JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 117/99

COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE CLARKE, J.A. (AG.)

LAMBERT WATSON v. R

Dr. Lloyd Barnett and Nancy Anderson for Appellant

Kathy Pike and Kenneth Ferguson for the Crown

July 8, 9 10 & 11 and December 16, 2002

FORTE, P:

The appellant was convicted on two counts of murder in the Hanover Circuit Court on the 19th of July 1999, and as is provided for by Section 3(1A) of the Offences against the Person Act was sentenced to death. His application for leave to appeal to this Court against his conviction and sentence was refused by this Court and the convictions and sentences affirmed on the 5th March 2001. Thereafter, he petitioned Her Majesty in Council, seeking leave to appeal his conviction. This was dismissed on 31st October 2001, but his Supplementary Petition against the mandatory sentence of death imposed on him was heard by the Privy Council, treated as

the hearing of the appeal and the issue raised therein remitted to this Court for consideration.

Their Lordships in their opinion to Her Majesty stated inter alia, and in so far as is relevant to this appeal, the following:

> "(2) that in respect of the Supplementary Petition against the mandatory sentence of death imposed upon the Petitioner (A) special leave ought to be granted to the Petitioner to enter and prosecute his Appeal as a poor person against such sentence (B) the hearing of the Supplementary Petition be treated as the hearing of the Appeal and (C) the matter raised in the Supplementary Petition ought to be remitted to the Court of Appeal of Jamaica to consider the matter."

The Supplementary Petition referred to in the Order, was kindly provided to us by Counsel for the appellant. It reads:

> "Supplementary Petition
>
> 2.1 This Petition is supplementary to the Petition for special leave to Appeal filed on behalf of the Petitioner on 26th July 2001
>
> ***2.2*** The Petitioner respectfully adopts the submissions in the Supplementary Petition of ***Michael Pringle v. The Queen*** (a Petition from Jamaica) relating to the Constitutional validity of the mandatory sentence of death, a copy of which is attached hereto marked 'A'."

It is necessary, therefore to look at the Supplementary Petition in Michael Pringle, in order to determine the specific issues which have been referred to us for consideration. These appear under a paragraph headed "Core Submissions" in the Petition of ***Michael Pringle*** (also supplied by counsel for the appellant). The paragraph sets out the issues as follows:

"Core submissions

3. Your petitioner makes 3 core submissions in relation to this applicant.

(i) The mandatory death penalty for capital murder provided for by sections 2 and 3 Offences against the Person Act 1864, (as amended by the Offences against the Person (Amendment) Act 1992 ('the 1992 Act') (the '1864 Act'), is unconstitutional in that it offends against the constitutional principle of the separation of powers and violates your Petitioner's right to life and his right not to be subjected to inhuman and degrading treatment, protected, respectively, by sections 14(1) and 17(2) of the Jamaican Constitution (section 3 & Schedule 2 of the Jamaica (Constitution) Order in Council 1962, SI 1962/1550) (the 'Constitution').

(ii) The savings clause in section 26(8) of the Constitution does not prevent a constitutional challenge to sections 2 & 3 of the 1864 Act because those provisions, as amended, were not in force immediately before the day upon which the Constitution came into force (the 'appointed day'), and do not fall within the category of amendments provided for by section 26(9) that are deemed to fall within section 26(8).

(iii) The savings clause in section 17(2) of the Constitution does not prevent a constitutional challenge that the mandatory nature of the death penalty constitutes inhuman and degrading treatment; it only prevents a challenge that the death penalty itself constitutes such treatment."

In summary, the Petition raised the following contentions:

(i) The mandatory death penalty infringes the doctrine of the Separation of Powers.

(ii) It also infringes the provisions of section 17(1) which gives the petitioner, as indeed to all citizens, the right not to be subjected to inhuman or degrading punishment or other treatment.

(iii) The mandatory death penalty is not saved from unconstitutionality by either section 26(8) or section 17(2) of the Constitution.

Dr. Barnett who represented the appellant before us maintained these complaints.

Firstly, I will deal with (ii) and (iii) above, as there has been in recent times a trilogy of cases coming from Her Majesty's Privy Council which dealt in depth with those issues. However, in none of those cases, was a provision such as section 26(8) dealt with and so it will be necessary to determine what effect, if any, that section would have on the conclusion of their Lordships Board i.e. whether the provision of section 26(8) in the Jamaican Constitution distinguishes the consideration in this appeal from those in the trilogy of cases.

The cases referred are ***Reyes v. The Queen*** (2002) 2 W.L.R 1034, ***R. v. Hughes*** (2002) 2 W.L.R 1058, and ***Fox v. The Queen*** (2002) 2 W.L.R 1077.

Reyes v. The Queen is a case emanating from Belize. The facts and conclusions of the Board are conveniently set out in the headnote to the case which reads as follows:

> "The defendant was convicted on two counts of murder by shooting, which by section 102(3)(b) of the Criminal Code of Belize Criminal Code, s 102, as amended: see post, para 4 was classified as a class A murder. Pursuant to section 102(1), which prescribed a mandatory death penalty for class A

murder, he was sentenced to death on each count. By the proviso to section 102(1) in the case of a murder classified as class B the court might, where there were special extenuating circumstances, refrain from imposing a death sentence and instead pass a sentence of life imprisonment. The defendant's appeal against conviction and sentence was dismissed by the Court of Appeal of Belize. The Judicial Committee of the Privy Council dismissed his petition for special leave to appeal against conviction but granted leave to appeal against sentence so that he could challenge the constitutionality of the mandatory death penalty for class A murder on the ground, among others, that it infringed his right not to be subjected to inhuman or degrading punishment or other treatment, contrary to section 7 of the Constitution of Belize. Constitution of Belize s2: see post, para 6. By section 2 any law inconsistent with the Constitution was void to the extent of the inconsistency.

It was held, allowing the appeal, that since the character of the offence of murder by shooting could vary widely the imposition of the death penalty for some such offences would be plainly excessive and disproportionate, and so to deny a person convicted of murder by shooting the opportunity to seek to persuade the court, before sentence was passed, that in all the circumstances to condemn him to death would be disproportionate and inappropriate would be to treat him as no human being should be treated and thus to deny his basic humanity; that section 102 of the Criminal Code, in requiring a mandatory sentence of death to be passed on the defendant on conviction of murder by shooting and thereby precluding any judicial consideration of the humanity of condemning him to death, therefore subjected him to inhuman or degrading punishment or other treatment incompatible with the right afforded to him by section 7 of the Constitution; that that constitutional defect in the sentencing process could not be remedied by the subsequent opportunity to seek mercy from the executive pursuant to sections 52 and 53 of the Constitution; that section 102(3)(b) of the Code, to the extent that it indiscriminately referred to any murder by shooting, was thus void by virtue of section 2 of the Constitution, and, in accordance with section

> 134(1) of the constitution, any murder by shooting was to be treated as a class B murder as defined in section 102(3) of the Code; and that, accordingly, the death sentences would be quashed and the case remitted to a judge of the Supreme Court of Belize to pass appropriate sentence on the defendant after hearing or receiving any evidence and submissions on his behalf."

It is worthy of note that the Board after examining the law as it is in many jurisdictions of the world, nevertheless restricted its conclusion to the particular facts in the case, that is to say, the constitutionality of the mandatory death penalty for murder by shooting. Lord Bingham of Cornhill, who delivered the opinion of the Board said at page 1055:

> "43. For purposes of this appeal the Board need not consider the constitutionallty of any mandatory penalty other than death, nor the constitutionality of a mandatory death penalty imposed for any murder other than by shooting. ..."

Nevertheless, it is necessary to point out two important variations between the Constitution of Belize and that of Jamaica:

1. Section 21 of the Constitution of Belize states:

> "Nothing contained in any law in force immediately before Independence Day nor anything done under the authority of any such law shall, for a period of five years after Independence Day, be held to be inconsistent with or done in contravention of any of the provisions of this Part."

Their Lordships commented on that section on page 1038 as follows:

> "Section 21 was contained in Part 11 of the Constitution, entitled 'Protection of Fundamental Rights and Freedoms'. Thus, unusually if not uniquely, the continuing savings clauses found in many if not all Caribbean Constitutions, whether in the wider form found in some Constitutions or the narrower form found in others, have no close counterpart in the Constitution of Belize."

Indeed, "the continuing savings clause" or general savings clause does exist in the Jamaican Constitution, which did not limit the life of those provisions to a specific period. Thus section 26(8) will be dealt with later, but for clarity and to demonstrate its difference to that of the Constitution of Belize, I set it down hereunder:

> "Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

These provisions are still of effect in Jamaica, whereas at the time of the decision in the ***Reyes*** case, those similar provisions in the Belize Constitution, were no longer of any effect. Consequently, they played no part in the decision arrived at in that case. It will be necessary in this appeal to determine what effect if any, those provisions have, in respect to the constitutionality of the mandatory death penalty.

2. Section 7 of the Constitution of Belize provides:

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

Section 7 though identical with the provisions of section 17(1) of the Jamaican Constitution is devoid of the savings clause which exists in section 17(2) which reads:

> "**17**-(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

The Board therefore in the ***Reyes*** case had no necessity to consider provisions similar to sections 17(2) and 26(8) of the Jamaican Constitution and considered the issues, directly on whether the mandatory sentence of death contravened the equivalent provisions to section 17(1). Lord Bingham in approaching this task gave guidelines as to the correct principles of interpretation to be so employed. He did so in the following words at page 1045:

> "As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see ***Trop v. Dulles*** 356 US 86, 101."

This passage sets out with ease of understanding the correct principles to be applied in the interpretation of constitutional provisions protecting human rights, and consequently is no less applicable to the interpretation of those protective sections in the Jamaican Constitution.

As we have seen, as a result of the savings clauses that exist in the Jamaican Constitution, there must of necessity be a determination as to whether they are of such effect, that the reasoning and conclusions in the ***Reyes*** case, as to the constitutionality of the mandatory death penalty would

have any place in determining its validity in respect to the Jamaican Constitution.

The answer in respect to the provisions of section 17(2) is given in one of the other cases from the trilogy i.e. ***Regina v. Hughes*** (2002) 2 W.L.R 1058. This case turned on the interpretation of paragraph 10 of Schedule 2 (paragraph 10) to the St. Lucia Order which is almost in exact terms as section 17(2) of the Jamaican Constitution. Paragraph 10 reads as follows:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 of the Constitution to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Saint Lucia immediately before 1 March 1967 (being the date on which Saint Lucia became an associated State.")

Section 5 of the St. Lucian Constitution states, as does section 17(1) of the Jamaican Constitution:

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

Therefore, the decision arrived at by Her Majesty's Board would equally apply to that issue raised in this appeal. Their Lordships' opinion concluded that the mandatory nature of the death penalty which section 178 of the Criminal Code of Saint Lucia required to be imposed for all murders, made it inhuman or degrading punishment or other treatment and to that extent it was inconsistent with section 5 of the Constitution (supra) and void pursuant to section 120 (the equivalent of section 2 of Jamaican Constitution) of that Constitution. The basis for that conclusion lay in the interpretation of paragraph 10, in that the Board concluded that paragraph

10 while saving the death penalty as a "description of punishment" which existed before independence, did not extend to the mandatory nature of that penalty.

In the arguments presented to Her Majesty's Board by Sir Godfray Lequesne on behalf of the Crown it was advanced by him that in applying paragraph 10, it is necessary not only to consider whether section 178 authorises the infliction of the death penalty but also to what extent it does. He contended that section 178 authorises the mandatory infliction of the death sentence. He relied for this proposition on a passage from the decision of the Board in ***Pratt v. The Attorney-General for Jamaica*** (1983) 1 A.C. 719. Their Lordships however found the passage unhelpful in respect to the issues before them. The following is the passage, along with the preceding paragraph dealing with the minority decision in the case of ***Riley v. Attorney General of Jamaica*** [1983] 1 A.C. 719 which their Lordships opined would explain their conclusion:

> "The minority, who would have allowed the appeal, adopted a narrower construction of section 17(2) which limited the scope of the subsection to authorizing the passing of a judicial sentence of a description of punishment lawful in Jamaica before independence and they held it was not concerned with the act of the executive in carrying out the punishment. Their Lordships are satisfied that the construction of section 17(2) adopted by the minority is to be preferred. The purpose of section 17(2) is to preserve all descriptions of punishment lawful immediately before independence and to prevent them from being attacked under s 17(1) as inhuman or degrading forms of punishment or treatment. Thus, as hanging was the description of punishment for murder provided by Jamaican law immediately before independence, the death sentence for murder cannot be held to be an

> inhuman description of punishment for murder. Section 17 (2) does not address the question of delay and is not dealing with the problem that arises from delay in carrying out the sentence."

Their Lordships concluded that the Board in the ***Pratt*** case was simply drawing a distinction. Here is what they said:

> "Sir Godfray cited the second paragraph. It has to be remembered, however, that in ***Pratt's*** case the Board was not concerned in any way with the fact that the sentence of death was mandatory. As can be seen from the context, in the second paragraph the Board was simply adopting the distinction between the death sentence itself as a description of punishment for murder, on the one hand, and the delay in carrying out that sentence, on the other. For the purpose of that argument the mandatory or discretionary nature of the death sentence would have been entirely irrelevant. Whether the death sentence had been imposed by virtue of a provision making it mandatory or by virtue of a provision conferring a discretion on the court the Board would still have drawn a distinction between the description of punishment and the delay in carrying out the sentence. In this passage the Board was simply drawing the distinction, not making a point about the nature of the death sentence. For this reason their Lordships are satisfied that the passage cannot properly be regarded as authority for the proposition that the mandatory nature of the death sentence is immune from challenge by virtue of paragraph 10."

I make reference to this argument of Sir Godfray's, since it related directly to the provisions of section 17(2) of the Jamaican Constitution and caused an opinion from their Lordships, as to its extent as a savings clause in respect of section 17(1) i.e. the inhuman and degrading punishment and treatment provisions.

On what basis then, did their Lordships arrive at their Conclusion?

Their Lordships were of the opinion that paragraph 10 operates as a savings clause "only to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in St. Lucia etc." In so far as section 178 of the Criminal Code required that a death sentence be passed, it could not be said that it merely authorises the infliction of the death sentence, and consequently the mandatory nature of the sentence cannot be saved by paragraph 10. Here is how Lord Rodger of Earlsferry reasoned it at paragraph 47 at page 1074:

> "**41.** Their Lordships have already held that section 178 'authorises' the infliction of the death penalty on all murderers. If that were all that the section did, then by reason of paragraph 10 it could not be held to be, to any extent, inconsistent with section 5 of the Constitution. For the measure of the exception in paragraph 10 is simply the extent to which the law 'authorises' the infliction of the specified type of punishment. In fact, however, section 178 goes much further than authorizing: it does not merely authorize, it actually requires the infliction of the death penalty on anyone convicted of murder. The second step in Sir Godfray's argument depends on classifying this requirement that the punishment be inflicted as simply one particular species of authorization. That step is unsound, however. While every law which requires that an act be performed authorizes that act, no law which merely authorizes an act requires that it be performed. Therefore a law like section 178 which requires that an act be performed contains a crucial additional element that goes beyond mere authorization. Indeed at the heart of the appeals in all these cases lies the very fact that there is a world of difference between a law that requires a judge to impose the death penalty in all cases of murder and a law that merely authorises him to do so. More particularly, it is because the law requires, rather than merely authorises, the judge

> to impose the death sentence that there is no room for mitigation and no room for consideration of the individual circumstances of the defendant or of the murder. These are, of course, the very matters upon which Mr. Fitzgerald bases the constitutional challenge by reference to section 5."

Their Lordships therefore concluded that to the extent that section 178 actually requires the infliction of the death penalty in all cases of murder, the exception in paragraph 10 does not apply.

It appears that the Board accepted the submission of Mr. Fitzgerald that "while a law providing for the death sentence per se cannot be regarded as inconsistent with section 5 of the Constitution, it can be regarded as inconsistent with section 5 to the extent that the mandatory nature of the punishment makes it so disproportionate as to amount to inhuman punishment or treatment. It is inhuman to require any person to be sentenced to death without the opportunity of mitigation or considering the appropriateness of that penalty in that case."

The third case in the trilogy of cases, ***Fox v. The Queen*** (2002) 2 W.L.R. 1077, was decided on the same bases as that of the ***Hughes*** case, and consequently nothing further need to be said in regard to it.

How do the decisions in *Reyes* and *Hughes* impact on the Jamaican Law?

As we have seen section 17(1) is in the same terms as section 5 of the St. Lucian Constitution and section 17(2), the same as paragraph 10. It would appear that the conclusions arrived at by their Lordships in the ***Hughes*** case would be equally applicable in construing sections 17(1) and 17(2) of the Jamaica Constitution.

As far back as 1864, murder, a common law offence was punishable with death by virtue of section 2 of the Offences against the Person Law (Chapter 268) which reads:

> "Whosoever shall be convicted of murder shall suffer death as a felon; and

Section 3 (1) states:

> "Upon any conviction for murder the Court shall pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice; and every person so convicted, shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners."

Section 3 of the Offences against the Person Act was amended in 1958, as follows:

> "Subsection (1) of section 3 of the principal Law is hereby amended by inserting at the end the following paragraph –
>
> 'where by virtue of this subsection a person convicted of murder is sentenced to death, the form of the sentence shall be to the effect only that he is to 'suffer death in the manner authorized by law'."

It is unarguable that at least as early as 1864 the death penalty was the only sentence for murder and that in any event immediately before the coming into effect of the Constitution, the judges were required to inflict that sentence on a convicted murderer. Subject to a determination of the effect of the savings provision in section 26(8) of the Constitution, which is a provision not present either in the Belizean or St. Lucian Constitution, it would appear that we ought to abide by the decision in ***Reyes and Hughes***.

Nevertheless, I make a few comments.

The conclusions in the trilogy of cases are dependent on the primary finding that the mandatory death penalty is inhuman and degrading punishment. The rationale is based on the fact that it is inhuman to subject a convicted murderer to the death penalty without first giving him an opportunity to have the sentence mitigated as a result of the particular circumstances of the killing, as also the antecedents of the particular convict. Such a finding, it is concluded in the judgments relates to the finality of the sentence placed against the gravity of the offence. Nevertheless, in the ***Reyes*** case (supra) their Lordships restricted their conclusion to the particular method of the murder in that case i.e. by shooting, and to the mandatory death penalty. In the ***Hughes*** case (supra) the particular murder was committed by the hitting of the deceased with a post and stones. Neither of these would come within the classification of capital murder in Jamaica. This is so, inspite of the enormous rate of murders committed in this country – averaging at eight hundred forty-six (846) citizens per year in the last thirteen (13) years.

Any attempt at arriving at the proper level of proportionality must be done on the background of the level of crime in the society in which the State seeks to carry out the responsibility with which it is charged in section 48(1) of the Constitution i.e. to make laws for the peace, order and good government of Jamaica, of course subject to the provisions of the Constitution. In 1992, Parliament, obviously with the intention of creating a proper balance, between the offence and the sentence per the Offences

against the Person (Amendment) Act, classified murder, committed in certain circumstances, as capital murder and retained the death penalty only in respect of those murders. In addition it ordained that anyone convicted for two or more non-capital murders would nevertheless suffer death. In summary capital murder is now confined to murders committed in furtherance of a felony, contract killings, murder of a judicial officer or a police officer in connection with their duties, and murders committed in circumstances of terrorism. Worthy of note is the fact that the legislation also provides that a person who aids and abets the commission of the offence, but who did not offer any violence to the deceased would not be subject to the death penalty.

In making the classification, Parliament must have weighed in a general way, the proportionality of murders committed in those well-considered and defined areas against the finality of the death penalty.

It is obvious that the social conditions existing in Jamaica are quite different from the social conditions existing in Belize, St. Lucia and St Christopher and Nevis, the countries from which the trilogy of cases emanated. The Parliament of Jamaica, it seems, attempted to craft out the types of murders which, committed in any circumstances, would still require a sentence of death. As I have said, Jamaica is a society that has been plagued by unnecessary, wanton, heinous and extremely violent murders especially in the last 12 years. Citizens have been left in fear, and voluntarily curtail their activities to safeguard their lives and that of their families. It is against that background that the Legislature enacted that

certain categories of murder necessitated the retention of the mandatory punishment of death.

Their Lordships in the case of ***Reyes***, however, took time out to make the following statement at page 1056 of their opinion:

> "Whether it would ever be possible to draft a provision for a mandatory death sentence which was sufficiently discriminating to obviate any inhumanity in its operation is not a question which the Board is called upon to decide."

The Board did however state (page 1050) that it is not aware of any case in which the distinction, when challenged, has been held to be sufficiently tightly drawn to provide the necessary guarantee of proportionality and relation to individual circumstances where the death penalty is mandatory in conviction of a murder in a capital category. Their Lordships cited dicta from cases from different jurisdictions, and named hereunder, each of which expressed the view that even though the mandatory death penalty was restricted to certain categories of murders, nevertheless it would be inhuman to inflict such a sentence without first giving the convicted an opportunity to plead in mitigation, given the particular circumstances of the case, his own character and factors which led him to commit the offence. See ***Woodson v. North Carolina*** (1976) 428 US 280 ***Roberts v. Louisiana*** (1977) 431 US 633 ***Mitha v. State of Punjab*** (1983) 2 SCR 690.

The question that therefore arises in the instant case, is whether the slaying of two persons per se, would be "sufficiently discriminating to obviate inhumanity" in the mandatory sentence of death. If this Court is to adhere

to the principles set down by the Privy Council in the trilogy of cases, then I would have to conclude that the answer to that question is "no" in spite of the pressing social conditions that would seem to make it so. Perhaps the best approach in keeping with the Board's interpretation of section 17(2) of the Constitution is to determine the correctness of the death penalty on the background of the particular circumstances of the case and the antecedent history of the appellant, including the factors which led him to commit these offences.

However, the final determination of the issue cannot be made until section 26(8) of the Constitution is examined as to whether its terms would be sufficient to prevent a declaration that the mandatory death penalty is truly inconsistent with the provisions of the Constitution.

For ease of reference I again set down the provisions of section 26(8) but also with the provisions of section 26(9) which became a material consideration in the submissions of Dr. Barnett for the appellant.

These sub-sections are a part of section 26, which has a marginal note indicating that it deals with the interpretation of Chapter 111 (The Human Rights section). They state as follows:

> "(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.
>
> (9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to

> have ceased to be such a law by reason only of –
>
> (a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council, 1962, or
> (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision."

Before considering the arguments advanced on this issue it may be of significance to look back to the ***Reyes*** case for the purpose of noting that in the absence of the equivalent of section 17(2) and section 26(8) in the Constitution of Belize their Lordships were content to hold (with the agreement of Mr. Fitzgerald for the appellant) that section 4(1) of that Constitution (equivalent of section 14 of the Jamaican Constitution) was sufficient to prevent a challenge to the constitutionality of the death penalty. That section states:

> "A person shall not be deprived of his life intentionally save in execution of the sentence of a Court in respect of a criminal offence under any law of which he has been convicted."

For that reason I would also hold that no matter what the effect of section 26(8) may be, the death penalty by virtue of section 17(2) and section 14 would not infringe the provisions of the Constitution.

Dr. Barnett, was content to argue that the Offences against the Person Act, having been amended in 1992 in respect of the death penalty, it could not be said to have been in force immediately before the day upon which the Constitution came into force (the appointed day). In addition he maintained,

that the amendments of 1992, did not come within the provisions of section 26(9). In any event, the adaptations and modifications to be made to any such provision by virtue of section 4 of the Jamaica (Constitution) Order in Council 1962 [the Order] had to be made within two years of the appointed day. I set out hereunder section 4 sub-sections (1) and (5)(a) of the Order:

> "**4.** (1) – All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them in conformity with the provisions of this Order.
>
> (5)(a) The Governor-General may, by Order made at any time within a period of two years commencing with the appointed day and published in the Gazette, make such adaptations and modifications in any law which continues in force in Jamaica on or after the appointed day, or which having been made before that day, is brought into force on or after that day, as appear to him to be necessary or expedient by reason of anything contained in this Order."

Since no adaptations or modifications can now be made in pursuance of section 5(a) to bring an offending provision into conformity with the Constitution, then in such a case the provisions must be construed with such adaptations or modifications.

I return however to Dr. Barnett's main point. The Offences against the Person Act was amended in 1992, in order to create different categories of

murder – capital and non-capital murder the former maintaining mandatory death penalty as punishment and the latter punishable with life imprisonment.

Section 3 of the 1864 Act was amended by section 3 of the Offences against the Person (Amendment) Act 1992 which states:

> "**3.** Section 3 of the principal Act is amended –
>
> (a) in subsection (1) –
>
> (b) (i) by deleting the words 'Upon every conviction for murder' and substituting therefor the words 'Every person who is convicted of capital murder shall be sentenced to death and upon every such conviction';
>
> (ii) by inserting immediately after the words 'so convicted' the words 'or sentenced pursuant to subsection (1A)';
>
> (iii) by deleting the words 'Where by virtue of this subsection a person convicted of murder' and substituting therefore the words 'Where by virtue of this section a person'."

Section 3(1) in the amended Act now reads:

> "Every person who is convicted of capital murder shall be sentenced to death and upon every such conviction the court shall pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice; and every person so convicted or sentenced pursuant to subsection (1A) shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners.
>
> Where by virtue of this section, a person is sentenced to death, the form of the sentence shall be to the effect only that he is to 'suffer death in the manner authorized by law'."

Section 3(1A) provides for the death penalty where a person convicted of non-capital murder if before that conviction he has –

> "(a) whether before or after the 14th October 1992, been convicted in Jamaica of another murder done on a different occasion; or
>
> (b) been convicted of another murder done on the same occasion."

In short a person convicted for two non-capital murders in circumstances of (a) or (b) is subject to the mandatory death penalty – as is the case before us.

The Amendment Act repealed section 2 of the principal Act, (the 1864 Act), which read before amendment:

> "Whosoever shall be convicted of murder shall suffer death as a felon"

In its place, is a new section 2, which lists the types and circumstances of murders which are categorized as capital murder, and thereafter states that murder not falling within that subsection is non-capital murder. It should be noted that in the principal Act through section 3, the court was given the mandate to pronounce the sentence of death. So, although section 2, which provided that a person convicted of murder shall suffer death has been repealed, section 3 by virtue of which the Court pronounces sentence of death, has not been repealed and was amended only so as to restrict that punishment to murders categorized in the new section 2 as capital murder.

Since before the appointed day, all murders were punishable by sentence of death, the amendment does not create any new sentence in

that regard, but rather provides that the death penalty would continue for murders falling within the new category of capital murder, and that all other murders would be punishable by life imprisonment.

The provision which enacts that the death penalty is mandatory for murder, was not abrogated because of the Amendment, and consequently it cannot be successfully contended, that the infliction of the death sentence was not provided for in our laws which were in existence before the appointed day.

In so far as section 26(9) is concerned Dr. Barnett's submissions that section 26(9) does not embody the amendment made to the Act in 1992 is obviously correct. However, I am of the view that the amendment did no violence to the principal Act in that the sentence of death which was provided for therein, remains intact. All that is necessary therefore is to determine whether section 26(8) would consequently prevent the court from concluding that the mandatory death penalty contravenes the provisions of section 17(1) as contended by the appellant.

Section 26(8) is a provision dealing specifically with the provisions of Chapter 111 of the Constitution which deals with the Fundamental Rights and Freedoms.

Section 13 (Chapter 111) recognizes that in Jamaica every person is entitled to the fundamental rights and freedoms of the individual and states the limitations to those rights, the relevant limitation being that those rights and freedoms are subject to the rights and freedoms of others and for the

public interest. It specifically enacts also that those rights which are set out in sections 14 to 24 are 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."

In addition, section 26(8) protects "anything contained in any law" in force immediately before the appointed day (Independence Day) from being held to be inconsistent within any of the provisions in Chapter 111 and anything done under any such law from being held to be in contravention of the said provisions. The purpose of this section is to ensure that no law existing before Independence could be found by any Court to be inconsistent with the rights and freedoms expressly stated in the provisions of Chapter 111. Lord Devlin in delivering the opinion of the Board in the case of ***DPP vs. Nasralla*** [1967] 10 W.I.R. 299, at 303, speaking to the purpose of section 26(8) said:

> Whereas the general rule, as is to be expected in a Constitution and as is here embodied in s. 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Cap. 111. This Chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution, the individual enjoyed.

Accordingly, section 26(8) in Chapter 111 provides as follows:

> **26.**(8) – Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

As section 26(8) has no limitations as section 17(2) has been found to have in respect of a law which "authorizes the infliction of any description of punishment" the conclusions reached in that regard cannot be applicable to its provisions.

The Offences against the Person Act provided for the mandatory death penalty and any infliction of that punishment is done by virtue of the provisions of that Act. I have concluded that the 1992 Amendment Act has no effect on the requirement of section 26(8) that the law in which the provisions are contained or under the authority of which the penalty is inflicted, must be a Law in force immediately before the appointed day. Consequently, it follows that the sentence of mandatory death penalty, being provided for and inflicted under the authority of the Offences against the Person Act, would fall within the protection of section 26(8) and cannot be held to be inconsistent with or in contravention of any of the provisions under Chapter 111 and in particular section 17(1).

This brings me to the alternative argument advanced by Dr. Barnett in this regard. He submitted that in the scheme of Chapter 111 of the Constitution, the constitution makers have provided a special savings clause in respect of punishments or treatments which fall foul of the prohibition

against inhuman or degrading punishment or treatment. Consequently, the subsequent general savings clause (section 26(8)) is clearly not intended to be applicable to section 17 of the Constitution for which a special savings provision has been made. He relies for this submission on the principle, generalia specialibus non derogant.

In my view there is no such restriction implicit in the provisions of section 26(8) which in clear words demonstrates its application to all the provisions of Chapter 111. It should be noted that most, if not all, of the human rights provisions in Chapter 111 have their own special qualifications, which are referred to in section 13. If therefore Dr. Barnett was correct, there would hardly be any purpose in section 26(8).

The answer of course also exists in the dicta of Lord Devlin in the ***Nasralla*** case, (supra) which correctly in my view, indicate that the purpose of section 26(8) is to avoid the necessity of scrutinizing all the laws that existed before Independence in order to determine their consistency with the provisions of Chapter 111. I am unable for these reasons to agree with the submissions of Dr. Barnett on this point, and would hold that section 26(8) is applicable to any and all the provisions of Chapter 111.

Separation of Powers

That the principle of Separation of Powers is applicable to the Constitution of Jamaica is not in doubt. That was specifically stated by Her Majesty's Privy Council in ***Hinds vs. The Queen*** [1977] A.C. 195 (225-227,231), and is very evident in the separate provisions in the Constitution speaking to Parliament, the Executive and the Judicature. [See also ***R. v.***

Noel Samuda SCCA 134/96 dated 18th December 1998 (unreported)]. As was expected, that fact was agreed to by both parties in this appeal and consequently there is no need to pursue that further. The issue however is the contention of the appellant that the legislative provision for the mandatory death sentence is in contravention of the principle. Dr. Barnett contends that in so legislating, Parliament stepped across the bounds and exercised a judicial function – that is to say it ordained the penalty for capital murder thereby depriving the judge of its discretion, a "function" that under the principle of separation of powers must abide with the judiciary.

A good starting point in the resolution of this issue is a reference to Section 48(1) of the Constitution which gives Parliament, subject to the provisions of the Constitution, the power to make laws for peace, order and good government of Jamaica. The Parliament therefore is possessed with authority, given the state of crime and its possible effect upon the country and its citizens to legislate in order to protect the country and its citizens. It is the Legislature, therefore that has the power to declare in various Laws, the criminality of particular conduct and to fix the penalties which are suited to that criminal offence as long as to do so would not create a law which is inconsistent with the provisions of the Constitution. The responsibility of the judiciary is to determine the guilt or otherwise, either by a Judge sitting alone or with a jury, and if there is a verdict of guilty to pass sentence upon the offender, within the bounds of the sentence set by the Legislature in the particular Law. In ***Hinds v. The Queen*** [1977] A.C. 195 at page 225 Lord Diplock uttered the following words which are relevant to this issue:

> "In the field of punishment for criminal offences, the application for the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution in the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restraints on the personal liberty of the offender is distributed under these three heads of power. The power conferred upon the Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law: (See Constitution, Chapter 111, section 20(1). ...
> In the exercise of its legislative powers, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence – as, for example, capital punishments for the crime of the murder. Or it may prescribe a range of punishment up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.
> Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity, of the offenders conduct in the particular circumstances of the case." (Emphasis mine)

Lord Diplock was there reiterating what has always been within the powers of Parliament, by virtue of section 48(1) of the Constitution.

This is also reflected in the words that came from the Supreme Court of Ireland in ***Deaton v. Attorney-General and the Revenue Commissioners*** [1963] 1 IR 170 at 182-183:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case ... The legislature does not prescribe the penalty to be imposed in an individual citizen's case, it states the general rule, and the application of that rule is for the courts ... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive ...". [Emphasis mine]

The above dicta drew the distinction between the prescription of a fixed penalty as a general rule which is characteristic of legislation and the selection of a penalty for a particular individual in a particular case. It is cited to support the view I have taken that fixed penalties are but a part of a general rule, which the legislature have always had the power to enact.

In this connection, I refer also to the dicta of Lord Morris in ***Runyowa v. Reginam*** [1966] 1 All E.R. 633, in delivering the opinion of the Board. It should be noted that this case though cited in the arguments in the ***Reyes*** case earlier referred to, was considered to be of limited assistance to the Board in their determination of the issue before them because the decision "was made at a time when international jurisprudence on human rights was rudimentary and the Board found little assistance in such authority as there was." I nevertheless cite the following passage from the opinion of Lord Morris which in my view is still relevant to the issue now under discussion because of the inclusion of a similar provision to section 26(8) in the Constitution of Southern Rhodesia.

"A legislature may have to consider questions of policy in regard to punishment for crime. For a particular offence a legislature may merely decree the maximum punishment and may invest the courts with a complete discretion as to what sentence to impose – subject only to the fixed maximum. There may be cases however where a legislature deems it necessary to decree that for a particular offence a fixed sentence is to follow. As an example a legislature might decide that on a conviction for murder, a sentence of death is to be imposed. A legislature might decide that on a conviction of some other offence some other fixed sentence is to follow. A legislature must assess the situations which have arisen or which may arise, and must form a judgment as to what laws are necessary and desirable for the purposes of maintaining peace, order and good government. It can hardly be for the courts, unless clearly so empowered or directed, to rule as to the necessity or propriety of particular legislation. Nor can it be for the courts, without possessing the evidence upon which a decision of the legislature has been based to overrule and nullify the decision. As Quenet A.C.J. said (in Gundu's Case) if once, laws are validly enacted it is not for the courts to adjudicate on their wisdom, their appropriateness or the necessity for their existence. The provision contained in s. 60 of the Constitution [similar provisions to section 17(1) and (2) of the Jamaican Constitution] enables the court to adjudicate whether some form or type or description of punishment, newly devised after the appointed day or not previously recognized, is inhuman or degrading, but it does not enable the court to declare an enactment imposing a punishment to be ultra vires on the ground that the court considers that the punishment laid down by the enactment is inappropriate or excessive for the particular offence. Harsh though a law may be which compels the passing of a mandatory death sentence (and may so compel even where aiding or abetting or assisting is by acts which, though proximate to an offence, are relatively trivial) it can be remembered that there are provisions (e.g. s 364 of the Criminal Procedure and Evidence Act in Southern Rhodesia) which ensure that further consideration is given to a case." [Emphasis mine]

It should be noted that their Lordships before expressing the above dicta considered section 70(1)(b) of the Constitution of Southern Rhodesia which they described as relating to a special saving of previously existing laws. Section 70(1)(b) is in similar terms to section 26(8) of the Jamaican Constitution. This might have been another basis for the Privy Council considering the case of little assistance as the case before their Lordships was dealing with a Constitution which was devoid of any section similar to section 26(8).

This principle was also recognized in ***Palling v. Corfield*** [1970] 123 CLR 52, a case from the High Court of Australia by Barwich C.J. when in his judgment he stated at page 58:

> "It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion it may lay an unqualified duty on the court to impose that penalty. The exercise of judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invalid: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute."

After speaking to the desirability of the Court having discretion in sentencing, he concludes:

> "If Parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect, assuming its validity in other respects. It is not, in my opinion, a breach of the Constitution

> not to confide any discretion to the court as to the penalty to be imposed."

The above dicta recognizes the true role of the Legislature in fixing policy in regard to the punishment of crime. It recognizes also the constitutional right of Parliament, to enact for fixed penalties in order to accomplish the dictates of its policy.

The Constitutional powers given to Parliament to make laws for the peace, order and good government of Jamaica, per se defeats any argument that the provision of a fixed penalty would infringe the Constitutional principle of the Separation of Powers. In order to void any such legislation, it would have to be shown that the legislation is in contravention of some other provision of the Constitution such as a human rights provision [see ***Reyes, Hughes & Fox*** (supra)] or e.g. some provision relating to the creation of a new body not endowed with judicial powers consistent with Chapter V11 of the Constitution and the Statutes, and giving to it judicial powers [see ***Hinds*** case (supra)].

Dr. Barnett in support of his contention relied to some extent on the case of ***Browne v. The Queen*** [1999] 3 W.L.R. 1158, which concerned the question of whether a sentence which was for the offender "to be detained until the pleasure of the Governor General be known" and which their Lordships in the Privy Council determined required a decision by the Executive as to the determination of the length of sentence. In particular Dr. Barnett relied on the following dicta of Lord Hobhouse at page 1163.

> "In their Lordships' judgment the answer to this part of the case is to identify the element of

> unconstitutionality in the relevant statutory provision and then to consider what change is necessary to give effect to the requirements of the Constitution and the appellant's constitutional rights. So far as the first part of this exercise is concerned, the relevant element is apparent from what has already been said. It is the fact that the decision on the length of sentence is entrusted to the executive not to the judiciary. It follows from this that what is required to make the provision comply with the Constitution is that the decision should be made by the court. If this is done the only objectionable part of the sentencing process is removed."

In that case it was decided that the sentence prescribed by the relevant Act (section 3(1) of the Offences against the Person Act) was a deprivation of liberty otherwise than in execution of an order or sentence of the court and was contrary to the Constitution. Significantly, the Constitution of St. Christopher and Nevis had no savings clause equivalent to section 26(8) of the Jamaican Constitution, a fact which was pointed out by Lord Hobhouse of Woodborough in the following words:

> "The validity of the provision is not saved by any provision of the Constitution which preserves the validity of previous laws. The Constitution, unlike that of other Caribbean countries, does not include a general preservation of the validity of all pre-existing law."

It was on that basis that their Lordship came to their finding and consequently construed the relevant section of the law with such "modification, adaptation, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution." In that regard the sentence was thereby varied to read "detention at the court's pleasure."

Dr. Barnett, also relied on dicta of Downer, J.A. in ***R. v. Mollison*** SCCA 61/97 delivered 29th May 2000 (unreported) a case in which it was held that section 29(1) of the Juveniles Act infringed the Separation of Powers doctrine. Here is what Downer, J.A. said:

> "It must be reiterated that Sec. 29(1) of the Act as amended is a law in force before the appointed day so as to the extent that it infringes section 15 of Chapter 111 of the Constitution which deals with the deprivation of liberty it could not be challenged because of the saving clause in section 26(8) of the Constitution. To the extent however, that it permits the executive to determine the duration of a sentence it conflicts with the judicial powers which are entrenched in Chapter V11 of the Constitution. This is an issue concerning 'the structure of government.' Section 4 of the Order in Council address such issues for existing laws."

Chapter VII speaks to the establishment of the Supreme Court and the Court of Appeal, the appointment, tenure of office, and remuneration of Judges of the Supreme Court and the Court of Appeal. Section 97 (1) of Chapter VII provides that there shall be a Supreme Court for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other Law. Section 97(4) provides that the Supreme Court shall be a Supreme Court of record, and "save as otherwise provided by Parliament shall have all the powers of such a Court. The powers of the Court are to be found in the Judicature (Supreme Court) Act and of course also in its inherent jurisdiction.

Downer, J.A. however relied inter alia on the following passage from ***Hinds v. The Queen*** [1976] 1 All E.R. 353 in which Lord Diplock deals with this point at page 360:

> "To the extent to which the constitution itself is silent to the distribution of the plentitude of judicial powers between various courts it is implicit that it shall continue to be distributed between and exercised by the courts that were already in existence when the new constitution came into force; but the legislature in the exercise of its power to make laws for the 'peace, order or good government' of the state, may provide for the establishment of new courts and for transfer to them of the whole or part of the jurisdiction previously exercisable by an existing court. What, however is implicit in the very structure of a constitution in the Westminster model is that judicial power, however it be distributed from time to time between various courts is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the constitution."

The conclusion must be then, that Parliament cannot without infringing the doctrine transmit to the Executive or take upon itself any of the functions of the Judiciary which the Constitution impliedly recognises per Chapter V11 and which powers are clearly prescribed by Statute and by its inherent jurisdiction. It should be noted that Downer, J.A. in the ***Mollison*** case (supra) was treating with a challenge to the constitutionality of section 29(1) of the Juveniles Act which provided for persons eighteen years and under, on conviction for murder to be sentenced to detention at the Governor General's pleasure. The challenge concerned the granting to the Executive, the powers to determine the duration of the sentence. Unlike the ***Browne*** case (supra) which upheld that challenge on the basis of an infringement to the constitutional right to liberty, the Court of Appeal in its majority held the provision to be in breach of the principle of the Separation of Powers and

consequently construed the provision in accordance with section 4(1) of the Order in Council to read a sentence of life imprisonment.

A good example of the operation of the principle in instances which fall outside of the provisions of Chapter 111 would be in circumstances such as existed in the case of ***Liyanage and others v. Reginam*** [1966] 1 All E.R. 650 where the Parliament of Ceylon enacted special legislation to deal solely with the trial of persons who were accused of offences arising out of an abortive coup dètat.

In commenting on the Legislation, Lord Pearce in delivering the opinion of the Board said:

> "Do the Acts of 1962, however, otherwise than in respect of the Minister's nomination, usurp or infringe that power? It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate. The fact that the learned judges declined to convict some of the prisoners is not to the point. That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law, is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that after these had been dealt with by the judges, the law should revert to its normal state.
> Such a lack of generality, however, in criminal legislation need not, of itself, involve the judicial function, and their lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not

> constitute such interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal."

The circumstances of the instant case cannot validly be said to establish any contravention of the doctrine on the basis of the decision in the ***Liyanage*** case (supra) which was decided on its own peculiar facts. Note for instance that in the instant case the impugned legislation was for the generality of the citizens of Jamaica and not directed to specific individuals as in ***Liyanage.***

I have already indicated that the legislation was within the responsibility of Parliament to make laws for the peace, order and good government of Jamaica. This fixes the Legislature with the duty to define what conduct shall constitute a criminal offence, and to enact for the appropriate sentences for those convicted by an independent and impartial court of those offences. In the result I would hold that the Legislation is not in breach of the constitutional doctrine of the Separation of Powers.

For these reasons, I would conclude that the mandatory death penalty was fixed by the Legislature in a Law that was in existence immediately before the "appointed day" and consequently, by virtue of section 26(8) there can be no successful challenge to its constitutionality.

I would therefore dismiss the appeal, in respect of the questions referred, and hold that because of the provisions of section 26(8) of the Constitution, the constitutionality of the mandatory sentence of death cannot be challenged.

PANTON, J.A.

1. The appellant's petition to Her Majesty in Council against his conviction for murder was dismissed on October 31, 2001. However, in respect of his supplementary petition against the mandatory sentence of death imposed upon him (special leave having been granted to him to prosecute the appeal), the hearing of that petition was treated as the hearing of the appeal and the matter raised in the supplementary petition was remitted to this Court for consideration. Of course, as has become customary in these matters, the very first time that the issues in the supplementary petition were being raised was before the Privy Council. It is without doubt the right of an appellant to raise any issue of relevance at any stage of the proceedings. The Courts recognize the right of an individual to use all legal and constitutional means in the protection of his rights. However, it has to be noted that in recent times there never seems to be any finality to appeals in capital murder cases. The appearance is, and I am sure it is only an appearance, that interminable points of law are taken until there is the substitution of a sentence of life imprisonment. The further result has been that, however hard the authorities may try, the expedition that has been dictated by **Pratt and Another v. Attorney-General and Another** (1993) 43 W.I.R. 340 is frustrated and placed in the realm of myth.

2. The supplementary petition of the appellant is a repetition of the submissions contained in the supplementary petition of another Jamaican

convicted murderer - Michael Pringle, the fate of which petition we know not at this point in time.

3. On March 11, 2002, the Privy Council delivered judgments in three non-Jamaican cases which now form the backbone of the arguments that have been presented in this appeal. The cases are:

1. **Reyes v. The Queen (2002) 2 WLR 1034;**
2. **Regina v. Hughes (2002) 2 WLR 1058; and**
3. **Fox v. The Queen (2002) 2 WLR 1077**

Dr. Barnett, on behalf of the appellant, submitted that the mandatory death sentence prescribed by section 3 (1A) of the Offences against the Person Act is, on the basis of the above decisions, unconstitutional. He said that the constitutions of the countries from which these cases originated are similar or identical in wording to the corresponding provisions of our constitution; and so, he argued, our decision in this case ought to coincide with what the Privy Council decided in those cases.

4. The headnote in **Reyes** is as good a starting point as any. It tells us that the defendant was convicted on two counts of murder by shooting, which by section 102 (3)(b) of the Criminal Code of Belize was classified as a class A murder, thereby attracting a sentence of death on each count. By the proviso to section 102(1) in the case of a murder classified as class B, the court might, **where there were special extenuating circumstances,** refrain from imposing a death sentence and instead pass a sentence of life imprisonment. The defendant's appeal against conviction and sentence was dismissed by the

Court of Appeal of Belize. His petition for special leave to appeal against conviction was dismissed by the Judicial Committee of the Privy Council, but he was granted leave to appeal against sentence so that he could challenge the constitutionality of the mandatory death penalty for class A murder on the ground, among others, that it infringed his right not to be subjected to inhuman or degrading punishment or other treatment, contrary to section 7 of the Constitution of Belize. By section 2, any law inconsistent with the Constitution was void to the extent of the inconsistency.

5. Section 102 of the Criminal Code of Belize originally provided thus:

> "Every person who commits murder shall suffer death."

In 1994, the section was amended by re-numbering it as subsection (1) and adding to it the following proviso:

> "Provided that in the case of a class B murder (but not in the case of a class A murder), the court may, where there are special extenuating circumstances which shall be recorded in writing, and after taking into consideration any recommendations or plea for mercy which the jury hearing the case may wish to make in that behalf, refrain from imposing a death sentence and in lieu thereof shall sentence the convicted person to imprisonment for life."

Section 102 was further amended by adding subsections (2) and (3). Subsection (2) states:

> "The proviso to subsection (1) above shall have effect notwithstanding any rule of law or practice which may prohibit a jury from making recommendations as to the sentence to be awarded to a convicted person."

In subsection (3) is a list of murders that are classified as "class A murder", and it is also therein provided that " 'class B murder' means any murder which is not a class A murder".

The Constitution of Belize provides:

> **Section 4 (1):** "A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted."
>
> ...
>
> **Section 7:** "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

6. The judgment of their Lordships of the Judicial Committee of the Privy Council was delivered by Lord Bingham of Cornhill. The Privy Council arrived at its conclusion in this matter by references to:

> (a) The Royal Commission on Capital Punishment 1949-1953;
>
> (b) A House of Lords Select Committee on Murder and Life Imprisonment in 1989;
>
> (c) "an independent inquiry into the mandatory life sentence for murder sponsored by the Prison Reform Trust and chaired by Lord Lane of St. Ippollitts in 1993";
>
> (d) the Universal Declaration of Human Rights (1948);
>
> (e) the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953);
>
> (f) the International Covenant on Civil and Political Rights (1977);

(g) the American Convention on Human Rights (1969);

(h) the Canadian Charter of Rights and Freedoms (1982);

(i) reports of the Inter-American Commission on Human Rights; and

(j) judicial decisions in South Africa, Guyana, the United States, the Eastern Caribbean Court of Appeal, India, Jamaica, and the Privy Council itself.

7. In leading up to the reference to the Royal Commission, the Privy Council acknowledged that the sentence of death for murder was a simple and undiscriminating rule introduced into many states that are now independent but were once colonies of the British Crown (page 1040G). The Royal Commission, it should be pointed out, examined "the facts of 50 cases of murder that occurred in England and Wales and Scotland during the 20 years 1931 to 1951" (p.1041B) and made observations on the wide range of cases, the sex, age and mental state of the convicts, the nature of the killing and the motives and emotions which gave rise to the killings. The three British studies, that is, the Royal Commission, the House of Lords Select Committee and the independent inquiry sponsored by the Prison Reform Trust, all refer to wide variation in the character of murders. In the report of the inquiry sponsored by the Prison Reform Trust, reference was made to research showing that in England and Wales "murder is overwhelmingly a domestic crime in which men kill their wives, mistresses and children and women kill their children" (p. 1041 F). The judgment of their

Lordships immediately goes on to say, "Judicial statements to the same effect are not hard to find".

8. It is obvious that reports such as this have influenced legislation as well as judicial thinking in England and Wales. And well they might. While recognizing that the killings in the instant case may be put in the category labelled domestic, it needs to be pointed out that the situation in Jamaica is patently different from that reported on in England and Wales in 1993, so I would be very surprised to find a judicial statement in Jamaica to this effect at this time. The type of killings referred to in the Prison Reform Trust report is distressing to say the least, although it has been described as domestic in nature. However, it would be inaccurate to say that murder in Jamaica "is overwhelmingly a domestic crime". It is far from that. Most murders in Jamaica are committed by armed bandits who have in their possession illegal guns and ammunition. They commit rapes, robberies and burglaries while killing unsuspecting, unarmed civilians. Police officers are also prime targets for these criminal executioners who strike anywhere and everywhere, at anytime. And this has been so for nearly three decades. Murder is the order of the day. With a population of under three million individuals, there is a murder rate of three persons per day.

The stark reality therefore is that the social situation that guides legislative thinking and action in Jamaica is much different from that which exists in Belize, St. Lucia and St. Christopher and Nevis.

9. The **Reyes** judgment, in referring to what it terms "this problem of differential culpability" states that in South Africa (prior to 1993) a judicial discretion to impose the death penalty was conferred, reserving its imposition for the most heinous cases. The 1993 Constitution changed that by permitting the imposition of the death sentence only if there are special reasons for so doing. The judgment acknowledges that in several countries :

> "...a distinction has been drawn between murders described as capital (or first degree), which carry the mandatory death penalty and others (non-capital or second degree) which do not. Such was the solution applied in the United Kingdom between 1957 and 1965. It is a solution favoured by a number of American states. And it is the solution adopted in 1994 by Belize, as noted above" (p. 1042 H).

Reyes then states that the ordinary task of the courts is to give full and fair effect to the penal laws enacted by the legislature. The ordinary task is said to be the basic constitutional duty of the courts in relation to enacted law - to interpret and apply it. In carrying out its task of interpreting the constitution, the court is to give a generous and purposive interpretation to constitutional provisions protecting human rights; and should not be concerned to evaluate and give effect to public opinion (p.1045 B-F).

10. The judgment continues with a consideration of the norms Belize is supposed to have accepted as consistent with the fundamental standards of humanity. The international instruments incorporating such norms which Belize has subscribed to are:

(1) The Universal Declaration of Human Rights (1948)- Articles 3, 5 and 10;

(2) The American Declaration of the Rights and Duties of Man (1948) Article xxvi;

(3) The International Covenant on Civil and Political Rights (1977)- Articles 6(1), 7, and 14(1); and

(4) The European Convention for the Protection of Human Rights and Fundamental Freedoms (1953).

The requirement of humanity has been read, the judgment continues, as incorporating the precept that consideration of the culpability of the offender and of any potentially mitigating circumstances of the offence and the individual offender should be regarded as a sine qua non of the humane imposition of capital punishment (p. 1046 C). The judgment concedes however that under the Belize Constitution questions whether the passing and implementation of sentence of death are themselves inhuman and degrading are questions which do not and cannot arise. There is also an acknowledgment that it is open to the people of any country to lay down the rules by which they wish their countries to be governed, and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies. The Courts however will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does (p.1046 E-F).

11. The Privy Council saw its task as that of deciding whether the mandatory sentence imposed on the defendant Reyes under the Criminal Code of Belize was "inhuman or degrading punishment or other treatment" within the meaning of that expression in the Constitution of Belize. In considering the submissions of Mr. Fitzgerald for the appellant who relied on a decision of the Eastern Caribbean Court of Appeal in the consolidated appeals **Spence v. The Queen** and **Hughes v. The Queen** [(unreported) 2 April 2001 (Criminal Appeals Nos. 20 of 1998 and 14 of 1997)] and on **Lauriano v. Attorney General** (1995) 3 Bz LR 77, the Privy Council said that the Board was not aware of any case in which the distinction between capital and non-capital murder, when challenged, had been held to be sufficiently tightly drawn to provide the necessary guarantee of proportionality and relation to individual circumstances where the death penalty is mandatory on conviction of murder in the capital category. For the purposes of the appeal, however, the Board did not feel it necessary to consider the constitutionality of any mandatory penalty other than death, nor the constitutionality of a mandatory death penalty imposed for any murder other than by shooting. In the absence of adversarial argument it was felt undesirable to decide more than was necessary to resolve the appeal (p.1055 D). It is very clear that the Privy Council was being very careful in not seeking to give the impression that this case was to be used as a precedent in other countries. The decision is clearly one which the Privy Council felt should be for Belize only, in the particular circumstances of that particular case. I am therefore very uneasy

with the submission that **Reyes** should be interpreted as binding on Jamaican Courts.

12. In **Hughes**, the defendant was convicted of murder in the High Court of St. Lucia and sentenced to death pursuant to section 178 of the Criminal Code which provided that whoever committed murder was "liable indictably to suffer death". By section 1284 a court could sentence an offender to "any less punishment other than death, than that prescribed". His appeal against conviction was dismissed by the Eastern Caribbean Court of Appeal. However, the Judicial Committee of the Privy Council granted him leave to appeal against sentence on the basis that the mandatory sentence of death was unconstitutional. In granting leave, the Judicial Committee remitted the case to the Court of Appeal for a decision as to whether the mandatory sentence of death should be quashed. By a majority, the Court of Appeal held that paragraph 10 of Schedule 2 to the St. Lucia Constitution Order 1978 (which provided that nothing contained in or done under the authority of any law was to be held to be inconsistent with or in contravention of section 5 of the Constitution) did not apply, and that the mandatory sentence of death for murder constituted inhuman or degrading punishment or treatment contrary to section 5 of the Constitution. The Court of Appeal quashed the death sentence and remitted the matter to the High Court for a jury to determine.

13. The Privy Council was unable to agree that it was for a jury to so decide and pointed out that in St. Lucia the responsibility for choosing the appropriate

sentence, except where the death penalty was mandatory, had always rested with the judges who had the appropriate training and experience. The Privy Council assessed that the critical dispute between the parties revolved around paragraph 10. It was noted that paragraph 10 conforms "to a model which is used to express qualifications to the fundamental rights and freedoms set out in various sections in Chapter 1".

The first issue in relation to paragraph 10 was said to be whether it prevents a court from holding that in this respect section 178 is inconsistent with section 5 of the Constitution and so void by virtue of section 120. The second issue in relation to paragraph 10 was whether it prevents a court from holding, in this way, that the death sentence imposed under the authority of section 178 of the Criminal Code is in contravention of section 5 of the Constitution. In relation to the first issue, so far as section 178 authorises the infliction of the death sentence it cannot be held to be inconsistent with section 5 of the Constitution as it was a form of punishment lawful in St. Lucia before March 1, 1967. The Privy Council accepted that there was a distinction between authorising a description of punishment and authorising the carrying out of that punishment in circumstances of extreme delay, as occurred in **Pratt v. Attorney General.** Although the Privy Council further accepted that section 178 of the Code is not inconsistent with section 5 of the Constitution to the extent that it authorises the infliction of the death penalty, the Privy Council was unable to accept that section 178 authorises the mandatory infliction of the death sentence.

The Privy Council held that to the extent that section 178 is to be regarded as **authorising** the infliction of the death penalty in all cases of murder, it cannot be held to be inconsistent with section 5 of the Constitution. But to the extent that it goes further and actually **requires** the infliction of the death penalty in all cases of murder, the exception in paragraph 10 does not apply. So, the defendant can legitimately seek to persuade a court that section 178 is inconsistent with section 5 of the Constitution and so is void in terms of section 120. Following the decision in **Reyes,** the Privy Council held that section 178 of the Criminal Code was inconsistent with section 5 of the Constitution to the extent that it **required** that the death penalty be imposed on anyone convicted of murder. To that extent, section 178 is void by virtue of section 120 of the Constitution. It was held that it was open to the court under section 178 in this case as in any other either to impose the death sentence or to impose a lesser punishment depending on the view which it takes having regard to all the relevant circumstances.

14. In **Fox v. The Queen**, the defendant was convicted in the High Court of St. Christopher and Nevis on two counts of murder. He was sentenced to death on each count pursuant to section 2 of the Offences Against the Person Act which prescribed a mandatory death sentence for murder. His appeal to the Eastern Caribbean Court of Appeal was dismissed. The Judicial Committee of the Privy Council which granted him special leave to appeal against conviction and sentence, by a majority, dismissed the appeal against conviction but in respect of

sentence, allowed the appeal while holding that section 2 of the Offences Against the Person Act was inconsistent with section 7 of the Constitution, and that section 2 was to be construed as providing that a person convicted of murder might be sentenced to death or to a lesser punishment. The sentence of death was quashed and the matter remitted to the High Court for the determination by a judge of the appropriate sentence having regard to all the circumstances of the case.

15. Dr. Barnett, for the appellant, submitted that the reasoning of the Privy Council in the abovementioned cases is "clearly applicable" in the instant matter before us. The mandatory sentence, he said, excludes the judiciary from the exercise of an essential part of its function, which is to determine the appropriateness of the sentence. Furthermore, the amendment of the Offences against the Person Act in 1992 makes the savings provisions in section 26(8) of the Constitution inapplicable. He also prayed in aid the Fundamental Rights (Additional Provisions) (Interim) Act which provides in section 5 that every person shall have the right to fair and humane treatment by any public authority in the exercise of any of its functions. This Act, he said, has impliedly repealed the mandatory aspect of section 3 (1A) of the Offences against the Person Act.

16. Miss Pyke, for the Crown, submitted that there are substantial legal and social differences between Jamaica on the one hand and Belize, St. Lucia and St. Christopher and Nevis on the other, making the decisions in **Reyes, Hughes** and **Fox** inapplicable to Jamaica. She said that this situation was foreshadowed

in the judgment of Lord Bingham in **Reyes.** She also said that although the Constitutions of the territories from which those decisions emanated are similar in wording to Jamaica's, they do not contain the general savings clause that is a feature of the Jamaican Constitution. So far as the mandatory nature of the death penalty is concerned, she was of the view that the amendment to the Offences against the Person Act did not interfere with that aspect, hence the law should still be viewed as a pre-independence law, the validity of which is not in dispute or doubt. Finally, she submitted that the mandatory nature of the death penalty did not breach the doctrine of the separation of powers.

17. The case **Ong Ah Chuan v. Public Prosecutor** (1981) A.C. 648, a decision of the Privy Council, on appeal from the Court of Criminal Appeal of Singapore is of importance, as I see it, to the disposition of the instant matter. In that case, the defendants were convicted of trafficking drugs in contravention of the Misuse of Drugs Act, 1973, as amended by the Misuse of Drugs (Amendment) Act 1975. Section 15 of the Act provided that any person who had in his possession more than 2 grammes of diamorphine (heroin) contained in any controlled drug "shall until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein". The defendants were sentenced to death as section 29 of the Act provided that penalty for any person convicted of trafficking in more than 15 grammes of heroin. Their appeals to the Court of Criminal Appeal were dismissed. On appeal

to the Privy Council, one of the questions for determination was whether the mandatory death sentence was unconstitutional.

18. It was held that article 12(1) of the Constitution of Singapore guaranteed an offender equal treatment with other offenders in like circumstances and, provided that the factors adopted by the legislature as constituting a dissimilarity of circumstances were not purely arbitrary but bore a reasonable relation to the social object of the law, there was no conflict with article 12(1); and that, accordingly, since it was not unreasonable for the legislature to have provided for a stronger deterrent in the case of persons dealing in more than 15 grammes of heroin than in that of those dealing in less, in differentiating between those two classes section 29 of the Misuse of Drugs Act was not arbitrary and the sentences passed on the defendant were not unconstitutional. Lord Diplock, in delivering the judgment of the Privy Council, said:

> "Their Lordships would emphasise that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to so evil and profitable a crime as trafficking in addictive drugs. Whether there should be capital punishment in Singapore and, if so, for what offences, are questions for the legislature of Singapore which, in the case of drug offences, it has answered by section 29 and Schedule 2 of the Drugs Act. A primary object of imposing a death sentence for offences that society regards with particular abhorrence is that it should act as a deterrent; particularly where the offence is one that is committed for profit by an offender who is prepared to take a calculated risk. There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not. At common law all capital sentences were

> mandatory; under the Penal Code of Singapore the capital sentence for murder and for offences against the President's person still is. If it were valid the argument for the defendants would apply to every law which impose a mandatory fixed or minimum penalty even where it was not capital - an extreme position which counsel was anxious to disclaim." (Pages 672 H to 673 C).

19. In relation to the question of equality before the law and equal protection of the law, Lord Diplock said:

> "All criminal law involves the classification of individuals for the purposes of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances - the conduct and, where relevant, the state of mind that constitute the ingredients of an offence. Equality before the law and equal protection of the law require that like should be compared with like. What article 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed" (page 673Dand E).

Lord Diplock's important judgment continues:

> "The discrimination that the defendants challenge in the instant cases is discrimination between class and class: the imposition of a capital penalty upon that class of individuals who traffic in 15 grammes of heroin or more and the imposition of a penalty, severe though it may be, which is not capital upon that class of individuals who traffic in less than 15 grammes of heroin. The dissimilarity in circumstances between the two classes of individuals lies in the quantity of the drug that was involved in

> the offence. The questions whether this dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with article 12(1) of the Constitution."

For completeness, it is necessary to state that article 12(1) of the Constitution of Singapore reads:

> "All persons are equal before the law and entitled to equal protection of the law."

20. When the Jamaican Parliament embarked on the process of amending the Offences against the Person Act, it would have had in mind this clear exposition of the law in the Singaporean situation by the Privy Council through the mouth of the noble Lord Diplock. This is so because judgments of the Privy Council in jurisdictions other than our own are regarded in our jurisdiction as highly persuasive, the Privy Council being our final appellate court. The amendment to the Act was a mere dozen years after Lord Diplock's judgment. The intention of our legislature was similar to the intention of the Singaporean legislature - that is, to separate into classes a particular criminal activity for the purpose of punishment. Indeed, in Jamaica, it was not a situation that a new penalty was being provided for a class of murderers. The punishment was untouched. It had

always been in existence, and remains so. The legislature merely looked at the circumstances and reduced the list of those who would suffer the mandatory penalty of death. There was nothing submitted or suggested to us in the arguments of there being any significant occurrence between the date of the judgment in **Ong Ah Chuan v Public Prosecutor** (supra) and the date of the amendment of the Offences against the Person Act which would indicate any other intention on the part of our legislature but to reduce the number of murderers who would be liable for execution based on the type of killings that is involved. And the legislature has clearly demonstrated its intention in the language used. There is no question of unfair or discriminatory treatment. The thinking of the legislature coincided with the reasoning of the Board in **Ong Ah Chuan v. Public Prosecutor**, and that thinking has been reflected in the words of the amendment. That being so, the fact that the Board has now thrown cold water on the words of Lord Diplock by reason of its judgments in the trilogy of cases outside our jurisdiction does not, in my respectful view, create an automatic change in the intention of the Jamaican legislature which had crafted its legislation with **Ong Ah Chuan** in mind.

21. Section 48 (1) of the Constitution gives Parliament the power, subject to the provisions of the Constitution, to make laws for the peace, order and good government of Jamaica. That is exactly what the Parliament has done in respect of the amendment to the Offences against the Person Act. If there is to be a change in the law as a result of a change in the intention of Parliament, bearing

in mind that that intention was influenced by that which was said in **Ong Ah Chuan**, it is my humble view that that change cannot be effected through Belize, St. Lucia, or St. Christopher and Nevis. Were it otherwise, there would be absolutely no need for the Parliament of Jamaica. The dissenting judgment of Lord Hoffmann in **Neville Lewis and others v. The Attorney General of Jamaica** [delivered 12th September, 2000 (Privy Council Appeal # 60/99)] is of some moment in a situation such as this. This is what he said in ending his judgment:

> "...the power of final interpretation of a constitution must be handled with care. If the Board feels able to depart from a previous decision simply because its members on a given occasion have a "doctrinal disposition to come out differently", the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean."

It goes without saying that the Privy Council, as the highest court, has the power to reverse itself. However, it is my humble view that the Lords of the Privy Council do not regard that power as capricious. It is my view that in reversing itself in the Jamaican situation it would always bear in mind the intention of the Parliament in enacting legislation. It bears repetition that the amendment complained of would have been very much influenced by the thinking and reasoning of the Privy Council in the **Ong Ah Chuan** case. Furthermore, the arguments before us are similar to those advanced before the Privy Council then.

22. Finally, a comment is necessary on the submission that the Fundamental Rights (Additional Provisions) (Interim) Act has impliedly repealed the mandatory

aspect of section 3 (1A) of the Offences against the Person Act. If it were the intention of Parliament to repeal any of the laws on the statute books by means of this Act, it would have clearly so stated. What Parliament has done instead is to provide additional rights on an interim basis. The very title of the Act indicates this. The rights that have been provided are rights that had not been stated in the Constitution or elsewhere.

23. Section 4 makes provision for the right to vote and to participate in free and fair elections. Section 6 confers the right to be granted a passport and not be denied or deprived thereof except by a law which also gives access to the court to challenge the denial or deprivation. Section 7 provides for redress in the Supreme Court for anyone who alleges a contravention of the Act in relation to himself.

Section 5 provides:

> "Every person shall have the right to fair and humane treatment by any public authority in the exercise of any of its functions".

It is this section that Dr. Barnett has advanced as the repealing portion of the Act. I am unable to agree with his submission. In my humble view, the section is otiose in relation to the instant matter. I say this because it adds nothing to the instant cause as section 17 (1) of the Constitution already provides the necessary protection. That section reads:

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

Section 5 of the Act above has merely added the reference to "public authority" which is defined, and which is obviously limited to the circumstances set out in the Act.

24. On the basis of the foregoing reasons, I am of the view that the appeal should be dismissed. I should add that, having read the judgments of the learned President and Clarke, J.A. (Ag.), I share their view that section 26(8) of the Constitution provides a barrier to a successful challenge to the constitutionality of the legislation that the appellant has sought to impugn.

CLARKE, J.A. (Ag.)

Upon his conviction in the Hanover Circuit Court on July 19, 1999 of two counts of murder, the appellant was mandatorily sentenced to death.

The mandatory death penalty pursuant to Statute

The Offences against the Person Act, 1864 required that a court pronounce sentence of death upon every conviction of murder. That legislative requirement continued in force on and after the appointed day which was August 6, 1962, the date of the coming into force of the Constitution of Jamaica.

The imposition of the mandatory sentence of death was subsequently restricted, however, to the following two situations by an amendment in 1992 to the statute:

(1) murder committed in particular situations categorized as capital murder; and

(2) multiple non-capital murders committed by the same person.

So, on the basis that the appellant was convicted of two murders he was, pursuant to section 3 (1A) of the Offences against the Person Act, sentenced to death. His application for leave to appeal against conviction was dismissed by the Court of Appeal on March 5, 2001. On October 31, 2001 the appellant's Petition to Her Majesty in Council against his conviction was dismissed. His Supplementary Petition against the

mandatory sentence of death imposed on him was also heard by the Privy Council and treated as the hearing of the appeal and the issues raised therein remitted to the Court of Appeal for consideration.

The Central Issue

The central issue raised in the Supplementary Petition concerns the constitutional validity of the mandatory sentence of death. The resolution of that issue requires an examination of some relevant constitutional provisions and principles. Besides, there are some helpful decisions including a trilogy of recent Privy Council decisions: ***Reyes v The Queen*** [2002] 2 W.L.R. 1034; ***R v Hughes*** [2002] 2 W.L.R. 1058; ***Fox v The Queen*** [2002] 2 W.L.R. 1077. And just as their lordships were mindful in those cases of the guidance given in earlier cases as to the proper approach to the interpretation of constitutional provisions, so too must this court be mindful in this case of that guidance: see ***Minister of Home Affairs v Fisher*** [1980] A.C. 319, 328 –329; ***Matadeen v Pointu*** [1999] A.C. 98.

The Constitution of Jamaica declares that every person in Jamaica is entitled to the fundamental rights and freedoms of the individual. Subject to the rights and freedom of others, these rights include the right to life: section 13. 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: section 14. Whenever any person is charged with a criminal offence he shall unless the charge is withdrawn

be afforded a fair hearing within a reasonable time by an independent and impartial tribunal established by law: section 20(1). Section 17 states:

> "**17.-** (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorise the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

The rights set out in sections 13, 14(1), 17(1) and 20(1) are some of the protective rights contained in Chapter III of the Constitution. These and other provisions of the Constitution are undergirded by section 2 which in general provides for the supremacy of the Constitution. Section 2 reads:

> "**2.-** Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

It is to be observed that there is no challenge to the lawfulness of the death sentence itself insofar as the Offences against the Person Act (the "Act") authorizes the infliction of that type of punishment. The appellant's challenge lies in the fact that the Act **requires** the infliction

of the death penalty on anyone convicted of capital murder or multiple non-capital murders, albeit restricted categories drawn by the Act.

Savings Clauses

Dr. Barnett's submission that section 17 (2) of the Constitution of Jamaica provides no more than a partial savings clause is well founded. In ***R v Hughes,*** *and* ***Fox v The Queen*** (supra) the Privy Council considered the virtually identical provisions of the Constitution of St. Lucia and of St. Christopher and Nevis respectively. The Board pronounced that since such savings clauses introduce exceptions to the rights and protection which people would otherwise have under those Constitutions they must be narrowly construed like any other derogation from constitutional guarantees. The purpose of such clauses is to preserve all descriptions of punishment lawful immediately before the coming into force of those Constitutions and to prevent such descriptions of punishment from being challenged as inhuman or degrading forms of punishment or treatment. Their lordships concluded that there was therefore no inconsistency with those Constitutions to the extent that the impugned statutory provisions authorized the infliction of the death penalty in all cases of murder. On the other hand, to the extent that the statutory provisions went beyond authorizing the death penalty and required its infliction in all cases of murder, the exceptions contained in the savings clauses did not apply.

So, I agree with the appellant's contention that the savings clause in section 17(2) of the Constitution of Jamaica does not prevent a constitutional challenge that the **mandatory** nature of the death penalty constitutes inhuman and degrading treatment; it only prevents a challenge that the death penalty itself constitutes such treatment. A distinction must be drawn between the punishment itself (death by hanging) which is covered by section 17(2); and the method of imposing it, (mandatory death penalty) which is not.

Is the challenge to the lawfulness of the mandatory death penalty therefore irrefutable under the Constitution of Jamaica? In my opinion it is not. It is indisputable that unlike the Constitutions of Belize and the Eastern Caribbean States, the Constitution of Jamaica includes a general preservation of the validity of all pre-existing laws so far as concerns the protective rights under Chapter III. Section 26 (8) is an elucidative provision of that Chapter. It provides:

> "Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any such provisions".

Insofar as the protective or fundamental rights of the individual are concerned there is now no such general savings provision in the Constitution of Belize; and the savings provisions in the Constitutions of the Eastern Caribbean States have been held to be only partial in that

they do not prevent a constitutional challenge that the mandatory nature of the death penalty in those countries constitutes inhuman and degrading punishment or treatment. An example of such punishment is said to occur where the offender's basic humanity is denied in not affording him the opportunity before sentence is passed to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate: see ***Reyes v The Queen*** (supra).

By adopting the submissions in the Supplementary Petition of ***Michael Pringle v The Queen*** (a Petition from Jamaica) relating to the question of the constitutional validity of the mandatory sentence of death, the appellant conceded before the Privy Council that had the 1864 Offences against the Person Act not been amended, it would not have been possible for him to challenge the constitutionality of the mandatory death penalty by reason of the general savings clause in section 26 (8): see section 2.2 of his Supplementary Petition. The 1864 Act was a "law in force immediately before the appointed day" and the mandatory death penalty was contained in that law and was carried out under the authority of that law. Dr. Barnett submitted, however, that the general savings clause is not intended to be applicable to section 17 of the Constitution, for which a special savings provision has been made.

According to Dr. Barnett section 17(2) would be unnecessary if section 26(8) were applicable to section 17(1).

That submission is, in my view, untenable. The plain language of section 26 (8) means precisely what it says: existing laws which are inconsistent with Chapter III of the Constitution and acts done under the authority of such laws cannot be successfully challenged in the courts as breaching any of the protective provisions of Chapter III. "This Chapter... proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed": see ***Nasralla v D.P.P.*** [1967] 2 A.C. 238 at 247G to 248A per Lord Devlin.

Dr. Barnett submitted that in any event the savings provisions of section 26 (8) are inapplicable to the provisions of section 3(1A) of the Offences against the Person Act which were introduced in 1992, because those provisions were not in force immediately before the day on which the Constitution came into force, and do not fall into the category of

amendments provided by section 26(9) that are deemed to fall within section 26(8).

Miss Pike submitted that the amendments of 1992 have not changed the mandatory nature of the death penalty required by the 1864 Act. All that the 1992 amendments have done is to drastically narrow the broad category of persons who under the pre-Constitution Act would have been mandatorily sentenced to death upon conviction of murder. The provision in the Offences against The Person Act for the mandatory sentence of death, inspite of the 1992 amendments, remains a law in force on and after the appointed day, since it continue to require the infliction of the death penalty, albeit only in cases categorised as capital murder and in cases of multiple non-capital murders committed by the same person. For Miss Pike, the amended Act falls within the ambit of the initial part of Section 4 (1) of the Jamaica (Constitution) Order in Council 1962 which reads:

> "**4.-** (1) All the laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having the power to amend or repeal any such law) continue in force on and after that day..."

Section 26(9) of the Constitution is, she submitted, not exhaustive of the circumstances under which pre-Constitution laws continue in force; it merely provides for laws to be deemed to have remained in force even

though they were reproduced in a consolidation or revision of laws or adapted or modified by or under section 4 of the Order in Council.

In my judgment, Miss Pike's submissions on this aspect of the remitment are sound. The 1864 Act in its unamended form required the infliction of the death penalty for murder. The Act insofar as the mandatory nature of the death penalty is concerned has continued in force on and after the appointed day, i.e. August 6, 1962. It is accordingly saved by section 26(8) of the Constitution from being inconsistent with any of the protective provisions of Chapter III. The Act as amended cannot now cease to be a law in force on or after that date and so lose the immunity of section 26(8). The reason is plain. In its amended form the Act retains the provision requiring that the sentence of death be imposed but restricts it to certain tightly drawn categories, namely, murders defined as capital murders; and multiple non-capital murders committed by the same person. The restrictive amendment does not in any shape or form derogate from the rights which at the coming into force of the Constitution the individual enjoyed. The general savings provisions of section 26(8) which were applicable to the whole range of murder convictions, must necessarily now apply to the restrictive categories, since the law in force, that is, the Offences against the Person Act, as amended, reduces the range of murders to which the savings provisions of the subsection are applicable. This therefore means that the

right to life enjoyed by the people of Jamaica and enshrined in section 13 and 14 of Chapter III of the Constitution is less circumscribed than was the case before the Act was amended in 1992.

Separation of Powers

If, as I hold, section 26 (8) of the Constitution prevents a successful constitutional challenge to section 3 (1A) of the Offences against the Person Act that the mandatory nature of the death penalty is inconsistent with particular protective rights of the individual such as the rights set forth in sections 13, 14, 17 (1) and 20(1) of the Constitution, the further and crucial question is this: does the mandatory nature of the death penalty as required by section 3 (1A) of the Act offend against the constitutional principle of the separation of powers?

Dr. Barnett submitted that the mandatory sentence of death violates the constitutional principle of the separation of powers and is accordingly unlawful. Subsections (1) and 1(A) of section 3 of the Act prescribing such sentence are inconsistent with the provisions of the Constitution relating to the separation of powers and are void by virtue of section 2 of the Constitution. In Dr. Barnett's view legislation is void for unconstitutionality where, as in this case, it deprives the judiciary of the function of determining whether a punishment which is final, absolute and irreversible should be imposed in a particular case, for it undermines an essential characteristic of the judicial function.

Miss Pike submitted that the principle of the separation of powers on which the Constitution is based is not violated where Parliament provides for mandatory capital punishment for certain categories of murder. The legislative prescription of such a punishment, she argued, is consistent with the power of Parliament to "make laws for the peace, order and good government of Jamaica" subject only to the provisions of the Constitution which itself recognizes that there is no absolute separation of powers between the executive, legislature and judiciary.

It has been recognized at the highest judicial level that it is not an abdication for our courts to acknowledge the competence of Parliament to prescribe a fixed punishment upon all offenders found guilty of a defined offence even if in the case of murder, the prescription is capital punishment. Where Parliament so prescribes, the exercise of the judicial function in so far as sentencing is concerned is the act of passing the sentence. On the other hand, were Parliament to transfer from the judiciary to the executive or to itself such a function, the constitutional restriction imposed by the separation of powers doctrine would be breached. That this would be so, has been demonstrated in a number of decided cases.

Liyanage and Others v Reginam [1967] 1 A.C. 259; [1966] 1 All E.R 650 is a case of seminal importance as much for what it decided as regards "legislative judgments" as for what it did not decide as regards

mandatory sentences. In that case, the Parliament of Ceylon enacted legislation in 1962 to deal with the trial of persons accused of offences arising out of an abortive coup d état. The legislation affected the mode of trial, the offences, the admissibility of evidence; and by enacting a minimum punishment accompanied by forfeiture of property, the legislation also affected the sentencing. The power, given under the legislation to the Minister of Justice, and exercised by him, to nominate three judges to try the accused without a jury, gave way upon a successful constitutional objection in the Supreme Court, to amending legislation which authorized the trial to be had before three judges without a jury, nominated by the Chief Justice. Before a court so nominated eleven persons were convicted and sentenced.

Their appeal succeeded in the Privy Council because upon a close consideration of the legislation challenged in the appeal, the Board upheld the appellant's contention that the legislation offended against the Constitution of Ceylon. The legislation amounted to a legislative plan to secure the conviction and severe punishment of the appellants, and thus constituted an assumption of judicial power by the legislature, or an interference with judicial power, which was outside of the legislature's competence and was inconsistent with the separation of power between legislature, executive and judiciary ordained by the constitution. Although the Parliament had the full legislative powers of a

sovereign independent state and was empowered to make laws for the peace, order and good government of the people of Ceylon, those powers as in the case of countries with written constitutions must be exercised in accordance with the terms of the constitution from which the powers derive.

Here is how Lord Pearce in delivering the judgment of the Board put in perspective the separation of powers doctrine with particular emphasis on constitutions based on the Westminster model [1966] 1 All E.R 630 at 659C to 660G:

> "Section 29 (1) of the constitution says: 'Subject to the provisions of this Order Parliament shall have power to make laws for the peace and good government of the Island'. These words have habitually been construed in their fullest scope. Section 29(4) provides that Parliament may amend the constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however, cannot read the words of s.29(1) as entitling Parliament to pass legislation which usurps the judicial power of the judiciary – e.g.; by passing an act of attainder against some person or instructing a judge to bring in a verdict of guilty against someone who is being tried – if in law such usurpation would otherwise be contrary to the constitution. There was speculation during the argument what the position would be if Parliament sought to procure such a result by first amending the constitution by a two-thirds majority; but such a situation does not arise here. In so far as any Act passed without any recourse to s,29(4) of the constitution purports to usurp or infringe the judicial power it is ultra vires.

Do the Acts of 1963, however, otherwise than in respect of the Minister's nomination, usurp or infringe that power?. It goes without saying that the legislature may legislate for the generality of its subjects by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate. The fact that the learned judge declined to convict some of the prisoners is not to the point. That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law, is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that after these had been dealt with by the judges, the law should revert to its normal state.

Such a lack of generality, however, in criminal legislation need not, of itself, involve the judicial function, and their lordships are not prepared to hold that every enactment in this field which can be described as **ad hominem** and **ex post facto** must inevitably usurp or infringe the judicial powers. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design the extent to which the legislation affects by way of direction or restriction, the discretion or judgment of the judiciary in the specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal.

Counsel for the appellants succinctly summarises his attack on the Acts in question as follows: the first Act was wholly bad in that it was a special direction to the judiciary as to the trial of particular prisoners who were identifiable (in view of the White Paper) and charged with particular offences on a particular occasion. The pith and substance of both Acts was a legislative plan **ex post facto** to secure the conviction and enhance the punishment of those particular individuals. It legalized their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered **ex post facto** the punishment to be imposed on them.

In their lordships view that cogent summary fairly described the effect of the Acts... Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years imprisonment and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial...

One might fairly apply to these Acts the words of Chase J, in the Supreme Court of the United States in ***Calder v Bull*** [(1780) 3 Dallas U.S.S. C.386]:

> 'These Acts were legislative judgments and an exercise of judicial power'.

Blackstone in his Commentaries Vol.1 (4th Edn.) p.44 wrote:

> 'Therefore a particular act of the legislature to confiscate the goods of Titius or to attaint him of high treason, does not

> enter into the idea of municipal law; for the operation of this act is spent upon Titius only and has no relation to the community in general; it is rather a sentence than a law.
>
> If such Acts as these were valid the judicial power would be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume that it had power to do so and was acting rightly; that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once; if it be allowed, may be done again and in a lesser crisis and less serious circumstances and thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their lordships' view the Acts were **ultra vires** and invalid." (emphasis supplied).

Clearly, by requiring that the death penalty be imposed on anyone convicted of murder committed only within certain tightly drawn categories, the Offences against the Person Act ought not to be characterized as constituting "legislative judgments and an exercise of judicial power". Although punishments fixed by the common law are generally **maxima** there are cases of high authority that acknowledge that it is within the competence of legislatures in countries with written constitutions on the Westminster model to prescribe a fixed punishment for particular offences, that is to say, to give no judicial discretion as to punishment in the case of capital crimes. For instance, in ***Hinds v The***

Queen [1997] A.C. 195 and 225G to 227B, Lord Diplock in delivering the majority judgment of the Privy Council said:

> "In the field of punishment for criminal offences the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power. The power conferred upon the Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law: see Constitution, Chapter III, section 20 (1). The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power; and, subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out. In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence – as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.
>
> Thus Parliament, in the exercise of its legislative power may, make a law imposing limits upon the

discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders. In this connection their lordships would not seek to improve on what was said in the Supreme Court of Ireland in ***Deaton v Attorney General and the Revenue Commissioner*** [1963] I.R. 170, 182 – 183, a case which concerned a law in which the choice of alternative penalties was left to the executive.

> 'There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case... The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive...'

This was said in relation to the Constitution of the Irish Republic, which is also based upon the separation of powers. In their Lordships' view it applies with even greater force to constitutions on the Westminster model. They would only add

> that under such constitutions the legislature not only does not, but cannot, prescribe the penalty to be imposed in an individual citizen's case: ***Liyanage v. the Queen*** [1967] 1A.C.259." (emphasis supplied).

Three things must be said about the passage. First, the selection of punishment is an integral part of the administration of justice and therefore cannot be committed to the executive. In this connection it is worthy of note that all the cases, but one, cited on behalf of the appellant on the separation of powers principle concern legislation involving the exercise of sentencing powers by the executive. The decisions in those cases make it plain that such legislation offends against the principle and is therefore inconsistent with constitutions on the Westminster model: ***Hinds v The Queen*** [1977] A.C. 195; ***Browne v The Queen*** [1999] 3 W.L.R. 1158; ***R v Mollison*** (no. 2) unreported S.C.C.A No. 61/97 delivered on May 29, 2000; and ***R v Samuda*** (unreported) S.C.C.A No. 134/96 delivered on December 18, 1998 where, by a majority, the Court of Appeal held that legislation empowering the judge to order as a penalty the imposition of whipping, the execution of which would be regulated by the executive, did not involve the exercise of sentencing powers by the executive and accordingly did not breach the principle of the separation of powers. So a valid distinction was drawn between the judicial act of imposing a sentence and the executive act of carrying it out.

The second thing that must be said about the passage quoted from the judgment delivered by Lord Diplock in the ***Hinds*** case is this: the legislature cannot consistent with the separation of powers prescribe the penalty to be imposed in an individual citizen's case. In other words, to do so the legislature would be making 'legislative judgment' which would be tantamount to exercising judicial power.

Third, it is no violation of the constitutional restriction for the legislature to prescribe punishment for all persons found guilty of defined offences, as for example capital punishment for particular categories of murder. The mandatory prescription would be no more (and no less) a statement of general application which is one of the characteristics of legislation. To say, as does Dr. Barnett, that Lord Diplock's pronouncement on the legislative competence of Parliament to prescribe mandatory punishment as stated above, was **obiter**, is to ignore the fact that the constitutionality of mandatory sentences was an issue in the ***Hinds*** case, leading counsel for the appellants therein arguing that mandatory sentences were in principle unconstitutional while the Director of Public Prosecutions contending for their constitutional validity. What the majority of the Board held in this connection was that although it was within the competence of the legislature to require mandatory sentences for defined offences, the mandatory sentence of detention "at hard labour during the Governor General's pleasure" was unlawful because

the legislative provisions prescribing it required the length of the period of detention to be determined by an executive body and not by the judge: see [1997]A.C. 195 at 225-227.

All the same, it must be recognized that the question of punishment for crime is not exclusively a matter for the Courts. There is in my opinion an important distinction between on the one hand, sentencing policy which is a function primarily for the legislature to determine consonant with the Constitution, and on the other hand, judicial discretion in sentencing where fixed punishments are not prescribed by the legislature: see ***Runyowa v The Queen*** [1966] 1 All E.R. 633 at 643 D to F where, in spite of the decision being only of limited value, the distinction is explained.

Conclusion

It must needs be appreciated, therefore, that the separation of powers does not require a virtually exclusive or limitless sentencing discretion of the courts. The legislature may consistently with the separation of powers and in furtherance of its constitutional responsibility to make laws for the peace, order and good government of the state "prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence- as for example, capital punishment for the crime of murder": ***Hinds v The Queen*** A.C. 195 at 226B; and see ***Dodo v The State*** [2001]4L.R.C. 318.

The Offences against the Person Act is such a law. It does no violence to the Constitution unless the impugned provisions are held to be inconsistent with any of the protective provisions of Chapter III. The Act requires the trial judge to impose the sentence of death on every person convicted of capital murder, or of multiple murders within the meaning of section 3(1A) of the Act. As there is no discretion in the trial judge to do otherwise, questions of proportionality and individualized sentencing can play no part. The non-applicability of these would otherwise offend against section 17(1) of the Constitution but for the general savings clause provided by section 26(8) which saves the mandatory nature of the death penalty prescribed by the Act, a pre-existing law, from inconsistency with any of the protective provisions of the Constitution.

For the foregoing reasons, I would uphold the constitutional validity of section 3(1A) of the Offences against the Person Act and dismiss the appeal against sentence.

FORTE, P:

Appeal against sentence dismissed.