Privy Council Appeals Nos. 35, 37 and 38 of 1995

(1) Devon Simpson
(2) Leroy Morgan and Samuel Williams and
(3) Walford Wallace *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 7th March 1996

Present at the hearing:-

Lord Goff of Chieveley
Lord Griffiths
Lord Jauncey of Tullichettle
Lord Mustill
Lord Nicholls of Birkenhead

*[Delivered by **Lord Goff of Chieveley**]*

There are before their Lordships three appeals from the Court of Appeal of Jamaica. Each of them raises a question or questions of construction of the Offences against the Person (Amendment) Act 1992 ("the Amendment Act"), which came into force on 13th October 1992. In section 3 of the Offences against the Person Act ("the Principal Act") it was provided that every person convicted of murder should be sentenced to death. The main purpose of the Amendment Act was to introduce into the Principal Act a series of amendments which had the effect that a person charged with murder would be charged either with capital murder or with non-capital murder; and that whereas, if convicted, the former would be sentenced to death as before, the latter would be sentenced to imprisonment for life.

Section 2(1) of the Principal Act as amended now specifies the categories of capital murder, and it is provided in section 2(3) that murder not falling within section 2(1) is non-capital murder. In

particular, among the categories of capital murder is murder in the course or furtherance of an act of terrorism, which is provided for in section 2(1)(f). This provides:-

> "any murder committed by a person in the course or furtherance of an act of terrorism, that is to say, an act involving the use of violence by that person which, by reason of its nature and extent, is calculated to create a state of fear in the public or any section of the public."

In addition, however, section 2(2) provides:-

> "If, in the case of any murder referred to in subsection (1) (not being a murder referred to in paragraph (c) 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 use 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."

This is known colloquially, if inaccurately, as the "triggerman test". Furthermore section 3 of the Principal Act as amended now contains a new subsection (1A), concerned with persons who are convicted or more than one murder, which provides:-

> "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."

The new section 3B(5) there referred to provides:-

> "A person referred to in subsection (1A) of section 3 shall not by virtue of that subsection be sentenced to death by reason of a previous conviction for murder unless -
>
> (a) at least seven days before the trial notice is given to him that it is intended to prove the previous conviction; and
>
> (b) before he is sentenced, his previous conviction for murder is admitted by him or is found to be proven by the trial Judge."

By section 7 of the Amendment Act the provisions of the Principal Act as amended are made applicable to those who, at the date of commencement of the Amendment Act, are under sentence of death for murder. Section 7 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 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."

Devon Simpson was convicted on 6th November 1992, after the Amendment Act came into force, of two murders; and his appeal is concerned with a question of construction of sections 3(1A) and 3B(5). Leroy Morgan and Samuel Williams were convicted of murder on 12th April 1991, and Walford Wallace was convicted of murder on 23rd July 1991, in both cases therefore before the Amendment Act came into force. Subsequently the Court of Appeal purported to classify these murders as capital murders, in the cases of Morgan, Williams and Wallace as being murders done in the course of or in furtherance of an act of terrorism within section 2(1)(f), and in the case of Williams as also being caught by the "triggerman test" in section 2(2). In the case of Wallace, where there was evidence before the court that he had been convicted on 21st February 1989 of two other murders, the Court of Appeal also purported, with reference to section 3(1A), to confirm the sentence of death imposed in respect of the murder of Carol Walker of which he had been convicted on 23rd July 1991. It was anticipated, both by the appellants and by the Crown, that these two appeals would provide their Lordships with an opportunity to give authoritative guidance on the scope of the two forms of capital murder arising under section 2(1)(f) and section 2(2). However in both appeals it was questioned whether, having regard to section 7 of the Amendment Act, the Court of Appeal had jurisdiction to act as it did. In the event of their Lordships holding that the Court of Appeal acted without jurisdiction, there could be no question of their Lordships embarking upon consideration of the scope of section 2(1)(f) or section 2(2).

At the hearing of the appeals, their Lordships heard the appeals of Morgan and Williams and Wallace together, since to a substantial extent they raised the same questions. The appeal of Simpson was heard separately, since it raised a discrete question. In this judgment, their Lordships will first give separate consideration to the appeal of Simpson, and they will then consider the other two appeals together.

Devon Simpson.

On 6th November 1992 the appellant, Devon Simpson, was convicted of two counts of capital murder, viz. that on 8th August 1991 he murdered two members of the same family, Cecil Cockett and Donovan Cockett. The Crown's case was that he threatened to kill the whole Cockett family, and that on the day in question he went to their shop where he shot and killed the two deceased with a pistol and fired his pistol at another member of the same family. At the trial three of the surviving members of the family identified him as the gunman, and he was duly convicted.

When the appellant was arraigned, he was charged with non-capital murder. However, on the fifth day of the trial, after the greater part of the evidence for the prosecution had been called, counsel for the prosecution applied successfully for the indictment to be amended to charge the appellant with capital murder under section 2(1)(f) of the Principal Act as amended (concerned with murder committed in the course or furtherance of terrorism). In the result, the appellant was convicted of capital murder.

The appellant applied for leave to appeal to the Court of Appeal on three grounds, of which the third was that the application to amend the indictment should not have been allowed. The Court of Appeal, while rejecting the other two grounds of appeal, accepted the third on the basis that the late amendment was prejudicial to the defence and manifestly unfair. In the result the Court of Appeal, having given leave to appeal, allowed the appeal and substituted convictions for non-capital murder on both counts. No challenge is now made to this part of the Court of Appeal's decision.

The Court of Appeal then proceeded to consider, under section 3B(3) of the Principal Act (as amended), the question of multiple murders under section 3(1A) of the amended Act. They considered that this provision contemplated two different situations - first, where a person who has a previous conviction of non-capital murder is again convicted of capital murder, and second, where a person has been convicted of another murder committed on the same occasion. Counsel for the appellant submitted that the jurisdiction under section 3(1A) was subject to the condition under section 3B(5) that, at least seven days before the trial, notice should have been given of intention to prove the previous conviction; and that, since that had not been done in the present case, sentence of death could not be imposed. The Court of Appeal rejected the submission. They said:-

> "Parliament having enacted sub-section (1A)(b), i.e. 'been convicted of another murder done on the same occasion', must be deemed to be aware that if more than one murder is committed on the same occasion, those murders will provide material for different counts in the same indictment. The result would be one trial. To allow separate trials in order to give notice as required by the subsection, can only be regarded as oppressive. On the true construction of the subsection, the condition as to notice does not apply to the second situation which we identified as sub-section (1A)(b)."

Before their Lordships Mr. Leveson Q.C. submitted for the appellant that the Court of Appeal erred in reaching this conclusion. His primary submission was that, on the true construction of the Act, no person is in peril of sentence of death for a non-capital murder unless, prior to the commencement of the trial, he is given notice in accordance with section 3B(5) of an antecedent conviction for murder. This submission was similar to that unsuccessfully advanced on behalf of the appellant before the Court of Appeal. In the alternative he submitted that the statute at least requires that the defendant should be given notice of his liability to be sentenced to death if convicted of more than one offence of non-capital murder.

Their Lordships are unable to accept these submissions. They approach the matter as follows. Turning to section 3B(5), they are satisfied that the function of the notice referred to in the subsection is that the defendant should have the opportunity to contest the validity of the previous conviction referred to in the notice. This strongly indicates that the section is concerned with those cases in which at the trial reliance will be placed by the prosecution upon a conviction of the defendant for murder at a previous trial; in other words, the expression "a previous conviction for murder" should be construed as referring to a conviction for murder at a previous trial. This reading is supported by internal evidence from the section, viz. the reference in subsection (a) to a notice being given seven days before the trial of intention to prove the previous conviction, which can only refer to a conviction at a previous trial; and the requirement in subsection (b) that the previous conviction should have been admitted by the defendant or found to be proved by the trial judge, which again is consistent only with the previous conviction having taken place at a previous trial.

This construction moreover enables section 3B(5) to lie well within section 3(1A). If the requirement of notice is understood to apply only in respect of a conviction of murder at a previous trial, it will in those circumstances be capable of applying, where appropriate, to either section 3(1A)(a) or (b). Of course, in most

cases where the other murder was committed on a different occasion, the conviction will have taken place at a previous trial, and in such circumstances a notice will be required under section 3B(5); and in most, indeed almost all, cases where the other murder was committed on the same occasion, the conviction will have taken place at the same trial, immediately before the second conviction, in which event no such notice will have been necessary. This is no doubt what the Court of Appeal had in mind. But it is conceivable that two murders committed by a person on different occasions may be the subject of a single trial, and that two murders committed by a person on the same occasion may be the subject of different trials, in which event notice will have been required in the second case but not in the first.

Their Lordships wish to add that, in a case where two non-capital murders are the subject of a single trial, no formal notice is required by the Act, even though the defendant is by virtue of section 3(1A) liable to be sentenced to death if convicted of both. The risk will be obvious, and no doubt will be drawn to the attention of the defendant by his counsel. Even so, since each count will be in respect of a charge of non-capital murder, it is desirable that the trial judge should take steps to ascertain that the defendant has been duly warned that a possible outcome of the trial will be a sentence of death.

Before leaving this appeal, their Lordships wish to advert briefly to section 3B(3) of the Principal Act as amended which provides as follows:-

> "Where on an appeal against conviction of capital murder the Court substitutes a verdict of guilty of non-capital murder for the verdict of guilty of capital murder, the Court shall nevertheless determine whether the sentence of death is warranted by subsection (1A) of section 3 and shall confirm that sentence if it is found to be so warranted."

It was on the basis of this subsection that in the present case the Court of Appeal, having substituted a verdict of non-capital murder for the jury's verdict of capital murder (on the basis of section 2(1)(f)), nevertheless proceeded to confirm the sentence of death on the appellant pursuant to section 3(1A). Their Lordships wish to observe that this subsection confers jurisdiction on the Court of Appeal only in the very limited circumstances there specified, no doubt because it will not have fallen to the trial judge, having sentenced the defendant to death for capital murder, to exercise the jurisdiction to impose a sentence of death pursuant to section 3(1A). Their Lordships wish to stress the limited nature of the Court of Appeal's jurisdiction under section 3B(3). This is a point to which they

will return later when they come to consider the scope of the Court of Appeal's jurisdiction in the case of Wallace.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

Leroy Morgan and Samuel Williams and Walford Wallace.

In the first of these appeals the two appellants, Leroy Morgan and Samuel Williams, were convicted on 12th April 1991 of the murder of George Chambers and were sentenced to death. At the trial, the case for the prosecution was briefly as follows. The two appellants approached the stall of Patricia Grey near a residential compound in the area of St. Catherine's, and told her that "Bruce Golding had said that no PNP musn't stay down here so" or that "Bruce Golding said him want no PNP in a de area". A fight then broke out, and stones were thrown. After a short time Patricia Grey's brother, George Chambers, came on the scene and told the two men to break it up. Morgan then drew a short gun. Chambers ran away, and Morgan and Williams ran after him. A short time later (to be measured in seconds) Patricia Grey heard a shot, and found her brother mortally wounded. In the course of the trial, Lurline Wilson (Patricia Grey's mother, who was called as a witness by Morgan) gave evidence that the two appellants said that "Mr. Bruce Golding tell them to burn down the boys' house and run them away because them is PNP". The two appellants made unsworn statements from the dock, denying that they had run anybody down, or shot anybody. They were both convicted by the jury, and sentenced to death.

In the second of these appeals, Walford Wallace was convicted on 23rd July 1991 of the murder of Carol Walker. The case against the appellant depended upon a statement made by him to the police, in which he was said to have admitted that he was one of a group of men who went to a place called Dallas. One of the men, called Hosang, explained that they were going to get rid of Carol Walker. Two of the men, one of whom was the appellant, were left at a bridge, and the remainder went to Carol Walker's house and brought him out with his hands tied behind his back. The group of men, including the appellant, then walked up to a hill with Carol Walker, where Hosang struck him several times on the head with a machete and killed him. The victim's body was later found in circumstances which accorded with the appellant's statement, as did the evidence of a post mortem examination. There was evidence which suggested that the killing had a political motive. The appellant was convicted of murder, and sentenced to death.

The appellants in both appeals were, of course, convicted and sentenced well before the date when the Amendment Act came into

force; and their cases fell to be considered under section 7 of the Amendment Act, which their Lordships have quoted in full earlier in this judgment.

What happened was as follows. Morgan and Williams applied to the Court of Appeal in the ordinary way for leave to appeal from their convictions. The matter came before the Court of Appeal on 27th October 1992, and judgment was given on 16th November 1992, when leave to appeal was refused. Likewise Wallace also applied to the Court of Appeal for leave to appeal, his appeal being heard in early December 1992. Judgment was given on 18th January 1993, when the Court of Appeal treated the application for leave as the hearing of the appeal and dismissed the appeal. At the conclusion of each appeal, the Court of Appeal immediately proceeded to determine whether the conviction was for capital or non-capital murder, purporting so to do pursuant to section 7 of the Amendment Act. In the case of Morgan, the Court determined that his conviction fell within section 2(1)(f) of the Principal Act (as amended), on the basis that he had committed a murder in the course or furtherance of an act of terrorism. This was because of his declared intention to drive certain residents out of the area because of their political affiliation, such a declared intention being one which "would certainly create a great state of fear in that community". In the case of Williams, the Court appears to have concluded that his conviction fell within section 2(2) of the Principal Act (as amended), on the basis that he had been the first to resort to violence, and that this violence continued when he joined in the pursuit of Chambers under cover of the gun in Morgan's hand; and also that the case fell within section 2(1)(f). Finally, in the case of Wallace, the Court determined that his conviction fell within section 2(1)(f), on the basis that the murder was committed in the course or furtherance of terrorism, the entire manner and scope of the planned execution being calculated to create a state of fear in a section of the public, viz. the Walker family. Alternatively the Court held the case to fall within section 3(1A), there being evidence that the appellant had been convicted of two other murders at a trial on 21st February 1989.

Before their Lordships Mr. Fitzgerald Q.C., who appeared for all three appellants, submitted that the Court of Appeal had erred in law in classifying the cases of Morgan, Williams and Wallace as falling within section 2(1)(f), and in classifying the case of Williams as also falling within section 2(2). It was in relation to this aspect of the appeals that both parties were hoping to obtain guidance from their Lordships on the scope of these two subsections. But Mr. Fitzgerald also submitted that the Court of Appeal had exceeded its jurisdiction in proceeding

as it did to embark upon the classification exercise; and since his submission on the point of jurisdiction was logically anterior to his submissions on the scope of sections 2(1)(f) and 2(2), their Lordships first heard argument upon it. Having heard both parties, their Lordships came to the conclusion that Mr. Fitzgerald's submission on jurisdiction was well founded.

As their Lordships have already recorded, section 7 makes provision for the treatment of existing convictions for murder, for which purpose section 7(1) provides that:-

> "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."

It is clear that the reference to appeals in this subsection does not confer any new jurisdiction on the Court of Appeal, and is simply concerned to ensure that section 7 shall not prejudice parties' rights of appeal under the existing law.

The remainder of the section is devoted to establishing a power of review in respect of cases, such as the two cases now under consideration, in which persons had been convicted of murder before the Amendment Act came into force. The essential purpose of the review is to classify the murder in question as capital or non-capital. The power is, by subsection (2), vested in the first instance in a single judge of the Court of Appeal; but if the convicted man is notified by the judge that in his case the murder has been classified as capital murder, he has the right under subsection (4) to have the classification reviewed by three judges of the Court of Appeal nominated by the President of the Court.

Now it is plain that, in the two cases under consideration, the Court of Appeal was purporting to act in its capacity as the Court of Appeal of Jamaica in determining whether or not to classify the murders as capital or non-capital. This appears in particular from the orders made by the Court of Appeal in each case. Their Lordships are clearly of the opinion that the Court of Appeal, acting as such, had no jurisdiction to carry out any such classification exercise; and indeed Mr. Guthrie Q.C. for the Crown experienced great difficulty in arguing to the contrary. First of all, it is plain that the statutory power of review is vested not in the Court of Appeal as such, but in judges of the Court of Appeal, the three judges of the Court who perform the second stage of the review procedure being nominated for that specific purpose by the President of the Court. Second, it is also plain that there is no other provision, in the Amendment Act or elsewhere, from which the Court of Appeal as such derives jurisdiction to perform the

classification procedure in these cases. It follows that, in the present cases, the Court of Appeal purported to make orders which they had no jurisdiction to make. Moreover this led, in particular, to the consequence that each appellant was deprived of the benefit of the first stage of review by a single judge of the Court of Appeal, and so was deprived of the possibility that the single judge might have classified his case as one of non-capital murder.

Their Lordships wish to state that they regard with some sympathy the understanding of the Court of Appeal that they should, in cases such as these, proceed to perform the classification process at the conclusion of an appeal where the appeal against conviction has been dismissed. It seems a strange result that, under section 7 of the Act, the review procedure should in such circumstances have first to be performed by a single judge and subsequently, if required, be brought back before three judges of the Court of Appeal for a further review. But in the opinion of their Lordships there can be no doubt that that is what the Act requires, perhaps because the draftsman proceeded on the assumption that the appellate process would, like the conviction, have been completed before the coming into force of the Amendment Act, after which the review procedure would take place as a separate and distinct exercise.

Their Lordships are also of the opinion that the purported decision of the Court of Appeal that sentence of death should be imposed upon Wallace under section 3(1A) of the Principal Act as amended was outside the Court's jurisdiction. Their Lordships have to confess that they are puzzled by the fact that in this case the Court of Appeal purported to impose a sentence of death in respect of the earlier of two convictions of murder, by reason of the subsequent conviction; whereas under section 3(1A) it is the other way round - the subsection authorises the imposition of a sentence of death in respect of the later conviction, by reason of the earlier. In cases arising after the coming into force of the Amendment Act to which section 3(1A) applies, it is for the trial judge to impose a sentence of death in respect of the later of the two convictions. In such cases the Court of Appeal will be entitled to exercise the appellate jurisdiction vested in the Court by the Judicature (Appellate Jurisdiction) Act, supplemented by the very limited jurisdiction arising under section 3B(3) of the Principal Act (as amended) - the latter being the jurisdiction which was exercised by the Court in the case of Devon Simpson. However, in cases such as the present, where the conviction has taken place before the coming into force of the Amendment Act, the process of review takes place under section 7 of the Amendment Act, and is to be performed by a single judge of the Court of Appeal and then, if

appropriate, by three designated judges of the Court, and not by the Court of Appeal as such. In such cases, the judge conducting the review has in particular to consider (see section 7(2)(b)) whether sentence of death would in any event be warranted having regard to section 3(1A). Whether that matter can then be further reviewed by three judges of the Court of Appeal pursuant to section 7(4) and (5) depends upon the construction to be placed upon the words in section 7(3) - "classifies a murder as capital murder" - a point which does not fall for decision in the present appeals. At all events, it is clear that in this review process the Court of Appeal as such has no part to play.

It follows that the decisions of the Court of Appeal in these two cases, whereby they purported to classify the acts of murder of all three appellants as capital, or (in the case of Wallace) to impose sentence of death under section 3(1A), must be quashed as having been made without jurisdiction and so null and void. In the result, the process of classification in these two cases will have to proceed in accordance with the statute; but no order is required from their Lordships for that purpose. It also follows that the other points raised by the appellants on these appeals do not arise for consideration by their Lordships.

For these reasons their Lordships will humbly advise Her Majesty that both appeals should be allowed.