# JAMAICA

**SUPREME COURT CIVIL APPEAL NOS.13,15,16/99**

**COR: THE HON. MR. JUSTICE DOWNER, J.A.**
**THE HON. MR. JUSTICE LANGRIN, J.A. (Ag.)**
**THE HON. MR. JUSTICE PANTON, J.A. (Ag.)**

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| **BETWEEN:** | **PATRICK TAYLOR )**<br>**ANTHONY McLEOD )**<br>**CHRISTOPHER BROWN )** | **APPLICANTS** |
| **AND** | **THE ATTORNEY-GENERAL FOR JAMAICA** | **1st. RESPONDENT** |
| **AND** | **THE SUPERINTENDENT OF ST. CATHERINE DISTRICT PRISON** | **2nd RESPONDENT** |

**Dennis Daly, Q.C. instructed by Daly, Thwaites and Company for Patrick Taylor and Christopher Brown**

**Jack Hines instructed by Daly, Thwaites and Company for Anthony McLeod**

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

**12, 15, 16, April and 20th May, 1999**

**DOWNER, J.A.**

These applicants, Patrick Taylor, Anthony McLeod and Christopher Brown seek conservatory orders to restrain the Superintendent of St. Catherine District Prison from carrying out the sentence of death imposed on them for the offences of capital murder.

It is necessary in the case of Patrick Taylor and Anthony McLeod to explain a preliminary ruling by this court (Downer, Patterson JJA and Langrin, J.A. Ag.) on the 12th April when the applications came on for hearing. It was pointed out to counsel by Patterson, J.A. that the Formal Orders in respect of Patrick Taylor and Anthony McLeod which read in part:

"IT IS HEREBY ORDERED:-

1. Order of Mr. Justice Wesley James in the Supreme Court staying the execution of the plaintiff/appellant, Patrick Taylor for a period of four (4) days to facilitate an appeal;"

gave a temporary stay pending leave to apply to this Court. However, Patterson, J.A. observed that Patrick Taylor and Anthony McLeod were not properly before this court as leave to appeal was not granted.

After submissions of counsel on both sides this Court by a majority (Downer, J.A. and Langrin, J.A. (Ag.) Patterson, J.A. dissenting) awarded further conservatory orders which preserved the applicants' lives for a further four days so as to permit applications to the judge in chambers in the Court below for leave to appeal if such orders were necessary. In his dissent, Patterson, J.A. ruled that this Court had no jurisdiction since leave to appeal was not granted, so that he would not be a party to the majority decision. So considered it is necessary to reiterate the basis of the majority decision which was also delivered orally. It ran as follows:

> "It is clear that by granting orders staying the execution of Patrick Taylor and Anthony McLeod for four days to facilitate an appeal that Wesley James J. intended to grant the applicants leave to invoke the jurisdiction of this Court. As a Superior Court of Record see Section 103(5) of the Constitution this Court has an inherent power to preserve its jurisdiction by granting conservatory orders to preserve the lives of the applicants to go back to the Supreme Court if necessary under the provisions of the slip rule to have the Formal Orders amended to reflect their necessary intendments. In so doing we were avoiding the consequence of Glen Ashby by following the salutory ruling of the Privy Council in the case of

**Guerra v Baptiste** [1995] 4 All E.R. 583 at 587 which reads thus:

> ' On 25 July, following the execution of Glen Ashby during the hearing by the Court of Appeal of his appeal from the dismissal of a constitutional motion, no stay of execution being then in place, the Privy Council, in order to preserve its jurisdiction as the final Court of Appeal for Trinidad and Tobago, granted a stay of execution of the appellant and Brian Wallen in the event of the Court of Appeal dismissing their appeal from the decision of Jones J. On 27 July 1994 the Court of Appeal dismissed their appeal from Jones, J. but, since the stay granted by the Privy Council then took effect, they themselves found it unnecessary to order a stay. Two days later, as already recorded, Brian Wallen died in prison'."

In the light of the majority ruling, both applicants sought and obtained amendments to the Original Orders which now read:

1. "Summons dismissed. Order of Mr. Justice Wesley James in the Supreme Court staying the execution of the plaintiff/appellant for a period of four (4) days to facilitate an appeal.

2. Leave to appeal granted" (Emphasis supplied.)

It was against this background that this Court was reconstituted to have the applications for conservatory orders pending the hearing and determination of their constitutional actions in the Supreme Court. No complaint could properly be made in respect of the Order by Ellis, J. as regards Christopher Brown but his conservatory order was also extended so that all three applications could be heard together.

## The basis of the application

It is important to delineate the nature of these applications before us, so as to provide guidelines for the future. All three applicants have constitutional actions

pursuant to the Judicature Constitutional Redress Rules 1963 pending in the Supreme Court. So these applications are in the nature of interlocutory proceedings. It is doubtful whether these rules contemplated the elaborate procedure by writ as is followed in these proceedings. The warrant which are brought to be stayed are in existence and the cases most relevant to these proceedings from Trinidad and The Bahamas were all by motion. The most relevant cases **Reckley No. 1 and No.** 2 which will be referred to fully later in this judgment was decided on Petition to the Privy Council. The important point being made is that while the Constitutional Redress rules makes it necessary to resort to the writ procedure for actions where the alleged acts are likely to contravene the fundamental rights of the applicants, the conservatory orders now being sought relate to existing warrants or past conditions. As the issue was not argued, I reserve my opinion on it. Yet if I were to rule on it I would say a motion was the proper procedure. It is now necessary to refer to the provisions for stays of execution generally in the Court of Appeal Rules 1962 and the Civil Procedure Code Law bearing in mind the unique features of a stay of execution to preserve lives pending hearings in the Supreme Court. Section 596 of the Civil Procedure Code Law reads:

> "596. Any party against whom judgment has been given may apply to the Court for a stay of execution, or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court may give such relief, and upon such terms, as may be just."

Here it must be noted that this provision must be adapted to the circumstances of those applications. The Supreme Court is a superior court of record in accordance

with Section 97(4) of The Constitution. One of the attributes of a superior court of record is to regulate its own procedures where there are no specific rules. So the learned judges in the Court below were acting within their powers to grant stays of executions although the guilty verdicts were ordered on the criminal side of the Supreme Court and affirmed in the Court of Appeal. The applicants' petitions were refused in the Privy Council. An equally valid approach would be to say that implicit in Section 25(2) of the Constitution which reads:

> "25(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;"

is the jurisdiction to grant interlocutory orders as a stay of execution to preserve the jurisdiction of the Supreme Court. Full stays of executions being refused by the Supreme Court it is appropriate to turn to the Court of Appeal Rules 1962. Rule 21 in part states:

> "21. (1) Except so far as the Court below or the Court may otherwise direct -
>
> (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below;
>
> (b) no intermediate act or proceeding shall be invalidated by an appeal."

Then turning to Rule 22(4) it states:

> "(4) Wherever under the provisions of the Law or of these Rules an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below."

There is an authoritative ruling on the comparable provisions in the United Kingdom in **Cropper v Smith** (1883) 24 Ch.D. 305 which has never been doubted in this jurisdiction. It is appropriate to cite the headnote which reads:

> "Held, that Order LVIII., r. 16, gives concurrent jurisdiction to the Court below and to the Court of Appeal as to staying proceedings pending an appeal; that rule 17 does not take away any of the jurisdiction thus given to the Court of Appeal, but only requires that it shall not be exercised till an application has first been made to the Court below, and that the application to the Court of Appeal to stay proceedings when an order for that purpose has been refused by the Court below, is not properly an appeal motion, and need not be brought within twenty-one days from the refusal."

After distinguishing the difference between an interlocutory injunction and an application for a stay of proceedings Brett, M.R. said at page 311:

> "It seems to me that these cases do not contain anything that conflicts with the view I have expressed as to the true construction of rules 16 and 17 - viz., that there is an independent jurisdiction in this Court to stay proceedings pending an appeal but that this Court is not to exercise that independent jurisdiction until an application has been made to the same effect and decided upon in the Court appealed from, and that that is the only condition limiting the exercise of the jurisdiction of this Court. It does not limit the jurisdiction, it limits the exercise of it, but in every other respect the motion here is an original motion and it is not subject to the other conditions of an interlocutory appeal. We must then treat this as an original motion."

Then Cotton, L.J. stated at page 313:

> "The preliminary objection to the application raises a question of some importance. The 16th rule of Order LVIII. provides that an appeal shall not stay the execution of the decree appealed from, except

> so far as the Court below or the Court of Appeal may so order. That undoubtedly gives co-ordinate jurisdiction to the Court below and the Court of Appeal, and if it stood alone this Court might without any application having been made to the Court below, entertain an application to stay proceedings as distinguished from an application to grant an injunction for the protection of the property pending the appeal."

Then the learned Lord Justice continues thus:

> "But then rule 17 provides that where the application may be made under any of the rules either to the Court below or to the Court of Appeal, then it shall be made in the first instance to the Court below. That prevents this Court from entertaining an application to stay proceedings untill a similar application has been made to and refused by the Court below. In one sense, therefore, the application here is in the nature of an appeal, it is coming to this Court and asking it to exercise the original jurisdiction given to it under sect. 16, where the Court below has on a similar application declined to exercise the jurisdiction given to that Court. The Court of Appeal is asked to vary what has been done by the Court below. In one sense, therefore, the application here is in the nature of an appeal, it is coming to this Court and asking it to exercise the original jurisdiction given to it under sect. 16, where the Court below has on a similar application declined to exercise the jurisdiction given to that Court. The Court of Appeal is asked to vary what has been done by the Court below, and in that sense it is an appeal."

Then explaining the distinction between an application and an appeal the learned Lord Justice stated:

> "But what we have now to consider is whether it is an appeal within the rules and orders which prescribe and regulate how appeals from decisions given by the Court below, and as regards which this Court has no jurisdiction except by way of appeal, are to be entertained, and the time within which they are to be made to this Court if they are made at all. In my opinion those rules do not apply to an application of this nature where the Court has

> original jurisdiction, subject only to the proviso that it shall not exercise it until it has been seen what the Court below will do."

Bowen, L.J. put the position as follows at page 315:

> "I am of the same opinion, and will not add anything as to the merits; but I will say a few words as to the preliminary objection. I think it is clear if we go to the fountain-head - rules 16 and 17 of Order LVIII.- that the application to this Court is not an appeal within the meaning of the rules limiting the time allowed for appeals, but is a renewal before the Court of Appeal of an application already made to the same effect to the Court below. I think it is impossible to read rule 17 without seeing that the motion to this Court is an application of an original kind, although it is a renewed application, that is to say, although the rule makes it essential that a like application should have been previously made to the Court below."

There is a distinction between **Cropper v Smith** and the instant case in that the stay now is required pending the hearing of the constitutional action in the Supreme Court. However, as previously stated this Court on the principle laid down by the Privy Council in **Guerra v Baptiste** (supra) has a jurisdiction to restrain the execution so as to preserve the jurisdiction of this Court and their Lordships' Board.

In this context Rule 33 of the Court of Appeal Rules, 1962 must be explained. It reads:

> "33. (1) In any cause or matter pending before the Court, a single Judge of the Court may, upon application, make orders for -
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> (a) giving security for costs to be occasioned by any appeal;
> **(b)** leave to appeal in ***forma pauperis*;**
> (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
> (d) an injunction restraining the defendant in the action from disposing or parting with the possession of the subject matter of the appeal pending the determination thereof;
> (e) extension of time;

> and may hear, determine and make orders on any other interlocutory application.
>
> (2) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by the Court." [Emphasis supplied].

Further for there to be an application under this section a single Judge of Appeal has jurisdiction in a matter pending before this Court. Then Rule 25 which covers the instant case reads:

> "25. This Title applies, subject to the provisions of section 6 of the Judicature (Supreme Court) Additional Powers of Registrar Law, to every appeal to the Court, including, so far as it is applicable thereto, any appeal to the Court from the Registrar of the Supreme Court or other officer thereof, or from any tribunal from which an appeal lies to the Court under or by virtue of any enactment, not being an appeal for which other provision is made by the enactment giving the right of appeal or by rules made under that enactment."

As regard the learning on stay of execution in cases of capital murder, in **Reckley v Minister of Public Safety and Immigration and Others No. 1** [1995] 4 All ER 8 at 14 Lord Browne-Wilkinson had this to say:

> "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. In the present case, great difficulty was encountered by the petitioner in convening a Court of Appeal in The Bahamas and a Board of the Privy Council with sufficient speed to deal with the appeals in the short time available before the time fixed for execution. In the view of their Lordships, even if a court decides in such a case not to grant a full stay until determination of the constitutional motion

> itself, the court should grant a short stay ( a matter of days) to enable its decision to be tested on appeal. Execution of a death warrant is a uniquely irreversible process. It is neither just or seemly that a man's life should depend upon whether an appellate court can be convened in the limited time available."

Earlier Lord Browne-Wilkinson said at p.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 769 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."

In this jurisdiction the problem is the ever increasing number of criminal and civil appeals which require urgent attention, and to this has been recently added appeals from constitutional actions or motions and applications for conservatory orders in capital murder cases before this Court which sits in two divisions. There has been a whole new jurisprudence as a result of the decision in **Pratt and Morgan v The Attorney-General of Jamaica** [1993] 4 All E.R. 769. Having regard to these circumstances there can be no special arrangements during term time for any judge to concentrate on the writing of judgments however complex or urgent. A judge sits continuously in court or in chambers during term. Consequently, some judgments have to await the legal vacation.

It is clear from his reasons that Wesley James, J. was following faithfully the guidelines of **Reckley (No.1)**. This is what he said in the **Taylor and McLeod** cases:

> "In dealing with the points argued before me the issues I had to consider were (a) whether the delays pre-trial and post trial were such that the decision in **Pratt v. Attorney-General for Jamaica** 1994 2 AC 1 would avail the plaintiff's relief sought. (b) the conditions complained of during his incarceration were such that his Constitutional rights were infringed and (c) whether the Privy Council of Jamaica erred in not affording the Plaintiffs a hearing. I need not consider the merit of the arguments.
>
> I am assisted greatly by the authorities cited and I am of the view that there are no arguable points in(a) and (b) above and so hold.
>
> With regards to (c) above there has been nothing before me to show any procedural irregularity.
>
> I therefore dismiss the summonses and grant a stay of execution for four days."

The necessary implication from this passage was that a full stay of execution was refused by the learned judge below and he gave a short stay of four days so that a further application could be made to this Court. Ellis, J. in the case of **Christopher Brown** worded his order thus:

> "1. Summons dismissed. Stay of execution granted for a period of four (4) days until 2nd February, 1999.
>
> 2. Leave granted to appeal."

He could have been even more cautious in (2) by stating:

> Leave to appeal granted if necessary.

Such a precaution is appropriate whenever there is a provision for an appeal with leave or there is provision for a further application to this court and the judge below wishes an appeal or application to go forward but is uncertain whether his permission is necessary. Perhaps it should be added that Ellis, J. expressly followed **Reckley No. 1**. The learned judge said:

> "However on the authority of Reckley I reluctantly granted a stay of 4 days to 2/2/99."

Since both judges applied the principle enunciated in **Reckley No.1** it is desirable to make the principle explicit. If there is a binding authority from the Privy Council then it is appropriate to say that the motion must fail.

Applying these principles to the above cases all these applicants had a right to invoke the jurisdiction of this Court for a full stay of execution pending the hearing of the actions in the Constitutional Court, and there was no need to grant leave to appeal. This is so because to reiterate implicit in the orders of both learned judges was a refusal to grant a full stay pending the hearing and determination of the constitutional actions in the Supreme Court. Further it is open to this Court to grant a limited stay

pending the hearing before the Commission or the Committee. Here is how Lord Millett put it in **Thomas and Hilaire** (from Trinidad) Privy Council Appeal 60 of 1998 at p. 19:

> **"Conclusion**
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> Their Lordships have accordingly stayed the execution of the appellants until their current petitions to the Commission have been determined and any report of the Commission or ruling of the IACHR has been considered by the authorities of Trinidad and Tobago. Subject thereto they dismiss the appeals of both appellants."

It is now necessary to advert to the averments and facts of each case to assess the merits of their applications.

**The case of Patrick Taylor**

In considering these three cases care must be taken to distinguish averments in the Statements of Claims from facts obtained from the affidavits filed. Presumably the affidavits were filed to enable the Court below and this Court to exercise its discretion properly on the issue of the stay.

In his Statement of Claim for his constitutional action the averments read as follows:

> "3. On 27th March, 1992, the bodies of four (4) members of the Peddlar family were found, murdered. On the same date, Patrick Taylor ("the Plaintiff") was arrested and taken into custody at the Barnett Street Police Station in Montego Bay. He was imprisoned for a period of 26 days. The Plaintiff was then released. On 4th May, 1992 he was re-arrested and again imprisoned. The Plaintiff was subsequently, on 7th May, 1992 (together with Mr. Desmond Taylor and Mr. Steve Shaw) charged with the murders of the Peddlar family. It was at this time that he was cautioned. He was detained for 29 days before being formally cautioned and without having access to a lawyer.

4. On 25th July, 1994, in the St. James' Circuit Court, Montego Bay, Jamaica, the Plaintiff was convicted of four counts of non-capital murder by common design and sentenced to death by Harrison, J. Accordingly, there was a delay of 2 years and 4 months between the initial arrest of the Plaintiff and the Plaintiff being brought to trial. The Plaintiff appealed against his conviction which was dismissed on 24th July, 1995.

5. On 12th February, 1996, the Plaintiff lodged a Petition to the Judicial Committee of the Privy Council for special leave to appeal against his conviction. On 6th June, 1996, the Plaintiff's Petition for special leave to appeal to the Judicial Committee of her Majesty's Privy Council was dismissed, as were the Petitions of the Plaintiff's Co-Defendants."

Having exhausted his domestic remedies the applicant complained to the United Nations Human Rights Committee and he averred as follows:

"6. On 14th June, 1996 the Plaintiff submitted a Complaint to the United Nations Human Rights Committee ("UNHRC") for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR"). On 18th July, 1997, the UNHRC adopted its view in relation to the Communication and found violations of Articles 6, 9(2), 9(3), 10(1), 14(1) and 14(3) (c) of the ICCPR.

7. The UNHRC concluded that, in the circumstances, the Plaintiff is, under Article 2 (3)(a) of the ICCPR, entitled to an effective remedy entailing commutation of his death sentence. The decision of the UNHRC was communicated to the Secretary to the Governor General.

8. Despite the decision of the UNHRC, the Governor General's Secretary sent a fax on 10th July, 1998 to Herbert Smith, Solicitors representing Patrick Taylor, indicating that the Jamaican Privy Council had decided that the UNHRC's recommendations would not be

> implemented and that accordingly the Prerogative of Mercy would not be exercised. The letter added that the Plaintiff's execution would not be postponed further unless the Governor General's Secretary was informed on or before 17th July, 1998 that an application was to be able to be made to the Inter-American Commission."

For the record it should be noted that on 23rd October, 1997 the Minister of Foreign Affairs notified the Secretary General of the United Nations of Jamaica's denunciation of the Optional Protocol to the International Civil and Political Rights. See Ministry Paper 34 / 97 dated 28th October, 1997. The withdrawal became effective 23rd January 1998 three months afterwards. See Article 12 of the International Convention on Civil and Political Rights 1996. So the above averments state that execution was further delayed by the Governor-General in Privy Council to permit an additional application to another international body. The averment continue thus:

> "9. An application was lodged with the Inter-American Commission on 4th August, 1998 but, by letter to Herbert Smith dated 21st August, 1998, the Inter-American Commission deemed the Petition inadmissible on the grounds that:
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> 1. It was not *'lodged within a period of 6 months from the date on which the party alleging violation of his rights was notified of the final judgment'*, in accordance with Article 46(1)(b) of the American Convention on Human Rights; and
>
> 2. the application was substantially the same as one previously studied by *'another international organization'* and was, accordingly, inadmissible pursuant to Article 47(d) of the Convention
>
> 10. On 31st August, 1998, the Inter - American Commission for Human Rights wrote to the Government of Jamaica and requesting that it

> "commute the death sentence of Mr. Taylor to life in prison for Humanitarian reasons".
>
> 11. In its correspondence with the IACHR, Herbert Smith, on the 25th August, 1998 requested that the IACHR reconsider the question of the admissibility of Patrick Taylor's application and also sought, in their letter of 4th September, 1998 an oral hearing on the issue of admissibility pursuant to Article 65-67 of the Regulations. The IACHR has not yet ruled on whether there shall be an oral hearing on the issue of admissibility of Patrick Taylor's statement. A decision is still awaited in this respect. "

Here it must be noted that the averments in paragraph 9 stated that the complaint was inadmissible so it is somewhat odd that a request was made to reconsider the application and that a further request was made for an oral hearing. It was in these circumstances that it was averred thus:

> "12. On 15th January, 1999 the Plaintiff was issued with a Warrant for his execution on 26th January, 1999."

It must be remembered that there were allegations filed but it is somewhat surprising that no entry of appearance or defence has been exhibited. This was the pattern in all three applications and the necessary implication was that the Crown considered that its submissions in law would be sufficient to persuade this Court to refuse to issue conservatory orders so that the warrants would be executed and the law would take its course. A feature which must be taken into account in proceedings such as these is the need to prevent frivolous and untenable proceedings see **Pratt and Morgan** p. 786 supra.

One paragraph in Taylor's Affidavit will suffice to indicate the nature of his complaints during the period.

> "5. Because of the beatings I received while I was in the Barnett Street lock-up, I was urinating blood but received no medical attention, despite my requests, until after I was taken to court when I was taken to the Cornwall Regional Hospital."

Another paragraph is sufficient as regards his complaint while he has been on death row. It runs thus:

> "11. Whilst on 'death row" I have witnessed wanton and uncalled for violence by warders against inmate. On 5th March, 1997 at 5.10 a.m. I was awakened by gunshots. I learnt from my fellow inmates that four inmates had tried to escape. On being spotted by the warders and fired upon, the fleeing inmates returned freely to their cells. The duty warders then proceeded to call the four inmates out of their cells whereupon they were brutally beaten by the warders. After the beatings the four inmates were placed in a cell together and the warders left."

As stated previously no affidavit in response was filed. When the issues of law are addressed it will be demonstrated that these facts even if true could not be a basis for delaying the death sentence.

**The case of Anthony McLeod**

In this instance it is sufficient to refer to certain salient features of the Statement of Claim.

> "4. The procedural history of the plaintiff's case is as follows:-
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> | 3 December 1994 | Murder of Anthony Buchanan (an off-duty police officer) |
> | 20-22 September 1995 | McLeod is tried by Cooke J and a jury in the St. Catherine Circuit Court, Spanish Town. He pleaded not guilty to the charge of murdering Anthony Buchanan in the course of furtherance of a robbery. He is convicted of murder and sentenced to death on 22nd September 1995. |

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| 20 March 1996 | McLeod's application for leave to appeal is heard by the Court of Appeal in Jamaica. McLeod's counsel conceded, it is submitted erroneously, that there were no arguable grounds of appeal. In the absence of any submissions and upon perusing the court record, the Court of Appeal agreed and dismissed the application for leave. |
| 8 May 1996 | Messrs Kingsley Napley agree to represent McLeod on a pro bono basis in respect of an application for Special Leave to appeal to the Judicial Committee of the Privy Council. |
| 21 November 1996 | The JCPC (Lords Goff, Nichols and Hope) adjourn the hearing of McLeod's petition to enable further enquiries (relating to the conduct of counsel for the petitioner) to be made in Jamaica. |
| 16 January 1997 | The JCPC (Lords Browne-Wilkinson, Mustil and Hutton) refuse Special Leave to appeal and dismiss the petition." |

Then going on to June:

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| "10 June 1998 | Messrs Kingsley Napley receive a letter from the Governor General's Secretary in the following terms: |

> I write to advise you that the Jamaican Privy Council considered the recommendations of the UN Human Rights Committee in the case of Anthony McLeod and found them to be without merit. I had put on hold the matter of his application to the I nter-American Commission on Human Rights but clearly that cannot be so any longer. That being so, I should be grateful to receive proof of furnishing of application to that body by 31 July 1998. After that date, I cannot confirm that no action will be taken in the absence of proof filing."

Then as to the month of August:

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| "3rd August 1998: | Messrs Kingsley Napley received a letter |

from the Inter-American Commission on Human Rights in the following terms:

> "The Commission has had the opportunity to review the petition and supporting documents which were filed on Mr. McLeod's behalf. Regrettably, the Commission is unable to process the petition presented on Mr. McLeod's behalf because it has already been examined by another international governmental organisation, the United Nations Human Rights Committee, and is therefore inadmissable pursuant to Article 47(d) of the American convention and Article 39(1)(b) of the Commission's Regulations"

"31st August 1998: Messrs Kingsley Napley received a further letter from the Inter-American Commission on Human Rights in the following terms:

> We wish to inform you that on August 31 1998, the Commission wrote to the Government of Jamaica and requested that it commute the death sentence of Mr. McLeod to life imprisonment for humanitarian reasons."

Here it must again be noted that although this body found that the complaint was inadmissible it proceeded to recommend that the death sentence be commuted to life imprisonment for humanitarian reasons. Then the averments continue thus:

> "15th January 1999: McLeod has a warrant read to him for his execution on 26 January 1999."

So in the case of McLeod like that of Taylor their remedies to international tribunals have been exhausted. There can be no further valid complaints on this issue.

Further paragraph 8 which challenges the procedures of the Governor-General in Privy Council reads:

"Further or alternatively, the execution of the plaintiff would violate his right not to be deprived of his life except by due process of law as required by section 13(a) and 14(1) of the Constitution and his right to protection of the law as required by section 13(a) of the Constitution because he was denied natural justice by the Jamaica Privy Council when they considered the issue of his reprieve. Natural justice was denied to the plaintiff in the following ways:

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

(b) failure to allow the plaintiff to make oral representations in 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 Jamaica Privy Council, alternatively the gist of such material, so that the plaintiff could make recommendations thereon;

(d) failure of the Jamaican Privy Council to take all relevant matters into consideration, namely the failure to consider the recommendation of commutation for humanitarian reasons by the Inter-American Commission of Human Rights;

(e) failure of the Jamaican Privy Council to notify the plaintiff that it intended to depart from the recommendations of the United Nations Human Rights Committee and give the plaintiff an opportunity to address them thereon;

(f) failure of the Jamaican Privy Council to provide written reasons for departing from the recommendation of the United Nations Human Rights Committee."

When the issues of law are addressed it will be found that these allegations are without merit.

I will be sparing in my citation and refer to one paragraph in McLeod's Affidavit prior to his conviction and one while he was on death row.

> "3. I was the victim of inhuman treatment and brutality while at the Spanish Town Station. I was beaten at least once per week and in one week I was beaten three times and in the presence of one Inspector Wright. I was hit with batons, chairs and fists. One policeman who had on several rings hit me and burst my lips. On one occasion they hit me with a baton and burst my head and I was left to bleed. I did not get any medical attention and other inmates in the cell had to tend to my injuries."

To reiterate even if true this complaint cannot be the basis in law for delaying the sentence of death. As for his complaint after conviction here is a specimen:

> "5. That I was convicted on the 22nd September 1995. That after conviction I was on Death Row. I have been there for over three years. That the cell in which I was, was eight feet by six feet. That I got only ten to twenty minutes out of my cell per day and that was to empty the buckets with the excretion. I only got the opportunity to exercise on four occasions in all this time. That in all this time I never ate any of the meat in my meals as it was either improperly prepared or spoilt. That the water I got to drink was impure and gave me a running belly. That I had a problem with my eyes. That I complained and requested a doctor but it took a whole year for me to see the doctor. That I had a problem with my urine but although I informed the authorities and requested medical attention only this week have I been able to see the doctor when he came into the condemned cell and he promised to return but to date he hasn't. That during the prison riot in March 1996, I was beaten along with other inmates. They burst my head. My shins were hit with baton and were swollen for one month and I was unable to walk. My arms and back were sore from the beatings with the baton. I had to be treated at the Spanish Town Hospital. Further I have made five requests to see the dentist. I have

> seen her only once. She informed me I had a cavity but it was never dealt with. Further in all the time I have been on Death Row I have never had the opportunity to learn a craft, I have never got any books or magazines and the only thing I have had to read were letters from my lawyers. Finally, on the 15th January a warrant for my execution was read to me."

Having regard to the administration of Prisons these claims are unlikely to be true, but even if they were they could not be the basis of staying the warrants of execution.

**The case of Christopher Brown**

The principal features of the applicant's Statement of Claim are as follows:

> "1. On 15th November, 1991 the Plaintiff was arrested for the murder of Alvin Smith. On a date which cannot be specified but which is believed to have been some two to three weeks after his arrest, the Plaintiff was charged with Mr. Smith's murder. On 28th October, 1993 the Plaintiff was convicted at the Home Circuit Court, Kingston of capital murder and sentenced to death. On 18th July, 1994, the Court of Appeal of Jamaica upheld his appeal against conviction and ordered a re-trial. On 23rd February, 1996, the Plaintiff was convicted at a re-trial of capital murder and sentenced to death. On 16th December, 1996, the Court of Appeal of Jamaica, dismissed his appeal against conviction. On 23rd October, 1997, the Plaintiff's Petition for Special Leave to Appeal against conviction was dismissed by the Judicial Committee of the Privy Council.
>
> ...
>
> 3. On 12th November, 1997, the Plaintiff petitioned the United Nations Human Rights Committee (the "Committee") alleging violations of Articles 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights (the "International Committee"). On 13th November, 1997, the Committee advised the Government of the Plaintiff's petition and requested a response. On 13th January, 1998, the Government responded to the Plaintiff's petition as requested by the Commission. On 23rd March, 1998 the Plaintiff's responded to the

> Government's response. The Commission has yet to consider and issue its decision on the Plaintiff's application. It is anticipated, however, that the Committee will consider the Plaintiff's petition when it sits in March/April, 1999."

In this case although the complaint was made by the applicant to the U.N.H.R.C. in November 1997 at the time of hearing there has yet been no decision by that body. There is an instance where the generous guidelines laid down by the Privy Council in **Thomas and Hilaire** (supra) ought to be followed. Here is how Lord Millett put it at page 19:

> "Similar considerations will apply in relation to other persons under sentence of death in Trinidad and Tobago who have lodged petitions with the Commission or the UNHRC. The Advisory Committee may, of course, take into account the delay occasioned by the slowness of the international bodies in dealing with such petitions. But in their Lordships view such delays should not prevent the death sentence from being carried out. Where, therefor, more than 18 months elapses between the date on which a condemned man lodges a petition to an international body and its final determination, their Lordships would regard it as appropriate to add the excess to the period of 18 months allowed for in **Pratt.**"

In this case the generous period of eighteen months considered appropriate in **Thomas and Hilaire** should be followed and the warrant stayed pending the determination by the UNHRC and the Governor-General in Privy Council. The fact is the warrant was issued on 28th January 1999 some fourteen months after the petition was lodged. The averments continue thus:

> "4. On 7th August, 1997 the Governor General published in the Jamaica Gazette of that date instructions (the "Instructions") with respect to prisoners under sentence of death who apply to international human rights bodies alleging

infringement of their rights under international human rights instruments.

5. The Instructions purport to lay down a timetable to be complied with by those applying to the Commission for the determination of their rights, and by the Commission itself. In particular, paragraph 5 and 10 of the said Instructions provide, in effect, that the Commission has six months from the date of the Government of Jamaica's response in which to determine the application otherwise execution will not be further postponed" [Emphasis supplied]

The problem with this time scale is that eighteen (18) months was recommended in **Pratt and Morgan** (supra) and this was affirmed in **Thomas and Hilaire** (supra).Then the averments continued thus:

"6. The Jamaica Government has signed and ratified the American Convention on Human Rights (the Convention) on or about 10th July 1978 and pursuant to Article II of the Convention the said Government is under an obligation to ensure to the Plaintiff a free and full exercise of his rights under the Convention. In signing and ratifying the Convention the Government created a legitimate expectation in its citizens, including the Plaintiff, that it would do nothing to frustrate or interfere with their right of access to the Inter-American Commission on Human Rights (the "Commission") for the determination of their rights under the Convention and the American Declaration.

7. Article 44 of the Convention allows the Plaintiff to lodge a petition with the Commission containing denunciations or complaints of violation on his rights and freedoms under the Convention. The rules and procedures for the Plaintiff to lodge a petition with the Commission are contained in the Convention and regulations made thereunder, particularly Articles 38, 44 and 48 of the Convention and Articles 34,43,44,45,48,49,50,51 and 54 of the Regulations.

8. On 3rd August, 1998 the Plaintiff petitioned the Commission alleging violations of Articles 1,4(1),4(3),4(6),5(1),5(2),7(4),7(5),8(1), 8(2) 24 and 25(1) of the Convention. On 4th August, 1998 the Commission acknowledged receipt of the Plaintiff's petition. That same day, Allen & Overy, the Plaintiff's solicitors in England, wrote to the Governor-General's Secretary enclosing a copy of the Commission's acknowledgement and seeking confirmation that no steps would be taken to execute the Plaintiff pending the Commission's decision on the Plaintiff's petition. On 5th August, 1998, the Governor General's Secretary confirmed that no action would be taken to execute the Plaintiff "so long as the deadlines in the Governor General Instructions are observed." [Emphasis supplied]

9. On 19th August, 1998, the Commission informed Allen & Overy that the Plaintiff's petition was inadmissible because the Plaintiff had a petition pending before the Committee. On 24th August, 1998, Allen & Overy wrote to the Commission requesting that it reconsider its decision on the admissibility of the Plaintiff's petition, particularly in view of the exception it had previously made in other, similar cases. On 31st August, 1998, the Commission confirmed that it had written to the Jamaican Government to request that the Plaintiff's death sentence be commuted to life imprisonment for humanitarian reasons."

So it must be noted that in this case also the averments are that the Commission found the petition inadmissible because the Commission found that the petitioner had a pending complaint before the Committee of the United Nations. Further the Commission had already done all it could do which was to recommend that the sentence of death be commuted to life imprisonment for humanitarian reasons. Then the Statement of Claim continues:

> "10.On Friday, 15th January, 1999 a warrant was read for the Plaintiff's execution on 28th January, 1999."

## THE THREE ISSUES OF LAW INVOLVED

### (a) On the exercise of the Prerogative of Mercy

Mr. Jack Hines argued the point on behalf of all three applicants with commendable skill. He advanced his case on two grounds, firstly that he was denied a fair hearing before the Governor-General in Privy Council with respect to Section 90(1) (c) of the Constitution and secondly that Section 1(9) of Chapter I of the Constitution gives the appellant a right of judicial review so as to challenge the procedural fairness of the exercise of the Prerogative of Mercy.

Mr. Campbell in an equally forceful submission relied on Lord Diplock's classic aphorism in **DeFreitas v Benny** [1976] A.C. 239 at 247 that "Mercy is not the subject of legal rights. It begins where legal rights end". It is against this background that the legal analysis must be conducted. I must pay tribute to counsel on both sides for their oral and written submissions. The skeleton arguments ran to some twenty pages and there was full citation of authorities.

The attempt to subject the Governor General in Privy Council pursuant to Section 90(1) (c) to the provision of Section 20(2) of the Constitution in these instances must fail. That section reads as follows:

> "20.-(2) Any court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

This provision forms part of Chapter III of the Constitution which protects Fundamental Rights and Freedoms. The purpose of Chapter III was succintly put by Lord Griffiths in **Pratt and Morgan** (supra) at page 783 thus:

> "The primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedoms, not to curtail them."

But the preamble to Chapter III in Section 13 of the Constitution recognises that rights must be subject to limitations so as to protect the rights of others and the public interest. It is pertinent to cite this section so that its scope and effect may be grasped. Section 13 reads:

> "13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
>
> (c) respect for his private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

As the Constitution is based on the concept of Separation of Powers, Lord Diplock's dictum in **Hinds v The Queen** (1976) 13 JLR 262 at 268 is instructive:

> "Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a Legislature, an Executive and a Judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the Executive or of judicial powers by either the Executive or the Legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the Judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the Legislature, by the Executive and by the Judicature respectively. To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading - particularly those applicable to taxing statutes as to which it is a well established principle that express words are needed to impose a charge upon the subject."

Having regard to the principle of the separation of powers it must be noted that the Prerogative of Mercy is exercised by the Executive Authority whose powers are in Chapter VI under the caption Executive Powers. Section 90 reads:

> "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." [Emphasis supplied]

In this context it is apt to cite **Reckley v Minister of Public Safety and Immigration No. 2** [1996] 1 All E.R. 562 at 569 Lord Goff said:

> "Mr. Tattersall's submissions immediately face the difficulty that they are contrary to the decision of the Privy Council in **de Freitas v Benny** [1976] AC 239, [1975] 3 WLR 388. In that case, which arose by way of an appeal under the Constitution of Trinidad and Tobago, the appellant claimed that he was entitled (1) to be shown the material which the designated minister placed before the advisory committee, and (2) to be heard by the committee in reply at a hearing at which he was legally represented (see [1976] AC 239 at 247, [1975] 3 WLR 388 at 394). It was claimed that the functions of the committee were quasi-judicial in nature and accordingly that 'any failure to grant to the appellant the rights he claims would contravene the rules of natural justice and infringe his rights not to be deprived of life except by due process of law'. The submission was rejected by the Judicial Committee in a judgment delivered by Lord Diplock. His judgment is so germane to the present case that their Lords propose to take the exceptional course of quoting the relevant part in full. It reads as follows."

Then Lord Goff proceeds to cite the following passage on the same page:

"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 at 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 advise 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 rights 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 a 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 sources 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 representatives. Section 70(1) of the Constitution makes it clear that the prerogative of mercy in Trinidad and Tobago is of the same legal nature as the royal perogative of mercy in England. It is exercised by the Governor-General but 'in Her Majesty's name and on Her Majesty's behalf'. By section 70(2) the Governor-General is required to exercise this prerogative on the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister. This provision does no more than spell out a similar relationship between the designated Minister and the Governor-General acting on behalf of Her Majesty to that which exists between the Home Secretary and Her Majesty in England under an unwritten convention of the British Constitution. It serves to emphasise the personal nature of the discretion exercised by the designated Minister in tendering his advice. The only novel feature is the provision in section

> 72(1) and (2) that the Minister before tendering his advice must, in a case where an offender has been sentenced to death, and may, in other cases, consult with the Advisory Committee established under section 71, of which the Minister himself is chairman; but section 72(3) expressly provides that he is not obliged in any case to act in accordance with their advice. In capital cases the Advisory Committee too must see the judge's report and any other information that the Minister has required to be obtained in connection with the case, but it still remains a purely consultative body without any decision-making power. In their Lordships' view these provisions are not capable of converting the functions of the Minister, in relation to the advice he tenders to the Governor-General, from functions which in their nature are purely discretionary into functions that are in any sense quasi-judicial. This being so the appellant has no legal right to have disclosed to him any material furnished to the Minister and the Advisory Committee when they are exercising their respective functions under sections 70 to 72 of the Constitution."

The submission by Mr. Hines that because the Governor-General in Privy Council is the body which exercises the prerogative in contrast to the situation in the Bahamas and Trinidad where the Governor-General or the President acts after the Minister has consultations with an Advisory Council is untenable. It is untenable because whether it be the Home Secretary in the U.K., the Governor before the appointed day in Jamaica, the Minister in Trinidad after consulting with an Advisory Committee in Trinidad the functions being wholly discretionary are not justiciable. The substance of the matter is that the issue is not justiciable. That the prisoner on death row has rights is evidenced by the following passage in **Reckley No. 2** (supra). Lord Goff said at page 566-567:

> "In **Guerra v Baptiste** the Privy Council decided that justice and humanity require that a man under sentence of death should be given reasonable notice of the time of his execution. Such notice was required to enable a man to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and

> comfort to enable him to compose himself, as best he can, to face his ultimate ordeal (see [1995] 4 All ER 583 at 596. [1995] 3 WLR 891 at 905)); and also to 'provide him with a reasonable opportunity to obtain legal advice and to have resort to the courts for such relief as may at that time be open to him' ([1995] 4 All ER 583 at 597, [1995] 3 WLR 891 at 907)."

The death sentence is given special recognition in Section 91 of the Constitution. That section reads:

> "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 judgment 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."

In instances of the death penalty the procedure is specifically laid down and if this were not followed there could be an argument that judicial review recognised in Section 1(9) of the Constitution would be applicable. That the Constitution provides for judicial review of the procedures of the Privy Council is evidenced in Section 88( 3) which reads:

> "(3) Subject to the provisions of this Constitution, the Privy Council may regulate its own procedure."

The intervention of the courts by way of judicial review has been given great impetus since **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 but, it must be emphasised that in so far as the applicants have an argument, it is on the basis of judicial review. The challenge on this aspect of the case is brought out with clarity in the case of Christopher Brown. His Amended Statement of Claim has the following further averment:

> "10. At all times the Plaintiff complied with the timetable set out by the Instructions both in relation to its petition to the committee and in relation to its petition to the Commission. In the premises the plaintiff had a legitimate expectation that the Governor General and the Jamaica Privy Council would not issue a death warrant for the execution while petitions were pending before those international bodies and would, when they came to exercise their functions under sections 90 and 91 of the Constitution, take into account the decisions and recommendations of the said bodies whose jurisdiction to hear petitions by citizens of Jamaica the Government had explicitly acknowledged and ratified at the time when the said petitions were filed."

In this context the case of **Darrin Roger Thomas** and **Hanif Hilaire v Cipriani Baptiste (Commissioner of Prisons) Evelyn Ann Petersen (Registrar of the Supreme Court) Civil and the Attorney-General,** Privy Council Appeal No. 60 of 1998 delivered 17th March 1999 is of importance. As will be demonstrated shortly the Privy Council declared the Instructions issued pursuant to the Prerogative invalid. Earlier in **Pratt and Morgan** [1993] 4 All ER 769 at 776 the Privy Council approved of the Instructions issued on 14th August 1962. It is first of all necessary to examine how Ellis, J. treated this application of Christopher Brown in the Court below. He said:

> "There can be no question of legitimate expectation on the part of the applicant that a death warrant would not have been issued pending decision of

> international bodies. This is so in the light of the clear and lawful instructions given by the Governor General in the Gazette Extraordinary dated 7/8/97.
>
> I am in full agreement with Mr. Campbell's submissions and hold that:
>
> (1) There is no arguable point raised
>
> (2) The case referred to by Mr. Daly - Thomas and Baptiste cannot be any authority which binds me. That is a case from Trinidad which does not have any provision similar to those contained in the instructions given and gazetted here on 7/8/97.
>
> (3) The six months period referred to in the instructions gazetted 7/8/97 have been exceeded in this case.
>
> On the above I dismissed the Summons and would have refused any stay."

In the light of this an initial issue is whether the Instructions of the Privy Council can be challenged pursuant to Section 1(9) of the Constitution. These Instructions are similar to those issued in Trinidad and were declared invalid in **Thomas and Hilaire.** Further even if the challenge is successful does this mean that a stay of execution follows? It is necessary to reiterate that having regard to the guidelines in **Thomas and Hilaire** (supra), Ellis, J. was in error. We are bound by the ruling of the Privy Council on this issue and the period of 18 months after application to the relevant international bodies ought to be stipulated in the Instructions. Here is how Lord Millett speaking for the majority in **Thomas and Hilaire** put it at pp. 6-8:

> **"The Instructions**
>
> The Government's case does not depend on the validity of the Instructions, but on the absence of any legal basis for the appellants' claim to be entitled to proceed with their applications to the Commission and to have them determined before sentence of death is carried out. The invalidity of

> the Instructions is, however, crucial to the success of the appellants' arguments, and it is convenient to deal with this question first.
>
> Their Lordships are satisfied that the Instructions were unlawful. This is not because they were calculated to put Trinidad and Tobago in breach of the International Covenant of the Convention, for these had not been incorporated into and did not form part of the law of Trinidad and Tobago. But they were unlawful because they were disproportionate. They contemplated the possibility of successive applications to the Commission and the UNHRC (which was possible though unlikely), and laid down a series of successive time limits for the taking of the several steps which would be involved in the making of successive applications to both international bodies."

Here it is important to note that the concept of proportionality has been affirmed in constitutional and administrative law of Westminster constitutions which have entrenched provisions for Fundamental Rights and Freedoms. It seems a somewhat wider concept than **Wednesbury** [1948] 1 K B 223 unreasonableness which was described as irrationality by Lord Diplock in the **Civil Service** case (supra). A notable example of its application was **R. v. Barnsley M.B.C. ex p Hook** (see [1976] 1 W.L.R. 1052) and its scope and limits were considered in **R v. Secretary of State for the Home Department ex p. Brind** [1995] A.C. 396. Lord Millett in **Thomas and Hilaire** continued thus:

> "In their Lordships' view it was reasonable for the Government of Trinidad and Tobago to take action to ensure that lawful sentences passed by its Court should not be frustrated by events beyond the Government's control. It was reasonable to provide some outside time limit within which the international appellate processes should be completed. The Instructions had the object of introducing an appropriate element of urgency into the international appellate processes. This object was in conformity with the policy laid down by the

Board in **Pratt v Attorney-General for Jamaica** [1994] 2 A.C. 1, 33 that:

> '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 ... 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 part of our jurisprudence.'

The Govenment of Trinidad and Tobago, which is concerned to maintain public confidence in the criminal justice system in Trinidad and Tobago, was entitled to take appropriate measures to ensure that the international appellate processes did not prevent lawful sentence passed by the courts from being carried out.

In their Lordships' view it was also reasonable to provide for the possibility of successive applications to the same or different bodies. They are, however, satisfied that the Instructions were disproportionate because they curtailed petitioners' rights further than was necessary to deal with the mischief created by the delays in the international appellate process. It would have been sufficient to prescribe an outside period of (say) 18 months for the completion of all such processes. This could apply whether the petitioner made only one application or applied successively to more than one international body or made successive applications to the same body. It was unnecessary and inappropriate to provide separate and successive time limits for each application and for each stage of each application. This had the effect of drastically and unnecessarily curtailing the time limits within which the first such body could complete its processes'."

Then Lord Millett continues thus on the aspect of treaties:

> "Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty, in Trinidad and Tobago as in England, is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the Courts give effect to the domestic legislation, not to the terms of the treaty. The many authoritative statements to this effect are too well known to need citation. It is sometimes argued that human rights treaties forms an exception to this principle. It is also sometimes argued that a principle which is intended to afford the subject constitutional protection against the exercise of executive power cannot be invoked by the executive itself to escape from obligations which it has entered into for his protection. Their Lordships mention these arguments for completeness. They do not find it necessary to examine them further in the present case."

Lord Millett continued thus:

> "In their Lordships' view, however, the appellants claim does not infringe the principle which the Government invoke. The right for which they contend is not the particular right to petition the Commission or even to complete the particular process which they initiated when they lodged their petitions. It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action. This general right is not created by the Convention; it is accorded by the common law and affirmed by section 4(a) of the Constitution. The appellants are not seeking to enforce the terms of an unincorporated treaty but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended

> the scope of the due process clause in the Constitution."

Then comes the important statement which states thus:

> "Their Lordships note that a similar argument was rejected in **Fisher v. Minister of Public Safety and Immigration (No. 2)** [1999] 2 W.L.R. 349. They observe, however, that the Constitution of The Bahamas which was under consideration in that case does not include a due process clause similar to that contained in Article 4(a) of the Constitution of Trinidad and Tobago."

It is essential to cite a passage from the powerful dissenting judgment of Lord Goff and Lord Hobhouse in **Thomas and Hilaire** to put the issue in perspective. Their Lordships said:

> "The Instructions of 13th October 1997 were an attempt by the Government of the Republic to address the consequences of the decision of their Lordships' Board in **Pratt v. Attorney-General for Jamaica** [1994] 2 A.C. 1 having regard to the delays experienced when those sentenced to death sought to take advantage of the procedures of the two Human Rights Commissions. The Republic, in common with other Caribbean countries, found itself in an impossible position. The Privy Council had decided that delay in carrying out a sentence of death on a man beyond a certain time rendered his subsequent execution inhuman punishment and was therefore unconstitutional. Lord Griffiths delivering the judgment of the Board said, at p. 35.
>
> > 'The final question concerns applications by prisoners to the IACHR and UNHRC. Their Lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefitting 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 remedies'."

Then their Lordships continued thus:

> "The good faith of those drafting and issuing the Instructions is not questioned. But it is submitted that in contemplating that the relevant person under sentence of death would wish to obtain the support of both bodies and recognising that the applications to them had to be successive not simultaneous and, therefore subdividing the appropriate permissible periods into two sub-periods for such successive applications, the Cabinet acted unlawfully and therefore invalidated the whole of the instructions so that they have to be disregarded altogether. The principle invoked is proportionality. It is true that, with the benefit of hindsight, it might have been better to have allocated a single undivided period within which the relevant person could make such use as he could of the procedures of either or both bodies. But there were at the time arguments favouring the approach adopted by the draftsman which included a structure of responses within a detailed time table by the authorities in the Republic. It can now be seen that the attempt to reconcile the law as laid down in **Pratt** and reiterated in **Guerra v Baptiste** [1996] A.C. 397, 413 with the practices of the Commissions will rarely be successful. The Commissions espouse a policy of discouraging capital punishment wherever possible and, in accordance with that policy, appear to see postponement of an execution for as long as possible as an advantage since it may improve the chances of commuting the sentence or quashing the conviction. (See also **Johnson v. Jamaica** (1996) 1 B.H.R.C. 37.) There is thus a direct conflict between the policy of the Commissions and the enforcement of the law of the Republic. The Commissions appear to be unable or unwilling to alter their practice to accommodate the countries' requests for more speedy procedures."

In this context it is appropriate to examine how the Privy Council envisaged the situation so as to recommend a period of eighteen months for international tribunals and how it was thought that applications to those tribunals would be rare events. Lord Griffiths said at p. 788 of **Pratt and Morgan**:

> "The UNHRC has decided in this case and in **Carson-Reid v Jamaica 250/1987**, Annual Report of the Human Rights Committee, 1990 vol 2 GAOR, 45th Session, Supplement No, 40, p 85 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 Convention 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.' See **DS v Jamaica 304/1988**, Annual Report of the Human Rights Committee, 1991 GAOR, 46th Session, Supplement No. 40, 9 281.)
>
> 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."

It may be that Lord Griffiths' views on these matters have not turned out as he anticipated.

The question then in relation to the Constitution of Jamaica is whether it is appropriate to follow **Fisher No. 2** in Privy Council Appeal 1998 delivered 5th October, 1998 as there is no due process clause in the Constitutions of either Jamaica or the Bahamas. As the answer to that question is in the affirmative the following passage at pp. 8-9 in that judgment is relevant:

> "The first of the public law grounds is that the appellant had a legitimate expectation that he would not be executed so long as his petition was outstanding. This was one of the three grounds that was rejected by Osadebay J. in the first of the constitutional motions, and not renewed before the Board in **Fisher No. 1**. However Mr. Davies relied on the decision of the High Court of Australia in **Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh** [1995] 183 C.L.R. 273. It was held in that case that the ratification of the United Nations Convention on the Rights of the Child by the Commonwealth Executive in 1990 gave rise to a legitimate expectation that the Minister would act in conformity with the Convention, and treat the best interests of the applicant's children as a primary consideration in deciding whether or not he should be deported. But legitimate expectations do not create binding rules of law. As Mason C.J. made clear at page 291 a decision-maker can act inconsistently with a legitimate expectation which he has created, provided he gives adequate notice of his intention to do so, and provided he gives those who are affected an opportunity to state their case. Procedural fairness requires of him no more than that. Even if therefore the appellant had a legitimate expectation that he would not be executed while his petition was pending his expectation could not survive the Government's letters of 2nd and 30th January 1998 in which it informed the appellant's solicitors in unequivocal terms that it would wait no longer than 15th February 1998."

So although the Instructions dated August 7th 1997 are invalid as they are similar to the Trinidad Instructions then invalidity does not aid the appellants. They too

were informed as indicated earlier in this judgment by letters to their solicitors that their periods of grace would be withdrawn.

**(b) <u>The grounds on which the applications were based</u>**

All three applicants relied on the following grounds which were argued with great force and conviction by Mr. Daly, Q.C. :

> "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 of the sentence of death, the balance of convenience was in favour of the grant of the conservatory order."

The substantial issue argued under these grounds were firstly the matter of inhuman or degrading conditions during imprisonment and the matter of delay. All three applicants complained of inhuman and degrading condition of their incarceration both before trial and after conviction. As outlined earlier the complaints are detailed in their Statements of Claim and supported by affidavits in support of their claims for a stay of execution.

In **Thomas and Hilaire** at p. 20 Lord Goff and Lord Hobhouse in their dissenting judgment summarised the position thus:

> "We agree that the carrying out of the death sentences will not be unconstitutional by reason of the conditions in which the appellants have been held or their treatment in custody. **(Fisher v. Minister of Public Safety and Immigration (No. 1)** [1998] A.C. 673)."

On this aspect of the case the majority judgment delivered by Lord Millett stated the position thus at p. 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."

His Lordship continues on page 18:

> "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 cases fall 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."

The Statement of Claim and the Affidavits previously cited do not detract from the fact that these principles apply to the Jamaican Constitution and to this extent then Ellis, J. and Wesley James, J. were correct to find that the submissions on this ground were unarguable.

**(c) On the issue of delay**

It is helpful to look at the guidelines stated in both the majority and minority decisions in **Fisher No. 2** (supra), on the issue of delay. For the majority Lord Lloyd said at pp.10-11:

> "What is a reasonable time in the circumstances of a particular case is a question of fact. On this question their Lordships see no reason to disagree with the conclusion reached by Longley J. and the Court of Appeal. The overriding principle is that execution should follow as swiftly as practicable after sentence of death; see **Pratt and Morgan** [1994] 2 AC 1 at page 20, and **Guerra v. Baptiste** [1996] 1 A.C. 397 at page 413. Of course a defendant is entitled to exercise his domestic rights of appeal. He should also be allowed a reasonable time to petition the IACHR in accordance with Sir Godfray's undertaking. But in determining what is a reasonable time in the present case, it is of critical importance to bear in mind that the appellant has been sentenced to death. For the reasons advanced by Sir Godfray, which have already been outlined and which need not be repeated, their Lordships are in no doubt that a reasonable time for the Commission to complete its investigation had elapsed before 26th March 1998."

Then His Lordship continued thus.

> "Mr. Davies pointed out that five years from the date of sentence specified in **Pratt and Morgan** has not yet expired. This is true. But it is nothing to the point. **Pratt and Morgan** decides that it is

> normally inhuman or degrading treatment to execute a prisioner more than five years after he has been sentenced. It does not decide that he may not be lawfully executed before five years have elapsed: see **Guerra** at pages 414-5. As Gonsalves-Sabola P. observed in the Court of Appeal the complaint in cases where the **Pratt and Morgan** principle has been applied is that the prisioner has been kept too long on death row, not that he has not been kept long enough. It follows that the appellant's case fails not only on the new ground advanced in reply, but also on the original grounds:"

Turning to the minority decision of Lord Slynn and Lord Hope they state the position as follows at p.18:

> "Where, as in this case, the domestic appeal process has been completed well within the period which was regarded in **Pratt and Morgan v. Attorney-General of Jamaica** [1994] 2 A.C. 1 as a reasonable target period, any delay in dealing with the petition to the I.A.C.H.R. beyond the 18 months target period for this stage ought to be capable of being accommodated within the overall five-year period. Furthermore, as the decision in **Guerra v. Baptiste** [1996] A.C. 397 illustrates, the five-year period has in practice been treated not as a limit but as a norm, from which - as Lord Goff said in **Henfield** [1997] A.C. 413 the courts may depart if it is appropriate to do so in the circumstances of the case. The decision in **Reckley v. Minister of Public Safety (No. 2)** [1996] A.C. 527, 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."

The facts of each case on the issue of delay have already been detailed and are conveniently summarised in the skeleton argument in respect of Christopher Brown which runs thus:

> "b) the plaintiff petitioned the United Nations Human Rights Committee ("the Committee") on

> November 12th 1997 and again responded to the government's response on the 23rd of March, 1998. The committee has not come to a decision in respect of the plaintiff's petition but a decision is anticipated when the Committee sits in March to April 1999."

Since he was convicted on October 1993 and was retried pursuant to an order by the Court of Appeal he is now somewhat over the five-year target. However, the periods are not rigid and this additional period does not entitle Christopher Brown to allege that delay is a ground he can rely on for his sentence to be commuted to imprisonment for life because the State was in breach of Sections 17(1) and 20(1) of the Constitution. There are two useful guidelines in **Thomas and Hilaire** which must be cited. The first reads at page 15:

> **"DELAY**
>
> Thomas spent 2 years and 8 months in custody before conviction and a further 2 years and 7 months after it, making a total of 5 years and 3 months before the warrant was read. Hilaire spent 4 years and 3 months in custody before conviction and a further 3 years and 2 months after it, making a total of 7 years and 5 months before the warrant was read. These periods can be compared with those in **Fisher v. Minister of Public Safety and Immigration No. 1), [1998] A.C. 673** where the Board held that pre-trial delay could not be taken into account save in exceptional circumstances. In that case the Board affirmed the sentence despite the passage of 3 years and 5 months from arrest to conviction and a further 2 years and 6 months after it, making a total of 5 years and 11 months."

Then page 16 reads:

> "In **Fisher v. Minister of Public Safety and Immigration** the Board drew attention to the logical difficulty in simply aggregating the periods of delay before and after trial when the state of mind of the accused is different during the two periods. Their Lordships add that, if pre-trial delay is ever relevant to the inhumanity of carrying out the death

> sentence, it must nevertheless be because of the total period that has elapsed before and after conviction. This in itself is sufficient to dispose of this issue on the facts of the present case."

As to that of Anthony McLeod it runs thus in his skeleton arguments:

> "Anthony McLeod the appellant was convicted of murder and sentenced to death on the 22nd day of September, 1996
>
> On the 20th March 1996 application for leave to appeal was heard by the Court of Appeal of Jamaica and the application for leave to appeal is dismissed.
>
> On the 16th January 1997 the Judicial Committee of the Privy Council refused Special leave to appeal and dismissed the Petition."

There is a further paragraph in the skeleton argument which is instructive. It reads:

> "It is well to note that Anthony McLeod spent a total of three years and four months when the warrant was read to him and that he does not strictly fall within the **Pratt and Morgan** principle."

Be it noted that his application to the international body was refused.

That for Patrick Taylor runs thus at page 1:

> "The period from the date of the conviction and sentence of the applicant, Patrick Taylor (25/7/94) to the date proposed for his execution by the issue of a death warrant (26/1/99) is four (4) years and six (6) months, a period which it is submitted is within the scope of variation from the five-year norm."

In his case also the application to the International body was refused.

After giving the most careful consideration to these applications I think at this time it is appropriate that the applications for a stay pending the hearing and determination of the constitutional actions be refused. As stated previously in the case of Christopher Brown he ought to have a temporary stay pending the determination of

his case before the international tribunal and consideration by the Privy Council in Jamaica

However, having regard to **Reckley No. 1** it is appropriate to grant a stay for fourteen (14) days to permit an application to the Board and when conditional leave is granted, the applicants be given thirty (30) days to complete the record to be forwarded to the United Kingdom. An application for special leave is an alternative route. So the Order I would propose is as follows:

**CHRISTOPHER BROWN**

(1) Temporary stay of execution pending the determination of his case before the United Nations Human Rights Committee and the Governor-General in Privy Council.

(2) And a further temporary stay of fourteen (14) days after (1) above provided that an application is made to this Court for conditional leave to go to the Privy Council or Petition by special leave to the Privy Council. Liberty to apply.

**PATRICK TAYLOR AND ANTHONY MCLEOD**

Temporary stay of execution granted provided that an Application is made to this Court for conditional leave to go the Privy Council within fourteen (14) days hereof or an application by Petition for special leave to the Privy Council. Liberty to apply.

**LANGRIN, J.A. (Ag.)** (dissenting)

These appeals are brought with the leave of the Supreme Court from the dismissal of the appellants' summonses seeking Conservatory Orders to stay their executions until their Constitutional Writs filed in the Supreme Court are heard.

**BACKGROUND**

The appellant Patrick Taylor was arrested on 27th March, 1992 and after remaining in custody for a period of 26 days was released. On May 4, 1992 he was re-arrested and subsequently charged with murder. On 25th July, 1994 the appellant was convicted of four counts of non-capital murder by common design and sentenced to death. He appealed against his conviction and this appeal was dismissed on 24th July, 1995.

On the 12th February, 1996 Taylor lodged a Petition to the Judicial Committee of the Privy Council for special leave to appeal against his conviction.

On the 6th June, 1996 Taylor's Petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed.

On 14th June, 1996 Taylor submitted a complaint to The United Nations Human Rights Committee (the UNHRC) for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). The UNHRC on 18th July, 1997 adopted its view in relation to the Committee and found violations of Articles 6,9 (2) 9 (3) 10 (1) 14 (1) and 14 (3) (c) of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

The UNHRC concluded that in the circumstances, Taylor is under Article 2 (3) (a) of the ICCPR, entitled to an effective remedy entailing commutation of his death

sentence. The decision of the UNHRC was communicated to the Secretary to the Governor General.

Despite the decision of the UNHRC the Governor General's Secretary sent a fax on 10th July, 1998 to the Solicitors representing Taylor indicating that the Jamaican Privy Council had decided that the UNHRC's recommendations would not be implemented and therefore the Prerogative of Mercy would not be exercised. The letter also indicated that Taylor's execution would not be postponed further unless the Governor General's Secretary was informed on or before 17th July, 1998 that an application was able to be made to the Inter-American Commission.

An application was lodged with the Inter American Commission on 4th August, 1998 but by letter to Taylor's Solicitors dated 21st August, 1998, the Inter-American Commission (the "IACHR") deemed the Petition inadmissable on the grounds that:

> "1. It was not *'lodged within a period of 6 months from the date on which the party alleging violations of his rights was notified of the final judgment'* in accordance with Article 46 (1) (b) of the American Convention on Human Rights; and
>
> 2. The application was substantially the same as the one previously studied by *'another international organisation'* and was accordingly inadmissible pursuant to Articles 47 (d) of the Convention".

On 31st August, 1998 the I.A.C.H.R wrote to the Government of Jamaica requesting that it commute the death sentence of Taylor to life in prison for humanitarian reasons.

In its correspondence with the I.A.CH.R the Solicitors of Taylor on 25th August, 1998 requested that the I.A.C.H.R reconsider the question of the admissibility of Taylor's statement. A decision on this aspect of the matter is still awaited.

On the 15th January, 1999. Taylor was issued with a Warrant for his execution on 26th January, 1999.

Writs were filed by Taylor and McLeod on 22nd January, 1999 seeking constitutional redress under Section 25 of the Constitution. An injunction and/or conservatory order to restrain the second respondent from executing Taylor and McLeod was sought on the same day. The summonses came before Wesley James J on 25th January, 1999 and he dismissed the summonses and stayed both executions for a period of four days to facilitate an appeal.

The appellant Anthony McLeod was arrested and charged with the offence of murder on February 3, 1995. He was convicted and sentenced to death on September 22, 1995. The Court of Appeal dismissed his application for leave to appeal on 20th March, 1996. On the 16th January, 1997 the Judicial Committee of the Privy Council refused special leave to appeal and dismissed the Petition. On the 16th January, 1997 a communication for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights was submitted to the UNHRC on behalf of McLeod. On the 9th June, 1998 McLeod's representative received from the U.N.H.R.C. the approved text of the views adopted by the Committee on 31st March 1998. On June 10, 1998 the Secretary to the Governor General advised that the Jamaican Privy Council had considered the recommendations of the UNHRC in the case of McLeod and found them to be without merit. A communication under the American Convention on Human Rights was submitted on 20th July, 1998 to the Inter-American Commission for consideration. On the 31st August, 1998 MCLeod's representative received a letter from the Inter-American Commission on Human Rights informing them that the Commission had written to the Government of Jamaica requesting that it

commute the death sentence of McLeod to life imprisonment for humanitarian reasons. On the 15th January, 1999, Anthony McLeod had a warrant read to him for his execution on 26th January, 1999. A Writ was filed on 25th January, 1999 seeking constitutional redress. A summons seeking an injunction was dismissed by Wesley James J. However, he was granted a stay of 4 days to facilitate an appeal.

The appellant Christopher Brown was arrested on 15th November, 1991 and later charged with murder. He was convicted and sentenced to death on October 28, 1993. On the 18th July, 1994 his appeal against conviction was upheld in the Court of Appeal. He was retried and again convicted and sentenced to death on February 23, 1996. His appeal was dismissed by the Court of Appeal on 16th December, 1996 and his Petition for leave to the Judicial Committee of the Privy Council was dismissed on October 23, 1997.

The appellant petitioned the United Nations Human Rights Committee on November 12, 1997 and again responded to the Government's response on the 23rd March, 1998. The Committee has not come to a decision in respect of the appellant's petition but a decision is anticipated when the Committee sits in March to April, 1999.

On Friday 15th January, 1999 a warrant was read for the appellant's execution on 28th January, 1999. A Writ was filed on his behalf on the 26th January, 1999 seeking constitutional redress. A summons was heard by Ellis J, seeking a stay of execution. The summons was dismissed and a stay of execution for 4 days was granted to facilitate an appeal.

## RELEVANT LAW

The Jamaican Constitution at Section 13 (a) provides for the fundamental right of individuals inter alia to life, security of person and protection of law (emphasis

supplied). Section 14 (1) provides that no person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted. The Constitution also prohibits inhumane or degrading punishment or other treatment (Section 17).

Section 90 (1) of the Constitution provides for the decision by the Governor General as to whether a person convicted of a capital offence suffer the less severe punishment of life imprisonment rather than execution. In doing so he must act on the recommendation of the Jamaica Privy Council (Section 90 (2).

Section 24 of the Constitution states inter alia:

> **"24.** - (2)... no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority".

Section 25 (1) of the Constitution provides for the enforcement of the protective provisions and states:

> "... if any person alleges that any of the provisions of Section 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".

In ***Pratt v Attorney General for Jamaica*** [1994] 2 AC.1 the Judicial Committee of the Privy Council in allowing for a period of five (5) years after sentence for the death penalty to be carried out, included a period of three (3) years for appeals to be made to two international human rights bodies, namely the United Nations Human Rights Committee (U.N.H.R.C.) and Inter-American Commission on Human Rights (I.A.C.H.R.).

Further the Judicial Committee of the Privy Council ruled at pages 34-35:

> "That the aim should be to hear a capital appeal in Jamaica within 12 months of conviction and to complete the entire domestic appeal process within two years; that it should be possible to complete applications to the UNHRC with reasonable dispatch and at the most within a further 18 months; and that where execution was to take place more than five years after sentence there would be strong grounds for believing that the carrying out of the sentence would constitute inhumane or degrading punishment or other treatment contrary to the Constitution of Jamaica".

On the 7th August, 1997 instructions were published by the Governor General setting a time frame of six (6) months after the response by the Jamaican Government to the international body to which a convicted person had complained, beyond which execution would not be postponed. The effect of the instructions was to reduce the time limit within which the Committee could complete its processes.

The Government of Jamaica also denounced the First Optional Protocol under the International Government on Civil and Political Rights which became effective in January, 1998.

There are three essential issues arising for determination by the Court:

(1) Whether under the Jamaican Constitution a person sentenced to death has the right to be informed as to when and where the Jamaican Privy Council will be meeting to consider his case and the precise factual material upon which it will be relying in advising the Governor General and that the condemned man be allowed to make representation through his representative to deal with adverse matters. In short, was there a breach of natural justices in terms of Sections 9, 13, 14, 24 of the Constitution.

(2) Whether in the context of a pre-trial delay of two years and four months from the date of the appellant's arrest to his trial during which time the plaintiff was in custody and including a period of twenty nine days during which he was kept in custody without charge, when he was first arrested, the post-trial delay of four years and six months constitute inhumane and degrading treatment or punishment in breach of Section 17 (1) of the Constitution.

(3) Whether the appellants have been denied their common law rights not to have their Petitions to the Committee and Commission pre-empted by executive action.

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*** [1995] 4 All E.R 8 (P.C). Lord Browne-Wilkinson who delivered the judgment of the Board had this to say at pg. 12.

> "...if the constitutional motion raises a real issue for determination, it must be right for the court 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 to 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 AG of Jamaica*** [1993] 4 All E.R 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 E.R. 769 at 783, [1994] 2 AC 1 at 29 -30). 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 pressure of time which always attend applications for a stay of execution." (emphasis supplied).

And he continued at pg. 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".

This test was adopted and applied in the recent case of ***Neville Lewis v AG,*** Supreme Court Civil appeal No. 7/99 delivered April 12, 1999.

## REPRESENTATIONS

This issue lies at the heart of all the appeals and affects all the appellants. The appellants contend that their constitutional rights under Section 13 of the Jamaica Constitution to life, security of person and protection of law were denied them because they were not given the opportunity to make informal representation to the Privy

Council as to why the sentence of death pronounced against them should not be carried into effect.

Mr. Dennis Daly Q.C and Mr. Jack Hines submitted on behalf of all the appellants that the Jamaica Privy Council has a discretion vested in it by the Constitution. This discretion is quasi-judicial in which the Council has considerable power to mitigate the arbitrariness of the mandatory death sentences. That being so then the deliberations should be subject to natural justice and be reviewable. Mr. Hines argued that the position of the Jamaican Privy Council under the Constitution is not only distinct from that of the Advisory Committee in the Bahamas and Trinidad and Tobago Constitutions but is also distinguishable from the situation in colonial Jamaica in which the prerogative of mercy was exercisable by the Governor in his personal discretion as the Sovereign's Representative. Cases such as ***Doody v Secretary of State for the Home Department*** [1993] 3 All E.R 92 and ***R v Secretary of State of Home Department ex p Bentley*** [1993] 4 All E.R. 442 were relied on. These cases illustrate that the concept of the Prerogative of Mercy is reviewable.

To this Mr. Campbell, Counsel on behalf of the respondents made several objections. He submits in the main that under the doctrine of the separation of powers the Prerogative of Mercy is not justiciable. Further Section 13 of the Jamaican Constitution does not provide a remedy to any one.

He relied on the decisions of the Judicial Committee in ***Reckley v Ministry of Public Safety*** (No. 2) [1996] 1 All E.R. 562 and ***DeFreitas v Benny*** [1976] AC. 239. Lord Diplock stated in the latter case that : "Mercy is not the subject of legal rights. It begins where legal rights ends". Because I do not think it appropriate to express an

opinion without having the benefit of full argument on the matter, I shall content myself by holding that an arguable point is raised.

Accordingly I find that this is an arguable point which should be dealt with by the Constitutional Court.

## DELAY

Taylor spent four years and six months in custody after conviction and before the warrant was read. He spent 2 years and 2 months before conviction. This is a total period of 6 years and 8 months in custody before the warrant was read. Brown was in custody for 5 years and 2 months from conviction to the warrant being read. He spent 1 year and 11 months before conviction making a total of 7 years and 1 month in custody before the warrant was read to him.

In the recent Privy Council Appeal ***Thomas and Hilaire v the Attorney General*** P.C. A No. 60 of 1998, Lord Millett in delivering the judgment for the majority had this to say at p. 16:

> "In ***Fisher v Minister of Public Safety and Immigration*** (No. 1) [1998] A.C. 673 the Board drew attention to the logical difficulty in simply aggregating the periods of delay before and after trial when the state of mind of the accused is different during the two periods. Their Lordships add that, if pre-trial delay is ever relevant to the inhumanity of carrying out the death sentence, it must nevertheless be because of the total period that has elapsed before and after conviction. This in itself is sufficient to dispose of this issue on the facts of the present case".

There is no evidence that the delay in the case of Taylor in bringing him to trial made his trial unfair and so it is impossible to conclude that it contravened his constitutional rights. His post trial delay is within the norm laid down in ***Pratt v AG***

43 W.I.R 340 In respect of Brown, his total period in custody from conviction to the warrant being read to him has exceeded the normal period.

There is no arguable point in respect of delay in so far as Taylor is concerned. However, in relation to Brown there appears to be an arguable case having regard to the principle in ***Pratt and Morgan.***

## THE INSTRUCTIONS

The Instructions issued on the 7th August, 1997 by the Governor General are in every material respect identical to the Instructions issued by the Trinidad and Tobago Government on the 13th October, 1997. Those Instructions have been held by the Judicial Committee of the Privy Committee to be unlawful as being disproportionate because they curtailed petitioners' rights further than was necessary to deal with the mischief created by the delays in the international appellate processes. (See the majority judgment in ***Thomas and Hilaire v the Attorney General of Trinidad and Tobago*** P.C.A No 60/98 dated 17th March, 1999 at pg. 6).

The respondent has submitted that in so far as Brown is concerned the period of 14 months which elapsed from time of first petition to the International Human Rights Body would not be disproportionate in light of the ruling in ***Thomas and Hilaire v the AG*** (supra). At pg. 19 the Board said this:

> " Where, therefore, more than 18 months elapse between the date on which a condemned man lodges a petition to an international body and its final determination, their Lordships would regard it as appropriate to add the excess to the period of 18 months allowed for in ***Pratt".***

Because no decision in respect of Brown's petition to the UNHRC has yet been made the case raises a fairly arguable point.

## CONCLUSION

Accordingly, for the reasons stated, I would stay the execution of the three appellants until the Constitutional Court has determined the applications of all the appellants. I would allow the appeal.

**PANTON, J.A. (Ag.)**

The applicants were duly tried and convicted for capital murder in a Circuit Court. They were sentenced to suffer death in the manner authorised by law. Their appeals to the Court of Appeal and their petitions for leave to appeal to the Judicial Committee of the Privy Council were all dismissed. Having exhausted their domestic remedies, they turned to international bodies, namely, the United Nations Human Rights Committee (hereinafter UNHRC) and the Inter-American Commission on Human Rights (hereinafter IACHR).

In relation to the applicants **Patrick Taylor** and **Anthony McLeod,** their applications have been dealt with and these bodies made favourable recommendations to the Governor-General on their behalf. Favourable in the sense that they recommended commutation of the death sentences. These recommendations have not been accepted by the Jamaican Privy Council. So far as the applicant **Christopher Brown** is concerned, the UNHRC has not yet made a decision.

Warrants have been issued for the execution of the applicants, in keeping with the sentence of death passed on them. In an effort to prevent their execution, they have filed writs of summonses seeking relief under section 25 of the Constitution. They applied separately to the Supreme Court for a stay of execution pending the hearing of their application for constitutional redress. In respect of each, the application for a stay of execution was denied by the Supreme Court. However, a stay was granted to facilitate their appeals against the refusal.

The appeals were taken together before us. The proceedings are in effect a rehearing of the application for a stay of execution. This, to my mind, entitles or obliges us to examine the issues involved in the constitutional actions. The results of

such an examination will determine whether there is an arguable case to be presented to the Court and consequently a basis for staying the carrying out of the lawful sentences.

In determining whether a Court should grant a stay of execution in a death penalty case, the procedure that ought to be adopted by the Court is set out in the judgment of the Privy Council in **Reckley v Minister of Public Safety** (1995) 4 All E.R. 8 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... 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."

Having stated this, it appears to me that the appeal of **Christopher Brown** ought to succeed. He has exhausted his domestic appeals but his petition to the UNHRC has not yet been determined. That petition was made on November 12, 1997. This is indicative of the lack of urgency that has been displayed by the UNHRC. It is not the fault of the appellant.

Turning to the other appellants, it is noted that they have filed identical complaints that:

> "1. The learned judge erred in law and in fact in finding that arguments adduced on (their) behalf ... 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; and
>
> 2. the learned judge erred in law in failing to hold that (they) ... had an arguable claim for constitutional redress and that in view of the irreversibility of the execution of the sentence of death, the balance of convenience was in favour of the grant of the conservatory order."

**PATRICK TAYLOR**

By a writ dated 22nd January, 1999, this appellant claims the following reliefs under section 25 of the Constitution:

> (a) an order rescinding the warrant for his execution;
>
> (b) a declaration that the issue of the warrant was unlawful and/or in breach of the Constitution;
>
> (c) an order staying the execution;
>
> (d) an order commuting the sentence of death imposed on him to one of life imprisonment; and
>
> (e) all such orders, writs and directions as may be necessary or appropriate to secure redress by the appellant for the contravention of his fundamental rights and freedoms which are guaranteed by the Constitution.

In the Statement of Claim, the appellant has set out a history of the circumstances that have led to his present situation. I shall state some of these. He was taken into custody on March 27, 1992, in connection with the deaths of four

members of the same family who were found murdered earlier that day. After 26 days, the police released him without having charged him with any offence. He was re-arrested on May 4, 1992 and, along with two other men, was charged on May 7 with the murders of the persons mentioned above. On July 25, 1994, he was convicted and sentenced to death. His appeal was dismissed by the Court of Appeal on July 24, 1995. His petition to the Judicial Committee of the Privy Council was dismissed on June 6, 1996. He submitted complaints to UNHRC and IACHR. The former found violations of six Articles of the International Covenant on Civil and Political Rights, and concluded that the appellant was entitled to the commutation of his death sentence. This conclusion was communicated to the Governor-General. However, the Jamaican Privy Council decided against that recommendation of the UNHRC and said that the prerogative of mercy would not be exercised in the appellant's favour.

The appellant's application to the IACHR was lodged on August 4, 1998. That body deemed the petition inadmissible. Notwithstanding this situation, the IACHR in a letter dated August 31, 1998, requested that "the Government of Jamaica" commute the appellant's sentence "to life in prison for humanitarian reasons". This request has been denied.

On January 15, 1999, a warrant was issued for the execution of the appellant on January 26, 1999.

The appellant's grounds for seeking relief under the Constitution may be tabulated thus:

1. he has been awaiting execution for over four years;

2. he has been incarcerated in conditions which fall below the minimum required by section 17 of the Constitution;

3. at no stage has he been notified that the Jamaican Privy Council would be considering whether to recommend to the Governor-General the exercise of the prerogative of mercy; and

4. he has not been provided with legal aid for constitutional motions prior to the reading of the warrant for his execution."

**DELAY**

In the submissions before us, the main contention was in respect of what the appellant has categorised as delay - the period of time between conviction and the issuance of the warrant for execution. According to learned Queen's Counsel, Mr. Daly, if the warrant had been issued in September, 1998, the complaint as to delay would not have been made. It is the delay since September, 1998, that is the subject of the complaint. He said that four years and six months, the period since conviction, could be inhuman and degrading if aggravated by pre-trial delay; and in this case the pre-trial delay was one of two years.

The legal position on this question of delay is now beyond argument. In **Pratt v Attorney General for Jamaica** (1993) 4 All E.R. 769, at page 786 Lord Griffiths said:

> "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 part of our jurisprudence." [Emphasis added}

In **Pratt**, a case of excessive delay (fourteen years) the Privy Council indicated that in their view all appellate procedures and applications should be completed in time to allow executions to take place no more than five years after conviction.

In **Fisher v The Minister of Public Safety and Immigration (Privy Council Appeal No. 53 of 1997 delivered on December 16, 1997)** the Privy Council accepted that as a general principle it was inappropriate "to bring into account pre-trial delay for the purposes of considering whether execution had been rendered inhuman on the principle in **Pratt**" (page 7):

> "The principle in **Pratt** .. does not admit to being extended ... to address the wholly different problem of pre-trial delay." (page 8).
>
> "In the opinion of their Lordships ... the principle in **Pratt** is concerned with post-conviction delay, and ... it is not permissible for the purposes of invoking that principle simply to add pre-trial delay to the post-conviction delay." (page 9).

**Pratt** makes it "clear that it is the inhumanity of keeping a man facing the agony of execution over a long period of time which renders his subsequent execution unlawful" (page 6 of **Fisher** (above).

In the instant case, the appellant **Taylor** has been given full opportunity to complete all appellate procedures and to file petitions to the relevant international bodies. He has taken advantage of the opportunity. The delay between September 1998 and January 1999 of which he complains cannot be regarded as a long one by any stretch of the imagination. That cannot be regarded as a serious matter for argument before the Constitutional Court. In my view, he fails so far as the question of delay is concerned.

**PRISON CONDITIONS**

The appellant **Taylor** in his affidavit for use in the constitutional court has said that he was assaulted when first arrested; that when he was re-arrested, he remained handcuffed for three days. He was beaten while in the lock-up (he doesn't say by whom) and was taken to the hospital for treatment after he had appeared in Court. While awaiting trial he shared a cell with twenty to twenty-five other men. There was no light and his exercise each day was limited to a period of forty minutes. Although he was supplied with soap and toilet tissue, neither toothbrush nor toothpaste was provided for his use. He witnessed violence being used by warders on other inmates. He was given food and drink in plastic bags; the food consisted of "very small" rations that were "poorly cooked" and his "water vessel" was too small.

It would be ideal for condemned men to be provided with well-lit cells, ample servings of nutritious food, and comfortable sleeping quarters. However, as recognised in **Darrin Thomas and Haniff Hilaire v Cipriani Baptiste and others (Privy Council Appeal No. 60. of 1998 delivered on 17th March, 1999):**

> "prison conditions in third world countries often fall lamentably short of the minimum which would be acceptable in more affluent countries" (page 17). Further, "It would not serve the cause of human rights to set such demanding standards that breaches were commonplace. Whether or not the conditions in which the appellants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions both in and outside prison... 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."

Section 17(1) of the Constitution provides thus:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

The circumstances narrated by the appellant **Taylor** clearly do not amount to torture which the Concise Oxford Dictionary defines as "the infliction of severe bodily pain especially as a punishment or a means of persuasion." Indeed, torture has not been alleged. In any event, outside of the ordinary prison conditions, there is nothing to suggest that the appellant **Taylor** has been subjected to "punishment or other treatment."

I hold therefore that the prison conditions as alleged do not present any matter for argument to secure a commutation of the sentence of death.

**MERCY**

The final major thrust of the appellant **Taylor** is the suggestion that he is entitled to be consulted in respect of the prerogative of mercy, and that he should be given an opportunity to be represented in that respect.

Section 90 of the Constitution reads thus:

> "(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."

Section 91(1) requires the Governor-General, in a capital case, to cause a written report of the case from the trial judge to be forwarded to the Privy Council so that that body may advise him in accordance with the exercise of his powers and responsibilities as set out in section 90.

As quoted above, the Constitution provides for the exercise of the prerogative of mercy by the Governor-General "in Her majesty's name and on Her Majesty's behalf". **Sir William Holdsworth's "A History of English Law"** reminds us of the development of the Sovereign's power to exercise mercy "owing to the defects in the criminal law" (See **Volume X page 415).** In **DeFreitas v Benny (1975) 27 WIR 318 at 322j - 323f,** Lord Diplock explained the nature of the royal prerogative of mercy in Trinidad and Tobago as the Constitution then provided. He put it this way:

> "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 at 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 quasi-judicial

> function... While capital punishment was still a 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 sources 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 representatives."

The position is, and has been, the same in Jamaica for generations. Furthermore, the constitutional provisions then existing in Trinidad and Tobago were not dissimilar to those in Jamaica except that Jamaica does not have the participation of a Minister of Government in the process. Whereas in Trinidad and Tobago the Governor-General was advised by a Minister designated by him, in Jamaica the Privy Council is the body that advises the Governor-General. It should be noted that this Privy Council consists of six members who are all appointed by the Governor-General after consultation with the Prime Minister.

Lord Diplock has in my view put the suggestion of the appellant on this matter of the prerogative of mercy beyond argument. The appellant **Taylor** therefore fails in this respect.

**LEGAL REPRESENTATION FOR CONSTITUTIONAL MOTIONS**

Our attention was not directed to any section of the Constitution that requires the provision of legal aid for the filing of a constitutional motion. In addition, there are no particulars of the time or times when it was desired to file such motions; nor of the unsuccessful efforts made to secure representation. No arguments were advanced in this respect. This is perhaps due to the lack of conviction the appellants may have on this issue.

**ANTHONY MCLEOD**

The main submissions advanced on behalf of this appellant were in respect of the exercise of the prerogative of mercy. Lord Diplock's words in **DeFreitas v. Benny** have made the issue un-arguable. His complaint about prison conditions is viewed in the same light as that of the appellant **Taylor.**

This appellant was convicted and sentenced on 22nd September, 1995. He has exhausted his domestic remedies and has had responses to his petitions to the international bodies. The Jamaican Privy Council has also acted with dispatch. As a result his case is well within the guidelines laid down in **Pratt.** He cannot seriously complain about delay.

There is nothing that is arguable in his favour. His appeal fails.

**CONCLUSION**

As Mr. Campbell stated in his submissions before us, there ought to come a time when judicial examination ends. I agree with this sentiment where the circumstances indicate that there is no legitimate room for argument. That is the position with the appellants Taylor and McLeod. It is in the interest of the general population and the rule of law that lawfully imposed sentences that have been confirmed at the highest appellate level should be carried out without delay. Frivolous applications should be discouraged.

In respect of the appellant Brown, the appeal is allowed and a stay of execution granted pending the determination of the petition to the UNHRC. In relation to the appellants, Taylor and McLeod, their appeals are dismissed.

Since writing this judgment, I have read the draft judgment of Downer, J.A. I agree with the Order that he has set out therein.

**DOWNER, J.A.**

By a majority stay of execution pending hearing of constitutional action in the Supreme Court refused.

**CHRISTOPHER BROWN**

1. Temporary stay of execution pending the determination of his case before the United Nations Human Rights Committee and the Governor-General in Privy Council.

2. And a further temporary stay of fourteen (14) days after (1) above provided than an application is made to this Court for conditional leave to go to the Privy Council or Petition by special leave to the Privy Council. Liberty to apply.

**PATRICK TAYLOR AND ANTHONY McLEOD**

Temporary stay of execution granted provided that an Application is made to this Court for conditional leave to go to the Privy Council within fourteen (14) days hereof, or an application by Petition for special leave to the Privy Council. Liberty to apply.

No order as to costs.