NM 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 47 & 48/99

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**DESMOND TAYLOR** **STEVE SHAW**	**PLAINTIFFS/APPELLANTS**
AND	**THE ATTORNEY-GENERAL FOR JAMAICA**	**1ST RESPONDENT**
AND	**THE SUPERINTENDENT OF THE ST. CATHERINE DISTRICT PRISON**	**2ND RESPONDENT**

Jack Hines for the Appellants

Lennox Campbell, Senior Assistant Attorney-General and **Marc Harrison**, Crown Counsel for the Respondents instructed by the Director of State Proceedings

June 28, 29, July 1 and 28, 1999

RATTRAY, P.

I have read the judgment of Langrin, J.A. and agree with his reasoning and conclusions.

Despite the submissions of Mr. Hines, counsel for the appellants, which I found attractive but after careful examination fragile the prerogative of mercy is exercised after the exhaustion of the right to all judicial processes. The consequence of that determination by the Jamaican Privy Council is not justiciable. The Constitutional and legislative provisions with respect to the Jamaican Privy Council are fundamentally and basically the same as exist in the jurisdictions of Trinidad & Tobago and the Bahamas. Their origins are rooted in the soil of the unwritten but well established constitutional

formulations of the Westminster model. It cannot now be arguable that our constitutional plant springing from that very soil produces on this branch a different fruit.

The decision of the Judicial Committee of the Privy Council is final in our jurisdiction and as stated in ***Defreitas v. Benny*** [1976] A.C. 239 and ***Reckley v. Minister of Public Safety and Immigration and Others*** (No.2) [1996] 1 All E.R. 562 precludes successful argument as to a right of appeal against the decision of the Governor-General acting on the advice of the Privy Council in the exercise of the prerogative of mercy.

The further alleged treatment of the applicant Shaw in respect of shackling and solitary confinement repulsive as it is, if established, can only have an effect on the carrying out of the death penalty if the applicant is subject to such treatment whilst in custody after conviction and so therefore whilst under the sentence of death, the carrying out of which is being challenged. The dictum therefore of Lord Millett in ***Thomas and Hilaire*** Privy Council Appeal No. 60/98 at page 18 suggesting that it would be otherwise if the condemned man was shackled or flogged or tortured would not apply since at the time of the treatment complained of the applicant Shaw was not a "condemned man".

The lack of detail as to dates and persons involved with respect to the allegation that in 1995 which would have been after his conviction - "I was also beaten at the St. Catherine District Prison by several warders who used their batons to beat me unconscious" indicates the absence of a sufficient foundation on which to establish treatment which would forfeit the right of the State to carry out the death penalty.

We cannot conclude that there is an arguable issue to go to the Constitutional Court when we are confronted with the final determination of the Judicial Committee of the Privy Council contrary to the submissions on the issues raised.

For these reasons I would agree with the judgment of Langrin, J.A. and the order proposed.

WALKER, J.A.:

I have had the advantage of reading in draft the judgment of Langrin J.A. and I agree with it. However, in view of the topicality of this subject matter and the novelty of the submission of the counsel for the appellants of solitary confinement or shackling as contributing to, or constituting, inhuman and degrading punishment in contravention of Section 17(1) of the Constitution of Jamaica, I desire to add a few comments of my own.

The procedure to be followed in determining whether a court should grant a stay of execution in a death penalty case is to be found in the judgment of the Privy Council in ***Reckley v. Minister of Public Safety and Immigration and others*** (1995) 4 All E.R. 8. There, in delivering the judgment of the Board, Lord Browne-Wilkinson said at page 12:

> "Their Lordships accept that, if the constitutional motion raises a real issue for determination, it must be right for the courts to grant a stay prohibiting the carrying out of a sentence of death pending the determination of the constitutional motion. But it does not follow that there is an automatic right to a stay in all cases. If it is demonstrated that the constitutional motion is plainly and obviously bound to fail, those proceedings will be vexatious and could be struck out. If it can be demonstrated to the court from whom a stay of execution is sought that the constitutional motion is vexatious as being plainly and obviously ill-founded, then in their Lordships' view it is right for the court to refuse a stay even in death penalty cases. Since the decision of their Lordships in ***Pratt v A-G for Jamaica*** [1993] 4 All ER 769, [1994] 2 AC 1 the postponement of the carrying out of the death penalty can have a profound effect on the question whether it would

> be inhuman or degrading treatment or punishment to execute the convicted man given the lapse of time since conviction and sentence. As ***Pratt*** itself makes clear, delay caused by 'frivolous and time wasting resort to legal proceedings' by the accused provides no ground for saying that execution after such delay infringes the constitutional right (see [1993] 4 All ER 969 at 783, [1994] 2 AC 1 at 29-30). However, their Lordships would emphasise that a refusal of a stay in a death penalty case is only proper where it is plain and obvious that the constitutional motion *must* fail. In cases where the motion raises a fairly arguable point, even if the court hearing the application for a stay considers the motion is ultimately likely to fail, the case is not appropriate to be decided under the pressures of time which always attend applications for a stay of execution."

Applying the law so stated, the question must now be whether the constitutional action brought by either of the appellants raises a real issue for determination by the Constitutional Court.

It was argued on behalf of the appellants that in the context of a pre-trial delay of two years and four months from the date of the appellants' arrest to the date of trial, for all of which time the appellants remained in custody, and a post-trial delay of four years and six months, the appellants were subjected to inhuman and degrading punishment in contravention of section 17(1) of the Jamaican Constitution. In this regard, the factual situation as respects both appellants is that the total lapse of time between the date of conviction and sentence and the date of reading of the death warrants is four years and eight months. Within this overall period of time the records show that the domestic appeal process was completed within two

years, the appellants' applications for special leave to appeal to the Privy Council having been dismissed on June 6, 1996. There followed the applications to the international bodies, all of which have now been dealt with. On these facts the time limits prescribed in ***Pratt v. Attorney-General for Jamaica*** (1993) 4 All E.R. 769, (1994) 2 A.C. 1, (1993) 3 W.L.R. 995, P.C., have been met and the guidelines laid down therein followed. Consequently, I am of the view that the breach on the ground of delay contended for by the appellants is non-existent and the case for the appellants plainly hopeless on that account.

It was also submitted on behalf of the appellant, Shaw, that following his arrest in 1992 he was kept in solitary confinement for a period of three weeks during which time he was shackled at the legs. This, it was argued, constituted inhuman and degrading punishment in contravention of section 17(1) of the Constitution of Jamaica. Such punishment was addressed by the majority of their Lordships of the Judicial Committee of the Privy Council in the recent decision of ***Thomas and Hilaire v. Cipriani Baptiste (Commissioner of Prisons) and others*** (unreported) Privy Council Appeal No. 60 of 1998 in which judgment was delivered on March 17, 1999. In delivering the majority judgment of the Board, Lord Millett said at pages 17-18:

> "Even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the appellants' constitutional rights, commutation of the sentence would not be the appropriate remedy. ***Pratt*** did not establish the

> principle that prolonged detention prior to execution constitutes cruel and unusual treatment. It is the carrying out of the death sentence after such detention which constitutes cruel and unusual punishment. This is because of the additional cruelty, over and above that inherent in the death penalty itself, involved in carrying it out after having exposed the condemned man to a long period of alternating hope and despair. It is the circumstances in which it is proposed to carry out the sentence, not the fact that it has been preceded by a long period of imprisonment, which renders it cruel and unusual. The fact that the conditions in which the condemned man has been kept prior to execution infringe his constitutional rights does not make a lawful sentence unconstitutional.
>
> It would be otherwise if the condemned man were kept in solitary confinement or shackled or flogged or tortured. One would then say: 'enough is enough'. A state which imposes such punishments forfeits its right to carry out the death sentence in addition."

Here the allegations of solitary confinement and of shackling has come to judicial notice for the first time in Shaw's Statement of Claim dated the 9th April, 1999. He repeats this complaint in paragraphs 17, 18 and 19 of his affidavit dated April 11, 1999. Those paragraphs reads as follows:

> **"17.** On my arrest in 1992 I was taken to a police station in Sandy Bay where I was kept in solitary confinement for three weeks during which time I was repeatedly beaten.
>
> **18.** That while at Sandy Bay I spent fifteen days in handcuffs which were only taken off to enable me to collect my food and which were replaced immediately after I collected the food, forcing me even to eat when handcuffed.
>
> **19.** That I was also shackled at the legs for

> those three weeks at Sandy Bay and had to more (sic) around one step at a time and even had to slop up in this state. They were only taken off when I was to be transferred to the Barnett Street lock up."

As regards this new evidence, for new evidence it is, my first comment is that it relates to Shaw's incarceration over a period of time which preceded his conviction. Then he was not a condemned man within the contemplation of Lord Millett's judgment. As I understand and interpret the thinking of the majority of their Lordships' Board as expressed in that judgment, to heap solitary confinement, or shackling, or flogging, or torture upon a condemned man would eventually result in a state forfeiting its right to carry out a death sentence in addition upon such a man. But the present case is not such a case. It is, I think, significant, that this is the first time since his arrest in 1992 that Shaw has disclosed evidence of this nature. He did not mention any such treatment at his trial in the Supreme Court, or at his appeal before the Court of Appeal, or in his petition to the Privy Council; nor did he rely on any such complaint in his application to the UNHRC or the IACHR. The very evidence which now comes by way of affidavit and upon which he now wishes to rely is evidence upon which he could have relied, certainly in his complaints to the two international bodies if not in the several courts to which he has already had access. Coming at this time, this evidence admits of the strongest inference that it is not merely coincidental to the decision in ***Thomas and Hilaire*** but was in all probability, prompted by that decision which pre-dated it by a mere 23 days. In paragraphs 20 and 21 of the same affidavit Shaw swears:

"20. That I was beaten on several occasions since being incarcerated.

(a) The first was in Sandy Bay where I was beaten on four different days by Inspector John Mollison, Sgt. Bowen and a Corporal for about fifteen minutes each time. They used pieces of board including a table foot, which Sgt. Bowen used to hit out three of my front teeth.

(b) The second occasion arose when I was taken to the Barnett Street lock up. Here I was beaten for at least two hours by over seven policemen and sustained a burst head, cuts to my face wail marks all across my body.

(c) I was also beaten at the St. Catherine District Prison in 1995 by several warders who used their batons to beat me unconscious.

21. That I also suffered unusual treatment when I was locked in my cell at Sandy Bay and was teargased by Sgt. Bowen and that further I am regularly threaten by warders that they will make sure to see me dead."

Although this evidence relates in part to a period of time (1995) which post-dated Shaw's convictions, it is evidence that is vague and unprecise. Overall, it is not evidence of such a quality as might reasonably admit of a description of flogging or torture so as to raise a real issue for determination by the Constitutional Court.

In the result, I would dismiss these appeals and also make an order in terms of the order proposed by Langrin J.A. in his judgment.

LANGRIN, J.A.

These appeals are brought with the leave of the Supreme Court from the dismissal by Orr J. of the appellants' summonses seeking an interlocutory stay of execution. The applications were refused but a stay of execution was granted for four days.

The appellants Desmond Taylor and Steve Shaw were convicted on four counts of capital murder, and sentenced to death on the 25th July, 1994. Their applications for leave to appeal against their convictions were dismissed by this Court on 24th July, 1995. The Judicial Committee of the Privy Council on the 6th June, 1996 refused special leave to appeal and dismissed their Petitions.

BACKGROUND

"On the 6th June,1996 a complaint was submitted for consideration to the United Nations Human Rights Committee (UNHRC) under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) on behalf of STEVE SHAW and a like complaint was submitted for consideration to the same body on the 14th June, 1996 on behalf of DESMOND TAYLOR.

On the 2nd April, 1998 the UNHRC adopted the views of both complaints in relation to the communication and found violations of Articles 6, 7, 9 (3), 10(1) 14(1) and 14(3) (c) of the ICCPR and the UNHRC held that in the circumstances the Plaintiffs/Appellants were under Article 2(2) (a) of the ICCPR entitled to an effective remedy entailing commutation of their death sentences. The decision of the UNHRC in the case of both Plaintiffs/Appellants was communicated to the First Respondent.

Despite the decision of the UNHRC on the 2nd April, 1998 the Governor General's Secretary sent a fax to Clifford Chance, Solicitors representing the Plaintiff/Appellant DESMOND TAYLOR and a fax to Simons, Muirhead & Burton Solicitors representing the Plaintiff/Appellant STEVE SHAW that the Jamaica Privy Council had decided that the UNHRC'S recommendation could not be supported and accordingly there was no justification for recommending the exercise of the prerogative of mercy. Both Plaintiffs/Appellants were informed that their execution would not be postponed further unless an application was made to the Inter American Commission on Human Rights (IACHR).

Applications were lodged with the IACHR on the 3rd June, 1998 for Shaw and on the 5th June, 1998 for Taylor but on the 9th March, 1999 the Inter American Commission on Human Rights said that the Applications were inadmissible on the ground that pursuant to Article 47 (d) of the American Convention on Human Rights the complaints of both Plaintiffs/Appellants were substantially the same as those presented to and studied by the UNHRC.

On the 6th April, 1999 both plaintiffs/appellants had separate warrants read to them for their execution on the 13th April, 1999.

On the 12th April, 1999 summonses were heard on their behalf in the Supreme Court seeking an injunction and/or conservatory order to restrain the second defendant or anyone else on behalf of the Crown or executive authority or the Governor General from executing them on the 13th April, 1999 or any other date pending the outcome of the constitutional actions and any resultant appeal therefrom. Mr. Justice Courtenay Orr dismissed the summons and granted stays of execution for four days for each."

The grounds of appeal are:

> "(1) That the learned judge erred in law and in fact in finding that arguments adduced on behalf of the Plaintiff did not provide sufficient material upon which he could find that there was an arguable case for the grant of a stay of execution pending the outcome of the constitutional action.
>
> (2) That the learned judge erred in law in failing to hold that the plaintiff had an arguable claim for constitutional redress and that in view of the irreversibility of the execution for the sentence of death the balance of convenience was in favour of the grant of the conservatory order."

The test to be applied in order to determine whether a condemned man's right to a stay prohibiting the carrying out of the death sentence pending the determination of the Constitutional Motion is laid down in ***Reckley v Minister of Public Safety and Immigration and Others*** (No. 1) [1995] 4 All E.R. 8. Lord Browne-Wilkinson who delivered the judgment of the Board had this to say at page 12:

> "Their Lordships accept that, if the constitutional motion raises a real issue for determination, it must be right for the courts to grant a stay prohibiting the carrying out of a sentence of death pending the determination of the constitutional motion. But it does not follow that there is an automatic right to a stay in all cases. If it is demonstrated that the constitutional motion is plainly and obviously bound to fail, those proceedings will be vexatious and could be struck out. If it can be demonstrated to the court from whom a stay of execution is sought that the constitutional motion is vexatious as being plainly ill-founded, then in their Lordships' view it right for the court to refuse a stay even in death penalty cases... However, their Lordships would emphasize that a refusal of a stay in a death penalty case is only proper where it is plain and obvious that the constitutional motion must fail. In cases where the motion raises a fairly arguable point, even if the court hearing the application for a stay considers the motion is ultimately likely to fail, the case is not appropriate to be decided under the pressures of time which always attend applications for a stay of execution."

And he went on to say at page 14:

> "Finally, their Lordships would add a word as to the procedure to be adopted in cases where application is made for a stay of execution in a death penalty case. If the first instance judge or the Court of Appeal reach the view that the constitutional motion is so hopeless that no stay should be granted, it does not follow that it is inappropriate to grant a short stay to enable their decision to be challenged on appeal... Execution of a death warrant is a uniquely irreversible process."

The Jamaican Constitution at Section 13 (a) provides for the fundamental right of individuals to life, security of person and protection of law, among others. Section 14(1) provides that no person shall intentionally be deprived of his life save in the execution of the sentence of a Court in respect of a criminal offence of which he has been convicted. Section 17(1) also provides that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

The Constitution provides for the enforcement of the protective provisions at Section 25 which states:

> "**25.--** (1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) 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:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal."

On the 9th April, 1999 writs were filed in the Supreme Court on behalf of the appellants seeking the following reliefs:

"(1) An order rescinding the warrant for the Plaintiff's execution issued on or about the 6th April 1999;

(2) A declaration that the issue of the warrant for the Plaintiff's execution on or about 6th April, 1999 was unlawful and/or in breach of the Constitution;

(3) An order staying the execution of the Plaintiff;

(4) An order commuting the sentence of death imposed on the Plaintiff to one of life imprisonment;

(5) An Interim Order staying the execution of the Plaintiff pending determination of this suit;

(6) All such Orders, Writs and directions as may be necessary or appropriate to secure redress by the Plaintiff for the contravention of his fundamental rights and freedom which are guaranteed by the Constitution of Jamaica".

The following issues arise for determination by the Court:

(1) Whether the Prerogative of Mercy is reviewable in death penalty cases.

(2) Whether there was any breach of the appellant's fundamental rights under Section 17(1) of the Constitution.

PREROGATIVE OF MERCY

Let me now turn to the issue relating to the Prerogative of Mercy.

In their respective Statements of Claim the plaintiffs have averred that to execute them would violate their rights not to be deprived of their lives except by due process of law as required by Section 13 (a) and 14(1) of the Constitution and their right to protection of law as required by Section 13 (a) of the Constitution. It was stated

that they were denied natural justice by the Jamaican Privy Council when the Council considered the issue of their reprieve. Natural justice was denied to the plaintiff in the following ways:

(a) Failure to inform the plaintiff when the Jamaican Privy Council were going to meet to consider his case so that full representation could be made on his behalf;

(b) Failure to allow the plaintiff to make oral representations in the light of the importance of the matter under consideration;

(c) Failure to disclose to the plaintiff all material that were to be put before the Jamaican Privy Council; alternatively the gist of such material, so that the plaintiff could make representations thereon;

(d) Failure of the Jamaican Privy Council to provide written reasons for departing from the recommendation of the United Nations Human Rights Committee and give the plaintiff an opportunity to address them thereon.

Mr. Jack Hines on behalf of the appellants submitted that the Jamaican Privy Council has the power and authority under Section 90 (2) of the Constitution to determine whether a person convicted of a capital offence should be executed or suffer the less severe punishment of life imprisonment. The Governor General, he argues acts on the Privy Council's advice and recommendation and that body performs a sentencing function. Accordingly, that body is subject to the rules of natural justice. Further the death sentences were pronounced against them without their being privy to the precise factual material presented to the Jamaican Privy Council and upon that precise factual material the Privy Council would have advised the Governor General. Neither were they given notice of the date upon which the case would be considered; nor were they given an opportunity to deal with any adverse comments or allegations that might have been in reports to council, nor were they given an opportunity to

correct any unfair summary of the case or evidence at the trial that was presented to Council; nor were they given the reasons for their advice to the Governor General. In denying them the above the Privy Council acted in breach of natural justice.

It is significant to note that the Governor General appoints the members of the Privy Council and attends and presides at all meetings of the Privy Council as far as he possibly can.

Section 90 of the Constitution reads:-

> "**90.--** (1) The Governor General may, in Her Majesty's name 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."

Section 91 of the Constitution states:

> "**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."

In ***The Council of Civil Service Union v the Minister for the Civil Service*** [1985] A.C 374, Lord Roskill said in the course of his speech:

> "Prerogative Powers such as those relating to the making of treaties, the defence of the realm, the Prerogative of Mercy, the grant of honours, the dissolution of Parliament and the appointment of Ministers as well as others are not I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to judicial powers." (Emphasis added).

Lord Scarman in a similar speech at page 407 had this to say:

> "The controlling factor in determining whether the exercise of prerogative power, is subjected to judicial review is not its source but its subject matter."(emphasis added).

In ***Defreitas v Benny*** [1976] A.C. 239 while the Board was dealing with similar provisions of the Constitution of Trinidad and Tobago, Lord Diplock who delivered the judgment of the Board had this to say at page 247:

> "Except in so far as it may have been altered by the Constitution, the legal nature of the exercise of the Royal Prerogative of Mercy in Trinidad and Tobago remains the same as it was in England in Common Law. At Common Law this has always been a matter which lies solely in the discretion of the Sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the Prerogative of Mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function. While capital punishment was still lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other source as he thought might help him to make up his mind as to the advice that he would tender to the Sovereign in the particular case. But it never was the

> practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representative."

In a consideration of similar provisions of the Constitution of the Bahamas where there was a challenge by an appellant to the death sentence on the basis that he had not been afforded an opportunity to see the judge's report and other materials which were placed before the Advisory Committee, Lord Goff in delivering the judgment in ***Reckley v Minister of Public Safety and Immigration and Others*** (No.2) [1996] 1 All E.R 562 had this to say at page 571:

> "After his rights of appeal are exhausted, he may still be able to invoke his fundamental rights under the Constitution. For a man is still entitled to his fundamental rights and in particular to his right to the protection of the law, even after he has been sentenced to death. If therefore it is proposed to execute him contrary to the law, for example because there has been such delay that to execute him would constitute inhuman or degrading punishment, or because there has been a failure to consult the Advisory Committee on the Prerogative of Mercy as required by the Constitution, then he can apply to the Supreme Court for redress under art 28 of the Constitution... But the actual exercise by the designated minister of his discretion in death sentence cases is different. It is concerned with a regime, automatically applicable, under which the designated minister, having consulted with the advisory committee, decides, in the exercise of his own personal discretion, whether to advise the Governor General that the law should or should not take its course. Of its very nature the minister's discretion, if exercised in favour of the condemned man, will involve a departure from the law. Such a decision is taken as an act of mercy or, as it used to be said, as an act of grace."

It must be observed that the Prerogative of Mercy which was said by Lord Roskill in the ***C.C.S.U*** case to be non justiciable has since been judicially reviewed. In ***R v Secretary of State for the Home Department exp. Bentley*** [1993] 4 All E.R. 442 the applicant applied for review of the Home Secretary's decision not to pardon her brother who had been sentenced to death and hanged, forty years earlier. The Home

Secretary's failure to consider the grant of a posthumous pardon when the previous Home Secretary's decision had been wrong was held to be a clear error of law. It should be noted that the Court made no order and simply invited the Home Secretary to reconsider the decision which he did.

In ***Patrick Taylor et al v Attorney General*** Supreme Court Civil Appeal No. 13, 15, & 16/99 in a judgment delivered on the 20th May, 1999 the majority of the Court decided that the Prerogative of Mercy in death penalty cases is not reviewable.

It is well known as a matter of constitutional law that the Governor General acts on the recommendation of the Privy Council, but the Prerogative of Mercy is still the Prerogative of the Crown alone. It is well established that the Courts have no power to review the exercise by the Crown of its Prerogative of Mercy in a death penalty case providing the Governor General is acting within the scope of his powers. The Courts are not entitled to be informed of, nor to pass any opinion upon such recommendation which may have been given to the Governor General.

Notwithstanding the fact that the Governor General shall act on the recommendation of the Privy Council, in exercising the Prerogative of Mercy there is no right given to the condemned man to make representations to the Privy Council. Indeed it may be inferred that the reason why provision was made in the Constitution for the Privy Council was to provide a safeguard for the exercise of this important discretionary power.

I find it difficult to formulate the appellants' submission that because the Jamaican Privy Council is not a consultative body like the Advisory Committee in the Trinidad Constitution and the Mercy Committee in the Bahamas Constitution it is a quasi-judicial body which attracts judicial review. This to my mind is a ***non sequitur***.

The controlling factor in determining whether the Prerogative of Mercy is reviewable is not its source but rather its nature and subject matter as indicated earlier. The function of the Privy Council is purely discretionary. This court in the final analysis must always be sensitive to its own limits in evaluating matters dealing with the Prerogative of Mercy in death penalty cases.

PRISON CONDITIONS AND TREATMENT WHILE INCARCERATED

I now turn to consider whether the appellants' rights under Section 17 of the Constitution have been violated.

The appellant Shaw recites in his Statement of Claim and supports it in his affidavit that on his arrest in 1992 he was taken to a Police Station in Sandy Bay where he was kept in solitary confinement for three weeks during which time he was repeatedly beaten and was shackled at the legs. This treatment it was submitted constitutes inhuman and degrading punishment contrary to Section 17(1) of the Constitution.

In ***Thomas and Hilaire*** P.C.A No.60/98 delivered 17th March, 1999 (unreported) the majority judgment delivered by Lord Millett stated at page 17:

> "Even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the appellants' constitutional rights, commutation of the sentence would not be the appropriate remedy. ***Pratt*** did not establish the principle that prolonged detention prior to execution constitutes cruel and unusual treatment. It is the carrying out of the death sentence after such detention which constitutes cruel and unusual punishment. This is because of the additional cruelty, over and above that inherent in the death penalty itself, involved in carrying it out after having exposed the condemned man to a long period of alternating hope and despair. It is the circumstances in which it is proposed to carry out the sentence, not the fact that it has been preceded by a long period of imprisonment, which renders it cruel and unusual. The fact that the conditions in which the condemned man has been kept prior to execution infringe his constitutional rights does not make a lawful sentence unconstitutional".

Then at page 18 Lord Millett continues:

> "It would be otherwise if the condemned man were kept in solitary confinement or shackled or flogged or tortured. One would then say: 'enough is enough'. A state which imposes such punishments forfeits its right to carry out the death sentence in addition. But the present case falls a long way short of this.
>
> Their Lordships are unwilling to adopt the approach of the IACHR, which they understand holds that any breach of a condemned man's constitutional rights makes it unlawful to carry out a sentence of death. In their Lordships' view this fails to give sufficient recognition to the public interest in having a lawful sentence of the court carried out. They would also be slow to accept the proposition that a breach of a man's constitutional rights must attract some remedy, and that if the only remedy which is available is commutation of the sentence then it must be adopted even if it is inappropriate and disproportionate. The proposition would have little to commend it even in the absence of section 14(2) of the Constitution, but it is clearly precluded by that section."

It is important to observe that Shaw's complaint relates to a period prior to his conviction and as a consequence does not connote the mental agony required in Section 17 (1) in order to satisfy the judgment of ***Thomas v Hilaire*** (supra).

Mr. Campbell, counsel on behalf of the respondent submitted that the credibility of the appellant must be seriously doubted in view of the absence of these allegations in his petitions before the International Human Rights Bodies.

While it is desirable that an affidavit in reply should have been filed, the evidence is insufficient to found this complaint because the punishment complained of did not occur while the appellant was a condemned man. The beatings alleged to have been committed in 1995 do not fall within the contemplation of the dictum of Lord Millett in ***Thomas v Hilaire.*** The complaint in respect of Taylor was not argued. However, adequate means of redress are available to them under other law.

There is therefore no breach of the appellants' rights under Section 17 of the Constitution:

DELAY

Both appellants have spent a total of four years and eight months when the warrants were read to them and so they do not strictly fall within the five year post conviction period established in ***Pratt and Morgan v A.G.*** [1993] A.C.1. The period of 5 years is to be accepted as reasonable. Consequently where delay is the basis of the complaint the period of five years will be the relevant period. Execution if it is to be carried out must be done within 5 years of the sentence being imposed. An execution subsequent to the period may be considered cruel and inhuman.

The decision in ***Reckley v Minister of Public Safety*** (No.2) (supra) in which the petition for special leave to the Judicial Committee was dismissed more than five years after the passing of the death sentence shows that there is room for some latitude either way in the application of the five year period, depending on the circumstances. There is no evidence to support any departure from the norm.

This renders the appellants' arguments hopeless.

CONCLUSION

In ***Pratt v Attorney General for Jamaica*** (supra) Lord Giffiths at page 786 said inter alia:

> "...Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as part of our jurisprudence".

The appellants have exhausted all their legal rights to contest the sentence of death passed on them and have failed in having the Privy Council recommend a commutation of their sentences in the exercise of the Prerogative of Mercy. In my judgment there is no arguable case in respect of either appellant.

Accordingly, on the basis of the foregoing reasons the application for stay of execution on behalf of the appellants is refused on the ground that there was no arguable case for the grant a stay of execution pending the outcome of the constitutional action.

However, on the basis of ***Reckley*** (No. 1) I hereby grant a stay of 14 days pending an application if any to the Judicial Committee of the Privy Council.

ORDER

Temporary stay of execution granted for 14 days pending an application for conditional leave to appeal to the Judicial Committee of the Privy Council or by Petition for special leave. All other remedies prayed for are herewith refused. Liberty to apply. No order as to costs.