IN THE HIGH COURT OF THE SUPREME COURT OF GUYANA

CRIMINAL JURISDICTION

Indictment No. 72/ 2010

THE STATE

V

DWAYNE JORDON

The Honourable Justice Navindra A. Singh, Puisne Judge

Ms. Konyo Sandiford-Thompson and Ms. Renita Singh representing the State

Mr. C. A. Nigel Hughes representing the Accused, Dwayne Jordon.

DECISION

The Accused, Dwayne Jordon was charged with the offence of murder, contrary to Section 100 of the Criminal Law (Offences) Act, Chapter 8:01 of the Laws of Guyana on August 3rd 2007, that the Accused murdered Claudine Rampersaud on June 14th 2007 in the County of Demerara, Guyana.

Following a Preliminary Inquiry, the Accused was committed to stand trial in the High Court of the Supreme Court of Guyana in its Criminal Jurisdiction on January 13th 2010.

The State presented the indictment for murder against the Accused on November 21st 2012, a jury was selected and a trial ensued. At the conclusion of the presentation of all of the evidence in the case, addresses by Counsel and summing up by the Judge the jury returned a unanimous verdict of guilty for the offence of murder on December 7th 2012.

Before the Accused was sentenced for the offence, Counsel for the Accused requested to be heard on the following points;

Firstly the mandatory death sentence in a case of this nature is unconstitutional in so far that the penalty is mandatory since it takes away the discretion of the trial Judge.

Secondly, the Accused is entitled to mitigate before the Court imposes a penalty.

Thirdly, the punishment of death is contrary to Article 154A of the Constitution of Guyana.

And fourthly, the punishment of death by hanging is cruel, unusual and inhuman treatment contrary to Article 141 of the Constitution of Guyana.

The Court adjourned the matter for arguments to be presented by the Attorneys.

Arguments were presented to the Court by both, Counsel for the Accused and Counsel for the State, on December 10th 2012.

In considering the first point raised by Counsel for the Accused, the Court opined that it must first determine whether a proper statutory interpretation of Section 100 of the Criminal Law (Offences) Act does in fact lead to the conclusion that the penalty of death is mandatory for a person convicted of murder.

As to the Courts power to so do, I quote from Craies on Statute Law, 6th ed. @ pg. 14:

"Parliament has power to declare by Statute the law or the meaning of any prior Statute and may declare wrong any judicial interpretation or misinterpretation of Statutes. But, subject to this power, the interpretation of Statutes is within the special province and under the exclusive control of the judicature, albeit a control exercised only in the course of a legal proceeding and upon examination of the terms of the Statute itself."

So, the first issue that comes up for consideration is what is the true meaning of the language which the legislature has used?

Section 100 of the Criminal Law (Offences) Act reads:
"Everyone who commits murder shall be guilty of felony and liable to suffer death as a felon."

This Court is of the view that the words "*liable to suffer death*" imports discretion in the Judge to pass some lesser sentence and this view is supported by the following considerations.

The word "liable" is defined in the Black's Law Dictionary, 9th ed., with regards a person, "subject to or likely to incur", words which are certainly not mandatory in nature; mandatory being defined "Of, relating to, or constituting a command; required; preemptory.

In Words and Phrases Legally Defined, 2nd ed., the definition of the word "liable" quoted from the case O'Keefe *v* Calwell (1949) A.L.R. 381 @ 401 and applicable to our present context reads in relevant part:
"The ordinary natural grammatical meaning of a person being liable to some penalty or prohibition is that the penalty or prohibition has occurred which will enable the penalty or prohibition to be enforced, but that it still lies within the discretion of some authorized person to decide whether or not to proceed with the enforcement."

Also, North, J. in James *v* Young (1884) 27 Ch. Div. 652 in analysing the phrase "shall be liable to be forfeited" stated:
"When the words are not "shall be forfeited" but "shall be liable to be forfeited", it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced."

And further, Lord Hanworth, M.R. in Wickhambrook Parochial Church Council *v* Croxford (1935) 2 K.B. 417, C.A. @ 428 in analysing the phrase "who would, but for the provisions of this Act, have been liable to be admonished to repair the chancel by the appropriate Ecclesiastical Court . . ." stated:

"It intends a peril of being admonished, to which he is exposed and subject, or from which he is likely to suffer"

Again "likely to suffer" is not mandatory in nature and in fact if the legislature intended the penalty of death to be mandatory it would have been unambiguous and unmistakable to simply replace the words "liable to" with "shall" or for that matter just delete the words "liable to".

Every word in a Statute must be taken to have a meaning and in this Court's opinion the insertion of the words "liable to" must import meaning, especially when, without those words the Statute would have imposed a mandatory penalty of death for the offence of murder.

In addition, Section 45(a) of the Interpretation and General Clauses Act, Chapter 2:01 of the Laws of Guyana, which was added by amendment by Act 4 of 1972, reads:

"Where in any written law a penalty is prescribed for an offence, such provision shall imply –

(a) That such offence shall be punishable upon conviction by a penalty not exceeding the penalty prescribed;"

Article 232(9) of the Constitution of Guyana reads:

"The Interpretation and General Clauses Act as in force immediately before the commencement of this Constitution, shall apply, with the necessary adaptations, for the purpose of interpreting this Constitution and otherwise in relation thereto as it applied for the purpose of interpreting, and in relation to, any Act in force immediately before such commencement, and in such application shall have effect as if it formed part of this Constitution"

It is noted that Article 125(9) of the Schedule 2 to the Guyana Independence Order 1966, which was in fact the Constitution contains a similar worded clause.

Gould, J. in R *v* Holland Palmer (1784) 1 Leach 352 stated:

"If there are several Acts upon which the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other."

We must also assume that the Legislature was acquainted with existing laws when this Statute was passed and if it was the intention of Parliament to exclude the penalty of death, Parliament would have done so.

It is the Court's view that the language of this Statute is clear and there is no need to employ any rules of construction to interpret it, as Bowen L.J. in L.N.W. Ry. *v* Evans (1893) 1 Ch. 16, 27 stated:

"These canons do not override the language of a Statute where the language is clear; they are only guides to enable us to understand what is inferential. In each case the Act of Parliament is all powerful and when its meaning is unequivocally expressed the necessity for rules of construction disappears and reaches its vanishing point."

The Court finds that, if there were any doubt as to the nature of penalties in the Criminal Law (Offences) Act, then Section 45(a) of the Interpretation and General Clauses Act makes it clear that they are maximum and not mandatory in nature.

The case of Jones et al *v* The Attorney General (of Bahamas) (1995) 46 WIR 8 was considered by this Court as possible persuasive authority but was determined distinguishable on the existence of Section 45(a) of the Interpretation and General Clauses Act in Guyana.

In fact, in Jones et al *v* The Attorney General, their Lordships agreed that the word "liable" is ambiguous, however on reading the various applicable Statutes of the Bahamas together, their Lordships concluded that in the Bahamas the penalty of death was mandatory for murder.

It is submitted that did their Lordships have the equivalent of our Section 45(a) of the Interpretation and General Clauses Act their conclusion would have been

different because, logically, the words "liable to" would have to import the meaning that this Court has imparted to them.

The case of Matthews *v* The State (2004) 64 WIR 412 was also considered by this Court as possible persuasive authority and was easily distinguished based on the wording of Section 4 of the Offences Against the Person Act of Trinidad and Tobago which reads:
"Every person convicted of murder shall suffer death."

That Statute is clear and unambiguous and even further even though their Lordships found that the death penalty was not a "fixed penalty" within the meaning of Section 68(2) of the Interpretation Act of Trinidad and Tobago so as to make it a maximum penalty Section 45(a) of the Interpretation and General Clauses Act, Chapter 2:01 of the Laws of Guyana addresses all penalties in clear and unambiguous terms.

The Court also considered Boyce and Joseph *v* R (2004) 64 WIR 37 as possible persuasive authority and again found that, that case was also distinguishable based on the wording of Section 2 of the Offences Against the Person Act 1994 of Barbados which reads:
"Any person convicted of murder shall be sentenced to, and suffer, death."

In fact the words used in the Statutes under examination in those cases illustrate the words Legislatures use to impose a mandatory penalty.

Further, Article 39(2) of the Constitution of Guyana reads:
"In the interpretation of the fundamental rights provisions in this Constitution a Court shall pay due regard to international law, international conventions, covenants and charters bearing on human rights."

And, Article 154A (1) and (2) reads:

(1) "Subject to paragraphs (3) and (6), every person, as contemplated by the respective international treaties set out in the Fourth Schedule to which

Guyana has acceded is entitled to the human rights enshrined in the said international treaties, and such rights shall be respected and upheld by the executive, legislature, judiciary and all organs and agencies of Government and, where applicable to them, by all natural and legal persons and shall be enforceable in the manner herein prescribed."

(2) "The rights referred to in paragraph (1) do not include any fundamental right under this Constitution."

The thrust of Article 39(2) and Article 154A is to require such a penalty to be imposed reasonably in paying pay due regard to international law, international conventions, covenants and charters bearing on human rights.

Article 6 of the International Covenant on Civil and Political Rights, to which Guyana has acceded to and is set out in the Fourth Schedule to the Constitution, reads in relevant parts:

1. "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."
2. "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant …"
4. "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."

In the opinion of this Court in keeping with our international obligations as provided for by virtue of Article 39(2) and Article 154A, it is implicit that the penalty of death cannot be a mandatory penalty.

In order for a sentence to be rational and reasonable and not arbitrary, the Court must be expected to consider the circumstances of each case and not apply a

sentence robotically, as Stewart, J. stated in Woodson *v* The State of North Carolina (1976) 428 US 280, case from the Supreme Court of the United States:
"…death is a punishment different from all other sanctions in kind rather than degree … A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass subjected to blind infliction of the penalty of death."

The punishment of a person convicted should be proportionate to the gravity of the crime and certainly based on the legal elements of murder it must be that the gravity of this crime varies widely with regards to criminal culpability; take for example the person who may have intended to cause harm as distinct from the person who clearly intended to kill. This was in fact recognised by the Privy Council in Reyes *v* R (2002) 60 WIR 42 and by the Legislature, evidenced by the enactment of the Criminal Law (Offences) Amendment Act in 2010.

Particularly, since the legal elements, if proven, that results in a conviction for murder in no way reflects the heinous nature of a particular case and as such only the Judge in a particular case, having heard the evidence may be able to determine the degree of criminal culpability of that particular convicted person.

In Bowe *v* R (2006) WIR 10 their Lordships stated in relevant part:
"…it took some time for the legal effect of entrenched human rights guarantees to be appreciated, not because the meaning of the rights changed but because the jurisprudence on human rights and constitutional adjudication was unfamiliar and, by some Courts resisted."

This Court finds that the penalty of death provided for in Section 100 of the Criminal Law (Offences) Act is not required to be mandatorily imposed upon

conviction, this Court finds that the penalty of death is the maximum penalty provided for in Section 100 of the Criminal Law (Offences) Act.

With regards to constitutionality of the death penalty the following Articles must be considered.

Article 138(1) reads:
"No person shall be deprived of his life intentionally save in execution of the sentence of a Court in respect of an offence under the law of Guyana of which he has been convicted."

Article 141 reads:

(1) "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment"

(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 punishment or the administration of any treatment that was lawful in Guyana immediately before the commencement of this Constitution"

Article 152(1)(a) reads:
"Except in proceedings commenced before the expiration of a period of six months from the commencement of this Constitution, with respect to a law made under the Guyana Independence Order 1966 and the Constitution annexed thereto, nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of articles 138 to 149 (inclusive) to the extent that the law in question –
Is a law (in this article referred to as "an existing law") that had effect as part of the law of Guyana immediately before the commencement of this Constitution, and has continued to have effect as part of the law of Guyana at all times since that day."

And again Article 154A (1) and (2).

In the opinion of this Court Articles 138, 141 and 152 operates to maintain and save the penalty of death as a lawful and constitutional penalty in Guyana under Section 100 of the Criminal Law (Offences) Act, however, as stated before such a penalty must be reasonably and rationally imposed.

It is a matter for the Legislature to consider further the possible implied obligations upon them with regards to the country's international obligations under the Constitution.

Finally, in the opinion of this Court, though the discretion regarding the sentence of death resides with the Judge, such a sentence should be reserved for murders that are of a seriously depraved and heinous character, which would of course, be determined based on the evidence of the case and any sensible and realistic mitigation plea by the convicted person.

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Hon. N. A. SINGH
PUISNE JUDGE

Dated this 17th day of December, 2012.