IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

REGINA v IAN GORDON

- MURDER-

Mr. C. Crooks for the Director of Public Prosecution.

Mr. Jack Hines for Ian Gordon.

Campbell J.

Heard: 22nd and 29th August 2005

Sentencing Hearing

The accused, Ian Gordon was convicted of Capital Murder and sentenced to death on the 8th October 2003, in respect of the killing of Garfield Gordon and Vincent Raffington on the 29th August 2000.

Crown Counsel at this hearing proposed that the sentence of death was appropriate in the circumstances of Ian Gordon's case. The court had the benefit of a Social Enquiry Report, Psychiatric Report, Superintendent's Report, from the Department of Correctional Services and we had character evidence from a minister of religion. We heard an eloquent, helpful and at times impassioned plea of mitigation from Counsel for the convicted man.

Up until 1992 a conviction for murder carried a mandatory or automatic death penalty. In that year, **The Offences Against the Person Act 1992** was enacted.

S. 2 (1) provided that capital murder was committed in circumstances where certain specified persons were murdered, or murder was committed in furtherance of certain specified offences or contract killing. Section (2) (3) provides that murder not falling in subsection (1) is non-capital murder.

The journey to that point had started with the overturning by The Judicial Committee of the Privy Council in **Pratt and Morgan v Attorney General of Jamaica** (1993) 43 WIR 340 of their decision in **Riley v Attorney General of Jamaica (1983) AC 719** (1982) 35 WIR 279. In Riley the Privy Council had concluded that section 17 was not a bar to the execution of a duly convicted person merely because the execution was unduly delayed. The Board found that S17 (1) to the Jamaican Constitution which declares that "no person shall be subjected to torture or to inhuman or degrading punishment or treatment," was inapplicable to cases of delayed execution because such execution would not have been unlawful before, and therefore came within the exception established by section 17(2).

In overturning **Riley**, their Lordships held at page 361;

> "...in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such to constitute "inhuman or

degrading punishment or treatment" under section 17(1) of the Jamaican Constitution."

The State apparatus that had been built on the jurisprudence of Riley had to be overhauled to ensure that the constitutional standards that a State who "wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong, the appellate hearing over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it." (Pratt and Morgan Per Lord Griffiths pg. 358)

In order to ensure that the Constitutional mandates of Pratt and Morgan were obeyed, the following steps were taken: -

(i) The Jamaican State moved to commute to life imprisonment the sentences of over 200 condemned men who had been on death row for five years or more.

(ii) A legislative distinction was made between capital and non-capital murders; this had the effect of reducing death penalty cases.

(iii) In order to reduce the delay between trial and the Court of Appeal to a period of 6 months, administrative and technological changes were made.

(iv) The problem with delay encountered before the International Organization were met by the introduction of time limits for

consideration of capital cases by both the IACHR and the UNHRC. Specific time periods were laid down for the notification of the filing of petitions, for consideration of petitions by the human right body that was first petitioned.

(v) Diplomatic initiatives were undertaken to ensure that the International bodies were made aware of the need of Jamaica to implement the relevant time periods for completion of consideration of petitions in capital cases, by these bodies.

The Government efforts to implement time limit in respect of petitions pending to the International bodies were not successful. These bodies met for brief periods each year and had thousands of complaint from all over the world.

In the result the Government opted for withdrawal from the optional Protocol to the International Convention on Civil and Political Rights.

These actions of the government were being implemented against a background of growing numbers of heinous murders. Witnesses to crimes were being killed. Many of the killings bore the hallmarks of contract murders. Policemen were being gunned done in the execution of their duty with frightening frequency. The elderly, the young and the defenceless were being shown no mercy. Drive-by shootings were a new feature to the criminal scene. Burglar bars, a standard feature in any architectural design was not sufficient to prevent marauders from invading homes and killing their defenceless victims, in many instances entire families.

A majority of the population has consistently supported the death penalty. The perceived failure of the justice system to respond effectively has resulted in mob and reprisal killings of persons suspected of having been involved in criminal activity. This perception has had the unwholesome effect of causing sections of the population to seek alternative means of redress. The **Offences Against the Person Act 1992** was an attempt to address the mischief that faced the State, and to have the process proceed expeditiously.

It was with this in mind that the Solicitor General of Jamaica, submitted before their Lordships Board of the Judicial Committee of the Privy Council in **Lambert Watson v The Queen** (PC Appeal 36 2003) "That it was inconceivable that Parliament would have intended when it made these amendments in 1992 that the death penalty for capital murders and for those convicted of non-capital murders should cease to be mandatory"

The issues before The Privy Council in **Lambert Watson v The Queen** (supra) were (i) whether the mandatory sentence of death infringed the doctrine of separation of powers; (ii) whether it also infringed the provisions of section 17(1) of the Constitution which sets out the right not to be subjected to inhuman or degrading punishment or treatment; (iii) whether it is saved from unconstitutionality either by section 17(2) or by section 26(8) of the Constitution.

The resolution of the first issue has resulted in the need for sentencing hearings in what were hitherto regarded mandatory death sentences pursuant to S3 of the Act.

The Board in **Lambert Watson**, as it did in **Pratt and Morgan** relied heavily on the views of International American Commission on Human Rights, to which Jamaica was signatory. Lord Hope of Craighead said at para 29;

> "As Lord Bingham pointed out in **Reyes** P 244, Para 17, the mandatory penalty of death on conviction of murder long pre-dated any international arrangements for the protection of human rights. The decision in that case was made at a time when international jurisprudence on human rights was rudimentary."

Professor Thomas Buergenthal, in his work entitled '**Protecting Human Rights in the Americas'** Fourth Edition illustrate the growth of the influence of international law on domestic courts. In commenting on the reversal of the Privy Council of its decision in **Riley**, writes at page 593;

> "Although the Lords tend not to reverse themselves very often, the fact that they did so in the instant case (Pratt and Morgan), would not, standing alone, make the judgement in **Pratt and Morgan** particularly noteworthy. What makes it so is the Privy Council's heavy reliance on decisions of international tribunals to support its conclusion that delay in the execution of the petitioners amounted to inhuman treatment under the Jamaican Constitution."

Murder may be committed in as many ways as the mind of man may devise. Its commission may range from cases where one is revolted and horrified at the perpetrator to cases where one may feel a sense of pity and sorrow for the

convicted man. The law now recognizes that to treat murder as a single category and to inflict an automatic sentence, wherever in the range the convict falls, is a denial of his fundamental rights and an assault on his basic humanity.

It is a well-established principle of international law that a state may limit its sovereignty by treaty and thus its citizens will become the subject of international law. A state such as Jamaica that has ratified human rights treaties has in effect internationalise its citizens and make them recipients of the states obligations under that treaty. **In Newton Spence and The Queen** (CA 20 of 1998), where constitutional arguments against the mandatory nature of the death penalty had been raised for the first time before the Privy Council. The appellants being successful, the matter was remitted to the Court of Appeal of the Eastern Caribbean for consideration whether the mandatory sentence of death should be quashed or affirmed. Byron C.J., at para 37 of the judgement states;

> "However, it is also well-settled law that domestic provisions whether of the Constitution or statute law should, as far as possible, be interpreted so as to conform to the states obligation under International law. Neville Lewis: The Attorney General of Jamaica and Mateen v Pointu (1999) 1(AC) 98, 114G-H."

The Offences Against the Persons Act was an attempt to identify "those extreme cases" and by so doing eliminate the cases of murder that would not be susceptible to the death penalty.

Byron C.J. says at para 47 of **Newton Spence** (supra)

> "In my judgement a distinction must be drawn between capital and non-capital murder. In two Caribbean countries, Jamaica and Belize legislation has already been passed drawing this distinction, giving effect to the evolving standards of our time by prescribing differing severity of punishment within the wide range of behaviour that could result in a conviction of murder."

This distinction, drawn by the legislature, did not meet the degree of subjectivity that was undoubtedly required. **In Reyes v The Queen** (Privy Council) (2002) 2 AC 235 Per Lord Bingham of Cornhill at para. 34

> "But the Board is not aware of any case in which the distinction, when challenged, has been held to be sufficiently tightly drawn to provide the necessary guarantee of proportionality and relation to individual circumstances where the death penalty is mandatory on conviction of a murder in the capital category."

Their Lordships then referred to the decision of the Supreme Court of the United States in Woodson v North Carolina (1976) 428 US 280 and a passage from the judgement of Stewart J at letter C;

> "A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.... A process that accords no significance to relevant facets of the character and the record of the individual offender or the circumstances of the particular offence excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."

At letter A

> This Court has previously recognize that "For the determination of sentences, justice generally requires consideration of more

> than the particular acts by which the crime was committed and that there be taken into account the **circumstances of the offence** together with **the character an propensities of the offender.**"

In **Lambert Watson v The Queen**, in dealing with the constitutionality of the mandated death sentence Lord Hope, at para 30, examined what he called "the march of international jurisprudence on this issue" from the Universal Declaration of Human Rights which was adopted by a resolution of the General Assembly of the United nations, in aftermath of the atrocities of the Second World War to the signing of the charter the American Convention of Human Rights. These agreements recognized the fundamental rights of the individual, inclusive of the Right to life and to be protected from" cruel inhuman degrading treatment or punishment, and at para 33 said;

> "To condemn a man to die without giving him the opportunity to persuade the court that this would in his case be **disproportionate and inappropriate** is to treat him in a way that no human being should be treated."

The circumstances of the offence

This is an offence that was committed with guns. The victims were at their most defenceless, they had retired to bed. There was no evidence before the court as to the reason for the attack. This is not uncommon in Jamaica. Persons at one end of a street are unable to go to the other end, for fear of death. Adjoining neighbourhoods are out of bounds, to many residents of so-called inner-city

communities. The language of the combatants is the language of war. Some young men in the communities are oftentimes called "soldiers." There are frequent news of 'Peace Treaties" being brokered between these communities. A man well respected and admired in his community may be vilified and viewed with opprobrium and scorn in another.

The gun features in most murders, and range from the most sophisticated of weapons to not very efficient home-made guns. The gunman and fear of him permeates every level of society. There is a special division of the Supreme Court for the trial of gun offences. As I write, there have been some eighty murders for the month of August. Over one thousand persons have been murdered so far this year. The possession of an illegal firearm is by itself a grave offence in this country and is usually punished, save in exceptional circumstances, with a custodial sentence. The possessor of an imitation firearm if used to commit a felony and is convicted before a Circuit Court is liable to imprisonment for life (**S.25 Firearms Act**). The offender, who uses an illegal firearm, may be presumed, to be among a category of men, who is undeterred by the sanctions that the law or public opinion imposes. To my mind this is a most aggravating feature. In **Reyes v The Queen**, Lord Bingham of Cornhill, in speaking of the evil of the Gun in the hand of criminals, said;

> "The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is

> retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate."

The firearm here was not legitimately owned. This case does not fit in the second category, where the death penalty would be plainly excessive and disproportionate.

The number of persons participating in the commission of the murder

The law recognizes that the number of participants in the commission of an offence may serve to aggravate that offence. In this case Gordon was along with two others. They were there to support each other and to overwhelm any opposition. All three men were armed with guns. The numbers, and mode of execution, indicate planning, organization and premeditation. Some 25 spent shells were recovered from the veranda of the home where the victims slept.

Time and place of the offence

The victims were at their most vulnerable they were asleep. The Court is aware that social life has been severely affected by escalating crime, and in particular the gunman. The victims were at home, closeted. It has become commonplace in this country, for whole communities to flee their homes for fear of their homes being invaded and themselves murdered. An attack by an offender

on a victim at his home goes some way in the determination that "the circumstances of the case" factor is satisfied for the imposition of the death penalty.

The number of victims

Two men were killed in cold blood. The witness might very well have been in the house. The number of spent shell and the manner in which they were fired is an aggravating factor.

The character and propensities of the offender

The Privy Council, in **Reyes v The Queen**, as it did in **Pratt and Morgan**, relied heavily, on the finding of the Inter-American Commission on Human Rights and United Nations Committee on Human Rights. In Reyes, their Lordships quote extensively from the findings of the IACHR and UNCHR, established under the international Covenant. At para 41 of the judgment, the Commission's views in **Downer v Tracey v Jamaica** are quoted in discussing the components of mitigating circumstances;

> "Mitigating circumstances requiring consideration have been determined to include the character and record of the offender, the subjective factor that might have influenced the offenders conduct, the design and manner of execution of the particular offence, and the possibility of reform and social readaption of the offender."

The social enquiry report provides statements on the reputation of Ian Gordon. The Probationer After Care Officer, reports that, "He however has not displayed any apprehension or anxiety. Subject remains focused and is encouraged by the appeal process and a strong supportive network". He is described as being responsive to supervision and that he has never breached any rules or regulations. That has to be looked at in light of his criminal record sheet, which has the offender for having been convicted, of False Declaration, Forgery, Uttering forged documents. He according to the Report, breached Canadian rules, by extending his stay beyond the time permitted, and was arrested when he tendered false document in a bid to re-enter Canada.

The report is vague as to the members of the community who are bitter, that the offender is serving time for the real culprits. These unnamed members of the community, had more than sufficient opportunity to step forward and provide the information. The court is also aware that in many communities the residents are very vociferous concerning police excesses and errors, the offenders wrongful arrest would be such an error. I place little weight on the statement cues, from offender's side of relatives indicate that relatives of the deceased do not believe that Ian killed Garfield.

The only person who is identifiable in the report, the nephew of the deceased, Vincent Raffington is "convinced by the evidence that helped put him away." The

report states that the general view is that he has never shown the propensity to commit such a crime. The offender left the country in or around 1993 returned in 2000, within three years of his return he is arrested and incarcerated for nine months. He has demonstrated no remorse. Counsel says that expression of remorse would be inconsistent with the offender's stance of innocence. The psychiatric report contains nothing that would be deemed a mitigating factor. The offender cannot point to anything, in the social context of this country that is disturbing in relation to his upbringing. The most outstanding feature is the character witness that paints a picture of a kind responsible man.

It should be noted that the subjective matters, important though they are, do not play as significant a role as do the circumstances of the offence. See **The Queen v Titus Albert (2) Vincent Norbert** – High Court of St. Lucia, Case no. 47 of 2001.

The objectives of punishment, have not been laid to rest, deterrence, prevention, reformation and retribution are still relevant. The sentence of death is to be reserved, for the most heinous of cases. The sentencer should approach the task dispassionately not taking into consideration any extraneous or irrelevant considerations, should disabuse his mind of sympathy and prejudice. It is a legal process.

In **Lambert Watson** at para 64: The Board, after referring to the widespread use of firearms and acknowledging that this fact is notorious. Said,

> "So long as those conditions prevail; and so long as a discretionary death sentence is retained, it may well be that judges in Jamaica will find it necessary, on orthodox sentencing principles, to impose the death sentence in a high proportion of cases which is, by international standards unusually high."

This is such a case. Having regard to all the relevant circumstances, Ian Gordon you are sentence to suffer death in the manner authorised by law.