NML8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 24/2003

BEFORE: THE HON. MR. JUSTICE FORTE, P:
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**McCORDIE MORRISON**	**APPELLANT**
AND	**THE CHAIRMAN OF THE PAROLE BOARD**	**1ST RESPONDENT**
AND	**THE MINISTER OF NATIONAL SECURITY**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD RESPONDENT**

Lord Anthony Gifford, Q.C. and Miss Nancy Anderson for the Appellant

Curtis Cochrane and Michael Deans for the Respondents

March 1 and 2, 2004

FORTE, P:

The appellant brought a Notice of Motion in the Supreme Court in which he requested the following orders:

1. A Declaration that he is eligible for Parole; and

2. An Order of Mandamus directing the Parole Board to hear and determine the Appellant's application for parole.

3. Order for prohibition directing the Parole Board not to refer such application to the President and Judges of the Court of Appeal for any order under section 5A of the Parole Act, until further order of this Court.

4. Such further and other relief as may be deemed just.

The matter came before Wesley James, J on the 26th February 2003, when the motion was dismissed; from this decision, an Appeal has come to this Court.

The appellant filed and argued the following grounds:

"(a) That the Learned Trial Judge erred in finding that the Parole Board had no duty to hear and determine the Appellant's application for parole as he had served seven years since the commutation of his sentence of death to one of life imprisonment.

(b) That the Learned Trial Judge erred in refusing to issue an order of mandamus to the Parole Board to hear and determine the Appellant's application as once the Appellant became eligible for parole this status became a vested right and his status of eligibility can not be taken away.

(c) That the Learned Trial Judge erred in his construction of section 5A of the Parole Act as this section can only apply in cases of inmates who are not yet eligible for parole as the section provides for deferral of the eligibility date if the court thinks fit and one can not defer an event which has already taken place.

(d) That the Learned Trial Judge erred in finding that section 5A of the Act applied to the

> Appellant as any contradiction in the provisions of the Act, between sections 6(4) and 5A should be resolved in favour of liberty of the subject."

The Appellant asked for the following Orders:

(i) A declaration that the Applicant is eligible for parole.

(ii) An order of mandamus directing the Parole Board to hear and determine the Applicant's application for parole.

(iii) Such further and other relief as this Honourable Court may deem just.

During the course of the arguments, it became clear that the issue was limited to an interpretation of section 5A of the Parole Act (the "Act") and how it is affected by section 6(4)(b).

Section 5A is so central to the issue, that it needs to be set out:

> "5A. Where, pursuant to section 90 of the Constitution, a sentence of death has been commuted to life imprisonment, the case of the person in respect of whom the sentence was so commuted shall be examined by a Judge of the Court of Appeal who shall determine whether the person should serve a period of more than seven years before becoming eligible for parole and if so, shall specify the period so determined."

This section is relevant because the appellant was originally sentenced to death for the offence of capital murder. His sentence was commuted on 5th June 1995 by His Excellency the Governor General on the advice of the Privy Council, to one of life imprisonment. The appellant has served over seven (7) years. The process in section 5A has not been carried out as no Judge of Appeal has examined his case.

What is the remedy? It depends on the interpretation of section 5A of the Act and in particular, on whom the responsibility lies to place the matter before a Judge of Appeal for examination.

When a sentence of death is commuted to life imprisonment, the burden is on the Secretariat of the Privy Council to inform the Registrar of the Court of Appeal. His Excellency's Secretary was obviously of that view, but the evidence before us reveals that it was not until 19th February 2002, nearly seven (7) years after the appellant's commutation, was the Registrar of the Court of Appeal informed that the sentence against the appellant was commuted. It was the responsibility of the State to bring the case before a Judge of Appeal for examination. A reading of section 5A clearly indicates that the responsibility is on the State. Nothing in the section implicitly or explicitly indicates that there is any burden on the appellant to take any step.

We conclude that section 5A puts the responsibility on the State.

The background and history of section 5A show, that that must have been the intention. Section 5A was added as a result of the amendments to the Offences against the Person Act in 1992, in which categories of murders were defined as capital and non-capital. In non-capital murder cases, judges were given the power to set periods of time before which prisoners would not be eligible for parole.

Following that scheme, section 5A provided that where His Excellency, the Governor-General acting on the advice of the Privy Council commutes a prisoner's penalty of death to one of life imprisonment, section 5A comes into

effect, to determine, as a judge would in a trial for non-capital murder, a period before eligibility for parole.

The Act provides that if no term was specified, a person is eligible for parole after seven (7) years. The appellant is in his ninth (9^{th}) year of imprisonment.

Lord Gifford has asked the Court to place a simple interpretation on the relevant section of the Act.

Section 6(4)(b) states:

> "... an inmate -
>
> in respect of whom –
>
> (i) a sentence of death has been commuted to life imprisonment; and
> (ii) no period has been specified pursuant to section 5A,
>
> shall be eligible for parole after having served a period of not less than seven years."

Lord Gifford in his submission pointed out that the appellant's death penalty was commuted to life imprisonment, satisfying sub-section (i) of section 6(4)(b). Secondly, no period was specified under section 5A (see 6(4)(b)(ii)) and thirdly, the appellant has served 7 years. He contends that the appellant has satisfied each and every one of the conditions, stipulated in section 6(4)(b) and is therefore entitled to have his application heard. That would be an easy way to decide the case, and we are tempted. But there is another question.

Section 5A puts the responsibility upon the State to have a Judge of Appeal examine the appellant's case. The State has failed to bring the matter

before the single Judge of Appeal. When the State fails to perform its statutory duty the appellant should not be made to suffer.

In the circumstances, the State having failed in its duty, the remedy is to give the appellant the right to have his matter heard by the Parole Board.

The appeal is allowed and consequently we make the following orders:

1. A Declaration that the appellant is eligible to make an application for parole.

2. Mandamus to issue directing the Parole Board to hear and determine the appellant's application for parole.

3. Costs to the appellant to be taxed, if not agreed.