SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.30 OF 2004

BETWEEN:

HARRY WILSON

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Ms. Nicole Sylvester for the Appellant
Mr. Colin Williams, Director of Public Prosecutions, with him Ms. Sandra Robertson, Crown Counsel for the Respondent

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2005: October 10; 13; 14;
November 28.

JUDGMENT

[1] RAWLINS, J.A.: The Appellant, Harry Wilson, was convicted for the murder of his daughter, Ariel, who was 2 years old at the time of the murder. He was sentenced to death. He was also convicted on 2 counts of attempted murder of his elder daughter, Shantel, and the girls' mother, Grace Williams. He was sentenced to life imprisonment on each of these counts. He appealed only against the conviction for murder and the death sentence which was imposed on him for the conviction.

[2] Wilson appealed on 12 grounds and reserved the right to add further grounds against his sentence. However, no further grounds were added. When the appeal was heard, Ms. Sylvester pursued grounds 2 and 7. The gravamen of these

grounds is that material irregularity occurred during the course of the trial and the trial Judge failed to deal with the irregularity properly. She also pursued grounds 8 to 12, by which Wilson appealed against the death sentence.

[3] On 14th October 2005, this Court dismissed the appeal against the conviction but allowed the appeal against the death sentence. The Order substituted instead a sentence of life imprisonment. The reasons for that decision are now given. I shall first consider the appeal on the ground of material irregularity.

Material Irregularity

[4] Ground 2 of the appeal, in its entirety, reads as follows:

> "Material irregularity occurred in the course of the Appellant's trial, namely:
>
> (a) The Appellant was prejudiced by the fact that while his defence was being put, a member of the jury shouted out among other things 'Yes Jesus' after the said witness [Shantel Williams] responded to a question in cross-examination.
>
> (b) The Appellant immediately expressed his concern requesting that a new jury be empanelled or the matter be investigated to determine what the jury meant by the said words but this request was denied.
>
> (c) As a consequence, the Appellant was not able in the circumstances to conduct his defence fairly or at all.
>
> (d) The Learned Trial Judge without an investigation into why the words were said and by whom determined that the words were not prejudicial to the Appellant when it is well known that in local parlance the words 'Yes Jesus' may connote a meaning prejudicial to the Appellant.
>
> (e) Failure by the Learned Trial Judge to conduct an investigation as to what was said by the jury deprived the

Appellant of due process, the protection of the law and the possibility of having a different jury empanelled.

(f) Failure by the Learned Trial Judge to empanel a fresh jury deprived the Appellant of due process, the protection of the law and the possibility of having a fair trial.

(g) In the circumstances, the trial of the Appellant was unconstitutional."

[5] Ground 7 of the appeal stated that the Trial Judge took the wrong approach to the statement which the member of the jury made during the course of the trial.

[6] The complaints raised on these grounds of appeal relate to prejudice. Learned Counsel for the appellant relied on the test for bias in R. v Gough [1993] A.C. 646, at page 659, and in R. v Panayis (Charalambos) [1999] Crim. L.R. 84. The latter case involved an application for leave to appeal against conviction for the offences of conspiracy to defraud and conspiracy to commit arson. One ground of appeal was that there was a real danger of bias, which should have vitiated the convictions. This arose because a juror had a conversation with Panayis' Solicitor's Clerk. A reference was made to the trial in the conversation. The trial Judge conducted an inquiry, and concluded that the juror had done nothing wrong. He therefore did not discharge the juror. Rather, he warned the juror against discussing the matter further. Subsequently, during the course of the trial, the juror told the foreman that the earlier conversation with the solicitor's clerk was 'relevant'. The Judge conducted another inquiry. All of the members of the jury informed the Judge that neither the original conversation nor any further reference to it had influenced them. The Judge did not discharge any member of the jury.

[7] In Panayis, the English Court of Appeal refused to grant leave to appeal. That Court stated, *inter alia*, that it would not easily disturb the trial Judge's decision not to discharge the jury because it fell within the Judge's discretion to determine whether the incidents had actually influenced them. The Court of Appeal noted

that the parties did not ask the trial Judge to discharge the juror after the original conversation with the solicitors' was revealed. The Court expressed the view that what occurred subsequently was inconsequential. In the result, the Court could not conclude that there was a real danger of bias. What was perhaps most critical, however, was that the Court found that the Judge properly exercised the discretion by conducting the inquiry in order to ascertain whether the juror and other members of the jury were influenced, and by warning them to put the occurrences completely out of their minds.

[8] The basic principle is that where, during a trial, a Judge realizes that something has occurred which is likely to prejudice a juror, or which shows that a juror is likely to have some predisposition against an accused, the Judge should conduct an investigation into the matter. If, on that investigation, the Judge finds that there is a real danger that what transpired will prejudice or predispose any juror, the Judge must discharge the juror and continue the trial. If the investigation shows that other jurors had also been prejudiced or the jury panel has become contaminated, the Judge should discharge the jury and empanel a new jury, unless alternate jurors are sufficient to constitute a proper panel. (See Blackwell [1995] 2 Cr. App. R. 625.).

[9] Ms. Sylvester said that a juror uttered the words "Yes Jesus" and, given the circumstances in which the words were uttered, an extraneous matter was introduced into the trial, which could only have been prejudicial to the appellant. She insisted that the trial Judge erred in law when she did not recognize the potential risk of what occurred and investigate the matter. She cited as authority R. v Spencer and others [1998] 2 All E.R. 928. She recalled that since she raised the matter at the trial, the Appellant in the present case was not in the same position as the appellant in Leon Queeley v The Queen, British Virgin Islands Criminal Appeal No. 15 of 2001 (29th September 2003).

[10] In Leon Queeley, the appellant alleged, as a ground of appeal, that the trial Judge erred in law by failing to discharge the jury. At the trial only the mother of the deceased had given formal evidence when the jury asked her how she felt about the appellant who had killed her son. Redhead JA stated, at paragraph 57 of the Judgment, that the Appellant could not raise the issue of prejudice on appeal, since he did not raise it at the trial. There is therefore no bar to the issue being raised on appeal in the present case.

[11] The words "Yes Jesus" do not appear in the trial transcripts. The transcripts show that the record of the proceedings was replayed, but it did not reveal the words. Notwithstanding this, the learned trial Judge heard submissions from Ms. Sylvester and from the Learned Director of Public Prosecutions, Mr. Williams, when the matter was raised at the commencement of hearing on the morning of 9th November 2004. It was raised in the absence of the jury. Ms. Sylvester informed the learned trial Judge that during the cross-examination of Shantel on the afternoon before, a juror uttered the words at the point when, in answer to a question, Shantel said that her mummy told her to tell the truth and the truth must set her free.

[12] I agree with the Judge's ruling that the circumstances revealed no irregularity, and thus, no legal basis upon which she was required to conduct an investigation to determine whether to discharge the juror or the jury. In the Judge's view, the words revealed no prejudice against the accused (the appellant in this appeal). The Judge found that there was no evidence of improper acquaintance, improper influence or misconduct, which was likely to dispose any juror against the appellant. The Judge said that even if the words were uttered, in their true context, they amounted to no more than an acknowledgement that if the witness spoke the truth, the Lord would see her through. The learned Judge went on to state that, properly directed by her, the jury could have continued to fulfill their duty to afford the appellant a fair trial. However, Ms. Sylvester noted that the Judge did not address the matter in the summation to the jury.

[13] The transcript of the summation shows that the Judge did not specifically speak to the matter. However, she did what was important, when she admonished the jury to decide the case only on the evidence which they heard in court. She warned them against being influenced by sympathy for or prejudice against the appellant. She reminded them to be true to their oaths. She directed them how to consider the evidence. She informed them that it was the duty of the Prosecution to satisfy them so that they felt sure of the guilt of the appellant on each count before convicting him. She explained the elements of each count. In short, the Judge did what was required to ensure that the Appellant obtained a fair trial and that the jury understood the nature of their duty and the importance of returning a fair verdict. At the end of the summation, the learned Judge inquired of both Counsel whether there was anything that she omitted, which they wished her to speak to the jury about. There is no indication that there was request to address the matter, which is the subject of these grounds of appeal, specifically. In the foregoing premises, the appeal fails on grounds 2 and 7.

The appeal against the death sentence

[14] First, I shall restate the principles that are applicable to sentencing in a case in which a person is convicted of murder in the terms in which I distilled them in Mervyn Moise v The Queen, St. Lucia Criminal Appeal No. 8 of 2003 (15th July 2005). I shall then apply those principles to the present case.

The applicable principles

[15] In the jurisdiction of this Court, the legal principles that relate to sentencing in murder cases are fairly well settled. They flow from the fountainhead, which is the decision of this Court in Spence and Hughes, and subsequent kindred cases. Alleyne J.A., as he then was, rationalized the principles in Francis Phillip and Kim John v The Queen, St. Lucia Criminal Appeal No. 4 of 2003. He considered

the initial statements that Sir Dennis Byron, CJ, made in Spence and Hughes. He also considered the subsequent statements, which Lord Bingham of Cornwall made in Patrick Reyes v The Queen, Privy Council Appeal No. 64 of 2001. He considered as well a statement that Saunders J.A. (Ag.), as he then was, made in a dissenting Judgment in Christopher Remy v The Queen, St. Lucia Criminal Appeal No. 6 of 2002, and statements that Byron J.A., as he then was, made in Abraham v The Queen, St. Vincent Criminal Appeal No. 12 of 1995.

[16] The foregoing cases establish that the first principle by which a sentencing Judge is to be guided in these cases is that there is a presumption in favour of an unqualified right to life. The second consideration is that the death penalty should be imposed only in the most exceptional and extreme cases of murder. At the hearing, the convicted person must raise mitigating factors by adducing evidence, unless the mitigating factors are obvious from the evidence given at the trial. The burden to rebut the presumption then shifts to the Crown. The Crown must negative the presence of mitigating circumstances beyond a reasonable doubt. The duty of the sentencing Judge is to weigh the mitigating and aggravating circumstances that might be present, in order to determine whether to impose a sentence of death or some lesser sentence.

[17] It is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person. The death sentence should only be imposed in those exceptional cases where there is no reasonable prospect of reform and the object of punishment would not be achieved by any other means. The sentencing Judge is fixed with a very onerous duty to pay due regard to all of these factors.

[18] In summary, the sentencing Judge is required to consider, fully, two fundamental factors. On the one hand, the Judge must consider the facts and circumstances that surround the commission of the offence. On the other hand, the Judge must consider the character and record of the convicted person. The Judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case.

The present case

[19] In her sentencing judgment, the trial Judge correctly stated the applicable principles, although she did not refer to the burden and standard of proof until she stated her decision as follows:

> "This is a very brutal and heinous crime for which I am convinced beyond a reasonable doubt that Mr. Harry Wilson should receive the death penalty for having murdered his daughter … any lesser sentence would not be appropriate."

[20] I agree with the learned Judge that this was a heinous crime. She also described it as a very brutal and senseless murder that was carried out in circumstances which indicated an intention to kill or to cause grievous bodily harm. The Judge looked at the circumstances of the offence.

[21] The facts reveal that the appellant and Grace Williams became involved in a relationship when they were both quite young. She gave birth to Shantel when she was 16 years old. The appellant and Ms. Williams subsequently cohabitated eventually at Campden Park, and Ariel was born while they lived there. In 2000 the appellant migrated to Barbados in search of work. He spent almost one year there. During that time the relationship broke down. Ms. Williams told him the relationship was at an end. He nevertheless returned to the house at Campden Park. The relationship was tempestuous. Ms. Williams sent Shantel and eventually, Ariel, to reside with her mother. She sent Ariel on 15th February 2001. On 17th February 2001, the appellant collected the children from their

grandmother's house, on the pretext that he wanted to have them for the weekend. He took them to Campden Park.

[22] When the appellant arrived with the children at the home in Campden Park, Ms. Williams was about to go to a function. They quarreled. She stayed at home. They continued to quarrel and fight after he locked himself, Ms Williams and the children into a bedroom.

[23] The evidence of Ava Warner, a neighbour, paints a picture of events, which indicates strange behaviour by the appellant on the evening before Ariel was murdered and after. On the evening before the murder, the appellant told her that he was not going to leave the children with Ms. Williams to suffer. However, he did not answer her questions whether he would take them to his mother. According to Ms. Warner, he asked her for coins to call his mother, but she saw him pacing forward and backward in the yard after. She had left him after they spoke for a while because of the way his face looked.

[24] According to Ms. Warner, on the morning of the murder, the appellant kept telling her that Ms. Williams had killed herself and the children, even when Ms. Warner told him and it should have been clear to him that Ms. Williams and Shantel were alive. The appellant said the same thing to Verene Edwards, Ms. Williams' mother, when he called her by telephone just after the incident.

[25] The evidence of Ms. Williams indicates the tempestuous and abusive nature of the relationship, particularly as the gruesome events unfolded during the night of 17th February, 2001, and up to and immediately after the incident on which the appellant killed Ariel and inflicted cuts across the throats of Ms. Williams and Shantel. After these events, the appellant continually denied that he committed the crimes. Even as he spoke with Ms. Williams after the incident, he kept asking her why she killed herself and the two children.

[26] Ms. Sylvester relied on Cardinal Williams v The Queen, St. Vincent & the Grenadines Criminal Appeal No. 10 of 1995. The evidence in that case shows that the appellant, Williams, murdered his common law wife in circumstances which show parallels to those in which Ariel was murdered in the present case. Cardinal Williams had killed both of their children also. He admitted that he had killed the children in a statement to the police. He subsequently denied killing them. At his trial, he insisted that his common law wife killed them and it so enraged him that he killed her. He maintained this story long after his conviction.

[27] In his psychiatric report, Dr. Debnath formed the opinion that Cardinal Williams was mildly depressive and that he was faking amnesia. Dr. Mahy, a Psychiatrist of long experience, formed the opinion that Cardinal Williams was suffering from mild depression at the time of the killing. He stated that Williams clearly recalled all the events of the day of the killing. He therefore ruled out the possibility that Williams had suffered a major depressive disorder. According to Dr. Mahy, on the day of the killing, Williams, was very embarrassed and desperate and could no longer tolerate his wife's infidelity and he took a deliberate decision to kill her and the children.

[28] On the other hand, Dr. Eastman, an English Psychiatrist, formed the view that Cardinal Williams was mentally ill at the time when he committed the murders. He came to this conclusion by way of diagnosis. He said that the conclusion was strengthened by two other observations. The first was that a person deliberately killing both of his or her children in the absence of mental illness is rare unless there is a history of child abuse. Dr. Eastman's second observation was the enormous number of wounds which Williams had inflicted upon the deceased persons when he had no previous history of violence.

[29] Based primarily upon Dr. Eastman's Report, this Court found that there was sufficient evidence upon which the defence of diminished responsibility could have been available to Cardinal Williams. This Court quashed the conviction for murder

and substituted a conviction for manslaughter instead of remitting the case to the High Court for retrial, on the ground that a retrial would have served no practical purpose. By that time, the Pratt and Morgan principles would have precluded the imposition of the death sentence anyhow. Williams was sentenced to serve 10 years in prison.

[30] In the present case, the appellant, Wilson, had the benefit of two Reports from Dr. Debnath. In these reports, Dr. Debnath stated that the appellant had no signs of any formal thought disorder. He also found that the appellant is an intelligent person, who was "… in his full and normal sense" during or immediately prior to the time that he killed his daughter. The Judge did not have the benefit of any other psychiatric reports.

[31] There is a matter, however, from the Cardinal Williams case, which has some resonance in relation to the present case. It is that observation, which Dr. Eastman made that the killing of ones own children is rare in the absence of mental illness or child abuse. There is no evidence that the appellant, Wilson suffered abuse as a child. Although he cut the throat of his daughter, Ariel, and inflicted cuts across the throats of his daughter, Shantel, and Ms/ Williams, his common law wife on the morning of 18th February 2001, Wilson is in denial just as Cardinal Williams became. However, in the absence of any psychiatric or other relevant evidence, which specifically speaks to diminished responsibility in relation to Wilson, these observations could not confer the benefit of this defence upon him. I am of the view, however, that coupled with a matter, which comes out of the sentencing Judgment, they assist in vitiating Wilson's death sentence.

[32] In the sentencing judgment, the Judge noted Wilson's good antecedents. He had no previous criminal convictions. She also noted the evidence that he is a model prisoner, a good father and son. Notwithstanding this, she stated:

> "I do not have any evidence before me (from) which I can properly conclude that the prospect of rehabilitation exists in relation to Mr. Wilson."

[33] In the light of this statement, a consideration of the sentencing judgment reveals that although the Judge noted the mitigating factors, they were not detailed or weighed against the other factors as the principle in relation to death sentences require.

[34] It was obvious from the Probation Report by Mr. Matthews, the Deputy Director of the Family Services Division, and the evidence of Mr. Charles, the Chief Prison Officer in particular, and evidence that was given by others during the trial and at the sentencing hearing, that there was a plethora of material that spoke to Wilson's good chances of rehabilitation. These should have been detailed and dispassionately weighed and considered for the purpose of objectively analyzing Wilson's prospects for reform and social re-adaptation. The learned trial Judge erred by not doing this. The Probation Report and the other evidence which spoke to this, coupled with his clean record clearly show that his chances of rehabilitation are good. It is my view, that in the circumstances, no good purpose would be served by remitting this case to the High Court for a re-sentencing hearing.

[35] It was in the foregoing premises that the appellant's death sentence was quashed and a sentence of life imprisonment was substituted instead.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal