

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CRIMINAL)
A.D 2009**

SKBHCR 2008/0004

THE DIRECTOR OF PUBLIC PROSECUTIONS

V

CHE GREGORY SPENCER

Appearances:

Mrs Pauline Hendrickson, Director of Public Prosecutions, Mr Reynold Benjamin and Ms Rhonda Nisbett- Browne, Crown Counsel

Dr. Henry Browne Counsel for Che Gregory Spencer

**2009: May 28,
June 11**

JUDGMENT

- [1] **BELLE J.** On the 3rd day of February 2009 Che Gregory Spencer was convicted of the murder of Jason Marsham on 6th December 2006 at Godwin Ghaut in the Parish of Saint Thomas, St Kitts. On conviction The Director of Public Prosecutions announced that she was seeking the death penalty and Che Gregory Spencer was invited to present evidence in mitigation pending sentencing for the offence of murder. This opportunity afforded to Spencer is the standard practice in the Eastern Caribbean

Supreme Court since the landmark decision in **The Queen v Peter Hughes** Appeal No 91 of 2001 (St. Vincent and the Grenadines) in which it was held that the mandatory death penalty was unconstitutional and that sentencing hearings should be held to determine the appropriate sentence in each case of a murder conviction. Byron CJ as he then was rationalised the decision in the Court of Appeal in the following terms:

"The experience of other domestic jurisdictions, and the international obligations of our states therefore suggest that a court must have the discretion to take into account the individual circumstances of an individual offender and offence in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process.

In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicial principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty"

- [2] This court has followed what has come to be known as the **Hughes and Spence** (2 April 2001) guidelines from the inception and it certainly has been the practice in St Kitts since September 2005 when I assumed office as the resident judge in the Federation. I have no reason to believe that this practice was not seen in St Kitts and Nevis prior to that date.
- [3] The result of the practice is that in every case of a conviction of murder the convicted person must in accordance with the existing jurisprudence enunciated in **The Queen v Peter Hughes** and later developed in the cases **Harry Wilson v The Queen** Criminal Appeal No.30 of 2004 (St. Lucia) and **Mervyn Moise v The Queen** Criminal Appeal No.8 of 2003

be afforded the opportunity to raise mitigating factors in relation to the circumstances of the murder and surrounding the convicted murderer. It is also now standard practice for the state to provide a Social Enquiry Report and a Psychiatric Report on the status of the convicted man. According to this now established doctrine the convict can lead evidence, which mitigates the nature of the crime that he has committed and may thus affect the gravity of the sentence to be imposed. Among those persons who have been the beneficiaries of the guidelines and practice in St Kitts since September 2005 are Keith Herbert, Charles Elroy Laplace , Crispin Prentice, Travis Duporte, Romeo Cannonier, Kemba Swanston, Romeo Cannonier again Lewis Gardner, Ruedeney Williams , Sheldon Isaac , Justin Bass and Lumumba Matthew and William Benjamin.

[4] On 28th May 2009 after the Psychiatric Report and Social Enquiry Report were provided to the parties Dr. Henry Browne delivered his mitigation speech on the behalf of the accused. At the end of the speech the DPP stated that she would not reply but she would stand on her written submissions in favour of the death penalty, which were filed on 27th May 2009.

[5] In this case the relevant facts are that Che Gregory Spencer went to Godwin Ghaut to the home of the deceased along with 3 other persons at about 10 A.M. on 6th December 2006. There was some conversation between the deceased and another one of the individuals who went to Godwin Ghaut in a vehicle with Spencer. After some time Spencer went up to the deceased in the full view of a number of eyewitnesses and demanded of him to let him (Spencer) have his things from Marsham's car. There was a sharp exchange of words and thereafter the accused was seen to shoot the deceased twice firstly a grazing shot to the head

and then the fatal shot to the chest. This was witnessed by the deceased's sister among others.

Aggravating Factors

- [6] I view the aggravating factors in this case as the thoughtless act of violence and the use of a firearm in the perpetration of that act. Because of the prevalence of firearm offences in the Federation the court looks upon any such offence with grave concern. The act was callous and a reflection of the general malaise of social relations among some persons in the Federation who are acquainted with each other and even call each other friends. Yet at the slightest provocation or trigger from the so-called friend, violence of the most lethal kind is resorted to.
- [7] Apart from permitting the convict to make representation in relation to mitigating factors the prosecution is also permitted to lead evidence of aggravating factors. The DPP led no evidence in this case in regard to the aggravating factors. However in her submissions she argued that the nature and commission of the crime constitute a phenomenon, which must be deterred to ensure that it does not take root in this small community. She argued that the court owes a duty to impose such punishment that would reflect its utter abhorrence of the deed and at the same time would serve as a deterrent to other would-be perpetrators of this most heinous crime and repugnant practice.
- [8] The DPP submitted further that the evidence against the prisoner was overwhelming, and it was an extremely brutal, callous and senseless murder. She contended that the evidence of Rosaline Marsham , Terrance Marsham and Leon Thompson who witnessed the shooting clearly

demonstrates that the killing of Jason Marsham was unjustified and deliberate.

- [9] The evidence of Dr. Stephen Jones the Pathologist was to the effect that death was due to gunshot injuries to the chest with haemorrhage and shock.
- [10] In favour of the DPP's view we have the evidence of Leon Thompson who says that he heard Jason exclaim:

"Boy I don't know wha them a talk bout they a tell lie on me you know.

Duckfoot (Spencer) was leaning up with his hand folded. John was sitting on a block on the other side. Jason then went across and was talking to John. I couldn't tell what they were talking about. Duckfoot leave from the car and stand up between Jason and John and said:

'Boy you have something in the car belong to me and I want it now!'

When he reply he pulled out a grey gun and fired a shot to the head. He let go a second shot. That is when Jason buckled and went down".

(Earlier) Jason said: boy if you is man touch me car and see if you got anything in the car.

Spencer said to Jason: 'Boy you always f....ing around you know!'

That is when he shot Jason.

Terrance Marsham's evidence was: "John said something from the other side, about the car. Then Jason start to talk. Pacal tell them to cool down they just come to discuss.

Jason took up two bottles then Duckfoot (Spencer) came up: Jason tell him nothing in the car belong to all you. After that Spencer (Duckfoot) push him and shot him in his head."

Mitigating Factors

- [11] But there are some mitigating factors in this story emerging from the prosecution's evidence. According to this evidence Che Gregory Spencer

went to the scene and after some minutes of waiting asked to fetch certain belongings from the deceased's car. For no apparent reason the deceased turned extremely hostile. He picked up two bottles and approached Spencer. It is after this that Spencer shot the deceased twice. This evidence comes from the deceased's own sister who one would not expect to lie on the deceased.

- [12] As Roseline Marsham tells it, after some conversation between the two other parties who had come to the scene with Spencer and Marsham (the deceased) Spencer told the deceased :

"You have something in this car for me and I want it now!

He had come off the rental and went over by my brother. My brother was still talking to Pacal by the blue car 6-7ft (away). Duckfoot (Spencer) went in front of Jason. He put his hand in Jason face. Jason tell him if you is a man touch me car!

There had empty cases of bottles there. Jason took up two. This was after the accused put his hand in his face. Jason did not do anything with the bottles. I went in front of my brother and I tell him 'where part things start ain there it goin end.'

After I told Jason that he start going to the accused (Spencer) he heist up his shirt and give my brother a shot to his head. My brother was still going and he push me out of the way and he got the second shot. I was between the accused and Jason when he got the first shot. He (Jason) was not doing a thing with the bottles. After he received the second shot he fell on his back to the ground. After this I took up a Carib Bottle and said: 'See wha yu do to my brother?' He pointed the gun to my face and said: 'Miss me ain in no war with you.'"

- [13] These facts did not attract the verdict of manslaughter on the basis of provocation maybe because Spencer used a firearm against the possible attack with bottles. In addition to this it may have been felt that the defence

of accident, which was canvassed by the convict, was nothing but a plethora of lies and exposed a guilty mind, which precluded the possibility of a genuine provocation. Nevertheless the factors, which provided the basis for a judicial direction to the jury on provocation, must be taken into account if we are to give Spencer the benefit of the doubt. Moreover the relevant evidence comes from the prosecution.

[14] I have already intimated that the prevalence of gun crime will be condemned and serious punishment will be imposed to mark the disapproval of the community in response to these crimes. However the spontaneous nature of the crime puts it in quite a different category from those which are planned assassinations or retaliations for some previous act of aggression or injury. The spontaneous response to possible aggression is a mitigating factor, which must lower the required judicial response in terms of the kind of punishment to be meted out on the perpetrator.

[15] In looking at the circumstances surrounding the murder the court has to also take into account any sign of remorse or contrition shown by the accused after the killing. The report of both the Psychiatrist and the Probation Officer reveal that Spencer has expressed contrition for the crime he committed and regrets the death of the deceased who he described as a friend. But there was no mental illness found nor other reason for delaying sentence at this time.

[16] As I have already shown, it is open to the court to consider evidence from the trial in the determination of the issues relating to aggravating and mitigating circumstances. I have done so.

[17] I would say that I have reason to believe that Spencer is a candidate for reform. He has previously tried to turn his life around after being involved in criminal activity for a number of years in his youth. But he decided to change his life and indeed changed his name and stayed out of the criminal justice system for some six years before this murder was committed. I think that this is significant. The DPP had referred to the number of gun related crimes which Spencer had committed, but counsel Dr. Browne pointed out that seven of these offences arose from the same incident in 1992. Since then he had been convicted for possession of ammunition in the year 2000. This is confirmed by the record given to the court at the end of the trial.

[18] In a number of other cases in which I have imposed the death penalty I was not left in any doubt about the disposition of the convict. In most of those cases the convict stated that he had nothing to do with the killing. In the exceptional case of Charles Elroy Laplace the murder was committed in full view of numerous eyewitnesses and according to the evidence, after he had threatened to kill the deceased and lured her back to his house. In a number of the aforesaid cases the killings were cold-blooded non-judicial executions, carried out with the aid of firearms. There were in all of these cases clear signs of premeditation, the cold unemotional execution of preconceived plans to kill. Even after their arrest and conviction these convicts showed no remorse. Che Gregory Spencer does not fit into that category on the evidence which is before me.

[19] In **R v Winston Exhale** Saunders J, as he then was, stated that the convict did not fall into the category deserving of the death penalty. He explained,

"For example this was not a murder that was carefully and deliberately planned. This was not a murder where the victim was a judicial officer or a member of the security services or correctional force in execution in execution of a duty or judicial office. This was not a contract killing. The victim was not murdered because of his status as a juror or as a witness or party in litigation."

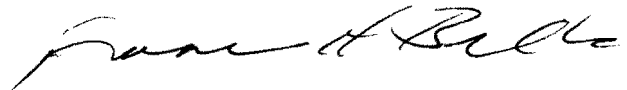
[20] In a case such as this where the accused has raised certain mitigating factors it is for the prosecution to disprove these factors beyond all reasonable doubt. This principle is stated in the **Moise** decision by Rawlins JA as he then was. The prosecution cannot rely on the guilty verdict to disprove mitigating factors since these matters may or may not have affected the jury's verdict. In this case there remains a possibility that the mitigating factors raised by the defence do exist. This means that the prosecution has failed to disprove them

[21] In light of these facts, the impressions I have formed and the doubt I have entertained I think that the most suitable sentence in this case would be one which reflects the seriousness of the crime, and the need to deter similar offences and prevent the prisoner from repeating such behaviour. The sentence should also reflect the community's disgust and the need for retribution for the casual but lethal use of a firearm in commission of the crime.

[22] In **Harry Wilson v The Queen** Rawlins JA as he then was opined that the death penalty should be imposed in the most exceptional and extreme cases of murder where there is no reasonable prospect of reform and the object of punishment would not be achieved by any other means. In **Moise** Rawlins JA had this to say;

"In summary, the sentencing judge is required to consider, fully, two fundamental factors. On the one hand, the judge must consider the facts and circumstances that surround the commission of the offence. On the other hand, the judge must consider the character and record of the convicted person. The Judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case."

[23] Guided by this statement I have accorded great significance to facts surrounding the commission of the crime. But because of the obvious mitigating factors reflected in the evidence and the evidence of some remorse in the reports of the Psychiatrist and the Probation Officer leading to my conclusion that the convict is a candidate for reform, I shall sentence the convicted man to a term of years imprisonment. That sentence is 18 years imprisonment with hard labour.



FRANCIS H V BELLE

High Court Judge