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Privy Council Appeal No. 10 of 1993

- (1) Earl Pratt and
- (2) Ivan Morgan

Appellants

v.

- (1) The Attorney General for Jamaica and
- (2) The Superintendent of Prisons,
Saint Catherine's, Jamaica

Respondents

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
2ND NOVEMBER 1993

Present at the hearing:-

LORD GRIFFITHS
LORD LANE
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD LOWRY
LORD SLYNN OF HADLEY
LORD WOOLF

[Delivered by Lord Griffiths]

The appellants, Earl Pratt and Ivan Morgan, were arrested 16 years ago for a murder committed on 6th October 1977 and have been held in custody ever since. On 15th January 1979 they were convicted of murder and sentenced to death. Since that date they have been in prison in that part of Saint Catherine's prison set aside to hold prisoners under sentence of death and commonly known as death row. On three occasions the death warrant has been read to them and they have been removed to the condemned cells immediately adjacent to the gallows. The last occasion was in February 1991 for execution on 7th March; a stay was granted on 6th March consequent upon the commencement of these proceedings. The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows. It is unnecessary to refer to the evidence describing the restrictive conditions of imprisonment and the emotional

and psychological impact of this experience, for it only reveals that which it is to be expected. These men are not alone in their suffering for there are now 23 prisoners in death row who have been awaiting execution for more than ten years and 82 prisoners who have been awaiting execution for more than five years. It is against this disturbing background that their Lordships must now determine this constitutional appeal and must in particular re-examine the correctness of the majority decision in *Riley v. Attorney-General of Jamaica* [1983] 1 A.C. 719.

The death penalty.

The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal even to the House of Lords within a matter of months. Delays in terms of years are unheard of.

In earlier times execution for murder, as opposed to other capital offences, followed immediately after conviction. In 1752 An Act for better preventing the horrid Crime of Murder (25 Geo. 2, c.37) provided that all persons convicted of murder should be executed on the next day but one after sentence, unless convicted on Friday in which case they were to be executed on Monday and kept in solitary confinement upon bread and water until executed. The extreme rigour of this regime of immediate execution for murder was re-enacted in the Offences against the Person Act 1828 (9 Geo. 4, c.31) but was repealed by the Act of 1836 (6 Will. 4, c.30) "more effectually to preserve from an irrecoverable Punishment any Persons who may hereafter be convicted upon erroneous or perjured Evidence" and it was enacted that henceforth sentence of death in murder cases should be pronounced in the same manner and the judge should have the same powers as after convictions for other capital offences.

In England the practice in capital cases, henceforth including murder, was for the sheriff to fix a date of execution in the fourth week after the death sentence was passed. In Scotland, the date of execution was fixed by the court under section 2 of the Criminal Law (Scotland) Act 1830: if sentence was pronounced south of the Forth, it was fixed between 15 and 21 days hence, and if north of the Forth, between 20 and 27 days hence. In both England and Scotland the Court of Appeal heard an appeal in a capital case within three weeks of verdict. If the appeal was unsuccessful a revised execution date was set not less than 14 or more than 18 days after the day when the appeal was dismissed, in order to allow the Secretary of State time to decide whether the sentence should be commuted. The Report of the Royal Commission on Capital Punishment 1949-53 (Cmd. 8932) gave the average delay in 1950 as six weeks if there was an appeal and three weeks if there was not.

In 1947 there was great public disquiet that men convicted of a murder on the Gold Coast had been under

sentence of death for two years. The matter was debated in Parliament and the Colonial Secretary gave an assurance to the House that the rules and practice to be adopted in the Colonies should be quite sufficient to prevent a repetition of the happenings in the Gold Coast. The concern expressed by members of Parliament in the course of the debate reflected the expectation that the Colonies would follow the long established practice in this country that execution would not be long delayed after sentence. Mr. Winston Churchill expressed the sentiment of the House when he said "people ought not to be brought up to execution, or believe that they are to be executed, time after time whether innocent or guilty, however it may be, whatever their crime. That is a wrong thing".

The rules and practice referred to by the Colonial Secretary were those that laid down a strict timetable for appeals to the Judicial Committee of the Privy Council and provided that execution would only be stayed so long as the timetable was adhered to. Such rules were in force in Jamaica before independence and were adopted after independence by the Governor-General in Privy Council on 14th August 1962; it will in due course be necessary to consider why they were not followed in this case.

Delay of the character which has occurred in this case had never happened in Jamaica before independence. Appendix C of the appellants' case contains a schedule showing the time that elapsed between the date of conviction, appeal and execution in 40 capital cases immediately after independence between the years 1962 and 1970. The time is never more than 18 months and usually considerably shorter. The Solicitor-General felt unable to accept the accuracy of this schedule, but no figures were submitted to contradict it, and their Lordships accept it as showing that the delays that are now being encountered in the execution of the death penalty are of fairly recent origin.

It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment. Prior to independence, applying the English common law, judges in Jamaica would have had the like power to stay a long delayed execution, as foreshadowed by Lord Diplock in *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342 when he said at page 1348:-

"In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'."

And as was asserted by Lord Templeman in *Bell v. D.P.P.* [1985] A.C. 937 where at page 950 he said:-

"Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay."

The Chronology.

It is now necessary to consider and comment upon the course of events that has resulted in the inordinate delay that has occurred in this case.

The murder was committed on 6th October 1977 and the appellants were sentenced to death on 15th January 1979. Their application for leave to appeal was dismissed by the Court of Appeal on 5th December 1980 who said that they would hand down their reasons later. Although notice of application for leave to appeal was given within three days of the conviction on 18th January 1979, it took almost two years to arrange a hearing by the Court of Appeal. Making every allowance for the pressure of work on the Jamaican courts this does seem a long time to arrange a hearing in a capital case which one would have expected to have been expedited. On their application for leave to appeal the appellants both asked that the Court of Appeal should assign legal aid to them. The appeal was listed for hearing before the appellants had been assigned legal aid and had to be taken out of the list on their application on 28th May 1980 so that they might be legally represented. On the following day, 29th May 1980, a legal aid certificate was issued and counsel were assigned to the appellants. It appears therefore that at least part of the delay in hearing the appeal was attributable to the failure to issue a legal aid certificate at a much earlier date.

On 7th January 1981, a month after their application for leave to appeal was dismissed, the appellants wrote to the Registrar of the Court of Appeal requesting that the necessary papers be made available to their Attorneys-at-law so that whenever they wished they could take the case to the Judicial Committee of the Privy Council. On 30th January the Registrar replied to say she had spoken to their Attorney-at-law, Mr. Eric Frater, who had advised her that he was endeavouring to take their matter to the Privy Council in England.

It was at this stage, after the dismissal of their application by the Court of Appeal, that their Lordships would have expected the Governor-General to refer the case to the Jamaican Privy Council (JPC) to advise him whether or not the men should be executed in accordance with sections 90 and 91 of the Constitution which provide:-

"90.-(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -

- (a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;
- (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
- (c) substitute a less severe form of punishment for that imposed on any person for such an offence; or
- (d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

(2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council.

91.(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.

(2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgement the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion."

These sections are included in the Constitution against the background of the pre-existing common law practice that execution followed as swiftly as practical after sentence. They must be construed as imposing a duty on the Governor-General to refer the case to the JPC and the JPC to give their advice as soon as practical. In the ordinary course of events the Governor-General should refer a capital case to the JPC immediately after the appeal is dismissed by the Court of Appeal, unless there exist some special circumstances such as a moratorium upon the execution of all death sentences or a decision is awaited in another case of either the Judicial Committee of the Privy Council or a human rights body that may affect the view of the JPC. The Instructions approved by the Governor-General in Privy Council dated 14th

August 1962 for dealing with applications from or on behalf of prisoners under sentence of death for special leave to appeal to the Judicial Committee of the Privy Council are written upon the premise that the date for execution has already been set and will only be postponed if the prisoner adheres to the strict timetable contained in the Instructions. It is implicit in these Instructions that, by the time the prisoner has taken advice as to whether or not he should petition the Judicial Committee of the Privy Council in England, a decision will already have been taken by the JPC as to whether or not he should be executed or reprieved. There is no indication that the letter written to the Registrar on 7th January 1981 was brought to the notice of the Governor-General, and certainly no intimation in writing was sent to the Governor-General of an intention to apply to the Judicial Committee of the Privy Council as required by the Instructions.

Their Lordships were surprised to learn from the written submissions of the respondents that the procedure set out in the 1962 Instructions is no longer adhered to. The respondents say:-

"The appellants in keeping with what had now become established practice gave no intimation to the Governor-General of his intention to apply for special leave. That procedure had long fallen into disuse; it was a relic of history; it was obsolete; it was not required by law. The practice was now to apply directly to the Registrar of the Court of Appeal so that papers could be sent directly to the solicitors in London."

Their Lordships can perceive no reason why the appellants' case should not have been referred to the JPC for a decision early in 1981. A reason for a short period of delay after the decision of the Court of Appeal in December 1980 may be found in the political debate on the desirability of retaining the death sentence in Jamaica which resulted in a resolution of the Senate on 9th February 1979 to suspend all executions for a period of eighteen months pending the report of a Committee of inquiry. The Committee of Inquiry was appointed in June 1979. Before the Committee reported, an execution took place on 27th August 1980 which drew a protest to the JPC from the Chairman of the Committee. No further executions took place before the Committee reported in March 1981. On 12th May 1981 executions were resumed. The JPC must have considered and advised on the 12th May execution shortly after the Committee reported in March and it is difficult to see why at about that time they should not have considered and advised upon the appellants' case.

It is true that on 12th June 1981 Pratt petitioned the Inter-American Commission on Human Rights (IACHR) but it would not appear that the Jamaican authorities were aware of this until the IACHR wrote to the Government of Jamaica requesting information about Pratt's case on 17th February 1983. So these proceedings provide no answer to the

question why the JPC did not consider the appellants' case in 1981.

If the case had been considered by the JPC at that time and an execution date had been fixed their Lordships have little doubt that this would have galvanised the appellants and their legal advisers into pursuing their application for leave to appeal to the Judicial Committee of the Privy Council. As it was, no date was set for execution and matters were allowed to drift on; whether this was a deliberate policy adopted by the appellants and their advisers or, as seems more likely, due to the appellants' lack of access to legal advice, cannot be determined with any certainty.

Pratt showed renewed interest in the possibility of an appeal to the Judicial Committee of the Privy Council when he wrote on 23rd March 1984 to an English Member of Parliament to enquire about his right to appeal to the Privy Council and received advice in the form of a letter written by the Registrar to the Judicial Committee of the Privy Council which was forwarded to him on 17th May. Pratt then on 16th August wrote to the Registrar of the Court of Appeal asking for the reasons why his application for leave to appeal was dismissed. It then transpired that no reasons had yet been prepared by the judge to whom the writing of the judgment had been assigned. The papers had apparently been put in the wrong bundle and forgotten. This was a serious oversight by the judge and by those in the office of the Court of Appeal who should have reminded him that reasons had not been provided in accordance with the practice of the Court of Appeal, which is to provide a reserved judgment or reasons within three months of a hearing. Prompted by Pratt's request reasons were quickly prepared and handed down on 24th September 1984. No immediate steps were, however, taken to petition the Judicial Committee of the Privy Council.

On 3rd October the IACHR rejected Pratt's submission that his trial was unfair; but recommended that his sentence be commuted for humanitarian reasons.

Again their Lordships do not understand why the case was not then referred to the JPC to advise whether or not the execution should proceed. However it was not and 1985 appears to have been a year of total inactivity.

On 28th January 1986 Pratt petitioned the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights.

On 13th March 1986 the appellants lodged notice of intention to petition for special leave to appeal to the Judicial Committee of the Privy Council. The application for special leave was heard with reasonable dispatch and special leave to appeal was refused by the Judicial Committee of the Privy Council on 17th July 1986. Rule 5

of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 requires that a petition for special leave should be lodged as soon as possible after judgment. This was certainly not done in this case; but the requirement appears to have been waived without comment.

In dismissing the application Lord Templeman expressed the concern of the Judicial Committee that three years and nine months had elapsed between the dismissal of the appeal and the delivery of the reasons. He said:-

"On 5th December, 1980 the Court of Appeal dismissed the petitioner's appeal against conviction and the sentence of death for murder and promised to put their reasons for so doing in writing. Those reasons were not delivered until three years and nine months later, namely on 24th September, 1984. During the whole of that period the appellant had sentence of death hanging over him and, of course, no action could be taken on his behalf, or on behalf of the authorities, pending the possibility of an appeal to this Board which could only be considered when those reasons had been delivered."

As Rowe P. pointed out in his judgment in the Court of Appeal this comment was not strictly accurate and undoubtedly misled the two international bodies to whom the appellants petitioned. In practice it is necessary to have the reasons of the Court of Appeal available at the hearing of the application for special leave to appeal, as without them it is not usually possible to identify the point of law or serious miscarriage of justice of which the appellant complains. The availability of the reasons is not, however, a condition precedent to lodging an application for special leave to appeal. Their Lordships have no doubt that if an application for special leave to appeal had been lodged together with a request for the reasons they would have been swiftly delivered as they were when Pratt finally requested them in 1984. Although it is most regrettable that the Court of Appeal overlooked the delivery of its reasons for dismissing the appeal, it is not possible to attribute the delay in lodging the notice of application for leave to appeal to the Judicial Committee of the Privy Council to the lack of reasons.

On 21st July 1986 the UNHRC requested Jamaica not to carry out the death sentence on Pratt and Morgan before it had an opportunity to consider the admissibility of the complaint.

On 18th November 1986 the JPC, apparently for the first time, considered the appellants' case. They did not accede to the request of the UNHRC to stay the execution and the first warrant of execution was issued on 12th February 1987 for execution on 24th February.

On 23rd February the Governor-General issued a stay of execution. The reasons for the stay are not entirely clear but may have been the result of a telegram from the UNHRC

urging a stay of execution and a letter from Mr. Noel Edwards Q.C., to the Governor-General informing him that the case of the appellants was due to be considered by the UNHRC on 23rd March 1987 and the IACHR on 26th March 1987.

The Superintendent of the Saint Catherine District Prison at that time says in his affidavit that he was informed of the stay by telephone at 4.30 p.m. on 23rd February and ten minutes later informed the appellants in the condemned cell and that as soon as he received written confirmation about twenty minutes later the men were removed from the condemned cell and returned to death row. The appellants in their affidavits say that they were not informed of the stay until 45 minutes before they were due to be executed on the morning of 24th February. This is a dispute which their Lordships cannot resolve on the affidavit evidence.

On 9th July 1987 the IACHR pursuant to further representations of Pratt and Morgan informed the Jamaican government of the following findings:-

"Pratt and Morgan suffered a denial of justice during the period 1980-1984 violative of Article 5(2) of the American Convention on Human Rights. The Commission found that the fact that the Jamaican Court of Appeal issued its decision on December 5 1980 but did not issue the reasons for that decision until four years later, September 24, 1984, was tantamount to cruel, inhuman and degrading treatment because during that four year delay the petitioners could not appeal to the Privy Council and had to suffer four years on death row awaiting execution.

The Inter-American Commission on Human Rights, pursuant to its cable of July 7 1987 requests that the execution of Messrs. Pratt and Morgan be commuted for humanitarian reasons."

This decision, as has already been explained was based on a misunderstanding of the appellants' right to appeal to the Judicial Committee of the Privy Council.

On 13th October 1987 the JPC reconsidered the appellants' case. They did not accede to the request of the IACHR and on their advice the second warrant of execution was issued on 18th February 1988 for execution on 1st March.

On 29th February 1988 the second stay of execution was issued by the Governor-General. This time it appears to have been as a result of a further request from the UNHRC not to execute the men until the Committee had completed their review of the case.

On 24th March the UNHRC decided that the appellants' case was admissible contrary to the submission of the Jamaican government that the appellants had not yet exhausted their domestic remedies and requested Jamaica not to carry out the death sentence until the Committee had arrived at their decision on the merits. Their Lordships observe that it had taken over two years for the Committee to determine that the case was admissible. The ground upon which the Jamaican government had opposed the appellants' submission is stated in paragraph 6(4) of the Committee's decision:-

"The State party contends that the authors' communications are inadmissible because they have failed to exhaust domestic remedies as required by Article 5(2)(b) of the Optional Protocol. It points out that in respect of the authors' complaints - breach of the right to trial without undue delay and breach of the right to protection against subjection to torture or cruel, inhuman or degrading treatment - it would have been open to the authors to apply to the Supreme Court for redress alleging breaches of these fundamental rights protected by sections 17 and 20(1) of the Jamaican Constitution respectively."

Their Lordships find this a puzzling stance to be taken by the Jamaican government in view of their successful submission in *Riley v. Attorney-General of Jamaica (supra)* that delay in carrying out execution could afford no ground for holding the execution to be in breach of the Jamaican Constitution; unless it is perhaps to be construed as an encouragement to the appellants to challenge the decision in *Riley* and seek relief under the Constitution. This, however, seems to be unlikely in view of the Solicitor-General's formidable argument before their Lordships in support of the majority reasoning in *Riley*. What is certain is that it added to the delay in the Committee dealing with the case on the merits.

On 6th April 1989 the UNHRC gave their decision on the merits. They held that the failure of the Court of Appeal to deliver reasons for 45 months was a violation of Article 14 para. 3(c) and Article 14 para. 5 of the International Covenant on Civil and Political Rights and Optional Protocol which are in the following terms:-

"3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

(c) To be tried without undue delay.

...

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

The Committee gave the following reasons for their decision:-

"13.4 The State party has contended that the time span of three years and nine months between the dismissal of the authors' appeal and the delivery of the Court of Appeal's written judgement was attributable to an oversight and that the authors should have asserted their right to receive earlier the written judgement. The Committee considers that the responsibility for the delay of 45 months lies with the judicial authorities of Jamaica. This responsibility is neither dependent on a request for production by the accused in a trial nor is non-fulfilment of this responsibility excused by the absence of a request from the accused. The Committee further observes that the Privy Council itself described the delay as inexcusable (see para. 2.3 above).

13.5 In the absence of a written judgement of the Court of Appeal, the authors were not able to proceed to appeal before the Privy Council, thus entailing a violation of article 14, paragraph 3(c), and article 14, paragraph 5. In reaching this conclusion it matters not that in the event the Privy Council affirmed the conviction of the authors. The Committee notes that in all cases, and especially in capital cases, accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turns out to be."

It seems to their Lordships unlikely that the Committee would have made this finding if they had not been misled into believing that the delay in giving reasons prevented an appeal to the Privy Council.

The Committee also found a violation of Article 7 which provides:-

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

The Committee gave their reasons as follows:-

"13.6 There are two issues concerning article 7 before the Committee: the first is whether the excessive delays in judicial proceedings constituted not only a violation of article 14, but 'cruel, inhuman and degrading treatment'. The possibility that such a delay as occurred in this case could constitute cruel and inhuman treatment was referred to by the Privy Council. In principle prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary.

In the present cases the Committee does not find that the authors have sufficiently substantiated their claim that delay in judicial proceedings constituted for them cruel, inhuman and degrading treatment under article 7.

13.7 The second issue under article 7 concerns the issue of warrants for execution and the notification of the stay of execution. The issue of a warrant for execution necessarily causes intense anguish to the individual concerned. In the authors case, death warrants were issued twice by the Governor-General, first on 13 February 1987 and again on 23 February 1988. It is uncontested that the decision to grant a first stay of execution, taken at noon on 23 February 1987, was not notified to the authors until 45 minutes before the scheduled time of the execution on 24 February 1987. The Committee considers that a delay of close to 10 hours from the time the stay of execution was granted to the time the authors were removed from their death cell constitutes cruel and inhuman treatment within the meaning of article 7."

The Committee did not know that this allegation was strenuously denied by the Jamaican government. The Solicitor-General has told their Lordships that the Jamaican government did not know that this allegation had been made to the Committee on behalf of Pratt and Morgan and that if the government had known of it they would have put in affidavit evidence denying it. If that had been done their Lordships surmise that the Committee, like their Lordships, might have found it difficult to resolve the conflict of evidence and thus to find a violation of Article 7 on the ground of delay of notification in the stay of execution.

The Committee made the following recommendation:-

"It is the view of the Committee that, in capital punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant. Although in this case article 6 is not directly at issue, in that capital punishment is not *per se* unlawful under the Covenant, it should not be imposed in circumstances where there have been violations by the State party of any of its obligations under the Covenant. The Committee is of the view that the victims of the violations of articles 14, paragraph 3(c), and 7 are entitled to a remedy; the necessary prerequisite in the particular circumstances is the commutation of the sentence."

Eighteen months then passed before a decision was taken by the JPC on this recommendation of the UNHRC. Press reports of Parliamentary proceedings show that in June 1990 the question of the death penalty was under review by the Cabinet but that no conclusions had yet been reached on commuting sentences.

On 17th September 1990 the JPC again reconsidered the appellants' case. They rejected the recommendations made eighteen months earlier by the UNHRC. On 18th February 1991 the warrant of execution was issued for execution on 7th March 1991, the delay in issuing the warrant of execution from 17th September 1990 to 18th February 1991 apparently being accounted for by the wish of the Governor-General to obtain the Attorney-General's advice on the legal status of decisions of human rights bodies. This is advice which it would have been appropriate to place before the members of the JPC at a much earlier date, and before they considered any recommendations of such bodies. Their Lordships have not seen the Attorney-General's advice but do not doubt that it correctly advised that, Jamaica being a signatory to the International Covenant on Civil and Political Rights and to the Optional Protocol, the views of the UNHRC should be afforded weight and respect but were not of legally binding effect; and that the like considerations applied to the IACHR.

On 28th February 1991 the appellants commenced these proceedings pursuant to section 25 of the Constitution and as a result the execution set for 7th March was stayed. On 14th June the Supreme Court dismissed their application.

On 8th June 1992 the Court of Appeal dismissed their appeal and on 18th January 1993 gave leave to appeal to the Judicial Committee of the Privy Council.

The primary submission of the appellants is that to hang them after they have been held in prison under sentence of death for so many years would be inhuman punishment or other treatment and thus in breach of section 17(1) of the Constitution.

Section 17 of the Constitution provides:-

"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 authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

This submission cannot succeed unless their Lordships are persuaded to prefer the construction of section 17(2) adopted by the minority in *Riley v. A.G. of Jamaica* to that of the majority. The five appellants in *Riley* had been sentenced to death and held in custody for between six and seven years before their appeal was heard by the Privy Council. They submitted that to execute them after such a prolonged delay would contravene their rights

under section 17(1) of the Constitution. By a majority the Privy Council rejected this submission because they construed section 17(2) as authorising execution by hanging for murder no matter how long the delay between the passing of the sentence and the execution. Lord Bridge of Harwich said at page 726:-

"The question, therefore, is whether the delayed execution of a sentence of death by hanging, assuming it could otherwise be described as 'inhuman or degrading punishment or other treatment' - a question on which their Lordships need express no opinion - can escape the unambiguous prohibition imposed by the words in section 17(2) emphasised as follows:

'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 authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.'

An act will fall within this prohibition if it satisfies three related conditions, viz.: (a) it must be an act done under the authority of law; (b) it must be an act involving the infliction of punishment of a description authorised by the law in question, being a description of punishment which was lawful in Jamaica immediately before the appointed day; (c) it must not exceed in extent the description of punishment so authorised.

There can be no doubt whatever that a delayed execution would satisfy conditions (a) and (b). The only words in section 17(2) that are even arguably ambiguous are the words 'to the extent that'. It seems to their Lordships that in their context these words pose the question: to what extent did the law in Jamaica before independence authorise the description of punishment which is under challenge? This question can only be answered by asking in turn the further question: if the like description of punishment had been inflicted in the like circumstances before independence, would this have been authorised by law? An obvious instance of a description of punishment exceeding in extent that authorised by law would be the execution of a death sentence by burning at the stake. But since the legality of a delayed execution by hanging of a sentence of death lawfully imposed under section 3(1) of the Offences against the Person Act could never have been questioned before independence, their Lordships entertain no doubt that it satisfies condition (c). Accordingly, whatever the reasons for or length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1)."

This construction of section 17(2) focuses on the act of punishment, and proceeds upon the assumption that the legality of a long delayed execution could never have been questioned before independence. Their Lordships, having had the benefit of much fuller argument, cannot accept that there could have been no challenge to a long delayed execution before independence and for the reasons already given are satisfied that such an execution could have been stayed as an abuse of process. The due process of law does not end with pronouncement of sentence - see *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342.

The minority, who would have allowed the appeal, adopted a narrower construction of section 17(2) which limited the scope of the sub-section to authorising the passing of a judicial sentence of a description of punishment lawful in Jamaica before independence and they held it was not concerned with the act of the executive in carrying out the punishment.

Their Lordships are satisfied that the construction of section 17(2) adopted by the minority is to be preferred. The purpose of section 17(2) is to preserve all descriptions of punishment lawful immediately before independence and to prevent them from being attacked under section 17(1) as inhuman or degrading forms of punishment or treatment. Thus, as hanging was the description of punishment for murder provided by Jamaican law immediately before independence, the death sentence for murder cannot be held to be an inhuman description of punishment for murder.

Section 17(2) does not address the question of delay and is not dealing with the problem that arises from delay in carrying out the sentence. The primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedoms, not to curtail them. Before independence the law would have protected a Jamaican citizen from being executed after an unconscionable delay, and their Lordships are unwilling to adopt a construction of the Constitution that results in depriving Jamaican citizens of that protection.

The majority also relied upon the judgment of the Board in *de Freitas v. Benny* [1976] A.C. 239. In that case which concerned the construction of the Constitution of Trinidad and Tobago the time scale was wholly different from the present case. The appellant had been sentenced to death in August 1972 and his constitutional appeal was heard and determined by the Privy Council in May 1975. Their Lordships in *de Freitas v. Benny* said that they had difficulty in formulating the appellants' argument based on delay: but it appears to have been founded upon a submission that as the time between sentence and execution was before independence on average five months, an execution that involved a delay longer than this was open to attack as cruel and unusual punishment.

Their Lordships dismissed this argument without calling on the respondents. Both the argument and the extent of the delay are so different from the present appeal that their Lordships are unable to gain any assistance from this decision.

Their Lordships will therefore depart from *Riley* and hold that section 17(2) is confined to authorising descriptions of punishment for which the court may pass sentence and does not prevent the appellant from arguing that the circumstances in which the executive intend to carry out a sentence are in breach of section 17(1).

The Court of Appeal rightly held that they were bound by the majority decision in *Riley* and did not therefore consider whether the appellants had been subjected to inhuman or degrading punishment or treatment within the meaning of section 17(1). It is however to this question which is central to this appeal that their Lordships must now turn.

There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time. But before their Lordships condemn the act of execution as "inhuman or degrading punishment or other treatment" within the meaning of section 17(1) there are a number of factors that have to be balanced in weighing the delay. If delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process the accused cannot be allowed to take advantage of that delay for to do so would be to permit the accused to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime.

A much more difficult question is whether the delay occasioned by the legitimate resort of the accused to all available appellate procedures should be taken into account, or whether it is only delay that can be attributed to the shortcomings of the State that should be taken into account.

There is a powerful argument that it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures however extended may be the eventual time between sentence and execution. This is the view that currently prevails in some States in the United States of America and has resulted in what has become known as the death row phenomenon where men are held under sentence of death for many years while their lawyers pursue a multiplicity of appellate procedures. Powerful statements in support of this point of view appear in the opinion of Circuit Judge O'Scannlain in *Richmond v. Lewis* (1990) 948 F. 2d. 1473, a decision of the United States Court of Appeals for the Ninth Circuit, and in the judgment of La Forest J. in *Kindler v. Canada (Minister of Justice)*

(1991) 67 C.C.C. (3d) 1, a decision of the Supreme Court of Canada. A further valuable analysis of the decisions in the United States Courts appears in the judgment of the Supreme Court of Zimbabwe in *Catholic Commission for Justice and Peace in Zimbabwe v. The Attorney General and Others* (Judgment No. S.C. 73/93, unreported, delivered on 24th June 1993).

Support for this view is also to be found in previous decisions of the Privy Council. In *Abbott v. A.G. of Trinidad and Tobago* [1979] 1 W.L.R. 1342 an unsuccessful appeal against the death sentence was made upon the ground that the period of eight months taken to reject the petition for reprieve infringed the appellant's constitutional rights. The appeal was heard by the Privy Council on 4th April 1979 nearly six years after the conviction on 16th July 1973. In delivering the judgment of the Board, Lord Diplock said at page 1345:-

"That so long a total period should have been allowed to elapse between the passing of a death sentence and its being carried out is, in their Lordships' view, greatly to be deplored. It brings the administration of criminal justice into disrepute among law-abiding citizens. Nevertheless their Lordships doubt whether it is realistic to suggest that from the point of view of the condemned man himself he would wish to expedite the final decision as to whether he was to die or not if he thought that there was a serious risk that the decision would be unfavourable. While there's life, there's hope. At any rate, as in *de Freitas v. Benny* [1976] A.C. 239, it has to be conceded that the applicant cannot complain about the delay totalling three years preceding his petition for pardon caused by his own action in appealing against his conviction or about the delay totalling two years subsequent to the rejection of his petition caused by his own action in appealing against the sentence on constitutional grounds. His case as advanced before their Lordships has depended solely on the period of somewhat less than eight months sandwiched between the two longer periods, which was allowed by the state to elapse between the lodging of his petition for pardon and its rejection by the President. This it is claimed amounted to delay so inordinate as to involve a contravention of his constitutional rights."

In *Riley* Lord Bridge of Harwich said at page 724:-

"Apart from the delays necessarily occasioned by the appellate procedures pursued by the applicant (of which it could hardly lie in any applicant's mouth to complain)."

Lord Scarman and Lord Brightman concluded their dissenting judgment by saying at page 736:-

"Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment. It is, of course, for the applicant for constitutional protection to show that the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading."

However, in an earlier passage of their judgment at page 735 Lord Scarman and Lord Brightman said:-

"It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading."

Their Lordships are therefore doubtful whether Lord Scarman and Lord Brightman would have regarded delay caused by appeals made within the time scale permitted by the State as time to be left out of account in computing the total period of delay.

There are other authorities which do not accept that delay occasioned by use of appeal procedures is to be disregarded. In *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General (supra)* Gubbay C.J. said:-

"It seems to me highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that by not making the maximum use of the judicial process available the condemned prisoner would have shortened and not lengthened his suffering. The situation could be otherwise if he had resorted to a series of untenable and vexatious proceedings which, in consequence, had the effect of delaying the ends of justice."

And he expressed his dissent from the contrary view contained in *Abbott v. A.G. of Trinidad and Tobago and Others*.

In *Soering v. United Kingdom* (1989) 11 E.H.R.R. 439 the applicant, a West German national, alleged that the decision by the Secretary of State for the Home Department to extradite him to the United States of America to face trial in Virginia on a charge of capital murder would, if implemented, give rise to a breach by the United Kingdom of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Cmd. 8969) which provides that no one should be subjected to torture or to inhuman or degrading treatment or punishment.

The United States had applied to the United Kingdom to extradite the applicant to stand trial in the State of Virginia on a charge of capital murder. The European Court of Human Rights recognised that the death row phenomenon in Virginia where prisoners were held for a period of six to eight years before execution arose from repeated applications by the prisoner for a stay of execution but nevertheless held that such a long period of delay might go beyond the threshold set by Article 3.

In India, where the death penalty is not mandatory, the appellate court takes into account delay when deciding whether the death sentence should be imposed. In *Vatheeswaran v. State of Tamil Nadu* [1983] 2 S.C.R. 348 Chinnappa Reddy J. said at page 353:-

"While we entirely agree with Lord Scarman and Lord Brightman about the dehumanising effect of prolonged delay after the sentence of death, we enter a little caveat, but only that we may go further. We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay."

The court held that delay exceeding two years in the execution of a sentence of death should be sufficient to entitle a person under sentence of death to demand the quashing of his sentence on the ground that it offended against Article 21 of the Indian Constitution which provides "No person shall be deprived of his life or personal liberty except according to procedure established by law".

In *Sher Singh and Others v. The State of Punjab* [1983] 2 S.C.R. 582 the court held:-

"Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But no hard and fast rule that 'delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death' can be laid down as has been in *Vatheeswaran*."

The court pointed out that to impose a strict time limit of two years would enable a prisoner to defeat the ends of justice by pursuing a series of frivolous and untenable proceedings.

In *Smt. Treveniben v. State of Gujarat* (1989) 1 S.C.J. 383 the Supreme Court of India approved the judgment in *Sher Singh v. The State of Punjab* and held

that a sentence of death imposed by the "Apex Court", which will itself have taken into account delay when imposing the death sentence, can only be set aside thereafter upon petition to the Supreme Court upon grounds of delay occurring after that date. Oza J. said, at page 410:-

"If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether, it is just and fair to allow the sentence of death to be executed."

In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

The application of the appellants to appeal to the Judicial Committee of the Privy Council and their petitions to the two human rights bodies do not fall within the category of frivolous procedures disentitling them to ask the Board to look at the whole period of delay in this case. The total period of delay is shocking and now amounts to almost fourteen years. It is double the time that the European Court of Human Rights considered would be an infringement of Article 3 of the European Convention and their Lordships can have no doubt that an execution would now be an infringement of section 17(1) of the Jamaican Constitution.

To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1). In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The delay in this case is wholly unacceptable and this appeal must be allowed.

In arriving at this conclusion their Lordships do not overlook the reliance placed by the Solicitor-General on the dissenting judgment of Sir Gerald Fitzmaurice in *The Republic of Ireland v. The United Kingdom* (1978) 2 E.H.R.R. 25, 120 but prefer an interpretation of the Constitution of Jamaica that accepts civilised standards of behaviour which will outlaw acts of inhumanity, albeit they fall short of the barbarity of genocide.

Section 25(2) of the Constitution provides that:-

"The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled."

The width of the language of this subsection enables the court to substitute for the sentence of death such order as it considers appropriate. The appropriate order in the present case is that the sentence of death of each appellant should be commuted to life imprisonment.

Their Lordships are very conscious that many other prisoners under sentence of death are awaiting the outcome of this appeal. In an attempt to assist the Jamaican authorities who may be faced with a large number of appeals their Lordships wish to make some general observations.

The delay in this case would never have reached anything like its present dimensions if the Governor-General and the JPC had reviewed the case pursuant to sections 90 and 91 of the Constitution early in 1981 after the Court of Appeal had dismissed the appellants' application for leave to appeal. As has already been pointed out, there was no reason why the case should not have been reviewed at that time and it appears inevitable in the light of after events that the JPC would have advised that the execution should proceed and a date would have been set. This would have provided the impetus for an immediate application to the Judicial Committee of the Privy Council which would have been disposed of in the summer of 1981 and a new execution date set within a matter of weeks. If this had occurred, the grounds upon which the two human rights bodies recommended commutation of sentence to life imprisonment would never have arisen, because the Court of Appeal would have been prompted to deliver their reasons by the application to the Judicial Committee of the Privy Council and the execution would have taken place years before the late reprieve of which the appellants have complained.

There may of course be circumstances which will lead the JPC to recommend a respite in the carrying out of a death sentence, such as a political moratorium on the death sentence, or a petition on behalf of the appellants to IACHR or UNHRC or a constitutional appeal to the Supreme Court. But if these respites cumulatively result in delay running into several years an execution will be likely to infringe section 17(1) and call for commutation of the death sentence to life imprisonment.

Their Lordships are very conscious that the Jamaican government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated to an appellant at an early stage. The aim should be to hear a capital appeal within twelve months of conviction. The procedure contained in the Governor-General's Instructions should be reinstated so that the JPC consider the case shortly after the Court of Appeal hearing and if an execution date is set and there is to be an application to the Judicial Committee of the Privy Council it must be made as soon as possible, as both the rules of the Judicial Committee of the Privy Council and the Governor-General's Instructions require, in which case it should be possible to dispose of it within six months of the Court of Appeal hearing or within a further six months if there is to be a full hearing of the appeal. In this way it should be possible to complete the entire domestic appeal process within approximately two years. Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets which, if achieved, would entail very much shorter delay than has occurred in recent cases and could not be considered to involve inhuman or degrading punishment or other treatment.

The final question concerns applications by prisoners to IACHR and UNHRC. Their Lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefiting from the wisdom of their deliberations. It is reasonable to allow some period of delay for the decisions of these bodies in individual cases but it should not be very prolonged. The UNHRC does not accept the complaint unless the author "has exhausted all available domestic remedies". The UNHRC has decided in this case and in *Carlton-Reid* that a constitutional motion to the Supreme Court of Jamaica is not a remedy to which the complainant need resort before making an application to the Committee under the Optional Protocol. A complainant will therefore be able to lodge a complaint immediately after his case has been disposed of by the Judicial Committee of the Privy Council. If, however, Jamaica is able to revise its domestic procedures so that they are carried out with reasonable expedition no grounds will exist to make a complaint based upon delay. And it is to be remembered that the UNHRC does not consider its role to be that of a further appellate court:-

"The Committee observes that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts and to review the interpretation of domestic law by national courts. Similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge, unless it is apparent from the author's submission that the instructions to the jury were

clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality."

It therefore appears to their Lordships that provided there is in future no unacceptable delay in the domestic proceedings complaints to the UNHRC from Jamaica should be infrequent and when they do occur it should be possible for the Committee to dispose of them with reasonable dispatch and at most within eighteen months.

These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment". If, therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the Constitution, the Governor-General now refers all such cases to the JPC who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to section 17(1).

The appellants pursued alternative grounds of appeal upon which their Lordships find it unnecessary to express any conclusions.

Their Lordships will accordingly humbly advise Her Majesty that this appeal ought to be allowed, and the sentences of the appellants be commuted to life imprisonment.

