JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 57 of 1989

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

REGINA VS. MOSES HEATH

Dennis Daly, Q.C. and D. Gittens for the applicant

Mrs. Lorna Errar-Gayle for the Crown

May 26 and June 15, 1992

WRIGHT, J.A.:

This is an application for leave to appeal against conviction and sentence of death in the Clarendon Circuit Court on the 5th day of April, 1989, before Harrison, J. and a jury for the murder of Merdina Thomas on the 17th day of October, 1988.

Before being arraigned on the charge, the issue of the applicant's fitness to plead was determined by a jury empanelled for the purpose. This issue was resolved against the applicant on the evidence of Dr. Franklyn Ottey, a consultant psychiatrist, and a police officer who had spoken with the applicant up to the day of the trial. The trial of this issue became necessary because on previous arraignments the applicant remained mute. Dr. Ottey had just one interview with the applicant lasting for a half-hour during which the doctor said that the applicant answered every question put to him but he did so guardedly and relevantly but only after he had repeated each question. It is clear, therefore, that not very many questions could have been asked in that time span. The jury decided that he was mute of malice and thereafter a jury was empanelled to try the applicant

on the capital charge. Throughout the entire proceedings the applicant remained mute and Mr. L. Diggs-White, who appeared for the applicant, maintained he could get no instructions from him.

The evidence spoke of a bizarre killing but having regard to the decision to which we have come it will not be necessary to give any details.

Two of the three grounds of appeal filed and argued relate to the trial judge's treatment of the issue of insanity which was raised only upon counsel's suggestion and the third ground dealt with the question of provocation based on an extra-judicial statement attributed to the applicant but not adopted by him. These grounds of appeal, unrelated as they are to any evidence, are altogether unmeritorious. It is trite learning that the onus of raising and proving the insanity of an accused person rests upon the defence which must discharge that burden on a balance of probabilities. The burden cannot be discharged, as was sought to be done in this case, by canvassing the opinion of witnesses as to whether the killing must have been the work of a madman. The Court appreciates the predicament of counsel who was left entirely on his own without any instructions from his client. But that does not alter, in any way, the rule that the burden of proof rests upon the defence.

With the Court's urging, Mr. Daly formulated the following ground for consideration, viz:

> "The fact that the applicant was examined as to his fitness to plead raised the inference that his defence may well have been Diminished Responsibility and inasmuch as that defence was not raised the result may have been a miscarriage of justice."

Counsel for the Crown, appreciating the validity of this contention, raised no objection.

Members of the bench who each spent many years as members of the Office of the Director of Public Prosecutions recall that there was a system whereby, at the instance of the Department,

poor prisoners were routinely examined as to their fitness to plead and also to ascertain whether a prisoner's mental responsibility for his acts was substantially impaired which could enable the defence of Diminished Responsibility to be raised. The medical report would then be supplied to Defence Counsel. We learned from counsel for the Crown that sometime ago there was an endeavour to secure such a report but there was a lack of evidence so the examination was not carried out.

Having regard to the evidence of the killing, the subsequent conduct of the applicant as well as his performance when examined by Dr. Ottey, we have strong reservations as to whether he had a fair trial so there may well have been a miscarriage of justice.

In the circumstances, we have treated the hearing of the application for leave to appeal as the hearing of the appeal. The appeal is allowed and it is ordered that there be a new trial. Appropriate steps should be taken to deal with the areas of concern, that is, adequate examination to determine the issue of fitness to plead as well as his mental responsibility for the killing before the case is re-listed for trial. It would seem desirable that the same counsel be not saddled with the responsibility of having to conduct the defence a second time.