IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA # 8/08 (13/2007)
(Indictment # 39/88)

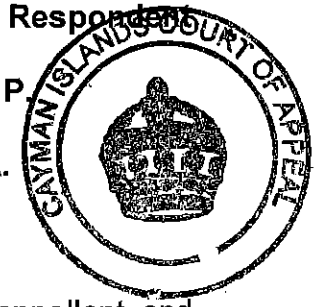
PHILLIP GLENNON EBANKS

Appellant

-AND-

HER MAJESTY THE QUEEN

Respondent



BEFORE: **THE RT. HON. SIR JOHN CHADWICK, P.**
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE CONTEH, J.A.

Appearances: Anthony Akiwumi, instructed by Stuarts for the appellant and Trevor Ward, Senior Crown Counsel for the Crown.

Heard on 6th April, 2009.
Judgment delivered: 6th April, 2009. Reasons delivered: 2nd September, 2009

Forte, J.A.

The appellant was convicted of the offence of murder on the 25th of August 1989 and on the 18th of September 1989, being of the age of seventeen at the time of the offence, he was sentenced to be detained during the Governor's pleasure.

This matter now comes before us, as a result of a decision of this Court in the case of Jason Orlando Hydes, CICA 20 of 2006 (unreported), in which we ruled that the sentence which required a prisoner to be detained at the Governor's pleasure is unconstitutional, and consequently substituted a sentence which ordered that that appellant be detained at the Court's pleasure.

Consequent on that decision, the appellant apparently through judicial process on the 31st July 2007, was successful in having his sentence set aside, and a sentence that he should be detained during the Court's pleasure, substituted therfor.

On the 17th August 2007, the appellant filed a notice of application for release. In the Hydes case, (supra), we said:-

> " We take note of the directives given by the Court of Appeal of Trinidad and Tobago in the case of Chuck Attin v The State for the Republic of Trinidad and Tobago, (CA 29 of 2004), and observe that the Court

followed in principle, the directions issued by Sir David Simmons sitting in the Court of Appeal of Barbados, in the case of Mormon Seantlebury v The Queen Cr. App. 34 of 2002, (unreported).
We suggest, however, that in the Cayman Islands, such guidelines for the Review Procedure should be formulated by the Hon. Chief Justice, after consultation with the Grand Court Judges."

We note that up until the time of this application for release, no such guidelines have been issued, but nevertheless, we are in agreement with the procedure adopted in this case by way of case management, to determine matters necessary to be considered in such a review.

As we are in agreement with the conclusions of the learned judge at the case management procedure, we need do no more than state with approval his decision in this regard:-

"The following list, although not intended to be exhaustive, identifies many of the questions upon which evidence is needed:

1. The nature and circumstance of the offence.
2. Any comments made by the sentencing judge in relation to the need to protect the public. [To this we would add any recommendation made by the sentencing judge in relation to a minimum period of sentence to be served before such an application can be entertained]
3. The background of the offender, including the nature and circumstances of any previous offending,
4. Whether the offender has made positive and successful efforts to address the attitudes and behavioural problems which contributed to the commission of the offence;
5. The offender's attitude towards and behaviour with other prisoners and prison staff, including the nature of any offences against prison discipline committed by the offender;
6. The opinion of the Prison service on the degree of risk to the public which would result from the offender's release;
7. A recent Social Inquiry Report containing the opinion of a Probation Officer on the suitability of the resettlement plan and the dwelling place where the offender proposes to live;
8. A recent psychiatric and/or psychological examination of the offender;
9. Any indication of predicted risk as determined by a validated actuarial risk predictor model or any other structured assessment of the risk to the public which would result from the offender's release;
10. Whether the offender is likely to comply with any conditions attached to the licence to be at large;

11. Any past breaches by the offender of a condition of a licence to be at large."

Before addressing the arguments in the appeal, we note that we should not substitute our own opinions as to whether the application should have been granted unless we find that the learned judge below failed to apply the correct principles in coming to his decision, or that he was obviously wrong in his conclusion. In fact, though entertaining doubts as to our statutory entitlement to consider an appeal from such an application, we nevertheless concluded that in the interest of justice, we should review the decision of the Court below, on the basis that it is an appeal against an order of that court.

In coming to our conclusion on this appeal we will take into consideration that the appellant was released on licence in the year 2000, by the then Governor acting under powers which at that time was believed to rest in him. The appellant was released on the 14th June 2000, but because of breaches of his licence was recalled to continue serving his sentence on the 19th January 2001. During the period of his release he had committed nine offences of Burglary for which he has been sentenced to seven and one half years imprisonment.

The application was heard over a period of three days. It is from the refusal of the application that this appeal comes before us.

The appellant seeks an order that, "the judgment of the Court below be set aside and an order that the appellant be released from HMP at Northward".
In the alternative the appellant seeks an order "that the part of the Judgment of the Grand Court ordering the appellant's case be reviewed again in two years time be set aside and the appellant's case be reviewed in a shorter period of time to be determined by the Court of Appeal."

The hearing proceeded on the basis that the Court would order that the offender be released, "if the Court is satisfied that it is no longer necessary for the protection of the public that Mr. Ebanks should be confined."

This principle was gleaned from English statutory provisions dealing with the parole board in the United Kingdom. The following words of the learned judge explains: (pg 178)

> 'In a prior hearing, I heard argument upon the nature of the test and gave a judgment in which I said:
>
> > "What is the test Ms. Williamson has brought to my attention? The test applied by the parole board in the United Kingdom for release of prisoners serving a life sentence. Such a prisoner shall be released if the board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.'
> > Crime Sentences Act 1997 Chapter 43 Section 28(6) (b).

She also cited certain directions to the parole board under Sec. 32 (6) of the Criminal Justice Act 1991 which in Sec. 4 provides:

> "The test to be applied by the parole board in satisfying itself that it is no longer necessary for the protection of the public that the prisoner should be confined, is whether the lifer's level of risk to the life and limb of others is considered to be more than minimal."

The learned judge then applied that test to this application.

There are no such statutory provisions relating to an application such as this in the Cayman Islands. Nevertheless we would agree that the English provisions as they relate to the parole board in the United Kingdom would be appropriate in considering an application such as this as these conclusions would no doubt be the result of an examination of the matters to be considered in items 1 to 11 outlined by the learned judge and to which we have referred earlier.

In the hearing of the application, the learned judge heard evidence from many witnesses all in keeping with the guidelines he had set himself. It is useful to look at some of the evidence which led him to his conclusion. The relevant evidence is obtained from the learned judge's outline of the evidence.

1. Social inquiry report:

The appellant was raised in West Bay in a large family. He was introduced to drug consumption at an early age and has a history of drug abuse. He has no employment history because he was incarcerated at a young age .The appellant makes a connection between his substance abuse and the offences he has committed. Notwithstanding that, he was not as of the date of the report, involved in any drug counselling. The most recent drug testing prior to the report, showed that the appellant was tested positive for ganja. The Probation Officer comments are relevant:

> "Mr. Ebanks said very little about the offence. He stated that at this point in his life, he is tired of talking about it and explaining himself over and over. He shared that he maintains his plea of not guilty which he initially presented in court many years ago. He claims that he knows the two persons who committed the murder and says that he gave them the gun but denies his involvement. Contrary to his claim of not guilty, his family members share details of the murder that Mr. Ebanks himself had allegedly disclosed to them which includes full admission of the crime."

The Report also indicates that he has committed twenty disciplinary offences against prison rules since 1997, though not very violent in nature. He has escaped from prison on four occasions, the last such escape being in 2001.

His family members have observed to the Probation Officer who presented the report, that," release at this point would be detrimental and would in fact set Mr. Ebanks up to fail".

Nevertheless the Report refers to the fact that two family members have offered their homes to the appellant as a place he could live on release. Another has offered a job.

The prison discipline record shows in recent years a series of minor offences against discipline, such as the use of indecent language to officers. In the 1990s, there was a threat to kill an officer. In 1988, he tied up an officer in the course of escaping custody.

At the prison at Northward, the appellant is classified in category B. There are four categories, A,B,C and D. One of the major factors taken into account in classifying prisoners is the risk they would present to the public if they were to escape.

D is the category that would present the least risk in the opinion of the prison authorities and A is the category which presents the most. The appellant would therefore be near to the category that would present the most risk.

2. Peter Foster:

However, Mr. Peter Foster of the Prisoners' Learning and Development Department at Northward presents a somewhat different view of the appellant. He states:

> " Phillip's behaviour, apart from the above mentioned incidents, is considered good. His pattern of behaviour indicates a great level of frustration stemming from his belief that he should not be imprisoned indefinitely because he committed his crime as a juvenile. Despite his threats to kill staff and persons, to this date he has not physically assaulted any staff except for the 1988 incident when he tied an officer and escaped from prison."

3. Dr. Von Kirchenheim:

Dr. Kirchenheim is a forensic psychologist who conducted a "battery" of tests on the appellant. He conducted the Hare PCL-R and Information Schedule which is meant to be a measure of psychopathic tendencies; the Ravens Standard Progressive Matricies, which are a measure of intellectual ability, and the Symptom Checklist 90-R, a measure of current psychological stress.

The test revealed that the appellant is in the high average range in respect of his intellectual ability and that he is not a psychopath.

Dr. Von Kirchenheim says:

> "It is my professional opinion that this man (the appellant), is not a psychopath, as he does demonstrate some empathy and has meaningful relationships with others. However, he tends to be quite impulsive, gets bored easily, and has a low frustration tolerance. Although he has some insight into the motivation behind his behaviour, he has not been able to use it so far to make significant changes."

He continues:

> "At the same time, he is now at an age where people are more likely to be successful in making such behavioural changes. In summary, I believe he continues to be at some risk for recidivism but with enough structure, ongoing support and effective planning, he has a reasonable chance at successful rehabilitation."

4. Dr. Marc Lockhart:

Dr. Lockhart also administered certain tests including a complete mental status examination, the Montgomery-Asberg Depression Rating Scale and the Colorado Actual Risk Assessment Scale, also known as CARAS. Dr. Lockhart in his report spoke to the fact that the appellant admitted the charges against him. There was a coherent plan regarding his future rehabilitation i.e. plans to work with his brother painting, doing handiwork and to continue with his dedication to graphic art. All his family members had changed and are no longer using illegal substances. He admitted to his last drug use at the end of 2007 at which time he tested positive for cannabis. The appellant was well aware of the importance of substance abuse treatment and counselling in which he was then, (March 2008), willingly involved. The appellant expressed to him a desire to continue with the treatment.

Dr. Lockhart used the CARAS test to determine the risk assessment of the appellant. The score for the appellant was three (3). The scores ranging from zero to two are considered to be associated with the presentation of a low risk to the public. A score of four through eight is considered to be high risk. On that basis it would appear that the appellant's score of three, would make him a moderate risk, but Dr. Lockhart concluded that the appellant, "does not pose a significant risk for re-offending.

5.

The learned judge also considered the content of an affidavit filed by the appellant in which the appellant stated:

> "I accept that I had difficulty adjusting to life outside prison when I was released in 2000. And in order to obtain money to satisfy a drug problem, I committed a burglary of a commercial premises. I was sentenced to four years imprisonment for this burglary."

As the learned judge commented, the appellant was in fact convicted of nine burglaries for which he was sentenced to seven and one half years imprisonment.

6. Mr. Mike Chester:

The learned judge also considered the evidence contained in a Report from Mr. Mike Chester in which it is disclosed that the appellant had engaged himself with counselling and had completed an intake and assessment session on the 4th March 2008.

The learned judge having examined all the evidence in some detail then came to his conclusion as follows:

> "All of the evidence and arguments must be considered and weighed. It would be wrong in principle to base my decision on any one event, report or opinion. I must also avoid placing undue weight on matters, which occurred long ago when Mr. Ebanks was an immature youth. His moral character, insight and personality must be assessed by focusing primarily upon the evidence of recent vintage. Mr. Ebanks was released on licence in 2000 and incarcerated again in 2001. Obviously he was not ready for release then, although persons in authority at that time must have concluded, mistakenly, that he was.
>
> What efforts at rehabilitation have been made during his last seven years of incarceration? He has not come to terms with the murder he committed or even accepted responsibility for it. He maintains his innocence at least to some. He has tested positive for drugs as recently as September 2007 while in prison. He has not, until March 2008, after being urged by the Court to do so, availed himself of any behavioural modification programmes available at Her Majesty's Prison at Northward. He believes it unnecessary."

Then having again examined the opinions expressed by Dr. Kirchenheim and Dr. Lockhart as to the appellant's risk of re offending he concludes:

> "Overall, the evidence suggests a prisoner who is just beginning to take steps he must take before release is justified. He must accept responsibility for what he has done and absorb counselling and other programmes available to him so as to convince those around him—prison officers, social workers, counselors--- that he is truly ready to live a law abiding life in the community. He must do more, much more, than simply serve time. He must embrace a moral life. Mr. Ebanks is not ready for release. If released he would present a substantial risk to the public. He would be likely to re-offend. I believe that Mr. Ebanks can qualify for release, but he will need to make much greater effort and it will take time.

The application for release is denied. Mr. Ebanks is at liberty to fix a date for a new release hearing which is approximately two years away."

We can find no fault with the assessment of the learned judge as to whether the appellant has been rehabilitated to the extent that he would not be a risk to the public if he were released at that time. It appears that the appellant's behavioural pattern is as a result of drug abuse and that over the years, not being truly able to exists without drugs, he has made it difficult to reach a stage in his character and personality to make it reasonable safe to release him. We note, however, that sufficient has been heard in this hearing to demonstrate that the appellant is not without hope and can be rehabilitated if he takes advantage of the opportunities available to him to do so. He has served enough time in prison to satisfy the penalty he deserves for the crime he committed but as the learned judge found, his circumstances have to be such that the court can feel satisfied that he has been rehabilitated to the extent that he would not be a risk or even a stage above a minimal risk to the public if he were released. The court below was correct in finding that the appellant had not reached that stage. He appears however to be in the process of rehabilitation, though delayed by his lack of motivation. We see no reason to interfere with the learned judge's decision to deny the appellant's release but find that the evidence heard, reveals a possibility that the appellant could be sufficiently rehabilitated within a shorter time than two years from his last application. In the event we give the appellant liberty to apply within 18 months of the refusal of his last application. In our calculation the appellant can now renew his application. The appellant should be cautioned however not to renew his application unless he has progressed a great deal along the path of rehabilitation since the refusal by the court below.

For these reasons the appeal was dismissed, immediately following the oral arguments. These then are the written reasons promised at that time.

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Chadwick, P.

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Forte, J.A.

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Conteh, J.A.