JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 23 & 24/2008

BEFORE: THE HON MR JUSTICE HARRISON, JA
THE HON MRS JUSTICE HARRIS, JA
THE HON MISS JUSTICE PHILLIPS, JA

WAYNE MORRIS & DEAN REID v R

Donald Bryan for the applicant Morris

Ravil Golding and Robert Fletcher for the applicant Reid

Mrs Sharon Millwood-Moore for the Crown

26, 27 July and 20 December 2010

HARRISON, JA

[1] The applicants Wayne Morris and Dean Reid were tried and convicted on 30 January 2008, for the offence of murder in the Home Circuit Court held at King Street, Kingston before Hibbert J, and a jury. The allegations are that both men on 14 April 2000, in the parish of St. Catherine, murdered Maurice Shirley he being a member of the Security Forces. Each applicant was sentenced to life imprisonment with a stipulation that he would not become eligible for parole until he has served a period of 35 years.

[2] Applications were made by both applicants seeking leave to appeal but the single judge refused to grant leave. It was his view that the evidence adduced at the trial consisted, among other things, of detailed confessions made by each applicant, supported by compelling expert evidence. Legal aid was granted however to both applicants and they have now renewed their applications to the court.

The Case for the Prosecution

[3] The facts in summary are as follows. On 14 April 2000, Det. Sgt. Shirley was shot and killed in Mysack's Bar, Strathmore Gardens, St. Catherine. Marie Hunt was the bartender in this bar. Sgt Shirley who was a regular customer of the bar would play the "poker" gambling machine whenever he was there. On the day of the shooting he was seated on a stool playing "poker" when three men entered the bar and ordered beers. Miss Hunt left from where she was standing in order to serve the men. As she placed the beers on the counter two of the men drew short guns from their waists. One of them pointed his gun at Sgt. Shirley and said to him, "Don't move". Sgt. Shirley replied and told this man "I am alright you don't have any problem with me". He then got up and moved towards the bar door. Several explosions were heard and Sgt. Shirley fell on the floor, fatally injured.

[4] Det. Inspector Samuel Bartley and other police personnel arrived on the scene immediately after the shooting occurred. He had known Det. Sgt. Shirley for a number of years as both officers were attached to the Internal Affairs Division of the Jamaica Constabulary Force since 1994. Part of Inspector Bartley's responsibility was to issue

firearms to persons who worked in the section. He had issued a 9mm semi-automatic pistol, bearing serial number 245PT49620 along with rounds of ammunition to Det. Sgt. Shirley. When he arrived at the murder scene he saw the body of Sgt. Shirley lying on the floor of the bar. He checked for the firearm which was issued to Sergeant Shirley and found that it was missing. Three spent shells were found on the floor in close proximity to the body. A firearm was shown to Inspector Bartley in court and he identified it as the firearm that was issued to Sgt. Shirley.

[5] On 2 May 2000, Det. Sgt. Lenford Johnson, who was stationed at Ulster Spring Police Station and other police officers went to a home at Walburt Street in Spring Gardens at about five o'clock that morning. The owner of the house (Mr Bertram) opened the door after the police knocked on it and the police spoke to him. He returned inside and slammed the door. They knocked again on the door and when there was no response they forced open the door and entered the house. Both applicants along with two female companions were seen in a room. A search was conducted of that room and two firearms were found in there. One of the firearms was a 9mm semi-automatic pistol containing ammunition which bore the serial number 245PT49620. This was the same firearm which Det. Inspector Bartley said he had issued to Det. Sgt. Shirley. The other firearm was a .38 revolver with the serial number CBP2303. Both applicants and the women along with the firearms and rounds of ammunition were taken to the Ulster Spring Police Station and thereafter to the Falmouth Police Station. The firearms were labelled and subsequently taken to the Government Forensic Laboratory on 3 May 2000, for testing.

[6] Senior Supt. Benjamin and other police personnel held interviews with both applicants at the Falmouth Police Station. Supt. Benjamin said he had known the applicant Reid before and that he was also called "Sampouchi". He told both applicants of his investigations into the murder of Det. Sgt. Shirley. Reid said, after he was cautioned, "Mek mi tell you all whey mi know." A cautioned statement was given by him and it was tendered into evidence at the trial. In that statement he admitted that he and another man had shot the deceased as he lay on the floor in the bar. The applicant Morris also gave a cautioned statement to the police. He admitted that he was along with Reid and another man. He stated inter alia, "...Tee Cee turn the car into Stratmore. Him stop at a bar and only one man and some woman in there. We did come out a the car and it was Tee Cee who juck the man and tek off a matic off a him and shot him up. Sampoochi tek whey the money in a box and we run and drive whey..."

[7] On 17 April 2000, Supt. Hibbert, a senior ballistic expert at the Government Forensic Laboratory, received three expended .38 bullets from Constable Campbell. These bullets were recovered at the murder scene. On 19 April 2000, he also received the bullet which was removed from the body of Det. Sgt. Shirley. On 3 May 2000, Supt. Hibbert received two sealed envelopes containing firearms from Detective Corporal Johnson. One was a 9-mm pistol, serial number, 245PT49620 and the other a .38 Special Smith and Wesson revolver bearing serial number, CBP2303. The firearms were examined and were found to have been discharged recently. Both firearms were test

fired with two rounds of ammunition from laboratory stock and microscopic comparisons in relation to these bullets were done. They were compared with the bullets which he had previously received from the police officers. An examination was carried out on the exhibits and Superintendent Hibbert found that the three bullets which were handed over to him were fired from Smith and Wesson revolvers. He also found that two of the bullets came from one of the revolvers that were found in the room where the applicants were held and the third came from another revolver. The examination also revealed that at least two of the revolvers were fired at Mysack's Bar.

[8] The postmortem examination report of Dr Clifford was tendered and read into evidence by Dr Prasad, a registered Medical Practitioner and Consultant Forensic Pathologist attached to the Ministry of National Security. Dr Clifford had died before the trial commenced. The report indicated that eight gunshot wounds were found on the body of Sgt. Shirley. The cause of death was due to gunshot injuries. A bullet was removed from the palm of the deceased and handed to Special Inspector Beville Rodgers. He in turn handed over this bullet to Cpl. Carter and it was admitted in evidence as exhibit 10.

[9] Marie Hunt was off the island at the time of trial so her written statement to the police was tendered and admitted into evidence. In that statement she stated inter alia, what she had witnessed on that fatal day and that she had attended an identification parade and pointed out the applicant Morris as one of the persons who had entered the bar and fired shots at Sgt. Shirley. On 10 May 2000, both applicants were arrested and

charged with the murder of Det. Sgt. Shirley.

The Defence

[10] The applicant Morris gave evidence on oath. He said he was 20 years old and lived at Spanish Town. His defence was an alibi. He testified that on the 2nd of May, the police did not find any guns in any room in which he was present. He also said that it was not true that he had dictated a statement to Inspector Grant at the Falmouth Police Station and that it was not true, that he was at the bar firing shots on 14 April 2000.

[11] Dean Reid also chose to give evidence on oath. He said he lived at March Pen Road and that on 14 April 2000 he was not in company with others robbing any bar. He also said that he did not participate in the shooting of anyone that night.

The Conviction and Sentence

[12] On 30 January 2008, both applicants were convicted as charged in the indictment and sentencing was adjourned to 22 February 2008. At the resumed sitting of the court, antecedent reports were given by the police in respect of both applicants and pleas in mitigation of sentence were made on their behalf. There is no record of the Crown participating in the sentencing exercise. The learned trial judge then proceeded to sentence the applicants and he stated inter alia:

> "Wayne Morris and Dean Reid stand. You both properly heard the attorneys address to me (sic) in relation to mitigating circumstances. I have no doubt you also heard that there is a particular sentence which can be imposed for offences of this nature.

> In Jamaica over the years there have been lobbying about capital punishment and as a consequence the law was changed to make, to remove mandatory death sentences to murder. In most instances of murder also, the question of the death sentence does not exist. Therefore, however, there are certain circumstances in which murder is committed which may attract the death sentence, and the killing of a police officer, or any other member of the security forces, because of the occupation, one of such circumstance. In this case you were each convicted for the murder of Detective Sergeant Shirley, he being a member of the security force. That in itself gives rise to the possibility of the death sentence being passed.
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> Mr. Reid, I think was under eighteen at the time of commission, so that would not apply to him. There is another amendment to the legislation in that, but it would apply to Mr. Morris."

[13] Thereafter, the learned judge examined the circumstances of the killing and considered what would be an appropriate sentence. He said:

> "Now I have to do a balancing act, I have to take into consideration your ages, your lack of previous convictions before this event.
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> Those would be weighed in one side of the scale. On the other side, I would have to place what transpired on this night of the 14th of April, 2000. You have already spent some time in prison for this, or most of it if not all of it. It is not in awaiting your trial, because you were serving a sentence. I take that into consideration. I also take into consideration that what is now happening in our society involving the use of firearms. Now, I have listened carefully to submissions made on your behalf and I will say that in light of all the circumstances of the case, bearing in mind your age, your lack of previous convictions before this event, not before this convictions,(sic) I will not seek to impose a sentence of death. I am, however, imposing a sentence of live (sic) imprisonment. In doing so I am entitled by law to stipulate a particular period that you must serve before you

> are eligible for parole, and taking everything into consideration, which in my view, that you should not be eligible for parole, each of you, before you have served a period of thirty-five years. So the sentence is that each of you be imprisoned and kept at hard labour for life, and that each of you should not be eligible for parole before you have served thirty-five years. That is the sentence of this Court you may take them down."

The Original Grounds of Appeal

[14] The sole ground of appeal filed in respect of each applicant is that the trial was unfair. However, at the hearing before us, both Mr Donald Bryan for the applicant Morris and Mr Ravil Golding for the applicant Reid, announced with commendable candour, that after the most careful consideration on their part, they could find nothing of merit to argue in support of the applications for leave to appeal against conviction. Mr Bryan stated as follows:

> "I have had the opportunity of going through the transcript and having gone in detail through the directions of the learned trial judge I am unable to find any area where any fault might arise with the directions. The learned trial judge was very careful in dealing with all the relevant issues of law which arose at the trial. He dealt carefully with identification evidence, common design and also with the statement of the main witness who did not give viva voce evidence. Those directions cannot be faulted. He had also given careful directions to the caution statement given by Morris. Regarding the alibi, sufficient directions were given in my view.
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> Given the nature of the evidence led by the Crown although the learned trial judge was not as fulsome in his directions on alibi in all the circumstances of the case it cannot be said that there was a miscarriage of justice especially given the evidence of the identifying witness concerning lighting, duration of incident, the fact that he was pointed out at an

> identification parade coupled with the admission in the caution statement. It cannot be said that the failure to give the full alibi directions enured to a miscarriage of justice where Morris is concerned.
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> There was failure on the part of the learned trial judge to give directions to the jury on the effect of the sworn evidence of Morris. The question is whether or not this non-direction amounts to a misdirection and if so whether it is fatal. Again on a totality of the evidence, it would not be fatal in all the circumstances. There would be no injustice done despite the failings outlined."

[15] Mr Golding fully adopted the views expressed by Mr Bryan and added that although there were deficiencies in the summation, at the end of the day, the evidence presented by the Crown was overwhelming.

[16] Having ourselves examined the record we are at one with both Mr Bryan and Mr Golding. We must say that the evidence which was adduced by the Crown was extremely strong. In the circumstances, we conclude that the convictions were unassailable.

The Supplementary Grounds of Appeal

[17] Leave was sought and granted however, for the applicants to argue supplementary grounds of appeal in respect of sentence. It was contended on behalf of the applicant Reid:

> "1. That the sentence of life imprisonment imposed on the applicant with the recommendation that he be not eligible for parole before spending 35 years was imposed without a fully and fairly informed sentencing process ...

2. That the sentence of 35 years before the applicant becomes eligible for parole, is manifestly excessive."

With respect to Morris it was contended that:

1. The sentencing process was devoid of the requirement of a sentencing hearing, thereby denying the Applicant an altogether fair sentence.

2. The sentence was manifestly excessive.

The Law

[18] The Offences Against the Person Act provides as follows:

2.-(1) Subject to subsection (3), every person to whom section 3(1A) applies or who is convicted of murder committed in any of the following circumstances shall be sentenced in accordance with section 3(1) (a), that is to say-

(a) the murder of -

(i) a member of the security forces acting in the execution of his duties or of a person assisting a member so acting;

"3.-(1) Every person who is convicted of murder falling within-

(a) section 2(1) (a) to (j) or to whom subsection (1A) applies, shall be sentenced to death or to imprisonment for life;

And section 3(1C) states:

(1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to

that person's eligibility for parole, as if those provisions had been substituted for section 6(1) to (4) of the Parole Act-

(a) 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;

[19] The burden of proof at a sentencing hearing where there is a possibility that the death sentence could be imposed, rests squarely on the shoulders of the prosecution. - see **Mitcham v DPP** Eastern Caribbean Court of Appeal from St Christopher and Nevis, delivered 3 November 2003 by Sir Dennis Byron CJ This case was referred to in the Privy Council decision of **Pipersburgh and Another v R** [2008] UKPC 11, delivered 21 February 2008; (2008) 72 WIR 108.

The Submissions

Re Wayne Morris

[20] Mr Bryan argued that the charge preferred in the indictment against the applicant Morris had exposed him on a conviction for the murder of a member of the security forces in the execution of his duties, to the death penalty or to imprisonment for life pursuant to section 3(1) (a) of the Offences Against the Person Act. He therefore submitted that once the sentence of death arose it required the trial court to conduct a sentencing hearing in order to determine whether there are mitigating factors which should result in passing a lesser sentence other than death upon a person who is

convicted for murder. He argued that such a requirement was not optional but mandatory and failure to observe it places a duty on the Court of Appeal to address such shortcoming.

[21] Mr Bryan submitted that the Privy Council decision in **Pipersburgh and Another v R** which is binding on this court provides useful guidelines on the approach to be taken where the death sentence is at the discretion of the trial judge. He referred to paragraphs 32-34 of that judgment where Lord Rodger of Earlsferry in delivering the judgment of the court stated:

> "[32] Since Conteh CJ issued his guidance in **R v Reyes** [2003] 2 LRC 688, other Caribbean judges have considered how the vital sentence hearing in a capital case should be approached. In particular, in an appeal to the Eastern Caribbean Court of Appeal from Saint Christopher and Nevis, **Mitcham v DPP** (3 November 2003, unreported), Sir Dennis Byron CJ said:
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> > 'When fixing the date of a sentencing hearing, the trial judge should direct that social welfare and psychiatric reports be prepared in relation to the prisoner. The burden of proof at the sentencing hearing lies on the prosecution and the standard of proof shall be proof beyond reasonable doubt.'
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> That guidance was affirmed and applied by Alleyne JA in a subsequent appeal to the same court from Saint Vincent and the Grenadines, **Charles v R** (6 December 2004, unreported). The Board considers that both aspects of Sir Dennis Byron's guidance should be applied by courts in Belize and should indeed be incorporated into any future guidance given by the Court of Appeal.

be achieved by any other means. The sentencing judge is fixed with a very onerous duty to pay due regard to all of these factors.

[19] In summary, the sentencing judge is required to consider, fully, two fundamental factors. On the one hand, the judge must consider the facts and circumstances that surround the commission of the offence. On the other hand, the judge must consider the character and record of the convicted person. The judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case.'

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

[22] Mr Bryan submitted therefore, that in the instant case, a sentencing hearing should have been held in view of the guidance given by the Privy Council in **Pipersburgh**. In such a situation, a social enquiry report, a psychiatric report and other reports should have been provided for the guidance of the Court in relation to the prisoners. He argued that an Antecedent Report is helpful in the sentencing process but it was his view that it was not sufficient in a case where the death sentence is an option since it did not speak to such things as the prisoner's prospect for reform or the factors that might have influenced the prisoner to commit the murder. He submitted that it was for these reasons, among others, that a proper sentencing hearing should have been held.

[33] The approach to be adopted by a judge when considering whether to impose a death sentence was further discussed in the Eastern Caribbean Court of Appeal by Rawlins JA Ag in **Moise v R** (15 July 2005, unreported). He referred to a number of previous decisions where the proper approach had been discussed and continued (at [17]-[19]):

> '[17] The cases mentioned in the foregoing paragraph establish that the first principle by which a sentencing judge is to be guided in these cases is that there is a presumption in favour of an unqualified right to life. The second consideration is that the death penalty should be imposed only in the most exceptional and extreme cases of murder. At the hearing, the convicted person must raise mitigating factors by adducing evidence, unless the mitigating facts are obvious from the evidence given at the trial. The burden to rebut the presumption then shifts to the Crown. The Crown must negative the presence of mitigating circumstances beyond a reasonable doubt. The duty of the sentencing judge is to weigh the mitigating and aggravating circumstances that might be present, in order to determine whether to impose a sentence of death or some lesser sentence.
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> [18] It is a mandatory requirement in murder cases for a judge to take into account the personal and individual circumstances of the convicted person. The judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person. The death sentence should only be imposed in those exceptional cases where there is no reasonable prospect of reform and the object of punishment would not

[23] In relation to the ground that the sentence was manifestly excessive, Mr Bryan submitted that although the learned trial judge in the exercise of his discretion did not impose the sentence of death on the applicant, the period of 35 years stipulated before becoming eligible for parole was manifestly excessive. He submitted that the mitigating factors were as such that they outweighed the aggravating factor to the extent that a term of 35 years imprisonment at a minimum is manifestly excessive. These mitigating factors he said are:

> "1. The age of the Applicant/Appellant;
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> 2. No criminal record prior to the acts giving rise to this offence;
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> 3. He had already spent eight (8) years in jail before being sentenced in this matter.
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> 4. He was an industrious young man, who worked to earn a living before the incident;
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> 5. Between arrest and release he would have spent a total of forty-three (43) years of his life behind bars (returning to society as a senior citizen but left it as one, who had barely emerged from his teens)."

[24] In the circumstances, Mr Bryan submitted that the case ought to be remitted to the Home Circuit Court for re-sentencing based on guidelines mandated by the Privy Council.

Dean Reid

[25] Mr Golding submitted that the sentencing process was deficient in that no

evidence was adduced as to the applicant's psychiatric status. The absence of these reports he said, denied the applicant the opportunity or the prospect of a favourable assessment for his rehabilitation and/or reform being made in his favour or indeed whether during the period of incarceration he should receive psychiatric treatment.

The Discussion

[26] The question which concerned us when the appeal hearing commenced on 26 July 2010 was whether the court below had properly followed the guidance given by the Privy Council in **Pipersburgh and Another v R** on sentencing hearings where there is a possibility that the death sentence could be imposed by the court. We therefore granted an adjournment to 27 July 2010, for both Mr Bryan and Mr Golding to consider whether they needed to file supplementary grounds of appeal. On 27 July, leave was sought and was granted for supplementary grounds of appeal to be argued.

[27] There is no record in the transcript of the trial that the prosecution had indicated to the court that they would not be pursuing the death penalty so when the verdict was delivered one gets the impression from the record that the death sentence was one of the options left open for the learned judge to consider. Indeed, sentence was adjourned to take place three weeks after the conviction but no order was made for the filing of reports on both applicants. All the learned judge had before him were the antecedent history of both applicants.

[28] We have observed that the **Pipersburgh** decision was handed down on 21 February 2008, a matter of a day before this matter was dealt with by the learned

judge. We therefore realize that he would not have had the guidance set out in that case but the earlier decisions of **Reyes**, **Mitcham** and other Eastern Caribbean cases should have at least been brought to the attention of the court. We do acknowledge that decisions from the Eastern Caribbean courts are not binding on the courts in Jamaica but they are nevertheless persuasive and do provide useful guidance especially in areas of the law similar to both jurisdictions. In **Pipersburgh** Lord Rodger of Earlsferry had stated:

> "... Naturally, it is for the Court of Appeal of Belize to provide the necessary further guidance for judges in Belize, as and when the issue comes before the court..."

We adopt these words and hope that in the future, judges bear in mind paragraphs 32 - 34 of the judgment in **Pipersburgh** (supra).

[29] In the circumstances, we are of the view that a social enquiry, psychiatric, psychology and other reports should have been made available to the trial judge for use in the sentencing exercise. We do agree with Mr Bryan when he submitted that an antecedent report is helpful but was insufficient in a case where the death sentence is an option since it did not speak to such things as the prisoner's prospect for reform or the factors that might have influenced the prisoner to commit the murder.

[30] The need for these reports was brought home quite forcefully when Mr Lloyd McFarlane who appeared on behalf of the applicant Reid below, did point out to the learned judge that Reid had undergone psychiatric evaluations prior to the trial of this

matter and was diagnosed as being psychotic. We do believe that even at this stage of the proceedings, the learned judge ought to have adjourned the matter so that steps could be taken for a psychiatric report to be filed since Mr McFarlane was most incapable of providing any form of expert evidence.

[31] We are also at a disadvantage in that no reports have been supplied to this court. We did make an enquiry of Crown counsel if there were any reports in the Director of Public Prosecutions' possession and we were told that checks would be made to ascertain this. To date, we have not had a response.

Conclusion

[32] We have given serious considerations to the submissions made on behalf of the applicants and must say that there is merit in the submissions in relation to the sentencing hearing carried out by the learned judge. In the circumstances, the applications seeking leave to appeal against conviction are refused. The applications seeking leave to appeal against sentence are treated as the hearing of the appeals. The sentences are hereby set aside and the matter is remitted to the Supreme Court for a proper sentencing hearing to be carried out as early as possible.