[2010] UKPC 22
Privy Council Appeal No 0101 of 2009

JUDGMENT

Earlin White *v* The Queen

From the Court of Appeal of Belize

before

Lord Rodger
Lady Hale
Sir John Dyson

JUDGMENT DELIVERED BY
Sir John Dyson
ON

29 July 2010

Heard on 28 June 2010

Appellant	*Respondent*
Tim Owen QC Alison Macdonald (Instructed by Simons Muirhead & Burton)	Not represented

SIR JOHN DYSON SCJ:

1. On 20 October 2003, the appellant was convicted after a trial before Gonzalez J and a jury in the Supreme Court of Belize (Central Criminal Session) of the murder of Dwayne Arnold. On 24 October 2003, he was sentenced to death by hanging. His appeals against conviction and sentence were dismissed by the Court of Appeal of Belize (Mottley P and Sosa and Carey JJA) on 2 March 2004, reasons being given on 18 June 2004. On 10 February 2010, he was granted permission to appeal against sentence by the Judicial Committee of the Privy Council.

2. The prosecution case at trial was that on 11 February 2002, the deceased was murdered at Electrical Zone Rebuilding, 88A Cemetery Road, Belize City, where he worked as an electrician. Franz Hamilton, a former employee of the deceased, gave evidence that he had been in the deceased's car when the appellant opened the driver's door, pointed a gun at him and demanded "one quarter". He said that the appellant followed him into the building. The deceased emerged from an office behind the sales counter and asked the appellant what he wanted. The appellant asked the deceased for "one quarter". He then produced a handgun and fired three shots at the deceased. Two lead projectiles were recovered from the deceased's body, one from the head and one from the right arm. At the trial, the appellant's defence was one of alibi.

3. He was convicted on 20 October 2003. Immediately after the jury's verdict had been pronounced, the Marshall of the court said:

> "Earlin White, stand up. Earlin White, the jury have found you guilty of the crime of murder, have you any matter of law to urge why sentence of death should not be pronounced on you?"

4. The appellant then made a few remarks after which his counsel, Mr Twist, sought from the judge and was granted an adjournment to enable him to prepare a plea in mitigation.

5. On 24 October, Mr Twist made his plea in mitigation. He referred the judge to the decision of the Board in *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235. He submitted that the death penalty was discretionary and that the judge should impose a life sentence. The prosecution sought the death penalty.

6. The appellant was 30 years of age at the time of sentence. He had a number of previous convictions. These included a conviction on 2 November 1994 for manslaughter, for which he was sentenced to 4 years' imprisonment; two drugs offences in 1995, for which he was sentenced to 18 and 3 months' imprisonment respectively; offences of burglary and possessing ammunition without a licence in 1999, for which he was fined; and an offence of "dangerous harm" in May 2003, for which he was sentenced to imprisonment for one year. No psychiatric, psychological or social enquiry reports were placed before the judge.

7. In passing sentence, the judge said:

> "I must say that in this case, right away that I do not see any mitigation factors which would cause me to exercise my discretion and impose a life sentence on the accused person, Earlin White. And I must also say that I have not been persuaded by the mitigation plea made by Mr Twist with a view to cause me to temper justice with mercy and thereby not (*sic*) impose a life sentence on the accused or on the prisoner. On the contrary, when I consider the manner in which this particular offence was committed the [? prevalence] of this offence and offences of similar nature, together with the fact that the prisoner has the propensity for the commission of offences of this nature, namely manslaughter in 1994, he [was] convicted for that crime, and dangerous harm as early as 2003, I find myself compelled to impose the death sentence on this convicted person, Earlin White. In the circumstances, therefore, I will impose the sentence of death on Earlin White."

8. Although there was an appeal against sentence to the Court of Appeal, counsel did not advance any arguments in support of it. In these circumstances, the Court of Appeal saw no reason to interfere with the sentence that had been passed.

9. On behalf of the appellant, Mr Tim Owen QC advances three grounds of appeal. These are that the judge (i) failed to adopt the correct approach to the imposition of a discretionary sentence of death; (ii) failed to adhere to the sentencing guidelines propounded by Conteh CJ in *The Queen v Reyes* (decision of the Supreme Court of Belize, 25 October 2002); and (iii) failed to obtain a psychiatric report.

Failure to adopt the correct approach

10. Section 106 of the Criminal Code of Belize provides:

> "(1) Every person who commits murder shall suffer death:

> Provided that in the case of a Class B murder (but not in the case of a Class A murder), the court may, where there are special extenuating circumstances which shall be recorded in writing, and after taking into consideration any recommendations or plea of mercy which the jury hearing the case may wish to make in that behalf, refrain from imposing a death sentence and in lieu thereof shall sentence the convicted person to imprisonment for life.
>
> (3) For the purposes of this section—
>
> 'Class A murder' means:-
>
> ………
>
> (b) Any murder by shooting…
>
> …….
>
> 'Class B murder' means any murder which is not a Class A murder."

11. Section 7 of the Constitution of Belize provides that "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment." At para 43 of its judgment in *Reyes v The Queen,* the Board said:

> "In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect."

Accordingly, the Board said, any murder by shooting is to be treated as a Class B murder. It remitted the case to the Supreme Court of Belize in order that a judge of that court could pass appropriate sentence on the defendant.

12. In passing sentence pursuant to the Board's decision, Conteh CJ said at para 17 of his judgment in *The Queen v Reyes* (decision of the Supreme Court of Belize, 25

October 2002) that the discretion to pass the death penalty "should be informed and guided by, for example, the gravity of the offence, the character and record of the offender, the subjective factors that might have influenced the offender's conduct, the design and manner of execution of the offence and the possibility of reform of the offender." At para 19, he said that "each case should be considered and determined within the overarching constitutional requirement of humanity stipulated in section 7 of the Constitution of Belize, which would include the consideration of the culpability of the offender and of any potentially mitigating circumstances of the offence and the individual offender." At para 20 he said that "it is the imposition of the death penalty rather than its non-imposition for murder that requires justification." These statements gave proper effect to the Board's decision.

13. At para 21 of its judgment in *Trimmingham v The Queen* [2009] UKPC 25, the Board distilled the approach that should be followed in discretionary death penalty cases into two basic principles:

> "The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, 'the worst of the worst' or 'the rarest of the rare'. In considering whether a particular case falls into that category, the judge should of course compare it with other murder cases and not with ordinary civilised behaviour. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled."

14. With one qualification, the Board repeats and wishes to emphasise the importance of applying these two principles. The qualification is as to the apparently absolute prohibition on taking into account *against* the offender his bad character and any other relevant circumstances that may weigh *against* him. There may be cases where an offender's previous offending is so bad and the previous offences are so similar to the index offence that they are relevant to its gravity. An example might be where the index offence is the latest in a series of sadistic murders. There is the further point that the second basic principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment cannot be achieved by any means other than the death penalty. There may be cases where an offender's previous offending is so persistent and his previous offences so grave that they may properly lead the sentencing judge to conclude that there is no reasonable prospect of reform and that the object of punishment can only be achieved by means of the death penalty.

But no judge should reach such a conclusion without the benefit of appropriate reports: see the discussion on the third ground of appeal at paras 27 to 29 below.

15. The Board accepts the submission of Mr Owen that the judge in the present case failed to apply the correct principles when passing the death penalty. First, his starting point was that it was for the appellant to persuade him to pass a life sentence rather than the death penalty ("I do not see any mitigation factors which would cause me to exercise my discretion and impose a life sentence"). But as was made clear in *Trimmingham,* the starting point is life imprisonment. The death penalty should be imposed only in the most extreme and exceptional cases and then only where there is no reasonable prospect of reform and the object of punishment can only be achieved by the death penalty.

16. Secondly, the judge did not indicate which features of the "manner in which this particular offence was committed" he considered made the case the "most extreme and exceptional", the "worst of the worst" or the "rarest of the rare". In fact, callous and serious though it undoubtedly was, the murder came nowhere near meeting the criteria specified in *Trimmingham.* The deceased was killed with two swift shots. There was no element of sadism, torture or humiliation. In *Trimmingham*'*s* case, counsel for the appellant accepted that the crime was a "brutal and disgusting" murder, involving the cold-blooded killing of an elderly man in the course of a robbery. But although the manner of the killing was "gruesome and violent", there was no torture of the deceased, prolonged trauma or humiliation of him prior to his death and the killing did not appear to have been planned or premeditated. The Board described this as "a bad case, even a very bad case of murder committed for gain". But in its judgment, the case fell short of being "the worst of the worst", such as to call for the ultimate penalty of capital punishment." The appellant had behaved in a "revolting fashion", but the case was not comparable with the worst cases involving sadistic killings. The facts of the present case were considerably less appalling than those in *Trimmingham's case.*

17. Thirdly, the judge took account of the prevalence of murder and offences of a similar nature. But the death penalty cannot be justified by the prevalence of murder or other similar offences. Neither of the two principles articulated in *Tremmingham* mentions prevalence as a relevant factor.

18. Finally, the judge was wrong to regard the appellant's previous convictions as a relevant factor to be taken into account. He had not been previously convicted of murder. He had only one previous conviction for manslaughter. There is no information about the manslaughter conviction in 1994. But the fact that the appellant was only sentenced to four years' imprisonment shows that the offence could not have been of the utmost gravity. In these circumstances, his previous convictions were

irrelevant to the gravity of the murder and did not even arguably show that there was no reasonable prospect of reform.

19. It is also to be noted that more than six years have passed since the death penalty was imposed on the appellant. Such a delay in carrying out an execution would itself constitute "inhuman or degrading punishment or other treatment" contrary to section 7 of the Constitution of Belize and would be a further reason for substituting a sentence of life imprisonment: see *Pratt v Attorney-General for Jamaica* [1994] 2 AC 1.

20. The first ground of appeal therefore succeeds and the appeal against sentence must be allowed. The sentence to death by hanging is therefore set aside and a sentence of life imprisonment substituted.

21. It is right, however, that the Board should express its view on the other two grounds of appeal

Failure to adhere to sentencing guidelines

22. In *The Queen v Reyes,* at para 26 of his judgment Conteh CJ proposed guidelines to be followed in the prosecution, trial and sentencing of accused persons charged with murder "in order to introduce some measure of consistency and rationality and in keeping with the provisions of the Constitution of Belize". These excellent guidelines which the Board strongly endorses are:

> "*(i)* *As from the time of committal, the prosecution should give notice as to whether they propose to submit that the death penalty is appropriate.*
>
> *(ii)* *The prosecution's notice should contain the grounds on which they submit the death penalty is appropriate.*
>
> *(iii)* *In the event of the prosecution so indicating, and the trial judge considering that the death penalty may be appropriate, the judge should, at the time of the allocutus, specify the date of the sentence hearing which provides reasonable time for the defence to prepare.*

> (iv) *Trial judge should give directions in relation to the conduct of the sentence hearing, as well as indicating the materials that should be made available, so that the accused may have reasonable materials for the preparation and presentation of his case on sentence.*
>
> (v) *At the same time the judge should specify a time for the defence to provide notice of any points or evidence it proposes to rely on in relation to the sentence.*
>
> (vi) *The judge should give reasons for his decision including the statement as to the grounds on which he finds that the death penalty must be imposed in the event that he so conclude. He should also specify the reasons for rejecting any mitigating circumstances."*

23. The judge failed to apply guideline (iv) or (vi). As regards (iv), he did not give any directions in relation to the conduct of the sentencing hearing or what materials should be made available. After the jury's verdict was returned, it was the appellant's counsel who requested time to prepare for the sentencing hearing. He asked for time to consider with his client whether there were any persons who should be called in support of the plea in mitigation. He was given no guidance by the judge as to what information should be presented at the sentencing hearing. The importance of following Conteh CJ's guidelines was emphasised by the Board in *Pippersburgh and Robateau v The Queen* [2008] UKPC 11 at para 31.

24. As regards (vi), the judge failed to give adequate reasons for imposing the death penalty in this case. In particular, he failed to explain why he considered (if he did) that the facts of the offence were the most extreme and exceptional and why he considered that there was no reasonable prospect of reforming the appellant. If he had imposed on himself the discipline of giving adequate reasons for his decision, he might have avoided the pitfalls which gave rise to the first ground of appeal.

25. The Board cannot stress enough the importance of following the carefully drafted sentencing guidelines of Conteh CJ.

Failure to obtain reports

26. The importance of obtaining relevant reports in capital cases has been emphasised on a number of occasions. The Board refers to its decision in *Pittersburgh and Robateau's case* at paras 32 and 33. The Board commended the judgments of the Eastern Caribbean Court of Appeal in *Mitcham v The Queen,* 3 November 2003 and *Moise v The Queen,* 15 July 2005. In the former case, Sir Dennis Byron CJ said: "When fixing the date of a sentencing hearing, the trial judge should direct that social welfare and psychiatric reports be prepared in relation to the prisoner". At para 33, the Board approved what Alleyne JA said in the latter case and said:

> "It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings."

27. In some cases where the possibility of mental disability exists, a psychological report should be obtained as well. It has not, however, been suggested by Mr Owen that such a report should have been obtained in respect of the appellant.

28. At the time of the sentence hearing in the present case, no psychiatric reports had been obtained and only a limited social inquiry had been undertaken by the Belize Police Department. To sentence the appellant to death without a psychiatric report and a comprehensive social inquiry report was plainly wrong. The Board finds it difficult to conceive of circumstances in which it would be right to impose the death penalty without such reports. The failure to do so in the present case is yet a further reason why the sentence should be quashed and a sentence of life imprisonment substituted.