[2011] UKPC 33
Privy Council Appeal No 0050 of 2010

JUDGMENT

Ernest Lockhart (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Brown
Lord Mance
Lord Kerr
Lord Dyson
Lord Wilson

JUDGMENT DELIVERED BY
Lord Kerr
ON
9 August 2011

Heard on 18 July 2011

Appellant *Respondent*
Tim Owen QC Howard Stevens
Elizabeth Prochaska
(Instructed by Simons
Muirhead and Burton)
(Instructed by Charles
Russell LLP)

LORD KERR :

Introduction

1. This appeal requires the Judicial Committee to return to an area that it has visited a number of times in recent years. In what circumstances is it appropriate to pass a sentence of death, and what steps must be taken by a court which is considering the imposition of the death penalty in order to be sure that that ultimate penalty is warranted?

The facts

2. On 8 June 1999 some time between 8 and 9 pm a young man called Caxton Smith was shot in Fowler Street, New Providence in the Bahamas. He died shortly afterwards from the injuries that he had sustained as a result of a single gunshot wound to the back. Mr Smith was twenty-three years old when he died. The

appellant, Ernest Lockhart, was convicted of Mr Smith's murder. At the trial of the appellant and one Jeffrey Prospero for the murder of Caxton Smith, Lockhart had been identified as the gunman who fired the fatal shot, while Prospero had acted as lookout.
3. Mr Lockhart was aged twenty-one when he murdered Caxton Smith. Both had been drug dealers. Mr Smith had been convicted of selling drugs and had served a term of imprisonment. The trial judge found that the murder had been carried out by Lockhart in order to protect his "turf", in other words, the territory on which he plied his trade of drugs supply. He had threatened the deceased some time previously. And, although it was not expertly executed, the killing had been planned by Lockhart with others.
4. By way of further background to the murder, the trial judge, Isaacs J, in his sentencing remarks, recounted evidence given to the court by Vanessa Woodside, the deceased man's girlfriend. She testified that some six months before the deceased was killed, he had been threatened by Ernest Lockhart. The appellant had said to Caxton Smith something to the effect that "if [he] (the deceased) thought that he had come out of prison to take bread out of his (Ernest Lockhart's) mouth, he would be killed." Ms Woodside also gave evidence that about two weeks before the killing Lockhart and another individual came to the home that she shared with Caxton Smith. On that occasion, she said, the second man spoke to the deceased outside the house but she could hear what was being said. This man asked Mr Smith to sell drugs for him and

Lockhart, but Caxton had replied that he was not into that. At that point, according to Ms Woodside, Lockhart, who had been lurking by a coconut tree, said something to the effect that as Caxton did not wish to sell drugs for them, he could die like others before him.
5. At the age of fourteen years Lockhart had been sentenced to serve a period of detention for six months at the Boys Industrial School for housebreaking and theft. In 1994 he was sentenced to three months in prison for causing damage to property and in March 1996 he was fined $3,000.00 for possession of dangerous drugs. Before being found guilty of Mr Smith's murder, he had no convictions for violence to others.
The principles
6. What were described as "the two basic principles" that applied to the question whether the death penalty should be imposed were set out by the Board in *Trimmingham v The Queen* [2009] UKPC 25 in the following passages from paras 20 and 21:
"20. Judges in the Caribbean courts have in the past few years set out the approach which a sentencing judge should follow in a case where the imposition of the death sentence is discretionary. This approach received the approval of the Board in *Pipersburgh v The Queen* [2008] UKPC 11, and should be regarded as established law.
21. It can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same

message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, 'the worst of the worst' or 'the rarest of the rare'. In considering whether a particular case falls into that category, the judge should of course compare it with other murder cases and not with ordinary civilised behaviour. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled."

7. In *Maxo Tido v The Queen* [2011] UKPC 16 the Board acknowledged that difficulties can arise in deciding which cases warrant the soubriquet, "the worst of the worst" or "the rarest of the rare". It is quite clear, however, that only the most exceptional will qualify. Attempting to define which will come within this egregious category is not easy and one must guard against the risks that attend over-prescription in a field that defies precise classification. Some analogical assistance might be derived, however, from considering the provisions of the Criminal Justice Act 2003 which in England and Wales specify the types of murder which call for the imposition of a whole life tariff. Schedule 21 to the 2003 Act provides in para 4:

"(1) If—

(a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and

(b) the offender was aged 21 or over when he committed the offence,

the appropriate starting point is a whole life order.

(2) Cases that would normally fall within sub-paragraph (1) (a) include—

(a) the murder of two or more persons, where each murder involves any of the following—

(i) a substantial degree of premeditation or planning,

(ii) the abduction of the victim, or

(iii) sexual or sadistic conduct,

(b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,

(c) a murder done for the purpose of advancing a political, religious, racial or ideological cause, or

(d) a murder by an offender previously convicted of murder."

8. The Board does not suggest that this should be used as a template for determining whether a particular case falls within the exceptional category that would

call for the imposition of the death penalty. Many other factors, apart from those adumbrated in the paragraph, such as aggravating features of the defendant's previous offending, will have to be taken into account. The structure of the provision makes it unsuitable for use in that way, in any event. The application of the paragraph calls for the exercise of a value judgment at significant points – thus, the seriousness of the offence must be "exceptionally high"; the examples given in sub-paragraph (2) are those which are to be regarded as "normally" requiring the imposition of a whole life tariff; and if planning or premeditation are to operate as factors they must be "substantial". The provision cannot, therefore, function as a checklist for the presence or absence of factors that might warrant the most severe penalty but the considerations that underlie the classification of a particular case within the category may serve as a general guide or indication of when the most severe form of punishment is justified. To that limited extent, the Board commends it to sentencers who have to confront this extremely difficult exercise.

9. The second principle in *Trimmingham*, (that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death) has, obviously, two aspects. These do not bear any clearly evident connection with each other. Indeed, the second aspect, that the ultimate sentence of death is required in order to satisfy the requirements of due punishment, might be thought to be rather more comfortably accommodated with the question whether the offence is one which can properly be regarded as the worst of the worst. Be that as it may, in the present appeal, the first aspect of what has been described as the second principle has been the one which has prompted most debate.

10. It is important to note that, in delivering the judgment of the Board in *Trimmingham*, Lord Carswell made it clear that the criteria that emerge from his formulation of the two principles *must be fulfilled to the satisfaction of the sentencing court* before the death penalty can be imposed. In relation to the first aspect of the second principle, the court therefore requires to be satisfied of a negative proposition – that there is no reasonable prospect of reform. If and how a sentencer can reach that point of conviction will obviously depend on the particular circumstances of the case but, as the Board observed in *Maxo Tido*, a sentencing court, contemplating the possible imposition of the death penalty, would need to have professional advice as to whether the possibility of reform does not exist.

11. On the present appeal, much of the discussion of this issue centred on the question whether a psychiatric report was invariably required. Mr Howard Stevens

for the respondent contended that it would be wrong to impose a requirement that a psychiatric report be obtained in every circumstance, irrespective of the contribution that it might make to the essential inquiry. That argument proceeds, of course, on the premise that there are circumstances in which a report from a consultant psychiatrist would contribute nothing to the debate as to whether the reasonable possibility of reform existed. This proposition is not easily sustained. How is a sentencing court to

face the task of deciding whether it is *satisfied* that there is *no reasonable prospect* of reform unless it has some professional assistance which provides an insight into the character and psyche of the individual whose execution is being contemplated? Judgments can of course be made on the basis of such evidence as is available and Mr Stevens may well be right in his claim that the sentencing judge in the present case carefully analysed that type of material in his sentencing remarks. But an exercise confined to an evaluation of the available material does not address the anterior question that the court must confront – is this material sufficient to establish whether there is or is not a reasonable prospect of reform?

12. Psychiatry is defined as "the branch of medicine concerned with the causes, diagnosis, treatment, and prevention of mental illness" – Oxford English Dictionary. The mental illnesses or disorders that psychiatry is designed to diagnose and treat include various affective, behavioural, cognitive and perceptual abnormalities.

It is therefore pre-eminently the discipline that is best suited – in the first investigation at least – to address the question whether an individual is incapable of reform and whether, if capable, there is a reasonable prospect that he might avail of it. It was, no doubt, for this reason that Sir Dennis Byron CJ, delivering judgment in the Eastern Caribbean Court of Appeal in *Mitcham v Director of Public Prosecutions,* 3 November 2003 said that when fixing the date of a sentencing hearing, "the trial judge should direct that social welfare and psychiatric reports be prepared in relation to the prisoner". In *Pipersburgh and Robateau v The Queen* [2008] UKPC 11 the Board approved that enjoinder and said that "it is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary *for all such sentence hearings*." (Emphasis supplied).

13. The Board has therefore concluded that in every case in which the death penalty is being considered, the report of a consultant psychiatrist is needed before the question whether the reasonable possibility of reform can be properly addressed. In some cases something more will be required. In *White v The Queen* [2010] UKPC 22 at para 27 the Board adverted to the possibility that a report from a clinical psychologist might also be necessary. Psychology involves, among other things, the study of cognition, emotion, motivation, brain functioning, personality, behaviour, and interpersonal relationships. Many of these character traits can be assessed by the administration of psychometric tests and many may bear on the question whether an individual is capable of, and is likely to attempt to achieve, reform. Where, therefore, a sentencing court considers that it is impossible to decide

whether the first aspect of the second principle in *Trimmingham* can be fulfilled without the assistance of a clinical psychologist, a report from such an expert will be indispensable to the proper consideration of that question.

Application of the principles to the present case

14. In his sentencing remarks the trial judge included the following passage:

"I find that the circumstances surrounding the death of Caxton Smith

outweigh the personal circumstances of the accused man, Ernest Lockhart. I find that the circumstances of this crime disclose premeditation, planning and a most skilful moving that is agreed. I am satisfied that the circumstances of this case fall within that category of the case which is regarded as 'worst case.' I am satisfied also that the defendant, Ernest Lockhart, is deserving of the Court's most [condign] punishment for murder, that is death in the manner authorised by law."

15. The circumstances in which a person has been done to death and the impact that his killing has had on his family, friends and community are, at least potentially, highly relevant to the question whether the murder comes within the wholly exceptional category of the worst of the worst crimes. But the quest for that elusive concept is not necessarily assisted by pitting the circumstances of the killing against the personal circumstances of the killer. It seems to the Board that the application of the first principle and the first aspect of the second principle in *Trimmingham* should normally be both disjunctive and sequential. The question whether a particular murder can be described as the "worst of the worst" must be addressed first. Of course, the personal circumstances of the killer may affect the judgment of whether the murder is to be characterised as "the worst of the worst" but, if they have any part to play in that, it must be secondary to an assessment of the nature of the crime and the surrounding circumstances, rather than any personal mitigating attributes that the offender may have.

16. If the murder cannot be characterised as the worst of the worst, the first aspect of the second principle, whether there is a reasonable prospect of reform, does not arise. It is only where the killing is to be regarded as occupying a place in the worst category of murder that the question of the possibility of reform need be addressed. In the present case, it is the Board's firm view that, callous and brutal though this murder was, it simply cannot be described as the worst of the worst. Mr Stevens relied on the judgment of Lord Bingham of Cornhill in *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235 in seeking to locate this case in that exceptional category. At para 11 Lord Bingham said:

"It has however been recognised for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat."

17. Counsel suggested that this killing was akin to a contract killing and, according to Lord Bingham's classification, it was therefore to be regarded as being in the "worst of the worst" category. The Board does not accept that argument. In the first place, Lord Bingham was not addressing directly the question of how the worst of the worst murders should be defined; he was demonstrating the broad spectrum of

culpability that should be recognised in various types of killing. More importantly, however, Lord Bingham was not suggesting that, simply by inclusion in a particular type of murder category, a killing was to be regarded as being the worst of the worst.
18. On the second issue – whether there was sufficient material on which the sentencing judge could be satisfied that there was no reasonable possibility of reform – the Board is of the equally clear view that the appeal must be allowed. As has been noted, it may well be the case that the judge carefully sifted such material as was available, in particular the probation report. If it had been appropriate to confine his consideration to that, it might have been unexceptionable to conclude that there was no reasonable prospect of reform but for the reasons that we have earlier given, this was not enough. There was not sufficient material on which a judgment on this issue of the quality envisaged in *Trimmingham* could be made. It should have been recognised that the probation report alone could not provide a sufficient basis for such an important decision.

Disposal

19. It was agreed that, in the event that the appeal was allowed, the matter should be remitted to the Court of Appeal with a direction that it should remit the question of sentence to a Supreme Court judge for sentencing, Isaacs J having retired. The Board will humbly advise Her Majesty that this should be done.
20. The Court of Appeal had indicated that, if they were wrong in the decision to affirm the death penalty, a period of imprisonment of sixty years should be substituted. Obviously, the selection of sixty years must have been on the basis of Court of Appeal's conclusion that this was a case which could properly be categorised as being "the worst of the worst". Now that this conclusion has been rejected, a fresh

sentencing exercise will be required and the observations about that alternative penalty are no longer relevant.
21. It will be for the sentencing court to decide which further reports are required in order to have a properly informed sentencing exercise. The Board's conclusion that a psychiatric report would have been necessary before consideration of whether to impose the death penalty could be undertaken does not necessarily mean, of course, that such a report will be needed in order to undertake the sentencing exercise that is now required. It seems likely that reports from the prison as to the appellant's behaviour will be necessary but whether such reports would require to be supplemented by others and, if so, what the nature of those reports should be is a matter for the court whose responsibility it will now be to select the appropriate penalty.