JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS 44/2000, 43/2001 AND 64/2001,

BEFORE: **THE HON. MR. JUSTICE FORTE, P**
THE HON. MR. JUSTICE HARRISON,J.A.
THE HON. MR. JUSTICE SMITH, J.A.

R v KEITH CARNEGIE
RENFORD DALEY
RICARDO BECKFORD

Dennis Morrison, Q.C. for appellants, **Keith Carnegie and Ricardo Beckford**

Ms. Janet Nosworthy for the appellant **Renford Daley**

Paula Llewellyn, Senior Deputy Director of Public Prosecutions for the Crown

B. St. Michael Hylton Q.C. and Katherine Denbow for the Attorney General

17th, 19th, 20th, 21st, 24th, 27th March & 20th November, 2003

FORTE, P.

The three applicants were each convicted of non-capital murder in separate trials having no connection with each other. The nature of their complaint, results in their applications for leave being granted and the hearing thereof treated as the hearing of the appeals. Because of the common issue in the appeals, it was agreed to hear the appeals together. The facts in each case are not particularly relevant to the issue on appeal,

except in so far as the circumstances of the murder would, if the appellants succeed, affect the particular sentence imposed on each of them. Nevertheless, the facts having been outlined in the judgment of Smith JA, there is no need to repeat them here. It is sufficient for my purposes to indicate that the appellant Carnegie was convicted in the Trelawny Circuit Court on March 2, 2000, and sentenced to life imprisonment, the learned trial judge ordering , that he should serve thirty years imprisonment before becoming eligible for parole, and to be subjected to psychiatric treatment. The appellant Beckford pleaded guilty in the St. Mary Circuit Court to the offence, and was on March 15, 2001 accordingly sentenced to life imprisonment. In his case the learned trial judge made no order as to the minimum sentence he should serve before being eligible for parole. As will be seen later, the fact that the learned trial judge made no such order, will result in this appellant being eligible for parole in seven years: (See the Parole Act).

The appellant Daley was convicted in the St. Elizabeth Circuit Court on the 7th March, 2001 and sentenced to life imprisonment. The learned trial judge made no order in relation to the period of sentence to be served before the appellant becomes eligible for parole. As in the case of the appellant Beckford, this appellant will also become eligible for parole in seven years.

A factor that should be noted, is that in each case Counsel was heard in mitigation in relation to the period to be served before the appellant could become eligible for parole.

In the cases of Beckford and Daley, the addresses by Counsel obviously had the effect of convincing the earned trial judge that a period of seven years, given the circumstances was sufficient to penalize the appellants for their conduct. By not setting a period, the Court left it to the Parole Board to determine after seven years, whether the appellants qualified for release under the Parole Act. In Carnegie's case, Counsel was also permitted to address the Court, in relation to the period to be served before eligibility for parole. In that case however, the learned trial judge having examined all the circumstances of that offence and the antecedent of the appellant, fixed that period at thirty years.

Against this background, the appellants complained:

(1) that the mandatory sentence of life imprisonment for the offence of murder, violates the requirements of Section (17) (1) and Section 20 of the Constitution.

(2) In the case of the appellant Daley, it was also argued that the mandatory life imprisonment breached the doctrine of the separation of powers.

It should be noted that Mr. Dennis Morrison, Q.C. who argued the appeals of Beckford and Carnegie, abandoned the complaint as to the

breach of the doctrine of separation of powers and contented himself with the complaint stated above in the paragraph numbered (1).

In that event, it is convenient to deal with Mr. Morrison's argument at this time.

Issue No. I

For clarity, the provisions of the sections of the Constitution of Jamaica which have been allegedly violated are set out hereunder.

Section 17 (1) states:-

> "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment..."

Section 20(1) states:-

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Mr. Morrison in developing his arguments in relation to this issue, relied on what has become known as the trilogy of cases – ***Hughes*** [2002] 2 All ER 1058, ***Reyes*** [2002] 2 WLR 1034 and ***Fox*** [2002] 2 WLR 1077 which inter alia concluded that the mandatory death penalty was inhuman and degrading punishment, and therefore breached the Constitutions of St. Lucia, Belize and Nevis respectively . The ratio in those cases arose out of the opinions of their Lordships that given the gravity and the finality of the sentence of death, such a sentence would not be proportionate to all the

varying circumstances in which the offence could be committed. In that event, it is inhuman and degrading to condemn a person to such a sentence without considering:

(1) The circumstances of the particular offence,

(2) the antecedent of the convict, including social inquiry reports etc., and

(3) without allowing him the opportunity to convince the court why in his particular circumstances, he should not suffer the ultimate punishment.

In delivering the opinion of the Board in the ***Reyes*** case [2002] 2 WLR 1034, Lord Bingham of Cornhill stated at page 1055:

> "The Board is [however] satisfied that the provision requiring sentence of death to be passed on the defendant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the Constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose in which the death penalty would be plainly excessive and disproportionate. 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."

The appellants, Beckford and Carnegie relied totally on the principle of proportionality adumbrated in the trilogy of cases (supra), and invited the Court to apply that doctrine to the question in issue in this appeal. Mr. Morrison, Q.C. argues that the mandatory sentence of life imprisonment deprives the prisoner of the opportunity of having his own antecedents, and the circumstances in which his offence was committed, considered in determining what is an appropriate sentence in his particular case. He contends that given the varying and wide range of circumstances in which a murder can be committed, there should be different considerations in respect of each case, in order to arrive at an appropriate sentence. He relies on the old saying that "the sentence should fit the crime" so appropriately used by Saunders J.A. in the case of ***Hughes*** (supra). To sentence the appellants arbitrarily to life imprisonment, he maintains :

(1) is to subject him to inhuman or degrading punishment and

(2) to deprive him of a fair hearing in respect of sentence which is required by virtue of section 20(1) of the Constitution.

These arguments must be considered against the realization firstly that the trilogy of cases dealt with the death penalty, the finality of which gives weight to the question of its proportionality to the circumstances under which a particular murder was committed, and secondly, that the offence of non-capital murder relates to the taking of a life in circumstances where the convict, committed a deliberate act with the intention to kill or at least to cause serious bodily injury.

Having said that, a look at the Jamaican legislation as it relates to the punishment for non-capital murder is appropriate.

In 1992, the Offences against the Person Act (the "Act") was amended to create two categories of murder :

(1) capital murder for which a sentence of death is mandated; and

(2) non-capital murder for which there is a mandatory sentence of life imprisonment.

It is unnecessary for the purposes of this judgment to set out the circumstances under which an offence is capital or non-capital. As we have noted the appeals with which we are concerned arose from convictions for non-capital murder. The 1992 amendment to the Act, added a new section, section 3A which reads:

" (1) Subject to the provisions of this Act, every person who is convicted of non-capital murder shall be sentenced to imprisonment for life.

(2) Notwithstanding the provisions of Section 6 of the Parole Act, on sentencing any person convicted of non-capital murder to imprisonment for life, the Court may specify a period, being longer than seven years, which that person shall serve before becoming eligible for parole".

For clarity of understanding the relevant subsection of Section 6 of the Parole Act is set out hereunder:

"**6. -** (4)Subject to subsection (5), an inmate:-

(a) who has been sentenced to imprisonment for life; or

(b) in respect of whom –

(i) a sentence of death has been commuted to life imprisonment; and

(ii) no period has been specified pursuant to section 5A

shall be eligible for parole after having served a period of not less than seven years."

Section 6 (5) states:

"(5) Upon the expiration of:

(a) a period of ten years, or

(b) the period specified pursuant to section 5A of this Act or section 3A (2) of the Offences against the Person Act,

> whichever is the greater, the Board shall review the cases of inmates who are serving a sentence of life imprisonment for the purpose of deciding whether or not to grant parole to them."(emphasis added)

For completion it is necessary to set out also Section 5A of the Parole Act which reads:

> "Where, pursuant to section 90 of the Constitution, a sentence of death has been commuted to life imprisonment, the case of the person in respect of whom the sentence was so commuted shall be examined by a Judge of the Court of Appeal who shall determine whether the person should serve a period of more than seven years before becoming eligible for parole and if so, shall specify the period so determined."

From the advent of section 3A of the amended Act, judges where there is a conviction of non-capital murder before them, have gone through a "sentencing process". This involves looking at the antecedents of the convicted person, including social enquiry reports, and hearing of character evidence, and submissions on mitigation of sentence, in order to determine what is an appropriate period of sentence to be served before the particular convict could be considered for parole. In cases where the judge concludes that a period of seven years imprisonment is sufficient, no order is made as to a required period.

In all the appeals now before us, that process was followed, and dealt with, in accordance with the relevant judge's discretionary powers to fix a period of sentence before eligibility for parole. We have seen that

in the case of the appellants – Beckford and Daley, no period was set by the judge, but in the case of the appellant Carnegie, a period of thirty (30) years was ordered by the judge.

Nevertheless the appellants maintain that the mandatory sentence of life imprisonment imposed on them subjected them to inhuman or degrading punishment or treatment.

To begin with, the offence of non-capital murder involves the deliberate and voluntary termination of the life of a human being, with the intention to do so or to cause serious injury to that person, without any lawful justification or excuse. The victim like all other citizens of the state, has a constitutional right to life of which he has been deprived by his assailant. The question of proportionality as between offence and punishment must therefore be considered on the basis that the offence of murder is a very serious crime, which must be punished by very harsh measures. Although there are degrees of violence and hostility with which the offence can be committed, there is none so benign that could lead to the opinion that a sentence of life imprisonment is not proportionate to the deliberate taking of the life of a human being. A murder by strangulation, by stabbing or by gun-shot all lead to the same result – the deliberate taking of a human life. In that event, the appellant will be hard pressed to succeed on the basis that the mandatory life imprisonment is not proportionate to the offence. For that reason alone, I would hold

that the mandatory life sentence is not inhuman and degrading punishment. A fortiori given the provisions of the Jamaican legislation and the practical application of those provisions, it cannot be successfully argued that the mandatory life imprisonment for non-capital murder is inhuman or degrading punishment or treatment.

The appellants nevertheless argue that the indeterminate sentence of "life" is in itself inhuman and degrading.

This contention, however, is put to rest, given the scheme of the Jamaican legislation. Although the sentence is mandatory and can be said to be indeterminate, the judge nevertheless has the discretion to fix a period of imprisonment which he/she determines is sufficient to punish the offender. He does so on the basis of the particular facts of the case before him, and the particular antecedents of the offender. The legislation therefore in so far as the punitive aspect of the sentence is concerned, allows the trial judge to set such a period on the basis of the particular case before him. At the end of that period the Parole Board will determine whether the prisoner can be released from custody. The criteria for coming to such a decision is set out in section 7 of the Parole Act which reads:

> **"7.** (7) The Board shall grant parole to an applicant if the Board is satisfied that—
>
> (a) he has derived maximum benefit from imprisonment and he is, at the time of his application for parole, fit to be released

> from the adult correctional centre on parole;
>
> (b) the reform and rehabilitation of the applicant will be aided by parole; and
>
> (c) the grant of parole to the applicant will not, in the opinion of the Board, constitute a danger to society."(emphasis mine)

The prisoner, therefore can by his own behaviour while in confinement, demonstrate that he is fit for release and on the road to rehabilitation, and most importantly that he will not constitute a danger to society. In doing so he can almost ensure that at the end of the period set by the Court, he will be released on parole. In that sense , it could be said that the prisoner can for the most part know the date on which he will be released. On the other hand, the Parole Board has the duty and responsibility to balance the inmate's interest against that of the society and ought to be sure that the inmate's release on parole will not constitute a danger to the society.

Mr. Morrison, Q.C. questioned however whether the fixed punitive period would be the answer, as the inmate would still be liable under the Parole Act, to a suspension or revocation of his parole and as a result be taken back into custody. These events, however are totally dependent on the behaviour of the inmate, and therefore can be avoided.

Section 9(1) speaks to suspension:

> "**9.**—(1) The Board shall suspend parole in respect of any parolee if during the parole order the

> parolee is convicted of any offence punishable by imprisonment without option of a fine for a period which does not involve forfeiture of parole under section 13."

Section 10 speaks to revocation:

> "**10.**—(1) Where a parolee commits a breach of the conditions of his parole order, the Board may, after investigating the circumstances surrounding such breach, revoke the parole granted to such parolee.
>
> (2) The Board may revoke the parole granted to a parolee if the Board is of the opinion that such revocation is in the interest of the parolee or in the public interest.
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> (3)Where the Board decides to revoke the parole granted to a parolee, the Board shall give written notice of such decision to the parolee."

These sections demonstrate that the offender by adhering to the conditions of his parole, and avoiding further commission of particular crimes, and exhibiting conduct which convinces that he is rehabilitated and is not a danger to the society can effectively in practice bring finality to his detention in prison.

Before concluding the consideration of this issue, I acknowledge that counsel on both sides in advancing their submissions relied on a number of cases dealing with the constitutionality of mandatory sentences. However, with due respect to counsel, having chosen to restrict myself, to the question in so far as it relates to the mandatory life

sentence for non-capital murder, I find it unnecessary to deal with those cases.

It would however be a great and significant omission on my part to avoid dealing with the case of ***R v Lichniak etal*** [2002] 4 All ER 1123, a case which in my view decisively buries the appellants' contention on this issue. The headnote effectively summarises the issue in the case.

> "The defendants were convicted of unrelated murders and sentenced to life imprisonment required by s 1(1) of the Murder (Abolition of Death Penalty) Act 1965. The trial judges were of the view that the defendants were unlikely to present any danger to the public upon release and that there was no likelihood of re-offending. The period of detention necessary to meet the requirements of retribution and general deterrence was fixed at eleven years in one case and eight years in the other. The defendants subsequently contended that s1(1) was arbitrary and disproportionate because it required the same life sentence to be passed on all convicted murderers, whatever the facts of the case or the circumstances of the offender, and irrespective of whether they were thought to present a danger to the public or not. They therefore submitted that s1(1) was incompatible with two provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human rights Act 1998) - the prohibition on inhuman or degrading treatment or punishment in art 3(b) ,and the right to liberty in art 5(1). Those contentions were rejected by the Court of Appeal. The defendants appealed to the House of Lords, contending that the preventative aspects of a life sentence served no valid penological purpose in the cases of those judged not to be dangerous. In particular, they complained that murderers serving the tariff term

of their mandatory life sentences could not know whether or not they would be released at the end of it and so would spend years uncertain about their release date; that, at the end of the tariff term, the onus was on the prisoner to show that it was safe to release him; and that, even when released, the prisoner remained liable to recall.

Held - Section 1(1) of the 1965 Act was not incompatible with either art 3 or art 5 (1) of the convention. In its operation practice, an indeterminate sentence did not constitute an arbitrary and disproportionate punishment. The defendants had not been sentenced to an arbitrary, rule-of-thumb term of imprisonment. Those responsible had done their best to match the respective terms to the particular facts and circumstances of each case. Although the defendants could not be sure of release on their tariff expiry date, they would probably be aware of the views of the trial judge. If they behaved appropriately whilst in detention, they could confidently hope for favourable reports as the tariff expiry date approached, enabling the Parole Board to consider their cases and permit release on the tariff expiry date if it so recommended. It was not arbitrary to postpone to the end of the tariff period the decision whether a person who had committed a murder would be a danger to the public if released, rather than decide that at the time of his trial. If, which was doubtful, there was a burden on the prisoner to persuade the board that it was safe to recommend release, it was not objectionable, in respect of someone who had once taken life with the intent necessary for murder, to prefer the interest of society over the interest of the individual in case of doubt. In any event, the process was defensible: material going to show that a prisoner was not dangerous would be before the board, and if the board was thought to show an exaggerated degree of caution it could be challenged. Finally, a prisoner released

> on life licence should be in no danger of recall in the absence of any resort to violence, and the propriety of any recall would be the subject of independent assessment by the board. In those circumstances, the complaints were not of sufficient gravity to engage art 3 and 5(1). Accordingly, the appeals would be dismissed."

In his speech in the Honourable House, Lord Bingham recognized that a period of detention before release on parole set by a trial judge in imposing a sentence of life imprisonment creates a sentence which is partly punitive and partly preventative. In keeping with my own views already expressed Lord Bingham at page 1126 had this to say:

> "The punitive element is represented by the tariff term, imposed as punishment for the serious crime which the convicted murderer has committed. The preventative element is represented by the power to continue to detain the convicted murderer in prison unless and until the Parole Board, an independent body, considers it safe to release him, and also by the power to recall to prison a convicted murderer who has been released if it is judged necessary to recall him for the protection of the public."

Lord Bingham also considered that the treatment of the appellant on the appeal under his consideration, ought to be considered in the context of this treatment as a whole. The following words which fell from Lord Bingham is relevant to the instant appeal, given the similarity between articles 3 and 5(1) of the European Convention and Sections 17(1) and 20(1) of the Jamaican Constitution. He said at page 1129:

> "Fourthly, and very importantly, I do not consider that the appellants' complaints are of sufficient

gravity to engage arts 3 and 5(1) of the convention. Those articles protect very important rights: art 3 the right not to be subjected to torture or to inhuman or degrading treatment or punishment, art 5(1) the right not to be deprived of liberty save in accordance with a procedure prescribed by law and save in a number of specified cases, of which the first is lawful detention after conviction by a competent court. But the convention is concerned to prevent significant, not minor, breaches. It has been held that mistreatment must attain a certain level of severity to breach art 3 (see ***Tyrer v UK*** [1978] 2 EHRR1 at 9-10 (para 30); ***Costello-Roberts v*** UK [1993] 19EHRR 112 at 133-134 (paras 30-32). With reference to art 5, in determining the arbitrariness of any detention regard must be had to the legitimacy of the aim of detention and the proportionality of the detention in relation to that aim. So the significance of the appellants' complaints must be viewed in context of their treatment as a whole. It is relevant to note, first of all, that each of the appellants was sentenced to a tariff term which reflected the judges' views of the bracket within which the term should fall. The appellants themselves may no doubt consider the term too long. The relatives of their respective victims may think it too short. But the appellants were not sentenced to an arbitrary, rule of thumb term of imprisonment. Those responsible did their best to match the respective terms to the particular facts and circumstances of each case. I accept that the appellants, while serving their tariff terms, could not be sure of release on their tariff expiry date. But they would probably be aware of the views of the trial judges. If they availed themselves of such courses as were on offer at their respective prisons and did nothing in prison or during home leaves to throw doubt on their ability to eschew acts of violence, they could confidently hope for favourable reports as the tariff expiry date approached."(emphasis added).

The underlined words in the above cited passage shows demonstratively the similarity between the issues involved in the ***Lichnaik*** case and the instant appeal.

The Legislation under which the mandatory life imprisonment is imposed in Jamaica provides distinctly for the consideration of the particular facts and circumstances of each case in the determination of the punitive term that each person convicted of non-capital murder must serve before he is released from detention. There is no "arbitrary rule-of – thumb term of imprisonment." On the contrary the Legislature impliedly, through the granting of a discretion to the trial judge, provides for due process in which such punitive terms can be fixed by the trial judge. Of importance also in relation to the complaint of a breach of section 20(1) of the Constitution is the fact that in the course of that determination is the opportunity given to the convicted person, to present evidence, and address the Court on issues relating to that determination. Significantly also, is the opportunity given to the convicted person, to appeal to the Court of Appeal in relation to the punitive term fixed by the trial judge, a right which has consistently been exercised since the amendment to the Act.

In the instant appeals, all the appellants were granted the opportunity to address the Court in relation to the punitive term. The learned trial judges in determining that period, gave consideration to the

facts and circumstances of their cases, and indeed also to the antecedents of the appellants. In the end, the appellants Beckford and Daley, were treated favourably when the judges did not fix a term of imprisonment to be served before eligibility for parole, thereby allowing them to benefit from the provision in the Parole Act.

In conclusion, I would hold that the provision of the mandatory life imprisonment is not in breach of either section 17 or 20(1) of the Constitution since its operation in practice and by virtue of the legislative provisions do not constitute an arbitrary and disproportionate punishment.

Separation of Powers

This ground argued only in respect of the appellant Daley, per his counsel, Miss Janet Nosworthy, alleges that the doctrine of the Separation of Powers was breached on the basis that the Legislature "purported to vest a Judicial or quasi-Judicial function/power in a non Judicial body, namely the Parole Board appointed by the Ministry of National Security under Section 3 of the Parole Act".

This ground is clearly misconceived . The Parole Board is not given the power of imposing sentence on, or determining the length of sentence of the convicted person. It is the Court that has been given the responsibility of imposing a life sentence on persons convicted of non-capital murder, and it is also the Court that determines the term of

imprisonment to be served before the convict can be considered for release on parole. It is after the punitive term has been served that the Parole Board decides on the basis of the criteria set out in the Parole Act whether an inmate is a fit person to be released and whether such a person if released, on licence, would be a danger to the public. It has no power for instance to alter the "punitive term" set by the Court and can take no action in respect of the release of the inmate in contradiction to the order of the Court. It's role is really to balance the interest of the inmate against the public interest in an effort to determine whether he/she can be released without being a danger to the public.

It is incorrect therefore, to maintain that the functions so exercised are judicial functions. This ground must fail.

In the event, I would dismiss the appeals, and affirm the convictions and sentences.

HARRISON, J.A:

I have read the judgments of Forte, P. and Smith, J.A. in these appeals. I agree with them that the mandatory sentence of life imprisonment for murder is not in breach of either section 17(1) or section 20(1) of the Constitution of Jamaica nor is it disproportionate and is therefore not unconstitutional.

However, the following are my comments on the principle of the proportionality of the sentence which seems to be the prime basis of the complaints.

Although sentencing is a judicial function, it is the legislature which names the offence and stipulates the range within which a sentence may be imposed. Further, because it is the executive which ultimately carries out the sentence imposed, it has been recognized that all three branches of government are in fact together engaged in the enforcement of the penal code.

The sentencing judge is required to take into consideration the circumstances of the offence, the fact of the conviction, the antecedents of the offender and the objects of the sentence. Accordingly, he is usually regarded as retaining his discretion to impose a sentence proportionate to the crime. As a result, because the sentence for the offence of non-capital murder, is a mandatory sentence of life imprisonment, it is challenged, in that it takes away the discretion of the sentencing judge, leaving in place the dictates of the legislature, which may be likely to be disproportionate, in the circumstances.

The Offences against the Person Act, by an amendment in 1992, made a distinction and created two categories of murder, namely: capital and non-capital murder.

The sentence for capital murder is the mandatory sentence of death. This Court In **Lambert Watson v R** (unreported) S.C.C.A. 117/99 delivered on December 16, 2002, decided that the mandatory sentence of death was valid and not unconstitutional. Forte, P. at page 25 said:

> "... the sentence of mandatory death penalty, being provided for and inflicted under the authority of the Offences against the Person Act, would fall within the protection of section 26(8) and cannot be held to be inconsistent with or in contravention of any of the provisions under Chapter III ..."

All murders not classified as capital murders are non-capital and on conviction the mandatory sentence of life imprisonment is imposed.

Murder, the unjustified taking of a human life, not in self-defence, nor affected by legal provocation, is a serious if not the most serious of crimes. So seriously regarded is the right of every man to the preservation of his life, that our Constitution expressly highlights it as a foremost right. In the expression of the Fundamental Rights and Freedoms in Chapter III, section 13, inter alia, reads:

> "**13 –** Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law; (Emphasis added)

The protection of this right is emphasized in section 14(1). It reads:

> "**14** –(1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted".

The infringement of the constitutional right to life by the commission of the crime of murder, if capital murder, is denounced by Parliament, in its power to "... make laws for the peace, order and good government of Jamaica" (section 48 (1)), by the mandatory sentence of death, on conviction.

Non-capital murder, itself also the ultimate deprivation of the right to life is viewed equally seriously by Parliament, by the nature of the sentence of life imprisonment, under the provisions of section **3A**-(1) of the Offences against the Person Act. It reads:

> "**3A**.-(1) Subject to the provisions of this Act, every person who is convicted of non-capital murder shall be sentenced to imprisonment for life.
>
> (2) Notwithstanding the provisions of section 6 of the Parole Act, on sentencing any person convicted of non-capital murder to imprisonment for life, the Court may specify a period, being longer than seven years, which that person should serve before becoming eligible for parole."

The Constitution of Jamaica is the supreme law, to which all other laws are subject. The supremacy clause is contained in section 2. It reads:

> "2 - Subject to the provisions of sections 49 and 50 of this Constitution if any other law is inconsistent with

> this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

The principles of sentence are aimed at achieving the various goals of retribution, deterrence, rehabilitation and the protection of society. One or several of these goals may be satisfied in a single sentence imposed, as the circumstances of the particular case may require. Consequently, the imposition of a mandatory sentence may seem to deprive the sentencer of the discretion to seek to satisfy the said principles, causing the sentence to seem disproportionate to the circumstances of the particular case.

In the case of **Dodo v State** [2001] 4 LRC 318, the Constitutional Court of South Africa considered the constitutionality of section 15(1) of the Criminal Law Amendment Act 1991, which mandated the High Court to impose a sentence of imprisonment for life on a person convicted of the offence of murder, in certain circumstances. Section 15(3)(a) did however reserve a discretion to the sentencing judge. It reads:

> "... if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence".

The Court found that the mandatory sentence of life imprisonment as provided by section 51(1) was not unconstitutional. Ackerman, J. who delivered the

judgment of the eleven-man court, in paying recognition to the interaction of the three entities of the State, at page 333, said:

> "The executive and legislative branches of state have a very real interest in the severity of sentences. The executive has a general obligation to ensure that law-abiding persons are protected, if needs be through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily integrity and increases with the severity of the crime.
>
> In order to discharge this obligation, which is an integral part of constitutionalism, the executive and legislative branches must have the power under the Constitution to carry out these obligations. They must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society.
>
> ...
>
> The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the judiciary. What an appropriate balance ought to be is incapable of comprehensive abstract formulation, but must be decided as specific challenges arise. In the field of sentencing, however, it can be stated as a matter of principle that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional state. It would a fortiori be so if the legislature obliged the judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights". (Emphasis added)

In the course of the judgment, Ackerman J. referred to cases from other democratic Commonwealth countries whose Constitutions followed the Westminster model. For example in the Australian case of **Palling v Corfield** (1970) 123 CLR 52, the compulsory imposition of minimum mandatory sentences by the legislature leaving little or no discretion to the sentencing judge was regarded as no violation of the imposition of powers doctrine. In **R v Latimer** [2001] 3LRC 593 the Supreme Court of Canada, in considering the test of proportionality of a sentence held that imposition of the mandatory sentence of imprisonment for life without parole for ten years was not grossly disproportionate to the circumstances of the case. The accused had been convicted of murder of his severely disabled 12 year old daughter. Both these latter Commonwealth countries, however, seemed to embrace a principle of parliamentary supremacy.

The South African Constitution, alike the Jamaican Constitution (section 2), includes a supremacy clause. Section 1 reads:

> "**1** The Republic of South Africa is one sovereign democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law". (Emphasis added)

and in section 2:

> **"2.** This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

The right to life is also expressed in section 11 in Chapter 2, which incorporates their Bill of Rights. The Court in **Dodo v State** (supra) recognized that in considering the constitutionality of the mandatory life sentence the concept of proportionality was the major influencing factor. However, Ackermann, J, at page 340 cautioned:

> "... the length of punishment must be proportionate to the offence. To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth (see **Prinsloo v Van Der Linde** [1998] 1 LRC 173), they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender's dignity assailed."

Because of the high value which the Constitution of Jamaica places on the right to life, it seems to me that the mandatory minimum sentence of seven years punishment for the taking of that life, cannot be regarded as having obliged the judiciary "to impose a sentence which is wholly lacking in proportionality to the crime". That period of incarceration could well be viewed as a mere temporary

curtailment by the State of the offender's right to liberty, whereas the latter by his conduct has deprived the victim irrevocably of that constitutional right to life. One cannot arguably therefore say that the mandatory sentence of life imprisonment "bears no relation to the gravity of the offence". In the instant appeals the taking of a human life in the commission of the offence of murder has attracted as a sentence, a reciprocal value assessment of a punishment of the minimum mandatory sentence of seven years. The right to life is a prime right guaranteed by the Constitution, the infringement of which curtails the enjoyment by that victim of all other rights. I too agree with the Solicitor General, Michael Hylton, Q.C. that a sentence of life imprisonment is not disproportionate for someone who commits murder in the most benign circumstances. Such an infringement of the victim's right creates, at times, immeasurable trauma and loss to his family, his relatives and the wider society.

No trifling views nor lofty academic rhetoric should be readily entertained to trivialize the value of the loss of a human life.

The minimum mandatory life imprisonment for murder curtails only partially the discretion of the sentencing judge. Therefore, the utilization in the sentencing process by the learned trial judge of, the address of counsel for the accused, along with the antecedents of the accused and the social enquiry report, if necessary, are all aspects of the exercise of the discretion of the sentencing judge.

Although traditionally, the legislature imposes maxima in sentences, the phrase "... not exceeding x years" is, in essence, a curtailment of the judicial discretion, beyond which a sentencing judge may not go. This, however, has never been regarded as objectionable.

The mandatory minimum of seven years in the "life imprisonment" for murder, is the punitive part of the sentence, which is an expression of the abhorrence of society to the crime. It is the retributive element in the principle of sentencing. The sentencing judge retains a discretion to determine how many years the offender should serve before being eligible for parole. It also satisfies the deterrent aspect of the principle. Thereafter, the rehabilitative phase takes effect under the provisions of the Parole Act. The sentence in effect, satisfies several aims of the principles of sentencing in the process.

In my view also the mandatory sentence of life imprisonment is not disproportionate and accordingly is not unconstitutional.

SMITH, J.A.

These three appeals were heard together as they involve a common issue. This common issue concerns the constitutionality of a mandatory life sentence for non-capital murder. It is agreed by all that apart from the constitutional issue there are no other arguable grounds of appeal. Carnegie's and Daley's convictions followed on overwhelming evidence, while Beckford pleaded guilty.

The facts of the different appeals

The relevant facts and circumstances of each case can be summarised as follows:

Keith Carnegie

On March 2, 2000, the appellant Carnegie, a 40 year old higgler, was convicted of the murder of Sashalee Clarke by a jury in the Trelawny Circuit Court, presided over by Mrs. N. McIntosh, J. He was sentenced to life imprisonment and it was ordered that he should not be eligible for parole until he had served at least 30 years. The trial judge recommended psychiatric treatment. The deceased was an infant girl, aged two years and eleven months. The appellant was the erstwhile "boyfriend" of the mother of the deceased. On the night of February 9, 1999, the appellant Carnegie told the brother of the deceased:

> "boy mi a go kill yuh mother you nuh because mi nuh know a what she a deal with."

Shortly after this statement was made the appellant went to the house where the deceased, her mother, two sisters and brother lived. The mother of the deceased was out. The appellant, wielding a machete, chopped the brother of the deceased twice in the head, he chased the sisters of the deceased into a neighbouring house where he chopped one of them twice and slashed the cheek of the other with a knife. When the sister who was slashed with the knife returned to her house, she discovered the deceased lying on a bed with her throat cut. Later that same night the appellant Carnegie accosted the mother of the deceased at a bus stop. He stabbed her in the neck and told her that he had just "murdered" her children. The following morning the appellant surrendered himself to the police.

At his trial the appellant made an unsworn statement to the effect that he knew nothing about the allegations made against him. The jury retired for 20 minutes. Before passing sentence the judge received evidence of the antecedents of the appellant and heard his counsel's plea in mitigation. The appellant had seven previous convictions – all involving violence.

Ricardo Beckford

The appellant Beckford, a 27 year old messenger, was indicted for non-capital murder. The particulars of offence were that on the 30th December, 2000, in the parish of St. Mary, he murdered Henry Hinds. He

was arraigned on the 15th March 2001 before Reid, J. in the St. Mary Circuit Court and pleaded guilty. The prosecution's case was that on Saturday, December 30, 2000 at about 2:00 p.m. the body of the deceased was found at the road side of the main road in Hamilton Mountain in St. Mary. The appellant was arrested by citizens and taken to the police station in Oracabessa. At the station the appellant Beckford gave a caution statement in which he confessed to chopping the deceased several times with a machete. He took the police to the spot where he had disposed of the machete.

The medical post mortem examination revealed that the deceased died from multiple chop wounds. The fatal chop wounds were to the frontal area of the skull which caused massive brain damage and haemorrhage. There were at least five other major chop wounds.

The learned trial judge received evidence of the appellant's antecedents. The appellant had four previous convictions. Counsel for the appellant in his plea in mitigation urged the trial judge not to specify a mandatory minimum term of imprisonment pursuant to section 3A(2) of the Offences against the Person Act. The judge acceded to counsel's request and imposed a life sentence without specifying a minimum period. The significance of not specifying a minimum period of years before the appellant becomes eligible for parole will be addressed later.

Renford Daley

The appellant Daley, a 36 year old contract worker, was convicted on the 7th March, 2001 in the St. Elizabeth Circuit Court before Dukharan, J. and a jury for the murder of Ezekiel Salmon. He was sentenced to imprisonment for life. The undisputed facts are that on May 21, 2000, at about 8:30 p.m., the appellant, alias Diago, and the deceased, a man in his mid sixties, were in a shop in Ginger Ground, St. Elizabeth. According to the sole eye witness, Mr. Uton Blake, the appellant bought a drink and both men left the shop together. Having reached about 10 feet from the shop, they stopped and faced each other. The witness said, "I see Diago stretch to Ezekiel and Ezekiel back off." When asked what part of Ezekiel he saw Diago's hand stretch towards, the witness replied, "In his chest." According to the witness, the appellant stooped, picked up an object and ran off. The deceased, who had started to pursue the appellant, clutched his chest. The witness approached him and heard him say, "Diago stab me." He then collapsed to the side of the road. The deceased was taken to the Black River Hospital where he was pronounced dead.

Dr. George Hamilton, who performed the post mortem examination, testified that he saw a two centimeter wide laceration to the base and front of the neck of the deceased. The wound extended to the chest cavity with damage to the right lung and the major blood

vessels in the neck. In the doctor's opinion, death was due to internal haemorrhage secondary to the wound.

The jury retired for 25 minutes and returned a verdict of guilty. The antecedents of the appellant were given. The appellant had no previous conviction. The trial judge then passed the sentence of life imprisonment, but did not specify a minimum period before which the appellant would become eligible for parole.

The Grounds of Appeal

As stated earlier, the complaints of the appellants concern the constitutional validity of a mandatory sentence of life imprisonment as provided for by section 3A(1) of the Offences against the Person Act.

The original grounds of appeal were not pursued. Counsel for the appellants sought and obtained leave to argue supplementary grounds. The supplementary grounds argued on behalf of the appellants Carnegie and Beckford were formulated as follows:

> "That the mandatory sentence of imprisonment for life upon conviction of non-capital murder provided for by section 3A(1) of the Offences against the Person Act is unconstitutional in that:
>
> (i) it offends against the principle enshrined in section 20(1) of the Constitution of Jamaica, that a person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law insofar as it does not afford a convicted person an opportunity to be heard on the question of the

appropriate question of the appropriate sentence in the circumstances of each particular case;

(ii) it offends against the constitutional principle of the separation of powers; and

(iii) it offends against the provisions of section 17(1) of the Constitution of Jamaica."

The supplementary grounds filed and argued on behalf of the appellant Daley which, in essence, are the same as those filed and argued on behalf of Carnegie and Beckford are:

"1. That the requirement of mandatory sentence of life imprisonment pursuant to section 3A(1) of the Offences against the Person Act constitutes inhuman or degrading punishment or treatment contrary to the terms of section 17(1) of the Constitution of Jamaica and is therefore unlawful and void.

2. That the learned trial judge erred in law when he imposed a mandatory sentence of life imprisonment on the appellant pursuant to section 3A(1) of the Offences against the Person Act in the absence of any or any adequate determination by the learned trial judge as to the appropriate period of duration of sentencing (sic) in all the circumstances of the case, thereby denying the appellant the consideration of mitigating factors in his favour against background of the circumstances of the case, in breach of the constitutional rights of the appellant contrary to section 17(1) of the Constitution of Jamaica.

3. That the requirement of mandatory sentence of life imprisonment on

> conviction of non-capital murder pursuant to section 3A(1) of the Offences against the Person Act offends the principle of separation of powers guaranteed by the Constitution of Jamaica and is therefore unlawful and void."

In summary, these appeals raise two basic issues:

(1) Whether all mandatory sentences offend against the Constitution.

(2) If not, whether the mandatory sentence of life imprisonment, as provided for by section 3A of the Offences against the Person Act is unconstitutional.

Before proceeding to deal with these issues I shall set out below the relevant statutory and constitutional provisions referred to in the grounds of appeal.

Section 3A of the Offences against the Person Act

In 1992 the Offences against the Person Act was amended by adding, inter alia, section 3A.

Section 3A of the Offences against the Person Act provides:

> " – (1) Subject to the provisions of this Act every person who is convicted of non-capital murder shall be sentenced to imprisonment for life.
>
> (2) Notwithstanding the provision of section 6 of the Parole Act, on sentencing any person convicted of non-capital murder to imprisonment for life, the Court may specify a period, being longer than seven years, which that person should serve before becoming eligible for parole."

The Relevant Constitutional Provisions

Section 17 of the Constitution of Jamaica reads:

> "17 – (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 section to the extent that the law in question authorise the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

It may be convenient at this point to emphasise that subsection 2 of section 17 cannot be invoked to save section 3A(1) of the Offences against the Person Act since the latter does not merely authorise but mandates the imposition of imprisonment for life on a person convicted of non-capital murder – see **R.v. Hughes** (2002) 2 W.L.R. 1058; (2001) 60 W.I.R. 156. The decision of their Lordships in **Hughes** was applied by this Court (Forte, P., Panton J.A. and Clarke, J.A. (Ag.) in **Lambert Watson v.R.** SCCA No. 117/1999 delivered on December 16, 2002.

Section 20(1) of the Constitution reads:

> "20 – (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

I now turn to the first issue:

1. The Constitutionality of Mandatory Sentences

This issue raises three points for consideration:

(a) whether a fixed penalty infringes the constitutional principle of the Separation Powers between the Legislature and the Judiciary;

(b) whether a fixed penalty contravenes the right to a fair hearing as provided for by section 20(1) of the Constitution;

(c) whether a fixed penalty breaches section 17(1) of the Constitution which prohibits torture, inhuman and degrading punishment or treatment.

Submissions and Analyses

Mr. Morrison, Q.C. told this Court that he did not propose to argue the Separation of Powers point in the light of the full discussion and decision on it in **Lambert Watson v.R.** (supra).

Miss Nosworthy, also, did not challenge mandatory sentences on the ground that they breach the principle of the Separation of Powers between the Legislature and the Judiciary. She, however, contended that section 3A of the Offences against the Person Act is incompatible with the constitutional principle of Separation of Powers between the Executive and the Judiciary in that it purports to vest the Parole Board (The Executive) with the judicial function of determining the length of a sentence. In my view, Miss Nosworthy's contention is wholly

misconceived. I will return to this when dealing with the second issue. It would be fair to say that the appellants concede that a mandatory sentence does not offend the Separation of Powers principle on which the Constitution is based.

In respect of point (b) counsel for the appellants submitted that a mandatory sentence is in breach of the right to a fair hearing as provided for by section 20(1) of the Constitution.

In **R.v. Dale Boxx** SCCA No. 123/2000 delivered on December 16, 2002, Downer, J.A. observed (page 28):

> "It may well be that any mandatory sentence does not afford the accused a fair hearing before sentence is imposed and would be incompatible with section 20 of the Constitution."

The argument of the appellants is that sentencing is part of the hearing and a mandatory sentence does not afford an accused the opportunity to have his particular circumstances considered with a view to mitigating the sentence. Accordingly, it is argued, a mandatory sentence is incompatible with section 20 of the Constitution. However, having conceded that mandatory sentences do not offend the Separation of Powers principle, it is difficult, if not impossible, in my view, for the appellants to argue that all mandatory sentences are incompatible with the right of an accused to a fair hearing as provided for by section 20(1).

I am inclined to agree with Mr. Hylton, Q.C. that this ground is misconceived. Indeed, as the learned Solicitor General and the learned Senior Deputy Director of Public Prosecutions submitted, the Court does not cease to be an impartial or independent tribunal because there is a minimum or even a fixed sentence. I, therefore, agree with the respondents that a convicted person may only contend that he had not received a fair hearing from an independent and impartial court by reason of a mandatory sentence, if there were a breach of the Separation of Powers principle or, as we shall see later, if the sentence were found to be disproportionate. As Mr. Hylton, Q.C. puts, it the fair hearing ground does not have a life of its own.

The respondents further submitted that both on high authority and on principle, a mandatory sentence is not per se incompatible with a person's right to a fair hearing pursuant to section 20(1). They referred to **Palling v. Corfield** (1970) 123 C.L.R. 52, **Dodo v. State** (2001) 4 L.R.C. 318, **Lambert Watson v. R.** (supra) **Smith v. The Queen** 40DLR (4th) 435 (Edward Dewey Smith). These cases to my mind illustrate the inextricable connection between the constitutional principle of the Separation of Powers and the constitutional right to a fair hearing, to which I have previously referred.

I would venture to say that it is now settled law that Parliament may prescribe fixed penalties with respect to specified crimes. Of course, the

prescription of a fixed penalty must be distinguished from the selection of a penalty for a particular case. In **Deaton v. Attorney General and Revenue Commissioner** (1963) I.R. 170 at 182-3, the Supreme Court of Ireland said:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule which is one of the characteristics of legislation ..."

This statement was referred to with obvious approval by the House of Lords in **R (on the application of Anderson) v. The Secretary of State for the Home Department** (2002) 4 All E.R. 1089 at 1100.

In **Palling v. Corfield** (supra), a decision of the High Court of Australia which has a written Constitution, Barwich C.J. said (page 58):

> "It is beyond question that Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invalid; nor, in my opinion is there any judicial power or discretion not to carry out the terms of the statute."

In **Lambert Watson v. R.** (supra), Forte P., after quoting the above passage, approvingly said (page 32):

> "The above dicta recognise the true role of the legislature in fixing policy in regard to the punishment of crime. It recognises also the constitutional right of Parliament to enact for fixed penalties in order to accomplish the dictates of its policy."

Clarke, J.A. (Ag.) in the same vein said at page 74 (ibidem):

> "Although punishments fixed by the common law are generally maxima there are cases of high authority that acknowledge that it is within the competence of legislatures in countries with written constitutions on the Westminister model to prescribe a fixed punishment for particular offences, that is to say, to give no judicial discretion as to punishment..."

In **Dodo v. State**, (supra) a decision of the Constitutional Court of South Africa, the question was whether a mandatory minimum sentence was inconsistent with a provision of the Constitution which guaranteed the right to fair trial and the Separation of Powers principle required by the Constitution.

In upholding the constitutionality of the mandatory minimum sentence, the Constitutional Court, per Ackermann, J. said at 333, d:

> "[23] Both the legislature and the executive shared an interest in the punishment to be imposed by courts both in regard to its nature ... and its severity. They have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment. The availability and cost of prisons, as well as the views of these arms of government on custodial sentences, legitimately inform policy on alternative forms of non-custodial sentences and the legislative implementation thereof. Examples

> that come to mind are the conditions on and maximum periods for which sentences may be postponed or suspended ..."

The Court referred to relevant statutory provisions which probably corresponid to section 6 of the Criminal Justice (Reform) Act (Jamaica). Ackermann, J then continued:

> "[24] The executive and legislative branches of state have a very real interest in the severity of sentences. The executive has a general obligation to ensure that law abiding persons are protected if needs be through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily integrity and increases with the severity of the crime."

However, Ackermann, J was careful to point out that as a matter of principle the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. The clearest example of this, he said, would be a statutory provision that obliged a court to impose a sentence which was inconsistent with an accused's constitutional right not to be sentenced to a punishment which was cruel, inhuman or degrading. Indeed, a mandatory sentence that may result in disproportionality between punishment and a particular offence would also be inconsistent with an accused's right to a fair trial under section 20 (1) of the Constitution. As was illustrated in **Reyes v.R.** (2002) 60 W.I.R. 42 the requirement that a sentence should not be

inhuman incorporates the consideration of mitigating circumstances of the offence and the individual offender.

Under the caption "Foreign Jurisprudence" at page 334, Ackermann J referred to other "open and democratic societies" (where the doctrine of the Separation of Powers exists) which permit the enacting of mandatory minimum sentence.

The learned judge examined the situation in the United States of America, the United Kingdom, Canada, Australia, New Zealand, India and Namibia and concluded (page 338 (e)):

> "It has never, so far as I have been able to determine, been decided in any of these jurisdictions that mere involvement by the legislature in the sentencing field conflicts with the separation of powers principle."

This opinion had previously been expressed by Lord Diplock in **Hinds v.R.** (1977) A.C. 195 at pages 225-227.

In respect of point (c) a minimum mandatory term of imprisonment is obviously not in and of itself inhuman or degrading punishment or treatment. In **Smith v The Queen**, (supra) a judgment of the Supreme Court of Canada, Lamer, J. in considering section 12 of the Canadian Charter of Rights (the right not to be subjected to any cruel and unusual treatment or punishment) said – page 481:

> "A minimum mandatory term of imprisonment is obviously not in and of itself cruel and unusual. The legislature may in my view provide for a compulsory term of imprisonment upon

> conviction for certain offences without infringing the rights protected by section 12 of the Charter."

As counsel for the respondents, correctly in my view, submitted, the real problem with mandatory sentences is that they may result in disproportionality between the sentence and the particular offence. A minimum mandatory sentence limits the discretion of a trial judge and he may be required to impose the same sentence on a wide range of conduct to which the offence could conceivably apply with the result that an offender may receive a punishment which does not fit his particular crime. A guilty verdict may lead to the imposition of a totally disproportionate term of imprisonment. Such a fixed sentence could not be corrected on appeal as being manifestly excessive – see section 13(1) (c) of the Judicature (Appellate) Jurisdiction Act.

The concept of proportionality therefore is crucial in determining whether an accused person's constitutional right, not to be subjected to inhuman or degrading punishment, has been breached. Proportionality, of course, involves a consideration of the range of conduct to which the mandatory sentence may conceivably apply and the nature of the mandatory sentence. If the range is narrow, a minimum mandatory sentence could not result in disproportionality and there could be no breach if the mandatory sentence is modest, reasonable and appropriate to the benign offender.

Accordingly, I will conclude this part by stating that to my mind it is clear that the authorities do not support the appellants' contention that generally mandatory sentences contravene the right to a fair hearing as provided by section 20 (1) of the Constitution. Further a mandatory sentence is not in and of itself inhuman and degrading punishment or treatment.

I now turn to the second issue which I think is the main issue in these appeals.

2. Whether the mandatory sentence of life imprisonment as provided for by section 3A of the Offences against the Person Act (as amended) is unconstitutional.

Submissions & Analyses

Mr. Morrison, Q.C. submitted that a mandatory sentence of life imprisonment for non-capital murder, irrespective of the circumstances of the particular offence or offender violates the requirements of section 17(1) and section 20 of the Constitution given the obvious risk of disproportionality of that sentence in a particular case. He referred to dicta in **Smith v The Queen** (supra) and **R.v. Offen** (2001) 2 All E.R. 154 at page 175. In keeping with the noble practice of his profession, as is his wont, counsel also referred to the decision of the House of Lords in **R.v. Lichniak/R.v. Pyrah** (2002) 4 All E.R. 1122. This decision does not support the contention of the appellants, however, counsel sought to distinguish it.

Miss Nosworthy for the appellant Daley, addressed mainly the Separation of Powers (Judiciary/Executive) point.

Mr. Hylton, Q.C. for the Attorney General submitted that proportionality is at the heart of this issue and is the most important point in these appeals. He argued that it was necessary to distinguish between the mandatory death sentence and the mandatory life sentence. He referred to Lord Bingham's observation in **Reyes v The Queen** (2002) 2 W.L.R. 1034 (a Privy Council decision from Belize) at paragraph 29:

> "A law which denies a defendant the opportunity, after conviction, to seek to avoid imposition of the ultimate penalty which he may not deserve is incompatible with section 7 because it fails to respect basic humanity."

(Section 7 of the Constitution of Belize is similar to section 17(1) of the Jamaican Constitution.)

The Solicitor General then submitted that a mandatory life sentence is not similarly disproportionate and that such a sentence can and should be distinguished from the mandatory death sentence which their Lordships considered in **Reyes.** He relied on **Lichniak v.R.** (supra) to support his contention that mandatory life imprisonment for non-capital murder is not disproportionate. Miss Llewellyn for the Crown submitted that the mandatory life sentence prescribed by section 3A of the Offences against the Person Act does not infringe the provisions of section 17(1) and section 20 of the Constitution for the following reasons:

(i) In practice, when a person is sentenced to imprisonment for life, it does not mean that he will spend the rest of his life in prison.

(ii) By operation of law (section 3A (2) of the Offences against the Person Act and section 6(4) of the Parole Act) a life sentence really means a mandatory minimum sentence of seven years imprisonment.

The Nature and Operation of the Mandatory Life Sentence

What is the nature of a mandatory life sentence? Does it impose imprisonment for life as a punishment? To answer these questions it is necessary to examine section 6 of the Parole Act in conjunction with section 3A(2) of the Offences against the Person Act. However, before doing so, I propose to say something about the Parole Board. The Parole Board was established under section 3 of the Parole Act. The Board is appointed by the Minister and shall consist of not less than five nor more than seven members. At least one of the members must hold or must have held judicial office – First Schedule.

The functions of the Board as set out in section 4 are:

(a) to receive and consider applications for parole and to grant or reject such applications;

(b) to issue summonses requiring the appearance before the Board of any parolee or applicant for parole or such

witnesses as the Board may consider necessary for the purposes of the Act;

(c) to revoke or suspend parole in respect of any parolee;

(d) to review the cases of inmates serving life sentences or inmates in respect of whom a sentence of death has been commuted to life imprisonment, for the purpose of determining whether or not to grant parole to such inmates;

(e) to issue a certificate to a parolee upon the termination of any parole period;

(f) to make reports to the Minister, at such intervals as the Minister may prescribe, upon the operation of the Act;

(g) to carry out such other functions as the Minister may direct as being, in his opinion, necessary for the purposes of this Act.

Miss Nosworthy's submission that the Parole Board determines the length of sentence of offenders on whom life sentences are imposed is without merit. The Parole Board does not determine the sentence of a person convicted of non-capital murder or of any offence. The sentence is imposed by the trial judge. The Parole Board merely administers the sentence of a person eligible for parole with a view to permitting him to spend a portion of his sentence outside the prison, to which he was confined. He is released on licence – nothing more. As we shall see later, the Parole Board is not concerned with the punishment of the inmate. The

judicial function of punishing the convicted person is performed by the judge. I, therefore, cannot accept the submissions of Miss Nosworthy that the principle of the Separation of Powers between the Executive and the Judiciary is breached by the practical operation of the mandatory life sentence. I shall say more, later, in relation to the role of the Parole Board.

I will now examine the nature and operation of a mandatory life sentence as provided for by section 3A(1) of the Offences against the Person Act. In this regard section 3A(2) of the Offences against the Person Act and section 6 of the Parole Act are relevant.

For convenience I will restate the provisions of section 3A(2):

> "(2) Notwithstanding the provisions of section 6 of the Parole Act, on sentencing any person convicted of non-capital murder to imprisonment for life, the Court may specify a period, being longer than seven years, which that person should serve before becoming eligible for parole."

The provisions of section 6(4)(a) and (5)(a) and (b) are relevant to this exercise:

> "6(4) Subject to subsection (5) an inmate –
>
> (a) who has been sentenced to imprisonment for life; ...
>
> shall be eligible for parole after having served a period of not less than seven years.
>
> (5) Upon the expiration of -
>
> (a) a period of ten years, or

> (b) the period specified pursuant to section 5A of this Act or section 3A(2) of the Offences against the Person Act,
>
> whichever is greater, the Board shall review the cases of inmates who are serving a sentence of life imprisonment for the purpose of deciding whether or not to grant parole to them."

Section 7(7) of the Parole Act is also important – it reads:

> "7(7) The Board shall grant parole to an applicant if the Board is satisfied that –
>
> (a) he has derived maximum benefit from imprisonment and he is at the time of his application for parole, fit to be released from the adult correctional center on parole;
>
> (b) the reform and rehabilitation of the applicant will be aided by parole; and
>
> (c) the grant of parole to the applicant will not, in the opinion of the Board, constitute a danger to society.

By virtue of section 3A(2) of the Offences against the Person Act, where an accused has been convicted of non-capital murder, on sentencing him to imprisonment for life the trial judge may specify a period in excess of seven years which he must serve before becoming eligible for parole. Where the trial judge does not specify any such period, then by virtue of section 6(4)(a) of the Parole Act a person sentenced to life imprisonment is eligible for parole after having served a period of not less than seven years.

An inmate eligible for parole may make written application supported by written representations to the Board: (section 7(1) Parole Act).

Where no application for parole is made, the Board has a statutory duty, on the expiration of ten years or the period specified pursuant to section 3A(2) of the Offences against the Person Act, whichever is the greater, to review the cases of inmates serving a sentence of life imprisonment with a view to granting them parole. The Board shall grant parole if the applicant has benefitted from imprisonment and is fit to be released, if parole will aid his rehabilitation and if the applicant on parole will not constitute a danger to society :(section 7(7) Parole Act).

In the light of the above statutory provisions, under no circumstances can the Parole Board grant parole to a mandatory life prisoner before the expiration of seven years. Unless the Court specifies otherwise, a mandatory life prisoner may be paroled after serving seven years of his sentence. Thus a mandatory life sentence does not impose imprisonment for life <u>as a punishment.</u> Emphasis is placed on the words underlined, as it is important to bear in mind that the test to be applied to determine suitability for release on parole is that the Parole Board is satisfied that the prisoner does not present a substantial risk of re-offending in a manner which is dangerous to society. Further punishment of the prisoner must have no place in the consideration of the Board.

Under the Parole Act this test is applicable both to mandatory and discretionary life prisoners.

In the United Kingdom the Secretary of State has adopted a "tariff" policy in exercising his discretion whether to release offenders sentenced to life imprisonment. In essence, the tariff approach involves breaking down the life sentence into component parts, namely retribution, deterrence and protection of the public. The "tariff" represents the minimum period which the prisoner will have to serve to satisfy the requirements of retribution and deterrence.

As was stated in the judgment of the European Court in **Stafford v. U.K.** (2002) 13 BH RC 260 [and this was recognized by the House of Lords in **R (Anderson) v. Secretary of State** (supra)], a mandatory sentence of life imprisonment consists at the outset of a period of years, the minimum term, which is served for punishment and after this period has expired there may be a second period, during which the prisoner continues to be held in prison if his release would constitute a danger to the public. It is a sentence partly punitive and partly preventative. This is the position in this country. Subject to a mandatory minimum of seven years it is the Court which fixes the "minimum term" which a mandatory life prisoner must serve before he may be released on parole.

Accordingly, a mandatory life sentence is in effect a mandatory minimum sentence. We have seen that in its effect and operation only

the statutory (minimum) punitive part of a mandatory life sentence is fixed. The preventative part is subject to the same treatment as a discretionary life sentence by virtue of the Parole Act. Before the trial judge decides whether or not the statutory minimum is adequate punishment, he hears submissions on behalf of the accused, as was done in each of the appellants' cases.

We have also seen that the removal of judicial discretion in sentencing by the enactment of a mandatory minimum is not in and by itself incompatible with or in contravention of the Constitution.

It seems to me, then, that the important question for this Court is whether a mandatory minimum term of seven years before parole eligibility for non-capital murder is inhuman and degrading punishment or treatment. In other words, is such a sentence arbitrary and disproportionate? In my judgment it is not. The mandatory minimum is imposed only on adults who, with intention to kill or cause grievous bodily harm and without provocation, unlawfully take the life of another. A person whose judgment was substantially impaired at the time of the offence would not be guilty of murder but manslaughter. In setting the statutory minimum sentence at seven years for non-capital murder, Parliament has determined that the gravity of the offence, the protection of the public, the suppression of senseless killings, are of paramount importance and that consequently the circumstances of the particular

accused should be given relatively less weight. This legislative determination does not transform the sentencing procedure into an arbitrary process: (See **Smith v. The Queen** 40 D.L.R. (4TH) 435 at 459).

As Mr. Hylton, Q.C. submitted, the point can be tested in this way – could it be said that a sentence of life imprisonment with no chance of parole for seven years would be disproportionately harsh for someone who committed murder in the most benign circumstances? For example, would it be disproportionately harsh to impose such a sentence on a person who killed as an act of mercy? I think not. Murder in any form is a serious offence. A statutory minimum of seven years is, in my judgment, reasonable, appropriate and just as a punishment for and a deterrent to such conduct. It is consistent with the sentencing principles of denouncing murder. I may add that a person who kills as an act of mercy and is convicted of murder may petition the Governor General in the exercise of his Prerogative of Mercy to substitute a less severe form of punishment. Having killed "as an act of mercy" he might indeed obtain mercy.

Miss Llewellyn, the senior Deputy Director of Public Prosecutions, in support of her submission that a mandatory life sentence with no chance of parole for seven years is not inhuman or degrading punishment, relied on the decision of the Supreme Court of Canada in **R.v. Latimer, Attorney General of Canada and Others** (2001) 3L.R.C. 593.

Robert Latimer's daughter, T, was born with a severe form of cerebral palsy. She was quadriplegic and was bedridden for much of the time, was considered to have the mental capacity of a four-month-old baby and could communicate only by means of facial expressions. She suffered five to six seizures daily and was thought to be in a great deal of pain. Her parents rejected the option of having a feeding tube inserted into her stomach which would have improved her nutrition and health, on the basis that it was the first step to preserve her life artificially. Although T did have a serious disability, she was not terminally ill. T had undergone numerous operations and was due to undergo a further procedure to help relieve pain. Latimer's wife stated that she and her husband perceived further surgery as mutilation. Latimer placed T in the cab of his truck and fed a hose from the exhaust pipe into the cab. T died of carbon monoxide poisoning. Latimer initially denied that he had killed T, maintaining that she died in her sleep. However, he later confessed to killing her. He was convicted of second degree murder by a jury who were told by the judge that, although the Criminal Code allowed for recommendations to be made only for a sentence over the 10-year minimum for second degree murder, the jury could make any recommendation they wished. The jury recommended a sentence of one year before parole eligibility. The trial judge, on that recommendation, granted a constitutional exemption from the mandatory minimum

sentence and sentenced Latimer to one year of imprisonment and one year on probation on the basis that, considering the facts of the case, the full sentence would amount to cruel and unusual punishment contrary to section 12 of the Canadian Charter of Rights and Freedom 1982. The Court of Appeal affirmed the appellant Lamiter's conviction but substituted the mandatory minimum sentence of life imprisonment without eligibility for parole for 10 years for the sentence imposed at first instance. The appellant appealed to the Supreme Court of Canada.

It was held (page 596) that:

> "A sentence amounted to cruel and unusual punishment, contrary to section 12 of the Charter, where its effect was grossly disproportionate to the offence charged and, in assessing that standard, a court was to take into account the gravity of the offence... the penological goals and sentencing principles upon which the sentence was fashioned, the existence of valid alternatives to the punishment imposed and a comparison of punishments imposed for other crimes in the same jurisdiction. A degree of deference was to be given to the valid legislative objectives underlying the criminal law responsibilities of Parliament ...
>
> Furthermore, the sentence concerned was consistent with the sentencing principle of denouncing murder. It followed that, on the facts, the minimum mandatory sentence was not grossly disproportionate." (Emphasis supplied)

The issue of proportionality also was central to the deliberations of the Supreme Court of Canada in **Smith v The Queen** (supra). At page 476 Lamer, J said:

> "...In my view the protection afforded by section 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the persons on whom it is imposed...
>
> The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of section 12 of the Charter is, to use the words of Laskin, C.J.C. in **Miller and Cockriell** ... "whether the punishment prescribed is so excessive as to outrage standards of decency. In other words though the State may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate ... The test for review under section 12 of the Charter is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive."

McIntyre, J (who dissented) stated at page 337:

> "The test of proportionality must be applied generally and not on an individual basis. The question is not whether the sentence is too severe having regard to the particular circumstances of offender A, but whether the sentence is cruel and unusual, an outrage to standards of decency, having regard to the nature and quality of the offence committed ..."

The decision of the House of Lords in **R.v. Lichniak** and **R.v. Pyrah** (supra) is very instructive. In that case the House was considering mandatory life sentence for murder. The defendants were convicted of unrelated murders and sentenced to life imprisonment pursuant to section 1 (1) of the Murder (Abolition of Death Penalty) Act 1965, which prescribed a mandatory life sentence. The trial judges were of the view that the

defendants were unlikely to present any danger to the public upon release. The defendants were ordered to serve a minimum of 11 and 8 years before becoming eligible for parole. They appealed to the Court of Appeal contending that section 1(1) was arbitrary and disproportionate because it required the same life sentence to be passed on all convicted murderers, whatever the facts of the case or the circumstances of the offender and irrespective of whether they were thought to present a danger to the public or not. This issue arose as a result of the passage in the United Kingdom in 1998 of the Human Rights Act, incorporating into U.K. domestic law the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. The defendants/appellants contended that section 1(1) was incompatible with articles 3 and 5 (1) of the Convention – the prohibition on inhuman or degrading treatment or punishment and the right to liberty respectively. Those contentions were rejected by the Court of Appeal. They then appealed to the House of Lords. The House held that section 1(1) of the 1965 Act was not incompatible with either article 3 or article 5(1) of the Convention and that in its practical operation an indeterminate sentence did not constitute an arbitrary and disproportionate punishment. (It should be noted that the wording of article 3 of the Convention is identical to section 17 of the Jamaica Constitution).

Before the House, counsel for the appellants focussed his criticism not on the punitive part of the mandatory life sentence but "on the preventative safeguards which affect alike those who are dangerous and those who are not" (page 1127). In this regard counsel complained of three features of the mandatory life sentence:

(1) That the convicted murderers, serving the tariff term of their mandatory life sentences, cannot know whether they will be released at the end of it or not, and so (unlike prisoners serving determinate sentences) will spend years on end uncertain about their dates of release.

(2) That at the end of the tariff term it is for the prisoner to show that it is safe to release him, the onus being on him.

(3) That even when released the prisoner remains liable to recall for the rest of his days if he is thought to present a danger to the safety of the public.

It was the contention of the appellants that in the cases of those judged to be dangerous or potentially so, these safeguards served a valid penological purpose. But in the cases of those not judged to be dangerous, the safeguards served no valid penological purpose; they were arbitrary, excessive and disproportionate and offended articles 3 and 5(1) of the Convention. These arguments, though attractive, and equally applicable to this jurisdiction, were rejected by their Lordships.

Lord Bingham of Cornhill made the following observations (page 1128):

> "First, sitting judicially, the House is concerned to decide not whether the mandatory life sentence is desirable or necessary but whether it is lawful. Unless the sentence is shown to be unlawful, this appeal must fail.
>
> Secondly, the House must note that section 1(1) of the 1965 Act represents the settled will of Parliament... The fact that section 1(1) represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled ... It may be accepted that the mandatory life penalty for murder has a denunciatory value, expressing society's view of a crime which has long been regarded with peculiar abhorrence.
>
> Thirdly, the mandatory life sentence is imposed only on those who have taken a life or lives, as adults, with the intention of doing so or of causing serious physical injury and whose responsibility for their conduct was not diminished. While, therefore, there will be those (of whom those who kill as an act of mercy, or battered wives, or those who overreact to a perceived threat may provide the best examples) who may reasonably be judged very unlikely to resort to violence again, the discussion inevitably takes place with reference to a person who is shown to have resorted to violence once, with fatal consequences to another. This in itself distinguishes this case from that to which section 2 of the 1997 Act applied, since it is clear that an offence may fall within the statutory definition of a serious offence and yet fall short of serious crime, as was the case in **R.v. Offen** itself and was the case in **R.v. Buckland** before it.

> Fourthly, and very importantly, I do not consider that the appellants' complaints are of sufficient gravity to engage articles 3 and 5(1) of the Convention. Those articles protect very important rights: article 3 the right not to be subjected to torture or to inhuman or degrading treatment or punishment, article 5(1) the right not to be deprived of liberty save in accordance with a procedure prescribed by law and save in a number of specified cases of which the first is lawful detention after conviction by a competent court. But the convention is concerned to prevent significant, not minor, breaches. It has been held that mistreatment must attain a certain level of severity to breach article 3 (see **Tyrer v. U.K.** (1978) 2 EHRRI at 9-10 (paragraph 30); **Costello-Roberts v. U.K.** (1993) 19 EHRR 112 at 133-134 (paragraphs 30-32)..."

I agree entirely with Mr. Hylton, Q.C. and Miss Llewellyn, that the reasoning of their Lordships in **Lichniak** applies to these appeals and, in my view, is determinative of the issue raised. Although the **Lichniak** decision presents a formidable obstacle to Mr. Morrison's submissions, the learned Queen's Counsel sought valiantly to distinguish it. To that end, he argued that in the U.K. the system of fixing a tariff for persons sentenced to life imprisonment is a developed and mature process in a way that it is not in Jamaica. This argument, in my view, is untenable. The fixing of a tariff is a sentencing exercise – a judicial function. It is the minimum sentence which ought to be fixed by the trial judge. The practice in England whereby the Secretary of State fixes the tariff was found by the House of Lords to be objectionable.

In **R (Anderson) v. Secretary of State** (supra) the House held that the Home Secretary should not play any part in fixing the tariff of a convicted murderer. See also **Stafford v. U.K.** (2002) 13 BHRC 260 and **Benjamin v. U.K.** 13 BHRC 287.

The opinions of the House in **R (Anderson) v. the Home Secretary,** in so far as they are relevant to this issue, were read into their Lordships opinion in **Lichniak** (page 1126 (a). It is my view that the decision in **Lichniak** endorses the practice and procedure in this jurisdiction whereby the trial judge fixes the minimum term which must be served before the prisoner becomes eligible for parole and the Parole Board administers the parole system.

Further, as Mr. Hylton contended, even if the "system of fixing a tariff" in this country were not "a developed and mature process" this can have no relevance to the constitutional validity of a mandatory life sentence. As counsel submitted "it cannot grow to become constitutional over time."

In any event the way the system has worked in practice does not show that it is unconstitutional. It is clear to my mind that the issue in these appeals is well within the parameters of **Lichniak.**

Summary and Conclusion

1. The authorities clearly show that a sentence is not inhuman or degrading punishment by reason only of the fact that it is mandatory.

2. A mandatory sentence does not infringe the separation of powers principle since "the power conferred upon Parliament to make laws for the peace, order and good government enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law."

3. The prescription of a fixed penalty by the legislature is not per se incompatible with the right to a fair hearing as is provided for by section 20(1) of the Constitution.

4. A mandatory life sentence does not impose imprisonment for life as a punishment. Such a sentence pursuant to section 3A of the Offences against the Person Act prescribes a mandatory minimum sentence of seven years imprisonment for non-capital murder after which minimum term the convicted murderer is eligible for parole. Accordingly the mandatory life sentence provided for by section 3A(1) is not in its operation inhuman or degrading punishment in breach of section 17(1) of the Constitution.

5. I therefore conclude that the mandatory sentences of life imprisonment imposed on the appellants pursuant to section 3A(1) of the Offences against the Person Act are not unconstitutional.

6. As earlier stated, it was agreed by all that, apart from the constitutional issue, there were no other arguable grounds of appeal. Accordingly, I would dismiss the appeals and affirm the convictions and sentences.

ORDER:

FORTE, P.

Applications for leave to appeal granted. Applications treated as the hearing of the appeals. Appeals dismissed. Convictions and sentences affirmed. In respect of **Keith Carnegie, Renford Daley, Ricardo Beckford,** it is ordered that sentence commence on June 2, 2000, June 7, 2001 and June 14, 2001 respectively.