CAPITAL & NON-CAPITAL MURDER

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The Offences Against the Person (Amendment) Act has now been in force for three years. For a measure which was designed as a compromise between opposing views on Capital punishment, it appears to have had a certain success. The population on Death Row has fallen from over 300 to around 50, because of the Act and also the decision in Pratt and Morgan. Yet the death penalty remains for those murders which most people would regard as the most heinous.

My personal position is as a opponent of the Death Penalty. No doubt that makes me all the more vigilant to ensure that the new law is interpreted strictly and accurately, so that no one should be condemned to death whose life ought to be spared according to law.

THE CATEGORIES OF CAPITAL MURDER

1. Murders Relating to the Status of the Victim as a Legal or Judicial Officer.

Definition. It is Capital Murder if the victim is a Police Officer, Correctional Officer, Judge, Prosecutor or Justice of the Peace if acting in the execution of his or her duty. The murder of a member of the public assisting a police officer or correctional officer is also capital. So is a murder directly attributable to the status of the victim as a witness in any proceedings or as a juror in a criminal trial. (OATPA s. 2(1) (a),(b) and (c))

does not depend on their personal characteristics but on their status as an officer of the law.

Case Experience. There have only been a few such cases. In R. vs. Taylor and Others (SCCA 50-53/91, 1st March 1993) the victim was a policeman, but the Court of Appeal stressed that there was no evidence that he was acting in the execution of his duty, at the time of the murder.

2. Murder in the Course or Furtherance of a Different Crime.

Definition. It is a Capital Offence to murder in the course or furtherance of:-

i) Robbery

ii) Burglary or Housebreaking

iii) Arson in relation to a dwelling house or

iv) any sexual offence.

(OATPA s. 2(1)(d))

Rationale. Some Judges have commented that it is an anomaly that a person who purposes to commit murder may be guilty of non-capital murder, whereas a person who purposes to commit a lesser crime, but in the course of it kills, is guilty of capital murder. But there is an intelligible rationale, namely to deter those who are minded to commit lesser crimes from carrying or using

March 1994) the deceased was killed by his gardener after a quarrel, and belongings and money from the deceased were found with the accused. He said to the police "out of mi boss pocket mi get dem when mi did hold im up". The Court of Appeal held that this was not sufficient to establish murder in the course of robbery, sine the larceny may have been an afterthought incidental to the murder, rather than the motive for the murder.

However the English cases decided under the Homicide Act 1957 show that the robbery does not have to be completed. A murder committed by a man when he intended to steal, and in order to further the theft, was capital murder: R. vs. Masters (1964) 2 All ER 623. So also was a murder committed after a theft in order to avoid detection and to escape: R. v. Jones (1959) 1 All ER 411.

Particular problems arise in the case of burglary and housebreaking. Burglary and housebreaking have various definitions in the Larceny Act section 39. 41. It is burglary to break and enter a dwelling house by night with intent to commit a felony; also to break out of a dwelling house after committing a felony therein. It is housebreaking to bread and enter a dwelling house and commit a felony therein, by day or night.

Clearly the person who breaks into a home in order to rob, and kills the householder when disturbed, is guilty of capital murder. But what of the person who breaks into the victim's house in order to kill him? I would argue that such a person has committed burglary in the course of furtherance of murder, rather

The point was argued in a number of cases heard on review before the three Judges of the Court of Appeal, and the view of the Judges was that once a burglary has been proved, then it is Capital Murder. A ruling is expected from the Privy Council.

3. CONTRACT MURDER

Definition. It is Capital Murder if the murder is committed pursuant to any arrangement whereby money or anything of value passes or is intented to passor is promised, as consideration for causing the death of the victim.

(OATPA s. 2(1) (e))

In the case of contract murders, all the parties to the contract are guilty of Capital Murder.

Rationale. One can well understand why Parliament wish to make a particular category of contract murders, when the murder is calculated and paid for through a professional hitman.

(OATPA s. 2 (1) (f))

Case Experience. None to my knowledge.

4. Murder in the Course or Furtherance of an Act of Terrorism.

Definition. The precise construction of this category has

Rationale. This subsection was introduced at a late stage in the Parliamentary debate. It appears to be prompted by a feeling that there are some murders which cause such revulsion, particularly in the Jamaican experience when caused in the course of gang warfare, creating fear in a whole community. "Terrorism" is not limited to political terrorism, thought if we ever have to face the style of I.R.A. or Muslim extremist bombing campaign it would be covered by the definition.

Case Experience. The difficulty has been that some Judges had been ready to label almost any killing in the public streets as a terrorist murder. In R. vs. Wallace (SCCA 99/91, 18th January 1993) the murderers abducted from his home and family and marched him to a place of execution. It was a dreadful murder but it did not have a marked public element. The Court of Appeal said:-

> "The test is not whether viewers or witnesses to the violence of inflicting fear, but whether the impact of that violence is calculated to serve as a warning to the public in general or section of it."

Further, the court said that even "A community or even a family unit within that community" could be a section of the public.

The case of R. vs. Morgan and Williams (SCCA 46/91, November 16, 1992) is a more obvious case of murder in the course of the furtherance of terrorism. On the evidence the murder was motivated by the "the declared intention of the applicants to drive out certain residents from the area because of their political

The Privy Council is expected shortly to pronounce on the terrorism section. I believe that they will require it to be restricted to a narrow ambit. The key is that, when examined closely, the subsection requires proof of a wider violent action in the course or furtherance of which the murder is committed. Thus the test is not whether the murder itself was of a terrifying nature (most murders are) but whether it was designed to further a wider aim which would strike fear in the hearts of the public. Further, I believe that "a section of the public" must be wider than a family; the case of R. vs. Britain (1967) 1 All ER 486, decided under the Race Relations Act, held that a family household was not a section of the public for the purposes of that act.

5. MULTIPLE MURDERS

Definition. A person is who is convicted of non-capital murder shall be sentenced to death if before that conviction he has been convicted of another murder, either done on a different occasion or on the same occasion. The Act provides that in such a case a person shall not be sentenced to death by reason of a previous conviction for murder, unless 7 days notice has been given to him that it is intended to prove his previous conviction. (OATPA s. 3(1A) and 3B(5)

Rationale. The purpose of Parliament appears to have been to recognise the revulsion which is felt by the public, both where a convicted murderer murders again and when a person kills two or more people at one time.

occasions of murder. But whether a murderer kills twice on the same occasion, he is invariably tried in the indictment containing two counts of murder. To try him in two separate trial would be oppressive and time wasting. But by trying him in one trial, it becomes impossible to serve the notice.

In R vs. Devon Simpson (SCCA 105/92, 9th May 1994) the Court of Appeal held that on the true construction of the Act, the condition as to notice does not apply to the situation where the accused is convicted of two murder on the same occasion. This case is pending on Appeal to the Privy Council.

6. THE EXCEPTION FOR AIDERS AND ABETTORS

Definition. In any case other than contract murders, if two or more persons are guilty of murder,

> "It shall be capital murder in the case of any other who by his own act cause the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or himself used violence on that person in the course or furtherance of an attack on that person; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

(OATPA s. 2(2))

Rationale. This provision, which is copied from the British Homicide Act 1957, introduces two degrees of culpability in murder case. In most cases of murder committed by a number of people on a joint enterprise, there some who are in the forefront of the actual violence, whereas others are keeping watch or lending encouragement. Whereas in legal terms all are guilty of murder, in

there is logic in the proposition that those who actually cause the death are more culpable than those who encourage or keep watch. Sensibly, the Act does not require a minute examination of whose blow or shot cause the death; any person who actually uses violence on the deceased will be guilty of capital murder.

Case Experience. There was an initial reluctance to apply this provision strictly. In R. v. Morgan and Williams (SCCA 46 and 47/91 16th November 1992) Wright J.A. spoke of a "a rule of construction of statute which inveighs against absurdity". But in other cases the courts have been able to make a clear distinction between the principles and the aiders and abettors. Thus in R. vs. Williams and Banks (30 and 31/92, 20th June 1994) Williams "faithfully kept watch" and was guilty of non-capital murder. When on the evidence it is impossible to say which of the accused discharged the fatal shots, then it will be non-capital murder in the case of all accused: See R vs. Taylor and Others (SCCA 50-53/91, 1st March 1993).

On the borderline are cases where several accused are seen to be armed with guns, but one only fires. Judges have taken the view that in such a case each of the attackers "himself used violence "on the deceased". Even more borderline was the case R v. Morgan and Williams (SUPRA), in which Williams was held to be guilty of capital murder because he chased the deceased "under the cover of a gun under the cover of Morgan's hand". It could be argued that the words in the statute "himself used violence"

THE ACT IN PRACTICE

The Responsibility of the Prosecution

Crown Counsel when drafting the indictment must seriously consider whether the facts amounted to capital murder. Capital murder must be specifically charged (OATPA Section 2 (4)), and the particular category of capital murder must be specified (See R vs. McKain (SCCA 106/93, 31st October 1994). Crown Counsel who charge non-capital murder in the indictment will normally not be allowed to amend to charge capital murder: See R v. Simpson (SUPRA), where the court said:-

> "As a matter of common humanity the applicant should be informed that he was on trial for capital offence at the outset and should not be faced without good reason with a late introduction of the capital charge."

It would appear to be permissible for the Crown to include two or more grounds for charging capital murder. If a hired killer broke into the home of a Judge and killed him as part of a terrorist campaign, he might be guilty of capital murder for four different reasons.

The Responsibility of the Defence

In preparing for trial Counsel should advise clients of the definition of capital murder if this is charged. The possibility of pleading guilty to non-capital murder may have to be considered in some cases; though this could only be accepted by the Prosecution and the court if there is a proper basis. During trial, Defence Counsel should be alert to ask questions in cross-

or if the evidence does not show that the accused was a principal actor rather than an aider and abettor. It will normally be better to get a ruling on this issue from the Judge; when it comes to a closing speech to the Jury, Counsel will be more concerned to show why the client is wholly innocent rather than to be bogged down in a submission in the alternative.

The Responsibility of the Trial Judge

Whether or not a submission is made, the trial Judge should take the opportunity at the close of the Prosecution case to consider whether there is sufficient evidence to found the capital charge, and if there is any doubt, to ask the Prosecution to justify the capital charge. The Act is clear that a person charged with capital murder may be found guilty of non-capital murder. The issues are the same as in any other case where alternate lesser verdict are open to the Jury. (See OATPA s 3B (1)).

In summing up the trial Judge must take care both to direct the Jury accurately as to the law (which in some cases may be complex), but also to make it clear that the decision whether it is a capital or non-capital murder is for them, to be decided according to the criminal burden and standard of proof. He or she should make clear that it is open to them to return a verdict of non-capital murder, if the capital murder ingredient is not proved.

Sentencing in Non-Capital Cases

The rationale for this provision is that in the case of a normal life sentence the Parole Act provides that a person sentenced to life imprisonment may apply for parole after seven years. Presumably it was thought by Parliament that some murder cases may be so heinous that the Court should specify a minimum sentence to be served.

In one of the first cases decided under the new Act, the then President of the Court of Appeal, Rowe P., said this:-

> "In our judgement, the legislature intended that in cases of non-capital murder, the Parole Act should only control where there can be seen some mitigating factor, whether relating to the offence or to the offender; for example an offender in relation to whom there is some indication that he was not fully responsible for his act mentally; or again for example, a crime of passion in which provocation is rejected by the Jury, but in which there is some substratum of inflamed passion.

R vs. McEckron (SCCA 67 and 72/91, 26th February 1973).

Defence Counsel should therefore first consider whether there are circumstances which can found an argument that there should be no minimum period prescribed by the Judge.

If a minimum sentence is inevitable the question arises how long? Different Judges may give different answers depending on their philosophy of sentencing.

In R vs. McEkron and Gordon (SUPRA) Rowe P. considered that, in keeping with the philosophy of the Act an aider and abettor should receive a lower minimum period than the principal

In later cases the Court of Appeal has adopted a harsher tariff. In a case of murder by shooting they have ordered minimum terms of 25 years and 20 years. In non-shooting cases the periods have been lower - 12 years in R vs. Barrett (SCCA 5/92, 10th January 1994), a chopping case, and 15 years in R vs. Carl Anglin (SCCA 129/91, 18th of December 1993), a stabbing case.

Defence Counsel should take the greatest care in mitigating on behalf of their client in a non-capital murder case. If necessary, the sentencing should be adjourned so that full instructions can be taken. The difference between 15 years and 25 years is mighty long for the person serving the sentence.

The factors which may be relevant in the sentencing exercise: The age of the accused; the nature of the crime and weapon used; the period already spent in custody; the part played by the accused; and the character of the accused.

I have to say in my opinion the level of sentencing has been too high, especially when one realises that there is no reduction for good behaviour. Before the Act, many of those guilty of non-capital murder would in fact have been commuted by the Governor General and would have served a life sentence offering the opportunity of parole after seven years. Now they have to serve 20 or 25 years without any hope of parole however good their behaviour as prisoners. Some review of these cases may be necessary in time to come.

to any term of imprisonment. A juvenile guilty of capital murder must be sentenced to be detained during Her Majesty's pleasure (Juvenile Act Section 29 (1)), but what of the juvenile sentenced to non-capital murder? Section 29 (3) suggests that he may be sentence to any term of years up to and including a detention for life. Some Judges have interpreted this as allowing them to sentence a juvenile to a fixed term in a murder case. The point is now being considered by the Court of Appeal.

The Appeal Process

Counsel instructed on behalf of an Appellant may have to consider the following issues in relation to a conviction to capital murder:-

- Whether there was sufficient evidence produced by the Prosecution to justify the charge of capital murder being left to the Jury.

- Whether the trial Judge gave an accurate direction on the capital murder ingredient.

- Whether the trial Judge properly left the issue to be determined by the Jury according to the criminal standard of proof.

If there is a possibility of a verdict of non-capital murder from the Court of Appeal, Counsel should be ready to plead in mitigation to obtain a low minimum period.

The Review of Pre-Act Cases

The Act provided that every case of a person who was under sentence of death for murder at the time of the commencement of the Act should be reviewed by a Judge of the Court of Appeal with a view to determining whether the murder was classifiable as capital or non-capital. In the case of a capital non-classification, the convicted person was entitled to have the classification reviewed by the three Judges of the Court of Appeal, at which point he could be represented by Counsel. (Amendment Act, s. 7)

Parts of this review process have been completed, but there is still unfinished business. The following points should be noted:-

i) In December 1992 various single Judges of the Court of Appeal went through the cases of death row inmates and made a classification of capital and non-capital. There was no hearing or right to make representation before the single Judge, and (in relation the capital cases) this was held not to be unconstitutional by the Privy Council since a justice hearing before the three judges was assured: Huntley vs. Attorney General (Privy Council Appeal 33 of 1994, 12th December 1994).

iii) Those who had been classified as non-capital by the single Judge were sentenced to serve long periods before being eligible for parole. The Act provides no right of appeal or review against such sentencing. In Huntley the government conceded that there should have been a right to make representations as to the the minimum sentence to be imposed. As a result, all these cases will have to be reviewed and an opportunity given to the inmates to make representations.

iv) An interesting question arises over the status of the "three Judges of Appeal designated by the President of that court". When the review process started the three Judges sat in dark suits as if they were an administrative tribunal. Later they sat in robes as if they were a court. If they were an administrative tribunal, then any error of law in the classification process would have to be challenged before the Supreme Court by way of an Application for an Order of Certiorari. The Privy Council is soon to rule on this issue.

v) The Privy Council will also be considering the cases of those who were convicted before the Act came into force but whose cases were under

vi) The new Act also has a provision covering those prisoners whose cases have been commuted to life imprisonment by the Governor General. (Amendment Act s. 5, Parole Act s. 5A) This includes a large number of inmates whose cases fell under the rule in Pratt and Morgan. Such cases have to be examined by a Judge if the Court of Appeal who will determine whether the inmate should serve a minimum period before being eligible for parole. Again, a right to make representations at this stage will have to be granted. At these "minimum period" hearings it would be relevant to take into account the length spent in custody and of the inmate's record while a prisoner.