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Privy Council Appeal No. 44 of 2004

Evon Smith *Appellant*

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 14th November 2005

Present at the hearing:-

Lord Steyn
Lord Hoffmann
Lord Hope of Craighead
Lord Hutton
Lord Walker of Gestingthorpe

*[Majority Judgment delivered by **Lord Hope of Craighead**]*

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1. The question in this appeal is whether the offence of which the appellant was convicted was capital murder within the meaning of section 2(1)(d)(ii) of the Offences against the Person Act 1864, as substituted by section 2 of the Offences against the Person (Amendment) Act 1992. It raises a short and, it has to be said, beguilingly simple issue of statutory interpretation. But it is, for the appellant, a matter of the very greatest importance. Although the effect of the Board's decision in *Watson v The Queen* [2005] 1 AC 472 is that the death sentence is no longer mandatory in Jamaica, the question whether or not this was a case of capital murder is likely to be regarded as a significant factor when a decision is taken on the appropriate sentence for the crime of which he was convicted. A correct decision

as to what section 2(1)(d)(ii) means is needed if justice is to be done in his case.

2. The appellant was charged with murdering Yvette Williamson on either 17 or 18 July 2000, this being capital murder within the meaning of section 2(1)(d)(ii) as it was committed in the course or furtherance of a burglary or housebreaking. He went to trial on this charge in the Manchester Circuit Court of the Supreme Court of Jamaica before McIntosh J and a jury. On 18 October 2001 he was found guilty of capital murder and was sentenced to death. On 12 December 2002 the Court of Appeal (Forte P, Panton JA and Clarke JA(Ag)) dismissed an appeal against his conviction. The question of statutory construction which is now before their Lordships' Board was not raised in the Court of Appeal.

3. The case for the prosecution was that the appellant killed the deceased, with whom he had had a relationship, while she lay in bed in her dwelling-house. He did so by breaking into the house through a window next to the bed and striking her repeatedly with a machete. Her bed was immediately under the window of an upstairs bedroom. The window was made up of several panes of glass, four of which were missing. The gap left by the missing panes had been covered with a piece of plastic and a fabric curtain. Various other members of the deceased's family were living in the house at the time, among whom was her nephew, Dennis Allen. His bed was on the other side of the room. He said that he woke during the night and saw the appellant at the window chopping the deceased. He could see the appellant's chest, face and hands, which were inside the room. He had removed the curtain and pulled aside a piece of the plastic. The lower part of his body was hidden by the wall. Next morning the witness saw a ladder up against the wall, leaning against the window under which the deceased had been killed. The appellant's defence to the charge, which the jury rejected, was alibi.

4. Section 2(1)(d) of the Offences against the Person Act, as amended, provides:

> "**2 Capital Murders**
>
> (1) Subject to subsection (2) [where two or more persons are guilty of the murder], murder committed in the following circumstances is capital murder, that is to say –
>
> ...

(d) any murder committed by a person in the course or furtherance of –

(i) robbery;
(ii) burglary or housebreaking;
(iii) arson in relation to a dwelling house; or
(iv) any sexual offence."

5. "Burglary" is defined in section 39 of the Larceny Act 1942 as follows:

"**39 Burglary**

Every person who in the night –

(1) breaks and enters the dwelling-house of another with intent to commit any felony therein; or

(2) breaks out of the dwelling-house of another, having –

(a) entered such dwelling-house with intent to commit any felony therein; or

(b) committed any felony in such dwelling-house, shall be guilty of felony called burglary, and on conviction thereof –

(i) where the felony committed in the dwelling-house is rape, shall be liable to imprisonment for life; and

(ii) in any other case shall be liable to imprisonment for a term not exceeding twenty-one years."

6. "Housebreaking" is defined in sections 40 and 41 of the Larceny Act as follows:

"40. **House-breaking and committing felony**

Every person who –

(1) breaks and enters any dwelling-house, or any building within the curtilage thereof and occupied therewith ..., and commits any felony therein; or

(2) breaks out of any such place, having committed any felony therein, shall be guilty of felony, and on conviction thereof –

(a) where the felony committed in any such place is rape, shall be liable to imprisonment for life; and

(b) in any other case shall be liable to imprisonment for a term not exceeding ten years.

41. **House-breaking with intent to commit felony**

Every person who, with intent to commit any felony therein –

(a) enters any dwelling-house in the night; or

(b) breaks and enters any dwelling-house, place of divine worship, or any building within the curtilage thereof …

shall be guilty of felony, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding seven years."

7. It is reasonable to assume that the use of the phrase "in the course or furtherance of" which introduces the list of aggravating circumstances in section 2(1)(d) of the Offences against the Person Act was modelled on section 5(1) of the Homicide Act 1957 which listed the categories of murder that were to be treated as capital murders in the United Kingdom. Among those categories was any murder done in the course or furtherance of theft: section 5(1)(a) of the 1957 Act. In that context the meaning to be attached to the phrase did not leave room for doubt. It envisaged a situation in which there were two criminal acts: the theft and the killing. It was a situation in which the defendant had two criminal purposes: to perpetrate the theft and then to kill, typically on the spur of the moment, in the course of perpetrating or in the furtherance of it.

8. The cases which illustrate how section 5(1)(a) of the 1957 Act was applied by the courts in the United Kingdom, before the 1957 Act was repealed by the Murder (Abolition of Death Penalty) Act 1965, support this analysis. In *R v Jones* [1959] 1 QB 291 there were two criminal acts and the defendant had two purposes, one ancillary to the other. His primary intention was to steal. Having stolen the money, he then killed as he left the house in order to avoid detection. In *R v Vickers* [1957] 2 QB 664 too there were two criminal acts and two purposes. He entered the house with the intention of stealing. He then killed in order to avoid being recognised. The murder was ancillary to the theft because, as Lord Goddard CJ put it at p 671, the killing was to

be attributed to the burglary which he was committing. The vice in these cases, which was thought by the United Kingdom Parliament in 1957 to justify the death penalty, was that the defendant resorted to killing his victim in the course or furtherance of committing the theft. It was the wanton and cynical nature of the killing, the debasing in the context of a comparatively minor criminal act of the value that is to be attached to human life, that was regarded as particularly reprehensible.

9. In *H M Advocate v Graham*, 1958 SLT 167, the accused was alleged to have stabbed the deceased while in the act of breaking into a public house with intent to steal from it. There was evidence that he was attempting to break in and steal when the fatal struggle took place. Here again there were two separate offences and a separate criminal purpose to which the killing was ancillary: the housebreaking with intent to steal, and the killing which was said to have been done in the course or furtherance of the stealing. Lord Sorn's directions to the jury at p 169 concentrated on the need for them to be satisfied that the accused was in the course of the theft when he did the killing.

10. In *Lamey v The Queen* [1996] 1 WLR 902, which was an appeal from a decision of the Court of Appeal of Jamaica in a case where the appellant had been convicted of capital murder under section 2(1)(f) of the Offences against the Person Act, the Board accepted the proposition that there had to be a double intent on the part of the defendant for there to be a conviction for murder " in the course or furtherance of an act of terrorism". The argument in that case was that double intent could not be shown because the appellant was engaged upon a single act when the murder was committed, namely his act of terrorism. There was no separate act of violence. The argument was rejected. At p 904H-905B Lord Jauncey of Tullichettle said that a single murder could very well have a dual purpose, namely the elimination of the victim and the terrifying thereby of a section of the public, even if no further act of violence was involved. The important point which that case demonstrates is that, just as was the case in the United Kingdom under section 5(1) of the 1957 Act, evidence of a dual criminal purpose has to be shown for a conviction of capital murder under section 2(1)(d).

11. At the outset of his admirably lucid and concise argument Mr Fitzgibbons said that what the appellant did in this case was to commit an act of burglary in the course of a murder, not a murder in the course of a burglary. In other words, his only purpose was to kill. There was only one criminal purpose, and this was not within what the statute

defines as capital murder. In their Lordships' opinion this is a correct description of what took place. The appellant broke into the house for the sole purpose of killing his victim. There was no evidence that he had any other criminal intention.

12. The description of the offences in the course or furtherance of which the murder was committed which is set out in section 2(1)(d)(ii) of the Jamaican statute does, of course, introduce a complication that was not to be found in the 1957 Act. It refers to the offences of burglary and housebreaking. The statutory definitions of these offences, which are to be found in sections 39 to 41 of the Larceny Act, show that breaking and entering does not in itself amount to either burglary or housebreaking. So too in the United Kingdom the offences of burglary in English law and of housebreaking in Scots law are constituted not by breaking and entering in itself but by breaking and entering with intent to commit theft. In Jamaica, however, the necessary intent is not confined to theft. It extends to the commission of "any felony", and Mr Fitzgibbons accepted that murder is itself a felony. So a person who breaks and enters a dwelling-house with intent to commit murder there is guilty of housebreaking within the meaning of section 41 or, if he does so in the night, of burglary within the meaning of section 39. If he actually commits murder there he is guilty of murder, but he is guilty also of housebreaking within the meaning of section 40.

13. Where a person breaks and enters a dwelling-house to commit the felony of murder there, the breaking and entering is done in the course or furtherance of the murder. There is a single purpose: to murder. The breaking and entering is done to facilitate that purpose. But section 2(1)(d)(ii) states that a murder is to be treated as capital murder if it was committed in the course or furtherance of something else – that is to say, either burglary or housebreaking. It would not be difficult to apply this provision to a case where, in the course or furtherance of an act of burglary or housebreaking with the intention of killing person A, the defendant attacks person B and murders him. But it seems to their Lordships to stand the provision on its head to say that it applies to a case where the burglary or housebreaking was done with the intention of killing A and A is the person who is then killed. There was only one criminal purpose throughout: to kill A. The duality of purpose which the Board accepted in *Lamey* was a necessary element for capital murder as defined in section 2(1)(f), and which is just as necessary for capital murder as defined in section 2(1)(d), is absent in these circumstances.

14. Their Lordships agree with the minority that the legislature could not have intended that an offender who broke into a dwelling house with intent to commit the felony of arson there and then murdered the occupant in the course or furtherance of setting it on fire should be guilty of capital murder – as he clearly would be, in their opinion – but that he should not be guilty of capital murder if he broke into the dwelling-house to set it on fire with the intention of killing the occupant. It is to meet that situation that the murders listed in section 2(1) as capital murders include any murder committed in the course or furtherance of arson in relation to a dwelling-house. A person who breaks into a house and sets fire to it and, as result of his act, kills someone who is in the house when it is burning commits a capital murder under section 2(1)(d)(iii). As the Board's decision in *Lamey v The Queen* [1996] 1 WLR 902 indicates, he has a dual purpose: to set fire to the dwelling-house, and to use the fire to kill his victim. The fact that it was thought necessary to deal with acts of that kind under a separate heading supports Mr Fitzgibbons's argument as to how section 2(1)(d)(ii) should be construed. It does not support the meaning which is given to that provision by the minority.

15. The minority say that the statutory purpose of section 2(1)(d)(ii) is to protect persons in their homes. That is plainly so, as the offences of burglary and housebreaking both relate to acts of breaking into and entering dwelling houses. The protection of the subsection undoubtedly extends to those who are at risk of being killed by intruders who have broken into their homes for the purpose of stealing from them. But it does not follow that every murder committed within a victim's own home is a capital murder, nor does it follow that a capital murder is committed by every person who kills after breaking into the victim's dwelling house. The legislature could have said so if this was its intention, and in this area of the law where the right to life is in issue it had to spell out what it meant with absolute clarity. What it did was to restrict the offence of capital murder to the categories listed in section 2(1), which require more of the intruder to qualify as a capital murderer than the act of breaking into and entering the dwelling house with intent to commit the murder. They require a duality of purpose which is absent from this case.

16. For these reasons their Lordships will humbly advise Her Majesty that the appellant's appeal against his conviction of capital murder should be allowed, that a conviction of murder should be substituted for

it and that the case should be remitted to the Supreme Court of Jamaica to determine the sentence that is appropriate for the crime of murder of which he has been convicted.

Dissenting judgment by ***Lord Hoffman and Lord Hutton***

17. We regret that we are unable to agree with the opinion of the majority of the Board that the appellant was not guilty of capital murder within the meaning of section 2(1)(d)(ii) of the Offences Against the Person Act 1864, as amended.

18. The appellant stood on a ladder against the outside of the deceased's house at night, pulled aside a curtain and a piece of plastic in a window, inserted his head and upper body through the window and struck the deceased a number of blows with a machete as she lay in her bed under the window.

19. It is important to observe that in Jamaica the offences of burglary and housebreaking are committed under sections 39 and 41 of the Larceny Act where a person breaks and enters a dwelling-house in the night "with intent to commit any felony therein". Therefore in the present case where the appellant broke and entered the deceased's house with intent to commit the felony of murdering her he was clearly guilty of burglary and housebreaking. It is an essential ingredient of those offences that the defendant had the intent not only of breaking and entering but also of committing a felony in the house, in this case the felony of murder. Therefore when, immediately after breaking and entering the house, he carried out the intention with which he had entered of killing the deceased, we are of the opinion that he committed a murder "in the course of burglary or housebreaking".

20. The majority summarise the argument of Mr Fitzgibbon for the appellant in this way (at para 11 above):

> "what the appellant did in this case was to commit an act of burglary in the course of a murder, not a murder in the course of a burglary. In other words, his only purpose was to kill. There was only one criminal purpose, and this was not within what the statute defines as capital murder."

The majority then state that in their opinion:

> "this is a correct description of what took place. The appellant broke into the house for the sole purpose of killing his victim. There was no evidence that he had any other criminal intention."

We are unable, with respect, to accept this analysis. Burglary is committed by entry into a dwelling-house with the intention of committing a felony therein. The burglar remains a burglar from the moment he enters until, at the very earliest, his felonious intention have clearly been completed or abandoned. The fact that the intention which characterised his entry as burglary was an intention to commit a murder cannot mean, as a matter of law or logic, that he was not a burglar when he committed the actual murder. On the contrary, it represented the accomplishment of the very purpose for which he entered. If he was a burglar when he killed, it seems to us right to describe the killing as having been in the course of a burglary. On the other hand, it seems to us wrong to say that the burglary was in the course of a murder. He was a burglar both before and probably after he was a murderer. If a man breaks into a dwelling-house to steal or to rape the fact that his purpose is to commit one or other of these offences does not mean that the theft or rape is not committed in the course of a burglary. Similarly, in our opinion, a man who breaks into a dwelling-house to murder commits a murder in the course of a burglary, and although it may be said that he has only one overall intention, in law he has the necessary intention to constitute burglary and the necessary intention to constitute murder.

21. If a person sets fire to a dwelling-house in order to kill the occupant he is, in our opinion, guilty of a capital murder under section 2(1)(d)(iii). No doubt his main purpose and intent is to kill, but he also has the purpose and intent of committing arson and he cannot escape guilt of capital murder by arguing that he committed an act of arson in the course of murder, not a murder in the course of arson. We consider that, just as a person who sets a house on fire with the intention of killing the occupant commits a murder in the course of arson, so also a person who breaks into a house with the intent of killing the occupant and then kills her commits a murder in the course of burglary and housebreaking. And just as section 2(1)(d)(iii) is not confined to a person who sets a house on fire without the intent to kill but subsequently murders the occupant, so also section 2(1)(d)(ii) is not confined to an intruder who breaks into a house to steal without the intent to kill, but subsequently murders the occupant in the house.

We are unable to agree with the view that arson was specifically dealt with in a separate subparagraph (iii) in order to permit the construction of sub paragraph (ii) which the majority adopt. In our opinion the draftsman simply set out robbery, burglary or housebreaking, arson and sexual offences in separate subparagraphs because they are separate offences.

22. We are further of opinion that a consideration of section 5(1)(a) of the English Homicide Act 1957 does not assist in the consideration of section 2(1)(d)(ii). The wording of section 5(1)(a) is much narrower than the wording of section 2(1)(d)(ii). The English subparagraph makes murder a capital murder where it is done in the course or furtherance of theft whereas the Jamaican sub paragraph constitutes murder a capital murder where it is done in the course of burglary or housebreaking, which includes breaking and entering a house with intent to commit murder.

23. In our opinion the purpose of section 2(1)(d)(ii) is to protect citizens from being murdered in their own homes by intruders who break in at night and to deter offenders from committing such murders. We consider that the legislature could not have intended that an intruder who broke into a house, which he believed to be unoccupied, for the purpose of stealing therein and then, coming upon the occupier, killed him or her, should be guilty of capital murder, but that a person who broke into a house with the express purpose of killing the occupant and did so should not be guilty of capital murder. The majority are disposed to accept that section 2(1)(d)(ii) applies if a person breaks into a house with the intention of killing A and kills B, and accept that the subsection extends to those who are at risk of being killed by intruders who have broken into their homes for the purpose of stealing. But it is difficult to see why the legislature would think that the intruder who breaks in with the express purpose of killing the occupier should be regarded as less heinous and should not be punished with equal severity.

24. In the course of their submissions counsel referred to three decisions of appellate courts in the United States in relation to the statutory offence of felony-murder. The offences took place in three different states and the wording of the statutes in the three states appears to be slightly different but the statutes provided, in essence, that murder committed in the course of a number of specified felonies, including burglary, constituted a felony-murder. In the three cases the

appellants unlawfully entered a dwelling-house with intent, not to steal, but to attack the occupier and carried out a murder. In each appeal it was argued that the felony-murder rule did not apply because, apart from the murder, there was no independent underlying felony which had to exist for the rule to apply. As the cases related to the felony-murder rule and the wording of the American statutes differed from the wording of the Jamaican statutes, the decisions are not of direct relevance, but we consider that two of the decisions give support to the argument advanced on behalf of the Crown and that the third case is distinguishable because of the wording of the relevant statute.

25. In *People v Miller* 297 NE2d85 [1973] (Court of Appeals of New York) and *Blango v United States* 373 A.2d885 [1977] (District of Columbia Court of Appeals) the argument of the respective appellants was rejected, it being stated in *Miller* at page 88, and followed in *Blango*, that:

> "... the Legislature, in enacting the burglary and felony-murder statutes, did not exclude from the definition of burglary, a burglary based upon the attempt to assault, but intended that the definition be 'satisfied if the intruder's intent, existing at the time of the unlawful entry or remaining, is to commit *any* crime'."

In each case the appellate court emphasised that the intention of the legislature was to protect persons in their homes.

26. In *Parker v State of Arkansas* 292 Ark. 421 (1987) (Supreme Court of Arkansas) the appeal succeeded, but in that case the Arkansas statute referred to a death caused "in the course of and in furtherance of" a burglary, and the decision was based on the words "and in furtherance of". The prosecution relied on decisions in *Miller* and *Blango* but the court distinguished those cases by reference to the different wording of the Arkansas Statute and stated, at p 427:

> "Simply put, the state has not advanced any convincing argument as to how the murder committed after the burglary could be in the course of and in furtherance of the burglary, both of which are elements required by our statutes. 'If we can, we give legislation a construction to affect legislative intent ... However, this is a criminal statute which must be strictly construed with doubt being resolved in favour of the accused'. *Knapp v. State*, 283 Ark. 346, 676 S.W. 2d 729 (1984). In strictly construing our statutes, as we must do, it is apparent that in order to

> constitute capital felony murder, the murder must be in the course of, and in furtherance of the burglary, which is not the case before us."

27. For the reasons which we have given we would have humbly advised Her Majesty that the appeal against the conviction of capital murder should be dismissed but that, pursuant to the decision of the Board in *Watson v The Queen* [2005] 1 AC 472, the sentence of death which was imposed on the appellant should be set aside and that his case should be remitted to the Supreme Court of Jamaica to decide what sentence should be imposed for the crime of which the appellant was convicted in this case.