDonald's enquiries of "where is the lady

for the car?" and "where is your licence"? Miller said that the lady was gone to town to look about the licence. All the time both men begged McDonald for "a chance" while saying that they did not want the police to become involved. Eventually McDonald left the scene and went directly to the Spauldings Police Station where he reported the accident and handed over the pouch and its contents. On the same day at about 3:00 p.m. at Tweedside district in the neighbouring parish of Clarendon the applicants were seen in the deceased's car. At that time the car had run out of gasoline and the applicants, who were the only two occupants of the car, were enquiring whether gasoline was sold in that area. Eventually gasoline was obtained and the car was driven away for a short distance by the applicant Mayne with the applicant Miller as his passenger. Shortly afterwards at about 5:10 p.m. both applicants were apprehended by the police after being detained as suspicious persons along with the car by citizens of the district. A subsequent search of the car by the police produced the deceased's driver's licence. When questioned by the police the applicant Mayne gave a false name and address and the applicant Miller, while giving his correct name, gave for himself the same false address as Mayne did. After being cautioned by the police and questioned about the car the applicant Mayne said that the car belonged to a man named Durval of Alston district in Clarendon. Furthermore he said that the man, Durval, had lent him the car and was awaiting its return. After being taken by the police to Alston about 7 ½ miles away in search of Durval and waiting there for thirty minutes no one was seen. Later that day the police took possession of a gold chain which the applicant Mayne was wearing around his neck as well as a gold ring being worn by the applicant Miller. Upon being questioned by the police about the ring Miller's first response was "Is me baby mother a town". For his part when asked about the gold chain the applicant Mayne said nothing. Subsequently, both items of jewellery were identified by the deceased's sister as being the property of the deceased and jewellery which the deceased was accustomed to wear. At that time the

applicant Miller revised his explanation as to his possession of the ring to say "Is Kevin mi get it from, mi no know nothing about it".

On October 31, 1997 the lifeless body of Valerie Williams was found by the police in a cave located at Ticki-Ticki district in the general area of Coleyville. The cave, known as the Gurie Cave, was sited in desolate country described in the evidence as "bushy like a wilderness" and like a "forest". In terms of distance it was situated three quarters of a mile from the nearest house, about two miles from Christiana and about one mile from Coleyville. It had thirty four steps leading down to the bottom. The body of the deceased was found on the floor of the cave. It was partially submerged in a shallow pool of water where a broken kitchen knife was also found. The hands of the deceased were tied behind her back and a piece of cloth was tied around her throat. The actual spot where the body was found was about ninety yards away from the nearest driveway outside the cave. A post mortem examination revealed that the deceased had suffered.

- (1) Dislocated neck;
- (2) 1 ½" deep cut to the left side of the neck;
- (3) ½" stab to the left supra-clavicular fossa;
- (4) 2" skin deep cut to the left neck, 4" above the left clavicle and 2" below the left ear;
- (5) 2 cuts to the left breast near the armpit;
- (6) ½" cut to the left chest, 6" below the armpit in the mid-axillary line penetrating the left lung;
- (7) ½" cut to the left chest, 5" below the armpit and 1" from the posterior axillary line;
- (8) ¾" muscle-deep cut to the left buttock in the mid-axillary line to the ischial;

- (9) 14 – ½” stab wounds to the upper back, all penetrating down to bone.

In total there were about 20 stab wounds which were inflicted with a fair or reasonable amount of force.”

3. Following the dismissal of Mayne’s appeal, English solicitors (Simons Muirhead and Burton) in December, 2001 were contacted so that there could be consideration of his case for the purposes of an appeal to the Privy Council. It was during the preparation by the solicitors that they became aware that Mayne had pre-existing brain damage which in their view could have seriously injured his ability to stand trial and to understand the trial process. Further this mental impairment may also have constituted a defence to the allegation even if the jury believed he had in some way assisted in the robbery and killing of the deceased. Accordingly the solicitors engaged Dr. Carol McDaniel who at that time was resident in Jamaica to prepare a report. Her report is dated January 20, 2003.

4. The solicitors, apparently influenced by the Privy Council decision in **Smalling (Robert) v. R** (2001) 58 W.I.R. 341 [a case from this jurisdiction] decided that rather than applying immediately to the Privy Council for fresh evidence to be considered on appeal it was preferable to proceed by way of petition for a referral to our Court of Appeal by the Governor-General, pursuant to section 29 (1) of the Court Judicature (Appellate Jurisdiction) Act. This section is as follows:

“29.—(1) The Governor-General on the consideration of any petition for the exercise of Her Majesty’s mercy

or of any representation made by any other person having reference to the conviction of a person on indictment or as otherwise referred to in subsection (2) of section 13 or by a Resident Magistrate in virtue of his special statutory summary jurisdiction or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit at any time, either —

- (a) refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted; or
- (b) ..."

The evidential basis which grounded this petition was the new medical evidence which emerged subsequent to Mayne's trial and appeal which "was not available and/or had not been sought by his counsel" on those occasions. This medical evidence was that contained in the report of Dr. McDaniel. In essence that report called into question the mental capacity of the applicant/appellant. By letter dated October 11, 2004 the Registrar of our Court of Appeal was advised that the Governor-General acting on the advice of our local Privy Council had ordered that there should be a re-hearing "pursuant to section 29 (1) (a) of the Judicature (Appellate Jurisdiction) Act".

5. The statutory provision which speaks to adducing fresh evidence is section 28 of the Judicature (Appellate Jurisdiction) Act which provides as follows:

"28. For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice —

- (a) ...

- (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and ..."

6. The applicant/appellant now seeks to adduce the fresh evidence contained in the report of Dr. McDaniel. The Court has to consider in respect of that evidence whether:

- (a) Dr. McDaniel was a compellable witness and if her evidence was admissible.
- (b) It was not available at the trial (and appeal).
- (c) It is relevant to an issue in the case.
- (d) It is credible, that is, capable of belief? and
- (e) If it had been given at the trial it might have created a reasonable doubt in the minds of the jury in respect of the guilt of the applicant/appellant for the crime with which he was charged.

As to: 6(a) it is certain that Dr. McDaniel is a compellable witness and her evidence would be admissible.

6(b) appears to be satisfied as the evidence was not available at the trial (or appeal).

In respect of 6(c) the criterion of relevance is pertinent to the issue of whether or not the evidence

which is sought to be adduced was of sufficient value so as to make the defence of diminished responsibility a live issue.

In this case 6(d) and (e) will largely be determined by the Court's assessment of 6(c).

7. In **Clifton Shaw et al v. R.** Privy Council Appeal No. 67 of 2001 (delivered on 15th October 2002) their Lordships' Board, in this case from our jurisdiction, provided guidance as to the proper approach of an appellate tribunal to an application to adduce fresh evidence. In para. 27 of that advice this was said:

"27. ... Guidance on the proper approach of an appellate court to an application to adduce fresh evidence is contained in the judgment of the English Court of Appeal in **R v Sales** [2000] 2 Cr App R 431. In delivering the judgment of the court Rose L.J. stated at p 438:

"Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for this Court to hear the witness *de bene esse* in order to determine whether the evidence is capable of belief. That course is frequently followed in this Court." "

The Court determined that the proposed fresh evidence fell into the third category and accordingly Dr. McDaniel was heard.

8. Although in the petition to the Governor-General and in the written submissions presented to this Court the applicant/appellant raised the question of whether due to mental incapacity he was fit to be pleaded, this aspect was not pursued in oral agreement. This is quite understandable, as the medical evidence on which reliance was placed did not support any such contention. The thrust of Dr. McDaniel's reports (which will be dealt with presently) was that Mayne's mental responsibility in being a party to the killing was substantially impaired. In other words, he was suffering from diminished responsibility. This being so it is important to appreciate the circumstances in which the defence of diminished responsibility could avail Mayne. Section 5 (1) of the Offences against the Person Act is now set out:

"5. — (1) Where a person kills or is a party to the killing of another, he shall be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

This statutory defence imposes a burden, on Mayne, on a balance of probability, to prove that:

- (1) he was suffering from an abnormality of mind;
and
- (2) this abnormality of mind substantially impaired his mental responsibility for the killing.

9. We now turn to the evidence of Dr. Carol A. McDaniel B.Sc. (Hons); MB, BS; DM (Psych) (UWI); MSc (Psych) (Birm). At the time she gave her evidence Dr. McDaniel was a Consultant Forensic Psychiatrist with the National Health Service, Birmingham, England. Her competence in the present field of enquiry is not in doubt. She conducted interviews with Mayne on the 27th December, 2002 and 17th January, 2003 and subsequently prepared a Psychiatric Report dated 20th January, 2003. It is this report which provided the evidential basis for this application to adduce fresh evidence. The conclusion of this report is as follows:

"CONCLUSION

- (1) Mr. Kevin Mayne has Mental Retardation (moderate) which pre-dates his head injury at age 11 years.
- (2) His IQ is estimated in the range of 35 — 49 (which is significantly below average intelligence).
- (3) He has features suggestive of Organic Personality Disorder arising from injury to the frontal lobe of the brain.
- (4) In my opinion, his mental responsibility for his acts and omissions in being a party to the killing, was substantially impaired by both mental retardation and head injury."

Dr. McDaniel had a subsequent interview with Mayne on the 27th April, 2006 and prepared a report which she dated 30th April, 2006. This report she said was to be read in conjunction with her report of the 20th January, 2003. This is her assessment.

"Assessment:

- (1) Mr. Mayne showed no neurotic or psychotic features.
- (2) Mr. Mayne presented as having Mental retardation (mild) i.e. and IQ range of 50 – 69 and educable to Grade 6.
- (3) He has an Organic Personality Disorder arising from injury to the frontal lobe of his brain.
- (4) In my opinion, his mental responsibility for his acts and omissions in being a party to the killing, was substantially impaired by both mental retardation and head injury."

It is to be noted that Dr. McDaniel has revised her opinion in two respects. Firstly, mental retardation is now "mild" instead of "moderate". Secondly and significantly, whereas on the 20th January, 2003 there were "features suggestive of Organic Personality Disorder... brain," in the assessment of 30th April, 2006 she states definitively that "he has an Organic Personality Disorder ... of his brain". Dr. McDaniel founded her opinion upon Neuropsychological tests and from access to reports pertaining to his behaviour after Mayne received his head injury. At this stage it is convenient to refer to the medical report of Dr. J. McHardy pertaining to the head injury. It is produced below.

"April 4, 2002
Ref: 37—48—09

TO WHOM IT MAY CONCERN:

Medical Report Re:Lushane Mayne, Age 11 Years

I first saw and examined this boy on August 20, 1990, after he had been transferred to this hospital,

Kingston Public Hospital from the Percy Junior Hospital in Spaldings where he had been admitted one week previously.

He had reportedly been hit in his left forehead by a stone, he fell and lost consciousness for almost half an hour.

On examination — on admission he was conscious with no focal signs in his central nervous system. He had a sutured laceration 4cm long to his left forehead with an underlying compound depressed fracture of his left frontal bone confirmed by x-ray.

On August 21, 1990 the depressed fracture was elevated under general anaesthetic. The dura mater overlying the brain was intact.

He was discharged home on August 25, 1990. He has been seen at the follow-up neurosurgical outpatient clinic on October 22, November 2, 1990 and March 14, and October 18, 1991.

He has complained of headache and pain at the site of operation for some months, but this has improved greatly [sic].

At his last visit on October 18, 1991 for the first time, he complained of not seeing blackboard at school, but this was not thought to be related to his injury.

This boy sustained a compound depressed fracture of his left frontal bone and some cerebral contusion.

Six months from the time of the injury should be an adequate period for recovery and there should be no permanent disability.

Yours truly,

Dr. J. McHardy, MB. FRCS
Consultant Neurosurgeon
Dept. of Neurosurgery"

Dr. McDaniel was asked to comment on her conclusion in the light of Dr. McHardy's opinion and in particular the last sentence in that report. She said:

"I do not believe that the conclusions are contradictory. His conclusions related to physical consequences. Where I mentioned lateralizing signs there are times when there is an injury to the brain and years after you may see that person walking with a limp/drooping of the eyelids/lame arm.

I would add that mental retardation is a permanent state. It is not a condition that changes significantly. I had a chance to interview the patient's mother on Thursday April 27, 2006. Her mental history was in keeping/compatible with the historical framework upon which I based my diagnosis. For several years prior to the index offence after the injury itself there is a history of the patient behaving in an increasingly bizarre manner. This involved violent behaviour, inappropriate laughter and impulsive acts. These episodes were interspersed with periods of rational behaviour. The patient's mother said that about one month prior to the index offence the patient's behaviour was the most bizarre that she had witnessed to that date."

In cross-examination Dr. McDaniel said:

"If this man had only mental retardation it would not have been substantial enough to affect his responsibility in being a party to the killing. That is, in my opinion he would have enough mental responsibility for his actions regarding the killing.

However, the head injury he sustained and subsequent OPD resulting from that would have substantially impaired this responsibility if he only suffered from that injury. Mental retardation and head injury whether mild or moderate would have impacted more on impairing his mental responsibility for his acts in being a party to the killing.

The features I saw which were a part of criteria of diagnosing OPD included what is called affective instability — so his expressions and mood fluctuated from being blunted (dead pan expression) blunted affect to appearing sad and tearful to having a neutral affect, meaning neither happy nor sad.

I also detected psychotic phenomenon. The main one I observed was perplexed appearance/perplexed facial expression and listening behaviour.

Only person who could have OPD must have had a previous brain damage. The brain damage underpinned my diagnosis of OPD.

When I speak of head injury I am speaking of the injury to the brain.”

9. The respondent/Crown submitted that “the supposed fresh evidence is incredible as far as it seeks to conclude that Mayne’s mental responsibility for his acts or omissions was substantially impaired by both mental retardation and head injury”. It was argued that the conduct of Mayne upon being arrested and inferentially during the trial belies the assertion that he was suffering from an abnormality of mind. It was submitted that:

- (i) He had presence of mind or mental ability to give the police a false name and address when he was first questioned.
- (ii) He gave the police an entirely spurious but cogent account as to how he came to be in possession of the deceased’s car.
- (iii) The unsworn statement of Mayne was cogent, clear, relevant and spoke

directly to his defence and his counsel's line of questioning of the prosecution witnesses. The essence of this unsworn statement was that; he (Mayne) on the day of his apprehension had taken a bus from Kingston to Frankfield and another bus to Tweedside (these are places in the parish of Clarendon). On his way to Tweedside, the bus in which he was a passenger was blocked by a truck which was across the road. It was at that stage the Police took him to the station. He was on his way to visit his grandmother in Tweedside. He denied that he was ever in the parish of Manchester in any motor vehicle or that any chain was taken from him. It was after his arrest he met Jeffrey Miller.

- (iv) In an affidavit sworn to by Paula Llewellyn, the prosecution counsel at the trial, she stated that at no time did counsel representing Mayne seek to have him medically examined. It should be noted that persistent efforts of Mayne's present legal team to ascertain from counsel who defended him at his trial, as to his perception of the mental capacity of Mayne has proved futile.

10. It was further sought to discredit the conclusion of Dr. McDaniel by indicating:

- (a) That "persons around him" did not notice any phenomena which were consistent with mental retardation and mental injury. In particular Mayne's teacher in the third grade did not detect any mental disability.
- (b) The opinion of Dr. McHardy (*supra*) had not been satisfactorily refuted.

- (c) The investigation by Dr. McDaniel was incomplete as no CAT scan or EEG test had been resorted to.

11. It was further argued that Dr. McDaniel did not give any, or sufficient weight to the following factors:

- (i) That Mayne was capable of experiencing a desire to work and subsequently held down two (2) jobs. One whilst he lived in Manchester working in a hardware establishment and thereafter he secured employment at another hardware store in Kingston.
- (ii) He was capable of "cultivating relationships". He had two children, one of whom lived with his family.

12. The question now arises as to whether or not Mayne at the relevant time was suffering from an abnormality of mind within the statutory context. It would seem to be accepted that a person suffering from an organic personality disorder has an abnormality of mind within section 5 (1) of the Offences Against The Person Act. The answer to the question posed requires an examination of the medical evidence presented. This, of course, will take into consideration the views expressed by the Crown. In respect of the submission in paras. 9 and 11 supra, the Court cannot ignore the opinion of Dr. McDaniel to the effect that:

"when he appeared rational he would still have the brain damage but the expression/manifested might wax and wane overtime."

As regards the report of Dr. McHardy, the response by Dr. McDaniel has already been mentioned at para. 9 supra. The medical examination did not involve the use of a CAT scan or an EEG test. Pertaining to this Dr. McDaniel opined.

"A CAT scan/EEG could not have picked up this considerable damage. That considerable damage would not have been picked up by these examinations. I use the word considerable because of the history that he had broken bones resting on the brain for one week and because Dr. McHardie said there was cerebral contusion.

There would have been functional/microscopic damage as well as physical damage beneath the brain. Often times the brain does not show damages to the naked eye. The fact that the doctor could see contusion with the naked eye indicated to me that there was some considerable damage."

It should be added that Dr. McDaniel expressed the opinion that the period Mayne spent in custody on death row would have affected his mood/psychologic condition because of the long period of time without treatment for his mental disorder. No medical evidence was put forward by the Crown to directly challenge the conclusion of Dr. McDaniel. This does not relieve this Court of its responsibility of subjecting the evidence of Dr. McDaniel to close scrutiny. Having so done the Court is of the view that there is a sufficiency of evidence to support the view that Mayne at the relevant time suffered from organic personality disorder — an abnormality of mind.

13. The next question is whether or not at the time of the killing there is evidentiary material which could suggest Mayne's abnormality of mind impaired his mental responsibility in respect of the murder. There is no evidence as to the specific role which Mayne played in this brutal murder. How many of the twenty stab wounds (if any) did he inflict? Was he involved in the dislocation of the

neck of the deceased? The evidence against him was entirely circumstantial. In Mayne's unsworn statement he denied any involvement in the murder. Therefore there is no evidence of the behaviour of Mayne during the criminal operation which culminated in the murder of Valerie Williams. Accordingly, while there is evidence to ground the opinion that Mayne suffered from organic personality disorder there is no evidence that this abnormality of mind impaired his mental responsibility at the time of the murder. The opinion of Dr. McDaniel was that the expression/manifestation of brain damage might "wax and wane overtime". It would appear that generally, the expression/manifestation of his organic personality disorder was not on constant display. Dr. McDaniel would seem to say that he could be rational despite his underlying organic personality disorder. Was he rational during his involvement in the criminal activity which took place over many hours? There is no evidence to suggest otherwise. In the absence of any evidence to the contrary the Court is compelled to answer the question posed at the beginning of this paragraph in the negative. The evidence of Dr. McDaniel fails to demonstrate a basis for the conclusion that at the time of the murder Mayne's abnormality of mind substantially impaired his responsibility for that crime. Having come to this determination it is unnecessary for the Court to advert to para. 6 (d) and (e). Accordingly for the reasons given the application to adduce fresh evidence is refused.