

EASTERN CARIBBENS SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
(Criminal)**

SAINT LUCIA

CASE NO. 1/2001

BETWEEN:

THE QUEEN

VS

MERVIN MOISE

Defendant

Appearances: Miss Victoria Charles
Ag. Director of Public Prosecution
For The Crown

Mr. Shawn Innocent
For the Accused

Wednesday 12th November, 2003

JUDGMENT ON SENTENCING

1. **EDWARDS J:** On Monday the 9th of November 2003, this Court heard submissions from counsel for the Crown and counsel for the Accused regarding the sentencing phase in this matter. I promised then, having heard the arguments that I would deliver my decision this morning, and here is the judgment on sentencing.

2. The Accused Mervin Moise was convicted of murder on the 16th of February 2001. He was then sentenced to death without having the opportunity to persuade the Court to refrain from passing the death sentence. His appeal against conviction was dismissed by the Court of Appeal on the 22nd of October 2001. The Court of Appeal then remitted this case to the High Court for sentence. Unfortunately it has taken a little more than a year for the sentencing phase to take place.

3. The judicial pronouncements by the Court of Appeal since the 2nd of April 2001 and the Privy Council on the 11th of March 2002 have repudiated the automatic mandatory death sentence under Section 178 of the Criminal Code, St Lucia and this was done in the decision of **Spence and Hughes versus The Queen** - Criminal Appeal No. 20 of 1998 and 14 of 1997 and also in **The Queen versus Hughes** [2002], 2WLR, 1058. These decisions now require the Court to consider any mitigating factors obvious from the evidence and pre-sentence reports, or otherwise adduced by the Accused.

4. These mitigating factors may persuade the court to impose a penalty other than death. In determining the sentence to be imposed I'm required to consider more than the particular acts by which the crime was committed. I'm enjoined by the decision in **Spence and Hughes** to take into account the character and record of the Accused, the nature and gravity of the offense, the design and manner of the execution of the offense, the subjective factors which may have influenced the Accused's conduct, the degree of the Accused culpability and the possibility of his reform.

This was stated by the Chief Justice, Sir Denis Byron at paragraphs 41, 47, 57 of his judgment in of Spence and Hughes.

The Facts

5. The Accused was convicted of murder as a result of his participation in an armed robbery at the Gas Station of Peter St Hill, deceased businessman, 62 years old at Guesneau on the 4th of December 1998 at about 8:30 p.m. The Accused wearing a black cloth mask and another tall, slim, man both dressed in camouflage S.S.U. uniform both armed with guns, approached the deceased while he was seated in front of the Gas Station talking to his employee Carlisle Daniel. The Accused and his accomplice began beating the deceased on his head with their guns. While the deceased was crying for help, the Accused who was the shorter of the two armed-men shot the deceased in his left hip with his rifle.

6. The bullet damaged his rectum and pelvis and lodged in his right buttocks. At the time this was happening, the daughter of the deceased, Ms. Gene St Hill was in the Gas Station reporting the day's sales. The Accused entered the Gas Station, demanded money, placed his gun on Ms. Gene St Hill's throat and threatened to kill her unless he got the money. The Accused was then joined by his accomplice. They robbed Ms. Gene St Hill of Eastern Caribbean \$2000 cash from the cash register and the cash tin.

Together they fled behind the gas station.

7. The deceased died five (5) days later in the Victoria Hospital from complications resulting from the gunshot wound inflicted on him by the Accused. The Pathologist, Dr. Stephen King recovered a large rifle slug with a wadding similar to shotgun shells from the right buttock of the deceased. The police recovered .12 -gauge calibre cartridge shells from the crime scene. The Accused was convicted on the 15th of February 2001 on the evidence of eyewitnesses and The Crown also relied on circumstantial evidence.

The Character and record of the Accused.

8. The Probation and Psychologist reports disclose that the Accused is now 32 years old. On the date of the offence 14th post December 1998, he was 28 years old having been born on the 4th of August 1970. In March 1986 he was committed to the Boys' Training Centre for 2 years. On being discharged at age 18 years from the Boys' Training Centre, he began stealing money, jewelry and food stuff from his father with whom he lived. It appears from the Probation report, that inadequate parental supervision and negative peer pressure led him to engage in stealing and house breaking. He subsequently engaged in peddling Marijuana and he also used Marijuana. While denying his involvement in this crime, he admitted to psychiatrist, Dr. Srikumarum on the 9th of September 2003, that he had used Marijuana on the date of the incident.
9. The Accused criminal record dates back to 1986 when he was 16 years old. Of his registered 15 previous convictions, 10 of them are spent, the offences have been committed between 1986 and 1992. I shall therefore not take these 10 previous convictions into account.

10. The five relevant previous convictions which the Accused admits, were recorded between August 1993 and January 1998. They read as follows:

“On the 7th of August 1993, he was convicted for Assault and he received a penalty of six months imprisonment. On the 16th of May 1995 he was again convicted for assault and he received a penalty of 1 month. On the 1st of March 1996 he was convicted for house breaking and his punishment was 8 months imprisonment. On the 3rd of September 1996 he was convicted for wounding and he was fined \$360 or 4 weeks. On the 29th of January 1998 he was convicted for stealing from a dwelling house and he received punishment of 6 months imprisonment.

The subjective factors influencing the Accused.

11. The Accused was exposed to domestic violence at an early age. His parents cohabited until he was 12 years and during this period he witnessed his mother being physically abused by his father on several occasions. His mother left the household with his two younger siblings when Accused was 12 years old, leaving the Accused and his brother Valentine to live with their father.

12. The Probation report and the Psychological assessment report of Dr. Griffin, disclosed that from the time he was about seven years the Accused was verbally and physically abused very frequently by his father. Consequently, he was afraid of his father and was constantly under the threat of a beating. The physical abuse was very cruel and severe,

the report discloses. The Accused told Dr. Griffin, that at the age of 10 – 11 years his father tied him up in an ants nest and forbade his mother to move him. There were other times when he received wounds from his father's abuse and had to obtain medical treatment. On two occasions he was beaten to the point of unconsciousness by his father and suffered concussions and fractures of his arms. This abuse has had a negative impact on the Accused's personality, says Dr. Griffin.

13. The tests conducted by the psychologist on the 10th and 19th October 2003 revealed that the Accused has feelings of inadequacy relating to childhood events. He's insecure; he lacks self-assurance and a sense of competence, he has low self-esteem, he leans on others for guidance and security, he assumes the role of an inadequate and self-sacrificing participant in many relationships and settings. He has an intense need for acceptance and nurturance, he discharges anger at those who reject him or otherwise fail to see his needs, he appears to have a self-deprecatory attitude. He fears humiliation and rejection. While he sometimes may submit to abuse and intimidation, he has a tendency to permit many of his emotional involvements to become explosive or abusive. His intelligence quotient is 81 with an age equivalent score of an eight year old, says Dr. Griffin. He dropped out of school at 15 years. His I.Q. ranges between mild mental retardation and low average intelligence. Though he scored an intellectually impaired range he shows no signs of being mentally defective or insane. There was no evidence that he was suffering from any diminished criminal responsibility or mental defect prior to and after the date of the crime.

14. Dr. Griffin's examination and analysis of the Accused was incapable of discerning the state of mind of the Accused at the date of the crime.

The likelihood of reform.

15. The psychologist, Dr. Griffin, has opined that it is unlikely that this Accused which he describes as hesitant, sad and fearful will initiate violence in prison or attempt to escape from prison. Dr. Griffin states that his characteristics make him well disposed to therapy and rehabilitation. The Accused has expressed a desire to improve his socio economic development, modify his way of life and be with and care for his children.

16. The Accused has three children, the eldest a ten year old boy, a girl six years old and another girl four years old. There's no evidence regarding the nature of his participation in the lives of any his children. His common-law partner and mother of his children was not interviewed by the probation officer.

Applicable Principles

17. I now consider the applicable principles to apply in this case. In the course of the arguments addressed to me by both counsel, I have been referred to decisions from the Privy Council and the High Courts of St Lucia, St Vincent and the Grenadines, St Christopher (St Kitts), Belize, Jamaica and the Bahamas and the Eastern Caribbean Court of Appeal. I have also been referred to a decision from the United States of America. Some of these decisions have relied on and adopted the approach of the courts in India, South Africa and the United States, Jamaica and Belize, in dealing with this controversial

death penalty. There are also two South African decisions that I was referred to which I found most instructive. Annexed to the Judgment are a list of the Cases I considered and or applied.

18. In the absence of legislative guidelines in St Lucia, some of these decisions are binding and or valuable for demonstrating the principles that I should apply in this matter. They disclose that the judicial discretion to impose the death penalty should be reserved for the most heinous cases. The value of life is immeasurable and though the willful taking of an innocent life calls for a severe penalty, the normal principle is that an Accused convicted of the offence of murder should be liable to be punished with the sentence of life imprisonment. If the Court finds that the offence is of an exceptionally depraved and heinous character and that it constitutes on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence. The case must be found by the Court to merit the extreme penalty.

19. Though public opinion may have some relevance it should not be the reason for imposing the death penalty. Since the death penalty should be imposed for the worst cases of murder, the question is, is this case in the category of the worst cases of murder?

The Burden of Proof.

20. The South African cases **S vs Nkwanyana and others** (1990) 4SA, 735 and the other case of the **State vs. T. Makwanyane and another** case No. CCT/3/94, Judgment of the Constitutional Court of South Africa paragraphs, 46 and the following paragraphs, have

been instructive on the burden of proof in this sentencing phase. They establish that the onus is on the Crown to prove beyond a reasonable doubt that this case is in the category of the worst cases of murder. The Crown does so by establishing the existence of aggravating factors and negating beyond a reasonable doubt the presence of any mitigating factors.

21. An Accused has to raise the mitigating factors unless it is obvious from the evidence and adduce whatever evidence he can on the point. The onus then shifts on the Crown to negative beyond a reasonable doubt the absence of mitigating factors. The absence of mitigating factors will not mean that the death sentence should be imposed, neither will the presence of mitigating factors mean that the death sentence should not be passed.

22. When both mitigating and aggravating factors are present their respective force or significance must be weighed so as to decide whether the death sentence is proper. Due regard should be paid to the personal circumstances and subjective factors which might have influenced the Accused's conduct, and these factors must be weighed. If there remains a reasonable possibility that mitigating factors exist the onus is not discharged.

23. The Findings as to mitigating and aggravating factors are not necessarily decisive. Due regard should be had to them; I should consider them in a degree appropriate to the demands of the particular case, since other matters may be relevant. All these factors must then be weighed up with the main objects of punishment, that is, deterrent, prevention, reformation and retribution. This means that I should consider whether these

four objectives can be properly met by a sentence other than death. If they can then the death sentence should not be imposed.

24. The death sentence should only be imposed in the most exceptional cases where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence. If the Accused's deed is so shocking and claimant for extreme retribution, to the point where the society of St Lucia would demand this Accused's destructor as the only punishment for his wrong doing, then retribution must play a decisive role, and the death sentence will be the proper sentence.

25. As Chief Justice Conteh declared in **The Queen vs Patrick Reyes** in his Judgment on Sentencing delivered on the 25th of October 2002 at paragraph 20 –

“The enormity of the murder itself and or the absence of redeeming feature in its commission and of the murderer, may be such as to nullify or out-weight any possible mitigating or extenuating circumstances”

I shall therefore look at the aggravating factors and the mitigating factors closely.

Aggravating Factors

26. The evidence in this case discloses the following aggravating factors:

- (a) The crime was not committed in a heat of passion, the murder was a planned murder, it was premeditated. The Accused and his accomplice were well prepared. Both men were dressed in military uniform and masked, and with guns

and it was carried out in cold blood. The Accused showed no mercy for the deceased while he was crying for help. It was then that the Accused shot him.

(b) The Accused committed the murder in furtherance of a robbery. Based on what he said before and after the crime, he was motivated by greed, covetousness, dishonesty and a dislike for the deceased; a reprisal for the deceased's refusal to employ the Accused. His mental capacity at the time of the murder was not impaired in anyway.

(c) The previous convictions of the Accused reveals, he has a propensity to be violent and dishonest. It would have been a little over five months after he had served his six months sentence for stealing from a dwelling house, that he was back planning the robbery of the gas station. The probation report discloses that he began his life of crime at an early age, and despite attempts by his father and the State to correct his behaviour, he continued his life of crime into adulthood. He's a recidivist. The learned D.P.P. has argued that owing to these aggravating factors among other things and the high incidents of murder in the society today, the death penalty should be imposed. The mitigating factors I now examine.

Mitigating Factors

27. Learned counsel Mr. Innocent has identified the following as mitigating factors:

(a) The Accused is the father of three children.

(b) The Accused's childhood abuse and exposure to acts of domestic violence between his parents has impacted on him negatively.

- (c) The Accused's academic performance was rated as below average and he had minimum level of primary school education.
- (d) The Accused has suffered as a result of severe physical abuse by his father.
- (e) The Accused's intelligent quotient is that of an eight year old and he functions between mild mental retardation and low average intelligence.
- (f) The Accused has suffered from anxiety and depression and psychological dysfunction since his imprisonment.
- (g) The Accused has a low potential for violence and is well disposed to therapy and rehabilitation.
- (h) The period of delay since the Accused was convicted and sentenced to death should be taken into account, since Accused has suffered anxiety of having an unlawful mandatory death sentence imposed on him.
- (i) The Court should attach considerable weight to the fact that the Accused's period on death row was an unlawful sentence.
- (j) In reference back cases where a significant period has already been spent on death row, it would be wrong in principle to pass the sentence of death, where there is no reasonable prospect that the Accused will complete all legal proceedings and the mercy process without spending five years cumulatively on death row.
- (k) The effect of the delay should be placed alongside the other factors, which must then be weighed cumulatively.
- (l) The Accused is a good candidate for rehabilitation. This is borne out by Dr. Griffin's report and the Director of Correction's Status report.

Conclusion

28. I have given significant weight to the Accused's degree of culpability in the murder of Mr. St Hill. There were two gunmen at the scene of the crime and both of them acting in concert, were beating the deceased with their guns. But it was the deceased who inflicted the gunshot wound on the deceased. But it was the Accused who inflicted the gunshot wound on the deceased. The Accused used personal violence on the deceased in the course of attacking the deceased. The eyewitnesses testified that it was the short, gunman who they identified as the Accused, who fired the fatal shot in the left hip of the deceased. The Accused should therefore be answerable for his own actions and not for anything done by the other gunman.

29. I have also consider the arguments of Mr. Innocent and the cases he has relied on advancing his submissions that the delay is a mitigating factor to be given considerable weight. I do not agree with counsel for the following reasons:

- (a) The Privy Council's decisions recognize that mental anguish, anxiety, agony and suffering are the inevitable consequences of being charged, tried and convicted and sentenced for the crime of murder. From the moment the Accused was charged, therefore, he was placed in jeopardy of a death sentence.
- (b) The Privy Council's decisions including and subsequent to **Pratt and Morgan**, (1994) 2AC 1 have sought to limit the agony and suffering of a person condemned to death by pragmatically establishing that a prolonged and unnecessary period of five years in the case of Jamaica and three and a half years

in the case of the Bahamas, may render it unlawful to execute a convicted accused under the Constitutional guarantee against inhuman or degrading punishment.

- (c) The decisions have sought to prevent or limit the State from adding further unnecessary suffering and agony to the inevitable consequences of being charged, convicted and sentenced for murder.
- (d) The decisions recognize that the conduct of the State at different stages of the process may aggravate the mental anguish, agony and suffering of the Accused unnecessarily.
- (e) Though in this regard the actual circumstances under which the particular Accused had existed from the date he had been charged, may be relevant and open to the examination of the court. I do not believe that the delay in this Accused's case should be given that significant weight. I'm dealing here with two different types of period part of the period is from the date of conviction and unlawful mandatory death sentence handed down on the 16th of February 2001 to the date of the Court of Appeal's decision dismissing the appeal and remitting the case to the court, and this was on the 22nd of October 2002 - a matter of 1 year and 8 months that the Accused faced the agony of execution.

This sentencing phase has taken 1 year, (a little over one year) to take place.

Since then this Accused's state of mind would be that he is cherishing some hope that he will receive a sentence of life imprisonment, or some other period of incarceration instead of the death sentence.

- (f) There are no established decisions or existing guidelines which accommodate,

collectively these two types of period, and in my view, this period of two years and eight months should not, by itself, attenuate to reduce the death sentence to that of life imprisonment in light of the aggravating circumstances in this case. On looking at all of the mitigating factors put forward by counsel for Accused, I'm not compelled to conclude that the shooting of the deceased by the Accused in furtherance of a robbery was out of character. The Accused has been proven to be guilty of murder in course of an armed robbery. This type of offence appears to be prevalent and poses a serious threat to the lives of innocent persons in the society. The Crown has convinced me beyond a reasonable doubt that this case is in the category of the worst cases of murder. It is important to note that the draft Criminal Code of St Lucia has identified the type of murder in this case as a capital murder. In my opinion this case clamours for extreme retribution, the mitigating factors are outweighed by aggravating factors.

Mervin Moise, please stand up.

The sentence of this Court is that you suffer death by hanging.

Dated this 12th November 2003.

OLA MAE EDWARDS
HIGH COURT JUDGE