

Death Penalty Procedure Conference

SPEECH BY HIS LORDSHIP, THE HON. ADRIAN D. SAUNDERS
Chief Justice [Ag.] of the Eastern Caribbean Supreme Court



on

SENTENCING FOR MURDER

Jamaica

13th September, 2004

I am exceedingly pleased to have been invited to this Conference because, as a jurist, what we shall be discussing today deeply interests me. I stress as a jurist, because for the record, I am not, and never have been, a member of any organization that promotes the abolition of capital punishment. Indeed, for some time I used to ask myself what were my philosophical views on the propriety of the death sentence as a punishment and I have to confess to a failure to come up with an unreserved or emphatic position to that question. I suppose one can say that I am somewhat of an agnostic on the matter.

I do have very clear views on jurisprudential issues regarding the application of the death penalty however and I believe I made some of those views known when, by sheer chance, I had the opportunity to act as a member of our Court of Appeal as it was faced with the consolidated cases of Hughes and Spence. Having listened to the arguments, I was convinced that whether a convicted murderer should or should not be executed was a matter that ought first to be determined by a judicial process as distinct from being determined by the Mercy Committee of the executive arm of government. I was also of the view that there were many murders where the death sentence was wholly disproportionate punishment.

Just consider for example that in many statutes it is sufficient to be convicted of murder if the defendant's intention was merely to cause serious harm as distinct from having a specific intent to kill. Finally, I felt that in these enlightened times

when we treasure basic concepts of natural justice, it could not be appropriate that the State should deprive a defendant of his life without giving that defendant a real, a meaningful opportunity to put forward cogent reasons why he should be spared such an irrevocable penalty.

In these circumstances, and in line with my understanding of the decisions of the highest judicial authority of many countries and many international tribunals, I had and continue to have absolutely no reservations about ruling automatic death penalties unconstitutional as infringing the constitutional protection against inhuman treatment.

Some said that in so deciding we were making law; that we were trespassing upon the province of Parliament. Well, if one wants to put it that way then I have a simple response. The Constitution enjoins Judges to interpret the law. Anytime a court interprets a law or a constitutional provision that has not been interpreted before, or the court reverses an extant interpretation, then the court is making law in a manner of speaking. And if judges fail to interpret the law and the Constitution according to their best understanding of the law and their consciences, then they would be abdicating their responsibilities. The Constitution states that no one shall be subjected to inhuman treatment and I think it is for the courts, not politicians, to determine, after hearing argument on

the matter, what does and what does not constitute inhuman treatment. This criticism about usurping the role of Parliament does not trouble me in the least.

Some would like their Judges to be timid souls, reactive and not pro-active. But I like to recall a quotation of Lord Denning's in *Candler v. Crane Christmas*. Lord Denning stood in a minority then and he reminded his brethren in the majority who were reluctant to break new ground that:

"This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases of *Ashby v. White*, *Pasley v. Freeman* and *Donoghue v. Stevenson* you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed."

Indeed, how will our law develop if Judges lack the courage to go in a direction that no court has gone before?

What the majority in *Hughes and Spence* struggled over was the manner in which an assessment should be made as to capital or non capital sentence and what procedure should be adopted to accompany that process. In *Hughes and Spence* we decided that the jury should determine whether a convicted murderer should or should not receive the death penalty. We thought that such a weighty decision

should best be left to the unanimous decision of the defendant's peers after an appropriate summation by the trial Judge.

We embarked upon that procedure, i.e. jury determination of the sentence, immediately after the decision in *Hughes and Spence* was given. As fate would have it, having returned to my then substantive position as a trial Judge, the first of a small handful of such matters under this new dispensation came before me. Patrick James had stealthily entered the victim's house in the dead of night, crept up on the victim as the latter lay in bed peacefully sleeping, hacked him to death with a long sharp cutlass and crept back out of the house. It was a gruesome, unprovoked attack and the jury rightly returned a verdict of guilty of murder. Having done so, members of the jury were now obliged to take part in sentencing proceedings where they would determine whether the punishment should be of a capital or non capital nature.

At the time the only guide I had as to how to proceed was the very limited one set out by Chief Justice, Sir Dennis Byron, in *Hughes and Spence*. Sir Dennis had stated there that at the sentencing phase, the offender should have an opportunity to mitigate on the same terms as he currently has to defend, that is he should have the right to remain silent, to make an unsworn statement (where substantive law allowed the same) or to give evidence on oath and be liable to cross-examination. He must also be allowed to call witnesses on his behalf, and

to address the jury himself or by his counsel. The Prosecution would have the right to adduce evidence on the factors relevant to the decision to be taken and also to make an address. After both sides had an opportunity to address the court, the Judge had to give the jury directions and invite the jury to determine whether the offence was of a capital or non-capital nature.

In the case of Patrick James I required the Prosecution to commission both a psychiatrist and a social welfare officer to examine the defendant and to report to the court on their findings. The psychiatrist reported that at the time of the murder, Patrick James was suffering from a moderate case of major depressive disorder. He was at the time mentally impaired. I summed up to the jury and stressed to them that here was a man who was mentally impaired at the time of the commission of the offence. The jury was unable to agree as to whether they should return a capital sentence. I took that to mean that he should receive a non-capital sentence and I sentenced Mr. James to 25 years in prison.

In the mean time of course the decision in Hughes and Spence had been appealed to the Privy Council. Their Lordships ultimately upheld the decision (Spence had since been acquitted on other grounds) and further held that Judges and not juries should determine whether a crime merited the death sentence. Hughes then came before me to be sentenced, ably represented by no less a person than Mr. Starmer QC. On that occasion I had to politely decline Mr. Starmer's

invitation to set down more specific guidelines as to the procedure that should be adopted during the sentencing phase of a murder trial. I thought that such guidelines should emanate from the Chief Justice or the Court of Appeal.

It was not until the case of Mitcham that Chief Justice, Sir Dennis Byron, sitting on a Court of Appeal Bench of which I was a member, laid down firm guidelines as to the procedure that should be adopted after a jury had arrived at a verdict of guilty of murder. We were constrained to do so because, without clear guidance on the matter, wide variations in procedure were creeping in among the trial judges. Some were requiring a separate sentencing hearing, some were not. Some insisted on the tendering of psychiatric and social welfare reports, some were proceeding straight away after the verdict to impose death sentences.

The OECS Bar Association met and discussed the issue and submitted to the Chief Justice guidelines which they thought should be adopted. In Mitcham we thought the time was right to set the record straight and in that case we laid down the following guidelines which adopted almost all of the recommendations of the OECS Bar Association.

Firstly we stated that if the prosecution intended to submit that the death penalty was appropriate, notice to that effect should be given no later than the day upon which the offender was convicted. We did not explicitly say this in Mitcham but

Prosecutors are encouraged to so indicate at the earliest opportunity. We thought however that the Prosecution should not be debarred from giving such notice immediately upon conviction in which case it may be given orally. We decided to allow the Prosecution the opportunity to give such late notice because we anticipated that there may be instances where the conduct of the defendant in the course of a trial might tip the scales as to whether the Prosecution may wish to submit that the death penalty was appropriate. In any event the notice, whenever it is given, should contain the grounds on which the death penalty is considered appropriate.

Upon conviction by the jury, and the Prosecution having given notice that the death penalty is being sought, the trial Judge should, at the time of the allocutus, specify the date of a sentencing hearing and that date should provide reasonable time for preparation. Where the Prosecution and the trial Judge consider that the death penalty is not appropriate, a separate sentencing hearing may be dispensed with if the accused so consents and the offender may be sentenced right away in the normal fashion.

We mandated that in every instance, the trial Judge should direct that social welfare and psychiatric reports be prepared in relation to the prisoner. The court should know of the defendant's social background and of his upbringing and I

think it is of the highest importance that the sentencing Judge, before imposing a death sentence, should know from an expert the state of mind of the defendant at the time of commission of the offence and also perhaps at the present time.

In *R vs Remy*, a case in which the majority on our Court of Appeal confirmed a death sentence, I dissented on that issue. No psychological or psychiatric report had been carried out before the prisoner was sentenced to death and that circumstance caused me too much discomfort. I think a trial Judge should always have the benefit of such an assessment because sometimes during the course of a murder trial, little or no suggestion might be made of any impairment of mind on the part of the accused. Sometimes, it is not in the interest of the defendant to raise such a matter. To do so may embarrass another defense being put forward. Between the *Hughes and Spence* and *Mitcham* decisions we had instances where, at a sentencing hearing, for the very first time, the court learned that the prisoner was or may have been labouring under some mental impairment. Such was the case in *Patrick James* and so also *Berthill Fox*. In each of these two cases that circumstance made the difference between a capital and some other form of sentence. This is why it is so important for the sentencing Judge to have the benefit of a psychiatric or psychological report.

In Mitcham, we confirmed that the burden of proof at the sentencing hearing lies squarely on the prosecution and that the standard of proof is proof beyond reasonable doubt. Finally, we indicated that the trial Judge should give written reasons for her/his decision at the sentencing hearing. This is critical in case there is an appeal.

There are quite a few grey areas in the above and I have no doubt that you will draw my attention to some of them. At least however, I think these guidelines set out a platform upon which we can build and I think it is salutary that Conferences like these are organized with the participation of the Bench and the Bar and members of the public. I trust also that the DPP's office is adequately represented here as well. Together, all the interested parties must work towards refining a developing but very important area of the law.