

- (1) **Larry Raymond Jones**
- (2) **Peter Meadows**
- (3) **Anthony Neely**
- (4) **Jeremiah Poitier**
- (5) **Arnold Heastie and**
- (6) **Nekita John Hamilton**

Appellants

v.

**The Attorney General of the Commonwealth
of The Bahamas**

Respondent

FROM

**THE COURT OF APPEAL OF THE
COMMONWEALTH OF THE BAHAMAS**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 3rd April 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Lane
Lord Jauncey of Tullichettle
Lord Browne-Wilkinson
Sir John May

[Delivered by Lord Lane]

The appellants in these consolidated appeals have each been convicted of murder, some of them of other crimes as well. Each of them has been sentenced to death by the trial judge who, it is plain, considered that he had no discretion to pass any lesser sentence. The dates of conviction and sentence are not material to the present proceedings because Mr. Ginton, Counsel for the appellants, has expressly disclaimed any intention at this stage of raising any question of lapse of time as part of his case. As a matter of history only, therefore, the dates of conviction and sentence ranged from August 1986 (Neely and Poitier) to 25th April 1989 (Heastie and Hamilton). Appeals against conviction were in every case unsuccessful. The appellants issued originating summonses pursuant to Article 28 of The Bahamas Constitution before the Supreme Court of The Bahamas claiming various forms

of relief, certiorari, prohibition and declarations, aimed at setting aside the sentences of death imposed upon them. Article 28 provides that:-

- "(1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
- (2) The Supreme Court shall have original jurisdiction -
 - (a) to hear and determine any application made ... in pursuance of paragraph (1) of this Article ..."

Execution of the sentences has in the meantime by way of an undertaking by the respondent been stayed. The present issues were tried at first instance in the Supreme Court before the Chief Justice of the Bahamas who in a written judgment delivered on 6th February 1992 refused the relief sought. The Court of Appeal dismissed the appellants' appeal on 28th January 1993, and it is against that dismissal that the appeal to Her Majesty in Council is made.

It has been possible for their Lordships, with the assistance of Counsel, to reduce the seemingly complex grounds of appeal set out in the originating summonses to a more manageable and comprehensible form.

1. Mandatory or Discretionary

The appellants contend that on a true construction of the Penal Code and the Capital Punishment Procedure Act, the imposition of the sentence of death for murder is not mandatory but discretionary, so that the trial judge in each case, had he considered it right to do so, could lawfully have imposed a lesser form of punishment. Clearly, if the judge had been under a misapprehension and so had wrongly considered himself obliged to pass sentence of death when he was not so obliged, it would not be just to allow such sentence to stand. The appellants' contentions are these.

Death by hanging was the mandatory punishment for murder under the Common Law. This applied in the Bahamas by virtue of the Declaratory Act 1799 which provided by section 2, *inter alia*, that:-

"The common law of England, in all cases where the same hath not been altered by any of the Acts or Statutes enumerated in the Schedule to this Act or by any Act ... is, and of right ought to be, in full force within the colony."

By the Offences against the Person Act enacted in the Bahamas in 1865 it was provided:-

- "I. Whosoever shall be convicted of murder shall suffer death as a felon.

- II. Upon every conviction of murder the Court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon, and in respect thereof, might have been had and taken, before the passing of this Act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon."

There can be no doubt but that these provisions imposed a mandatory sentence of death for murder.

On 1st January 1927 the Penal Code replaced the 1865 Act. The Penal Code as amended in 1929 and 1984 contains the following provisions:-

- "10. Nothing in this Code shall affect -
 - (6) the liability of a person under the common law.

- 122. The court before which a person is convicted of any offence, punishable otherwise than with death, or by a minimum term of imprisonment may, according to the circumstances of the case, substitute for a punishment assigned by this Code a different punishment.

- 312. Whoever commits murder shall be liable to suffer death."

The Capital Punishment Procedure Act 1926 provided by section 2 that:-

"Every sentence of death shall direct that the person condemned shall be hanged by the neck until he is dead, but need not state the place of execution."

This was a procedural enactment, amending the form in which the judge should express the death sentence. It does not help to solve the question of whether or not the judge has any discretion. So matters remained until the Capital Punishment Procedure Act 1959, section 2 of which reads:-

"Every sentence of death shall be to the effect only that the person condemned 'shall suffer death in the manner authorised by law'."

This again was procedural - a change in the required phraseology to be used by the sentencing court.

The appellants' case is based on the wording of section 312 of the Penal Code. It is submitted that the words "liable to suffer death" import a discretion in the judge to pass some lesser sentence. It is true that the word "liable" is ambiguous, but in their Lordships' judgment it can, at the best from the appellants' point of view, only be a concession to the possibility of an exercise of the prerogative of mercy and a reprieve under the powers given to the Governor-General.

That view is supported by the following further considerations. It is inconceivable that such a radical change in the law as the abolition of the mandatory sentence of death for murder would have been enacted by something other than clear and express words rather than the ambiguous terms of section 312.

Secondly, the same words "shall be liable" are employed in other sections of the Penal Code, for example sections 313 (attempted murder), 314 (manslaughter), 315 (abetting suicide) where one would expect them to have the same meaning as in section 312.

That meaning is made clear by section 115(3) of the Code which provides:-

"Subject to the provisions of this Code or of any other statute relating to the offence, the court before which any person is convicted of an offence punishable by imprisonment may, in its discretion, sentence him to any less term of imprisonment than the term prescribed by this Code, or such other statute for the offence."

If the word "liable" had meant that the court already had a discretion, the subsection would have been unnecessary.

If any further reason is required it may be found in section 122 of the Code set out above. The coupling of offences subject to a minimum term of imprisonment with those punishable with death indicates the mandatory nature of the latter.

It seems that the only other offence in the Code punishable by death is treason, at section 410, where the same words are used namely "shall be liable" to suffer death. If, as the appellants' argument entails, both murder and treason carry only a discretionary sentence of death, section 122 is otiose.

In short, the death sentence for murder is in their Lordships' view mandatory.

This conclusion coincides with the views (expressed *obiter*) by the Court of Appeal of the Commonwealth of The Bahamas on 28th June 1989 in *Black v. The Queen*, No. 55 of 1987 (unreported) with which view their Lordships respectfully agree.

2. The method of executing the death sentence

Is the method of execution of the death sentence, namely by hanging, provided for by the law of the Commonwealth of The Bahamas?

The appellants were each sentenced by the trial judge in the terms of section 2 of the Capital Punishment Procedure Act to "suffer death in the manner authorised by law". Death warrants were caused to be issued for their execution in accordance with section 5 of that Act.

The contentions advanced on behalf of the appellants are these. On the assumption that the death sentence is mandatory, yet nevertheless the carrying out of that sentence, that is to say the method of inflicting death, is nowhere provided for by any presently effective law; there is no existing law which authorises the infliction of death by hanging. That being the case, continues the argument, the appellants are protected by the terms of the Constitution of the Commonwealth of the Bahamas. Articles 15, 16 and 17, so far as relevant, provide as follows:-

"15 ... every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right ... to each and all of the following, namely -

(a) life ...

16(1) No person shall be deprived intentionally of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

17(1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the Bahamas Islands immediately before 10th July 1973."

If there is no lawful method of inflicting death then, it is submitted, there is a breach of Article 16 because the execution of the sentence imposed by the court is unlawful. There is no manner of execution "authorised by law". The deprivation of life could not be said to be "in execution of the sentence of a court".

By the same token, the appellants' argument continues, assuming hanging to be (under Article 17(1)) inhuman or degrading punishment, the potentially saving effect of Article 17(2) would not be available because of the absence of any law which "authorises the infliction" of such punishment.

As already explained, the common law of England, by which hanging was the lawful method of execution, was made part of the law of the Bahamas by the Declaratory Act of 1799. The appellants contend that the common law, although imported by the 1799 Act, was superseded and replaced by the Offences against the Person Act 1865 which was in its turn repealed by the Penal Code in 1927. Nowhere since then, it is said, can be found any enactment which authorises hanging as the lawful method of execution. This contention fails at the outset. Section II of the 1865 Act, after the opening words providing for the mandatory sentence of death for murder, goes on to import the common law sequelae to such a sentence. So far from superseding and replacing the common law, it recognises and affirms its provisions for the execution of the mandatory sentence. Thus the liability to death by hanging remained in force, reinforced, if necessary, by the words of section 10 of the Penal Code which provides that "Nothing in this Code shall affect ... (6) the liability of a person under the common law". In short, the common law which authorised the execution of a sentence of death by way of hanging was in force at all material times.

The Capital Punishment Procedure Act 1926 (set out above), although procedural, is by implication a recognition that the common law rules in this respect were still in force, and the further procedural enactment in the 1959 Act which prescribes the use of the words "in the manner authorised by law" is a reference to authorisation by the common law.

3. Sentence of a Court

Is the punishment ordered in these cases to be inflicted on the appellants imposed by a court, as required by the Constitution, in particular Article 16, or is it imposed by persons or bodies other than a court and therefore unlawful?

The appellants contend that the latter is the case. Their argument is based on sections 3, 4 and 5 of the Capital Punishment Procedure Act which are in the following terms:-

- "3. So soon as conveniently may be after any sentence of death has been pronounced, the presiding judge shall forward to the Minister his notes of the evidence taken at the trial with a report in writing containing any recommendation or observations on the case which he may think fit to make. The Minister shall cause such report ... to be taken into consideration at a meeting of the Advisory Committee on the Prerogative of Mercy constituted under Article 91 of the Constitution.
4. The Governor-General acting in accordance with the advice of the Minister after consulting the said Advisory Committee in regard to the case shall communicate to the said judge or his successor in office a copy under his hand of any order he may make thereon, which order if the sentence is to be carried out shall state the place where and the time when the execution is to be had, and if the sentence is commuted into any other punishment shall state what punishment or if the person sentenced is pardoned shall state the fact. On receiving such order the judge shall cause the effect thereof to be entered on the record of the court.
5. (1) If the sentence is to be carried out the Governor-General shall also cause a warrant under his hand and the Public Seal to be issued setting out the place where and the time when the execution is to be had as prescribed in the order aforesaid.
- (2) Such warrant shall be called a death warrant ..."

The contention that these provisions in some way form part of the sentence is misconceived. The judicial function is at an end when the judge passes sentence of death. The provisions of sections 3, 4 and 5 are directed at the exercise of the prerogative of mercy. When the decision has been taken as to whether or not the judge's sentence shall take effect, it is the duty of the judge as an administrative not a judicial act to cause the outcome to be entered on the court records. The sentence remains the sentence of a court.

For these reasons their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed.