

Privy Council Appeal No. 36 of 2003

Lambert Watson

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 7th July 2004

Present at the hearing:-

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Mr. Justice Edward Zacca

[Delivered by Lord Hope of Craighead]

1. On 19 July 1999 the appellant was convicted in the Hanover Circuit Court of the Supreme Court of Jamaica of the murder on 18 September 1997 of Eugenie Samuels and Georgina Watson. The deceased were mother and daughter, and the appellant was Georgina's father. The deceased and the appellant had been seen by a police officer on the morning of 18 September. The appellant was seen later that day coming from the place where the bodies of the deceased were found. They had both died from severe stab wounds to the neck and body.

2. Section 2(1) of the Offences against the Person Act of 1864, as amended by the Offences against the Person (Amendment) Act 1992, provides that murder committed in the circumstances referred to in that subsection is capital murder. Section 2(3) of the Act, as amended, provides that murder not falling within subsection (1) is non-capital murder.

Neither of the murders of which the appellant was convicted fell within section 2(1) of the Act. They were both non-capital murders. But section 3(1A) of the Act, as amended, provides that a person who is convicted of non-capital murder shall be sentenced to death "if before that conviction he has ... (b) been convicted of another murder done on the same occasion". It was a reasonable inference from the facts that the deceased were both killed on the same occasion. The appellant was sentenced to death under section 3(1A).

3. The appellant applied for leave to appeal against his conviction of murder. On 5 March 2001 the Court of Appeal of Jamaica dismissed that application. The appellant then sought special leave to appeal to their Lordships' Board. On 31 October 2001 his petition for special leave to appeal against his conviction was dismissed. But in a supplementary petition for leave to appeal he also sought leave to appeal against the mandatory death sentence on grounds relating to its constitutional validity. The matter raised in the supplementary petition was remitted to the Court of Appeal of Jamaica to consider. On 16 December 2002 the Court of Appeal (Forte P, Panton JA and Clarke JA (Ag)) upheld the constitutional validity of the mandatory death sentence and dismissed the appeal. On 1 April 2003 the Court of Appeal granted the appellant final leave to appeal from that judgment to their Lordships' Board.

4. The issue which is before their Lordships in this appeal is whether the mandatory sentence of death which was imposed on the appellant under section 3(1A) of the Act of

1864, as amended, was unconstitutional. But the case has a wider significance, because the grounds on which the mandatory death penalty is said to be unconstitutional in this case extend to the constitutionality of the mandatory death penalty in every case where this penalty is provided for by the law as it now stands in Jamaica.

The statutory background

5. It is first necessary to describe the legislation under which the mandatory death sentence that was imposed in this case was passed.

6. The Offences against the Person Act was enacted in 1864 as the Offences against the Person Law, chapter 268. It contained these provisions:

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

3(1) Upon every 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 the other prisoners."

In 1958 section 3(1) of the principal Law was amended by inserting at the end thereof 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 the law.'"

The legislation was still in this form immediately before 6 August 1962, which was the date on which Jamaica attained independence under the Jamaica Independence Act 1962.

7. The law on this matter remained in that form after independence. But it was not long

before questions began to be raised as to whether it should be changed. In June 1979 the Minister of Justice nominated a Committee under the chairmanship of Mr H Aubrey Fraser, Director of the Norman Manley Law School, with the following terms of reference:

"To consider and report within a period of eighteen (18) months whether liability under the Criminal Law of Jamaica to suffer death as a penalty for murder should be abolished, limited or modified and if so, to what extent, by what means and for how long, and under what conditions persons who would otherwise have been made to suffer capital punishment should be detained and what changes in the existing law and the penal system would be required."

8. The Fraser Committee reported in December 1981. Its recommendations are set out in paras 14 -20 of the Report. It recognised that discussion of the question of capital punishment is usually a highly emotional affair in which people's responses are inspired by strong instinctive impulses. The evidence which it had heard had shown that a proposal that capital punishment be wholly abolished would not generally be accepted by the Jamaican public, having regard especially to the state of violent crime in the society. The thrust of opinion was not wholly in favour of the retention of the penalty, nor was it wholly against the abolition of the penalty. It seemed to the Committee that a significant body of opinion was spread across a span between phased abolition on the one hand, and on the other hand its retention as a penalty for certain offences only. It was noted that the Report of the Commission of Enquiry into incidents which occurred at the St Catherine District Prison on 27 December 1974, known as the Barnett Report, had expressed the view that the long delay in the execution of the death penalty after it had been pronounced constituted cruel and inhumane punishment and that it had recommended that capital

punishment, being of questionable deterrent effect, should be abolished.

9. In para 18 of its Report the Fraser Committee concluded as follows:

"The Committee is likewise of opinion that death as a penalty for murder should be abolished. The Committee feels strongly however that such a step should be undertaken as part of a comprehensive system of penal reform which should commence without delay. This opinion finds support in the concern expressed by many witnesses who appeared before us. Many spoke about the inadequacies in the penal system and about some of the existing conditions in penal institutions which themselves contribute to crime. The introduction of a system of penal reform is likely to require careful research and study until such a scheme can be undertaken. The Committee recommends that, as an interim measure, consideration be given to modifying the circumstances under which capital punishment is now imposed as a penalty for murder."

10. The recommendations of the Fraser Committee were not implemented, and executions following the imposition of the mandatory death sentence continued in Jamaica during the 1980s. But questions as to the need for change continued to be asked. In September 1992 a joint select committee of the House of Representatives and the Senate recommended that the law should indeed be changed. A Bill was introduced which sought to amend the Offences against the Person Act by providing that the death penalty be retained in respect of certain murders only, to be defined as "capital murders", that life imprisonment be imposed for non-capital murders and that, in sentencing a person to life imprisonment, the court might specify a period which should elapse before the grant of parole to that person.

11. Attached to the Bill, which was to become the Offences against the Person (Amendment) Act 1992 ("the 1992 Act"), was a Memorandum of Objects and Reasons by the Minister of National Security and Justice. In the opening paragraphs of this Memorandum it was stated:

"Under the existing law in relation to homicide the death penalty is imposed on a conviction for murder.

The Bar Association of Jamaica, at an Extraordinary General Meeting voted against a Resolution for the total abolition of the death penalty, but made certain recommendations as to the retention of the death penalty for certain murders.

The Government has decided, after considering the views of the Bar Association and others, to make certain changes in the law relating to homicide."

12. The 1992 Act repealed section 2 of the 1864 Act ("the 1864 Act") and substituted a new section which defined murder which was committed in the circumstances set out in subsection (1) as capital murder. Section 2(1) was modelled on the provisions of the Homicide Act 1957, Part II of which created the offence of capital murder in Great Britain following the report of the Royal Commission on Capital Punishment in 1949 (Cmd 8932). None of these circumstances apply in this case. Section 2(3) of the 1864 Act, as amended by the 1992 Act, provides:

"Murder not falling within subsection (1) is non-capital murder."

13. Section 3 of the 1864 Act, as amended by the 1992 Act, provides:

"(1) 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.

(1A) Subject to subsection (5) of section 3B, a person who is convicted of non-capital murder shall be sentenced to death if before that conviction he has -

- (a) whether before or after 14 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."

The mandatory death sentence the constitutionality of which is in issue in this case was passed under section 3(1A) (b).

The constitutional provisions

14. On 19 July 1962 the Royal Assent was given to the Jamaica Independence Act 1962, by which Jamaica became a sovereign independent state within the Commonwealth. Section 1 of that Act provides:

"(1) As from the sixth day of August, nineteen hundred and sixty-two (in this Act referred to as 'the appointed day'), Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Jamaica.

(2) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Jamaica as part of the law thereof; and as from that day the provisions of the First Schedule to this Act shall have effect with respect to the legislative powers of Jamaica."

Paragraph 6 of the First Schedule provides:

"(1) Nothing in this Act shall confer on the legislature of Jamaica any power

to repeal, amend or modify the constitutional provisions otherwise than in such manner as may be provided for in these provisions.

(2) In this paragraph 'the constitutional provisions' means the following, that is to say -

- (a) this Act;
- (b) any Order in Council made before the appointed day (whether before or after the passing of this Act) which made or makes provision in respect of Jamaica in pursuance of the section five of the West Indies Act 1962.
- (c) Any law, or instrument made under a law, of the legislature of Jamaica made on or after the appointed day which amends, modifies, re-enacts with or without amendment or modification, or makes different provision in lieu of, any provisions of this Act, of any such Order in Council, or of any such law or instrument previously made."

15. The Constitution of Jamaica was established by the Jamaica (Constitution) Order in Council, which was made on 23 July 1962. Apart from certain provisions which were brought into effect in Jamaica on 25 July 1962, the Order came into operation immediately before 6 August 1962. The Constitution was set out in the Second Schedule to the Order. Section 4(1) of the Order provides:

"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 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 into conformity with the provisions of this Order."

16. Chapter I of the Constitution contains the interpretation section, which is section 1, and a section that describes its effect, which is section 2. Section 1 contains the following definition of the word "law": "'law' includes any instrument having the force of law and any unwritten rule of law and 'lawful' and 'lawfully' shall be construed accordingly". Section 2 provides:

"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."

Section 48(1) provides that, subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Jamaica, and sections 49 and 50 give power to Parliament to alter the Constitution subject to the conditions which these provisions lay down. The effect of section 2 is that the Constitution is the supreme law of Jamaica.

17. Chapter III of the Constitution sets out the fundamental rights and freedoms to which every person in Jamaica is entitled. Section 13 states that every person in Jamaica is entitled to each and all of the following rights and freedoms, namely (a) life, liberty, security of the person, the enjoyment of property and the protection of the law, (b) freedom of conscience, of expression and of peaceful assembly and association, and (c) respect for his private and family life, and that the subsequent provisions of that Chapter shall have effect for the purpose of affording protection to

these rights and freedoms, subject to such limitations as are contained in these provisions to ensure that they do not prejudice the rights and freedoms of others or the public interest.

18. Section 14(1) provides that no person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted. Section 17 provides:

"(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 contradiction of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

19. Section 26 sets out a number of provisions which are concerned with the interpretation of Chapter III of the Constitution. Among these provisions are the following:

"(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 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."

The issues

20. Three propositions advanced on the appellant's behalf were the subject of argument in the Court of Appeal: (i) the mandatory death sentence infringes the doctrine of the separation of powers; (ii) it also infringes the provisions of section 17(1) of the Constitution which sets out the right not to be subjected to inhuman or degrading punishment or other treatment; (iii) it is not saved from unconstitutionality either by section 17(2) or by section 26(8) of the Constitution. These propositions were restated for the purposes of the appeal to their Lordships' Board in the form of four questions, which may be further restated follows:

- (a) Does the fact that murders are classified by the 1992 Act into capital and non-capital save the mandatory death penalty from the conclusion that it is "inhuman or degrading punishment or other treatment" within the meaning of section 17(1) of the Constitution?
- (b) Was the law requiring the sentence of death to be passed on the appellant a law in force immediately before the appointed day within the meaning of section 26(8) of the Constitution (was it an existing law, in other words), with the result that nothing contained in it or done under its authority can be held to be inconsistent with or in contravention of section 17(1)?
- (c) If so, can its provisions be modified under section 4(1) of the Jamaica (Constitution) Order 1962 so as to bring its provisions into conformity with section 17(1)?

- (d) If the mandatory death penalty cannot be declared incompatible with section 17(1) or modified under section 4(1), is it nevertheless unlawful as a violation of the doctrine of the separation of powers?

The first issue: inhuman punishment

21. The background to a discussion of this issue is provided by the decision of the Board in *Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235. The appellant in that case had been convicted on two counts of murder by shooting. He appealed against the death sentence which was imposed on him by the High Court of Belize. Murder by shooting is classified by section 102(3)(b) of the Criminal Code of Belize as a class A murder, for which the sentence that was prescribed was the mandatory death penalty. Section 7 of the Constitution of Belize provides: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

22. In paragraph 43 of its judgment, which was delivered by Lord Bingham of Cornhill, the Board concluded that the passing of the mandatory death penalty on his conviction of murder by shooting subjected the appellant to inhuman or degrading punishment or other treatment incompatible with his right under article 7 of the Constitution, in that it precluded any consideration of the humanity of condemning him to death. It was pointed out that in a crime of that kind there might well be matters relating both to the offence and the offender which ought properly to be considered before sentence was passed. To deny him the opportunity, before sentence was passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate was to treat him as no human being should be treated and to deny his basic humanity, which was the core of the right which section 7 sought to protect.

23. The decision of the Board in *Reyes v The Queen* was applied in two other cases which were heard at the same time by the same members of the Judicial Committee: *R v Hughes* [2002] UKPC 12; [2002] 2 AC 259 and *Fox v The Queen* [2002] UKPC 13; [2002] 2 AC 284, in which the judgments of the Board were delivered by Lord Rodger of Earlsferry. The appellant in *R v Hughes* had been convicted in the High Court of Saint Lucia of murder and sentenced to death under section 178 of the Criminal Code which provided that anyone who committed murder was liable indictably to suffer death. Section 5 of the Constitution of Saint Lucia is in similar terms to those of section 7 of the Constitution of Belize. In paragraph 14 of the judgment it was noted that neither in that appeal nor in *Reyes* were their Lordships told of any legal or social differences between Belize and Saint Lucia which would cause the Board to adopt a different approach to the matter in that case. In paragraph 47 the Board held that the measure of the exception in paragraph 10 of the Constitution of Saint Lucia, which is in similar terms to section 17(2) of the Constitution of Jamaica, was the extent to which the law in question "authorises" the infliction of the specified type of punishment and that section 178 of the Criminal Code which, like section 3(1A) of the 1864 Act as amended by the 1992 Act, provided that the imposition of the death sentence was mandatory contained a crucial element which went beyond mere authorisation and was not saved by it. In these circumstances their Lordships decided to follow their decision in *Reyes* and hold 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: para 50.

24. The appellant in *Fox v The Queen* had been convicted in the High Court of Saint Christopher and Nevis of the murders of his fiancée and her mother and sentenced to death in terms of section 2 of the Offences against the Person Act 1873 which provided that the

sentence for murder was a mandatory death sentence. Section 7 of the Constitution of Saint Christopher and Nevis is in the same terms as section 7 of the Constitution of Belize. In this case too there was no suggestion that there were any special provisions in the constitution or any special social conditions which the Board should take into account. It was held, following the decision in *Reyes's* case, that section 2 of the 1873 Act was inconsistent with section 7 of the Constitution to the extent that it required the court to impose the death sentence when anyone was convicted of murder: para 10.

25. In the Court of Appeal Forte P said it appeared to him that, subject to a determination of the effect of the savings provision in section 26(8), the court ought to abide by the decisions in *Reyes* and *Hughes*. He observed that any attempt at arriving at the proper level of proportionality had to be done against 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 under section 48(1) of the Constitution to make laws for the peace, order and good government of Jamaica, subject to the provisions of the Constitution. He said that it was obvious that the social conditions existing in Jamaica are quite different from those in Belize, Saint Lucia and Saint Christopher and Nevis, and that it seemed to him that Parliament had attempted in the 1992 Act to craft out the types of murders which, committed in any circumstances, would still require a sentence of death. This was against the background of the fact that Jamaica was a society that had been plagued by unnecessary, wanton, heinous and extremely violent murders which had left citizens in fear and forced them to curtail their activities to safeguard their lives and those of their families. He summed up his position on this issue in these words:

"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."

26. Panton JA said that he was very uneasy with the submission that *Reyes* should be interpreted as binding on Jamaican courts. In his opinion it would be inaccurate to say that murder in Jamaica was overwhelmingly a domestic crime, as it was said to be in England and Wales in the report of an independent inquiry into the mandatory life sentence for murder sponsored by the Prison Reform Trust chaired by Lord Lane in 1993: see *Reyes v The Queen* [2002] 2 AC 235, para 12. This was because most murders in Jamaica are committed by armed bandits who have in their possession illegal guns and ammunition and commit rapes, robberies and burglaries while killing unsuspecting, unarmed civilians, and because police officers are also their prime targets.

27. Panton JA found support for his view in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648. That was an appeal from the Court of Criminal Appeal of Singapore, in which one of the questions for determination was whether the mandatory death sentence for trafficking in more than 15 grammes of heroin was unconstitutional. The appellant submitted that the mandatory nature of the sentence rendered it arbitrary, since it debarred the court in punishing offenders from

discriminating between them according to their individual blameworthiness. This was said to be contrary to the requirement in article 9(1) of the Constitution that a person might only be deprived of life "in accordance with law". Rejecting this argument, Lord Diplock said at p 674 that there was nothing unusual in a capital sentence being mandatory and that its efficacy as a deterrent might be to some extent diminished if it were not. Panton JA said that Parliament would have had these remarks in mind when it was amending the Offences against the Person Act in 1992. The legislature had clearly demonstrated its intention, and if there was now to be a change in the law for Jamaica it could not be effected through Belize, Saint Lucia or Saint Christopher and Nevis.

28. Clarke JA (ag) reached the same conclusion as Forte P. He said that the fact that questions of proportionality and individualised sentencing could play no part in the imposition of 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 would offend against section 17(1) of the Constitution, but for the general savings clause provided by section 26(8) of the Constitution for existing laws. This clause, in his opinion, saved the mandatory nature of the death penalty from inconsistency with any of the protective provisions of the Constitution.

29. Their Lordships consider that the mandatory death penalty which is imposed under section 3 of the Act is open to the same constitutional objections as those that were identified in *Reyes v The Queen* [2002] 2 AC 235. It is no longer acceptable, nor is it any longer possible to say, as Lord Diplock did on behalf of the Board in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 674, that there is nothing unusual in a death sentence being mandatory. As Lord Bingham pointed out in *Reyes*, p 244, para 17, the mandatory penalty of death on conviction of murder long pre-dated any international

arrangements for the protection of human rights. The decision in that case was made at a time when international jurisprudence on human rights was rudimentary: see p 257, para 45. Moreover, prior to its abolition by the Murder (Abolition of Death Penalty) Act 1965, it had been quite impossible to challenge the lawfulness of the mandatory death sentence in any of three jurisdictions of the United Kingdom, so long as it was duly imposed following a lawful conviction for murder.

30. The march of international jurisprudence on this issue began with the Universal Declaration of Human Rights which was adopted by a resolution of the General Assembly of the United Nations on 10 December 1948 (1948) (Cmd 7662). It came to be recognised that among the fundamental rights which must be protected are the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment: see articles 3 and 5 of the Universal Declaration; articles I and XXVI of the American Declaration of the Rights and Duties of Man which was adopted by the Ninth International Conference of American States on 2 May 1948; articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969); articles 6(1) and 7 of the International Covenant on Civil and Political Rights which was adopted by a resolution of the General Assembly of the United Nations on 16 December 1966 and entered into force on 23 March 1976 (1977) (Cmd 6702); and articles 4.1 and 5.2 of the American Convention on Human Rights which was signed on 22 November 1969 and came into force on 18 July 1978. So the practice was adopted, as many of the former British colonies achieved independence, of setting out in their Constitutions a series of fundamental rights and freedoms which were to be protected under the Constitution. The history of these developments is fully set out in *Reyes*. It is as relevant to the position under the Constitution of Jamaica as it was in that case to Belize. There is a common heritage. In *Minister of Home Affairs*

v Fisher [1980] AC 319, 328 Lord Wilberforce referred to the influence of the European Convention in the drafting of the constitutional instruments during the post-colonial period, including the Constitutions of most Caribbean territories. That influence is clearly seen in Chapter III of the Constitution of Jamaica.

31. Mr Pantry QC for the respondents did not dispute the significance of these developments. Nor did he seek, in the light of the Board's decision in *R v Hughes* [2002] 2 AC 259, to argue that the mandatory death sentence in this case was saved from challenge by section 17(2) of the Constitution. But he submitted that the Board's decision in *Reyes v The Queen* [2002] 2 AC 235 was distinguishable, in view of Lord Bingham's observation in para 43 that for the purposes of that appeal it was not necessary for the Board to consider the constitutionality of a mandatory death penalty for any murder than by shooting. He said that the social conditions in Jamaica were very different from those in Belize, for the reasons explained by Panton JA in the Court of Appeal. The legislation, which was directly related to the level of crime in Jamaica and the need for an effective deterrent, was also different. Section 2 of the Offences against the Person Act in Jamaica, as amended, was much more tightly drawn than the equivalent section in the Criminal Code of Belize.

32. Mr Pantry also submitted that the cases of *Woodson v North Carolina* (1976) 428 US 280 and *Roberts v Louisiana* (1977) 431 US 633, to which the Board referred in *Reyes*, paras 34 and 35, were distinguishable in the Jamaican context. The opinions of the plurality in those cases attached very considerable importance to the history of the mandatory death penalty in the United States, and to the actions of sentencing juries which suggested that it was viewed as an inappropriate punishment for a substantial proportion of first-degree murders. There were not the same signs of widespread

condemnation of the mandatory death penalty in Jamaica. It was to be noted that both of these cases concerned regressive statutes which had reintroduced the mandatory death penalty, whereas the effect of the 1992 Act was progressive as it reduced the instances in which the mandatory penalty was to be applied. It was a careful decision by Parliament that the types of murder that were selected for the mandatory penalty were so damaging to society that the death penalty was in their case the only appropriate penalty.

33. Their Lordships accept of course that the social conditions which currently exist in Jamaica are different from those in Belize, Saint Lucia and Saint Christopher and Nevis. And it is also true that the amendments which were introduced by the 1992 Act were carefully drawn in order to modify the circumstances in which in Jamaica the death sentence was to be mandatory. That was what the Fraser Report had recommended in 1981, as an interim measure pending the introduction of a system of penal reform that would include the abolition of the death penalty. But these points of difference do not remove the fundamental objections to the mandatory death sentence which lay at the heart of the decisions in *Reyes*, *Hughes* and *Fox*. As Lord Bingham put it in *Reyes*, para 43, the core of the right which section 7 of the Constitution of Belize exists to protect is that no human being should be treated in a way that denies his basic humanity. To condemn a man to die without giving him the opportunity to persuade the court that this would in his case be disproportionate and inappropriate is to treat him in a way that no human being should be treated. There are no limits to the variety of circumstances which may lead a man to commit homicide. The crime of which he has been convicted may turn out to have been far more serious than he foresaw or contemplated: *R v Powell (Anthony)* [1999] 1 AC 1, 14, per Lord Steyn. Attempts to confine the mandatory death sentence to those categories of murder that are most

reprehensible will always fail to meet these objections.

34. The crime of which the appellant in *Reyes v The Queen* was convicted was a murder by shooting. In *R v Hughes* the deceased died from injuries caused by striking him with a piece of post and a stone and jumping on him.

In *Fox v The Queen* the appellant was convicted on two counts of murder. In all these cases the imposition of the mandatory death sentence was held to be inconsistent with constitutional provisions which provided that no person was to be subjected to inhuman or degrading punishment or treatment. Their Lordships see no reason why these decisions should not be followed in the present case. In this case too basic humanity requires that the appellant should be given an opportunity to show why the sentence of death should not be passed on him. If he is to have that opportunity, it must be open to the judge to take into account the facts of the case and the appellant's background and personal circumstances. The judge must also be in a position to mitigate the sentence by imposing, as an alternative, a sentence of imprisonment. The mandatory sentence flies in the face of these requirements, as it precludes any consideration of the circumstances. It is to be noted that following the Board's decision in his case *Fox*, who was said in a psychiatric report to have suffered from several instances of uncontrolled rage associated with the use and abuse for about 40 years of anabolic steroids, was sentenced in the High Court of Saint Christopher and Nevis on 27 September 2002 to life imprisonment for the two murders of which he had been convicted.

35. Their Lordships hold that the imposition of the mandatory death sentence on the appellant subjected him to an inhuman punishment. It follows that, unless section 26(8) applies to the law under which he was sentenced, the law which authorised the sentence which he received was incompatible with section 17(1) of the Constitution.

The second issue: existing law

36. The question which must now be addressed is whether the mandatory death penalty is, as the Court of Appeal held, "saved" by section 26(8) of the Constitution. It will be recalled that section 26(8) provides that nothing contained "in any law in force immediately before the appointed day" shall be held to be inconsistent with any of the provisions of Chapter III and that nothing done under the authority of any such law shall be held to be done in contravention of these provisions. The law in force immediately before the appointed day which provided that the penalty for murder was death was to be found in section 2 of the Offences against the Person Law of 1864: "Whoever shall be convicted of murder shall suffer death as a felon".

37. But, as has already been noted, section 2 of the Act of 1864 was repealed by the Offences against the Person (Amendment) Act 1992. The 1992 Act substituted with effect from its commencement on 13 October 1992 a new section which established two separate categories for murder: capital murder and non-capital murder. Section 3 of the 1864 Act, which provided that the court shall pronounce sentence of death upon every conviction for murder, was amended by restricting the mandatory death sentence to every person who is convicted of capital murder as defined in section 2(1) of the Act, as amended. And section 3(1A) of the 1864 Act, as amended, provides that the death penalty is mandatory also in the case of a person who is convicted of two non-capital murders. So the law which was in force immediately before the appointed day is no longer the law. The appellant was sentenced to death under the law which is set out in the amendments contained in the 1992 Act.

38. In the Court of Appeal Forte P said that, since before the appointed day all murders were punishable by sentence of death, the amendment of the Act of 1864 did not create any new sentence and that the provision in the Act which enacts that the death penalty is mandatory for murders falling within the

relevant categories was not abrogated because of the amendment. At the end of his opinion he said that he 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 that consequently by virtue of section 26(8) there could be no successful challenge to its constitutionality. Clarke JA (ag) was of the same opinion. He said that the amendment which restricted the sentence of death to certain tightly drawn categories did not in any shape or form derogate from the rights which at the coming into force of the Constitution the individual enjoyed, and that the general savings provisions of section 26(8) that were applicable to the whole range of murder convictions must necessarily now apply to the restrictive categories. Panton JA said that he shared the view of the other judges that section 26(8) of the Constitution provided a barrier to a successful challenge to the constitutionality of the legislation.

39. Mr Hylton QC submitted that all that the 1992 Act did was to classify the offence of murder into various categories. The mandatory death sentence remained a feature of the law of Jamaica, as it was immediately before the appointed day. No new offence had been created, and the acts which attracted the mandatory penalty were the same acts as before. In support of this proposition he referred to *Huntley v Attorney-General for Jamaica* [1995] 2 AC 1, 14C where Lord Woolf, dealing with an argument that section 7 of the 1992 Act which provided for the classification of existing murder convictions as capital or non-capital contravened section 20(7) of the Constitution, said that section 7 was not an ex post facto law in that sense as it did not increase the punishment or adversely affect the position of the person already convicted of murder and sentenced to death. Mr Hylton submitted that section 26(9) of the Constitution was merely declaratory, and that was not to be taken as exhaustive of the situations in which a law in force immediately before the appointed day was to be deemed not to have ceased to be

such a law. He said that it was inconceivable that Parliament would have intended when it made these amendments in 1992 that the death penalty for capital murders and for those convicted of two non-capital murders should cease to be mandatory.

40. Section 26 is part of Chapter III of the Constitution by which the fundamental rights and freedoms of the individual described in section 13 are guaranteed. The concluding words of section 13 contain this declaration:

"the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

That declaration provides the background to the interpretation of the provisions which are set out in section 26(8) and section 26(9).

41. In *Director of Public Prosecutions v Nasralla* [1967] 2 AC 238 one of the issues was whether section 20(8) of the Constitution of Jamaica, which provides that no person who has been tried for a criminal offence and either convicted or acquitted shall again be tried for that offence, was to be treated as declaring or intended to declare the common law on the subject or as expressing the law on the subject differently. Lord Devlin dealt with this point at pp 247-248, where he said:

"All the judges below have treated [section 20(8)] as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unnecessary to resort to implication for this intendment, since the Constitution itself expressly ensures it. Whereas the general rule, as is to be expected

in a Constitution and is here embodied in section 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Chapter III. 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 III provides as follows ..."

42. These observations would plainly have had much force in this case if it were plain that the law under which the appellant was sentenced to death was a law which was in force immediately before the appointed day. But the issue in this case is whether the law under which he was sentenced falls within that description, when the provisions of section 26(8) are read together with those in section 26(9). Guidance as to how this issue should be approached is not to be found in any presumption as to whether the law which was in force immediately before the appointed day secured the fundamental rights of the people of Jamaica. It is to be found in the principle of interpretation, which is now universally recognised and needs no citation of authority, that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in section 13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to. Section 26(8) read with section 26(9) limits that protection. So it must be given a narrow rather than a broad

construction. This means that careful attention must be paid to the precise meaning of the words used in section 26(9). If this amounts to what has been described as "tabulated legalism", it is perfectly in order in this context.

43. Before coming to section 26(9) however their Lordships must deal briefly with a point which Mr Hylton made about the meaning of the word "law" in section 26(8). Section 1 defines the word "law" as including any unwritten rule of law. The offence of murder, it was said, remains the same as it always was - a common law offence. It was already part of the law of Jamaica immediately before the appointed day. The separation of that offence by the 1992 Act into different categories for the purpose of sentence did not change the nature of the offence. So the fact that the sentence of death was no longer mandatory in cases of non-capital murder did not affect the law to the extent that it continued to provide that a sentence of death was mandatory. The answer to this point is to be found in the fact that immediately before the appointed day the mandatory death sentence which section 2 of the 1864 Act laid down formed part of the written law of Jamaica. It was enshrined in statute. It is the state of that written law that must be scrutinised to see if it has ceased to be what it then was, not any rule of law which is unwritten.

44. Section 26(9) provides that, for the purposes of section 26(8), a law in force immediately before the appointed day "shall be deemed not to have ceased to be such law by reason only" of the circumstances referred to in paragraphs (a) and (b) of the subsection. The circumstance referred to in paragraph (a) plainly does not apply. The amendments to the 1864 Act were made by Parliament. They were not made by or under section 4 of the Jamaica (Constitution) Order in Council 1962. Nor can the circumstance referred to in paragraph (b) be applied here either. The amendments made by the 1992 Act went far beyond what that provision

contemplates. It did not seek merely to consolidate or to revise the existing laws. Its purpose was to amend the 1864 Act, not to confine itself to only such adaptations or modifications of the existing laws as were necessary to effect a consolidation or revision of them.

45. Mr Hylton, of course, recognised the difficulty which he faced in trying to bring the 1992 amendments within paragraphs (a) and (b) of section 26(9). That was why he submitted that those paragraphs were not exhaustive of the circumstances in which a law which was in force immediately before the appointed day could survive later changes without losing the status of an existing law for the purposes of section 26(8). But this argument fails to give effect to the words "shall be deemed" and "by reason only of" which precede paragraphs (a) and (b) of the subsection. The words "shall be deemed" indicate that, were it not for that direction, the law in force immediately before the appointed day would have ceased to be such law in the circumstances referred to in these two paragraphs. It must be concluded therefore that section 26(9) does not extend to any other circumstances that may be envisaged where the law in force immediately before the appointed day was subject to adaptation or modification which are not expressly covered by those paragraphs. The only circumstances where adaptations or modifications that are made to it are not to have the effect that the law in force immediately before the appointed day has ceased to be such law are those set out in paragraphs (a) and (b).

46. The narrowness of the wording of section 26(9) is no accident. It is entirely in keeping with the philosophy which requires a generous interpretation to be given to the principles which are enshrined in Chapter III of the Constitution. True it is that the laws which were in force immediately before the appointed day are to be taken to have given full effect to the fundamental rights and freedoms that are set out in section 13.

This is what section 26(8) provides. It was a reasonable working assumption, in the interests of legal certainty and to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy. So long as these laws remained untouched, they did not have to be scrutinised. But as soon as they were changed, adapted or modified in any respect, except in the circumstances referred to in paragraphs (a) and (b) of section 26(9), they had to comply with the requirements of Chapter III. This because there was no longer any need to apply the presumption on which section 26(8) proceeds. The opportunity to ensure that the law as changed, adapted or modified gave effect to all the fundamental rights and freedoms of the individual was now available, and it was up to Parliament to grasp that opportunity. Its power to make laws for the peace, order and good government of Jamaica is expressly made subject to the provisions of the Constitution by section 48(1).

47. It must be concluded therefore that the law as to the mandatory death penalty which was in force immediately before the appointed day ceased to be such law for the purposes of section 26(8) as from 13 October 1992 when it was amended by the 1992 Act. So the protection for existing laws in section 26(8) does not apply to the amendments which the 1992 Act sets out. The power to legislate which Parliament was exercising when it was enacting the 1992 Act was subject to the provisions of Chapter III which, as section 13 declares, have effect for the purpose of protecting the rights and freedoms of the individual. Their Lordships have already concluded that the mandatory death sentence in section 3(1A) is an inhuman punishment within the meaning of section 17(1) of the Constitution, and it is accepted that the fact that this description of punishment was made mandatory by that subsection is not saved by section 17(2). So the law which required the judge to impose this sentence on the appellant must be held to be unconstitutional.

Conclusion

48. Their Lordships do not need to examine the remaining issues which were addressed in the course of the argument, which were whether, assuming it to be an existing law, section 3(1A) of the 1864 Act as amended could be modified under section 4(1) of the Jamaica (Constitution) Order 1962 to bring it into conformity with the Constitution and whether the provisions of section 3(1A) are unlawful because they violate the doctrine of the separation of powers.

49. For the reasons already given, they hold under section 2 of the Constitution that section 3(1A) of the 1864 Act, as amended by the 1992 Act, is inconsistent with section 17(1) and hence void to the extent that it requires, rather than merely authorises, the imposition of the death sentence. So any death sentence passed under the mandatory requirement since the date when that amendment came into force must be held to be unlawful. To the extent that the judge was required to pass that sentence an order quashing the sentence will be the appropriate remedy. But it has to be recognised that section 3(1A) of the amended Act remains valid to the extent that it authorises the imposition of that sentence. It will therefore be open to the court in these cases either to impose the death sentence or to impose a lesser punishment, depending on the view it takes of the crime which the defendant committed and all the relevant circumstances. The judge may be asked to hear submissions and, if appropriate, evidence about these matters before he takes his decision as to what the sentence should be: see *R v Hughes* [2002] 2 AC 259, 282-283, paras 51-52; *Fox v The Queen* [2002] 2 AC 284, 290, para 11.

50. Their Lordships will humbly advise Her Majesty that this appeal should be allowed, that the sentence of death which was imposed on the appellant should be set aside and that his case should be remitted to the Supreme

Court of Jamaica to decide what sentences should be pronounced for the crimes of which the appellant was convicted in this case.

Postscript

51. Their Lordships have read with great care the opinion which has been prepared by the concurring minority. The issue on which there is a division of opinion is not crucial to the decision in this case, as the Board is agreed that section 3(1A) of the Offences against the Person Act 1864, as amended, was not a law in force immediately before the appointed day and that it is not protected by section 26(8) of the Constitution. But it is crucial to the decisions which their Lordships have reached in *Matthew v The State* [2004] UKPC 33 and *Boyce and Joseph v The State* [2004] UKPC 32. It is said that the outcome in this appeal, as compared with the result in those two cases, is anomalous. A few words of explanation are needed as to why their Lordships have not found it possible to arrive at the same conclusion in all three cases about the constitutionality of the mandatory death penalty.

52. The key to the approach which their Lordships have taken is to be found in the wording of the Constitutions that the Board has been asked to construe. On the one hand there are the clauses which proclaim that the Constitution is the supreme law: section 1 of the Constitution of Barbados; section 2 of the Constitution of Trinidad and Tobago; and section 2 of the Constitution of Jamaica. On the other there are the clauses which provide that existing laws are not to be invalidated by, or held to be inconsistent with, the provisions of the Constitution which recognise and declare the rights and freedoms of the individual: section 26(1) of the Constitution of Barbados; section 6(1) of the Constitution of Trinidad and Tobago; and section 26(8) of the Constitution of Jamaica. The Board's task has been to construe the supreme law clauses and the existing laws clauses as it finds them, and then to apply

them to the facts. In their Lordships' opinion the language which these provisions have used is plain and unambiguous. In *Matthew* and in *Boyce and Joseph* the laws in question are existing laws. In the present case the law in question is not.

53. There is undoubtedly an affinity between these three Constitutions, and their Lordships accept that broadly speaking they operate in the same way. But this does not mean, where the facts are different, that they must all lead to the same result. The concurring minority seek to achieve this result by using section 4(1) of the Jamaica (Constitution) Order in Council in the present case and the equivalent provisions in the Barbados Independence Order and the Constitution Act in Trinidad and Tobago in the other two cases. These are the provisions which require existing laws to be construed with such adaptations and modifications as are necessary to bring them into conformity with the Constitution. But these provisions are not part of the Constitution. They cannot prevail over what the Constitution itself provides, as it is the supreme law. Their Lordships firmly believe that respect for the rule of law requires them to give effect to section 28(1) of the Constitution of Jamaica, not to ignore it, when it says that existing laws are not to be held to be inconsistent with any of the provisions of Chapter III. Giving effect to this instruction, they find that the existing laws are in conformity with that Chapter. There is nothing in them which requires to be adapted or modified to bring this about.

54. There is, of course, much force in the point made by the concurring minority that human rights in Jamaica must not be thought to have been frozen indefinitely at the point they had reached when Jamaica became independent in August 1962. But their Lordships are not to be taken as suggesting that these rights were indeed frozen. On the contrary, they accept without reservation the modern approach to the interpretation of constitutional guarantees which is now so

well established that it needs no citation of authority. That, however, is not the issue which the Board has to decide. It is not being asked to construe the provisions of Chapter III which set out the fundamental rights and freedoms of the individual. It is being asked to apply section 2 which declares the Constitution to be the supreme law, and to give effect to section 26(8) of the Constitution which excludes existing laws from the constitutional guarantees as it preserves them from any inconsistency. The meaning of these provisions is clear, and it has not changed with the passage of time. Their effect is that, if existing laws are found to be inconsistent with obligations binding on Jamaica in international law, it will be - as it always has been - for Parliament to provide the remedy. The remedy which it provides will remove the exclusion which applies to existing laws, with the result that the new law will be open to scrutiny. It will be for the courts then to ensure that Chapter III of the Constitution has been complied with, as this case has shown.

***Judgment of Lord Bingham of Cornhill,
Lord Nicholls of Birkenhead, Lord Steyn and
Lord Walker of Gestingthorpe***

55. Having had the opportunity to study the judgment prepared by Lord Hope of Craighead, we agree, largely for the reasons that he gives,

- (1) that the imposition of the mandatory death penalty on the appellant subjected him to inhuman or degrading treatment (paragraph 35);

- (2) that section 3(1A) of the Offences against the Person Act 1864, as inserted by section 3(b) of the Offences against the Person (Amendment) Act 1992, under which the death penalty was passed on the appellant, was, subject to section 26(8) of the Constitution of Jamaica, incompatible with section 17(1) of that Constitution (paragraph 35);
- (3) that section 3(1A) of the 1864 Act was not a law in force immediately before the appointed day and is not protected by section 26(8) of the Constitution on any reading of that provision (paragraph 47);
- (4) that section 3(1A) must now be read as if for the word "shall" there had been substituted the word "may" (paragraph 49); and
- (5) that the appeal should be allowed, that the sentence of death passed on the appellant should be set aside and that his case should be remitted to the trial judge so that he may decide what sentence should be passed for the crimes of which he was convicted (paragraph 50).

We should, however, make plain that we would for our part reach the conclusions which we have numbered (4) and (5) even if section 3(1A) were a law in force immediately before the appointed day. Our reasons for holding this opinion very largely appear from our dissenting opinions in *Matthew v The State* [2004] UKPC 33 and *Boyce and Joseph v The Queen* [2004] UKPC 32, and may therefore be stated more briefly than would otherwise be appropriate in an appeal of such obvious importance.

56. Jamaica became independent and adopted its Constitution more than four years before Barbados followed suit. While there are obvious differences between the two Constitutions (that of Jamaica, for example,

has no preamble) there is a very strong affinity between the two. There is also an affinity, although weaker, with the 1976 Constitution of Trinidad and Tobago. Thus we find in section 2 of the Constitution of Jamaica (quoted by Lord Hope in paragraph 16) a provision providing that the Constitution shall, subject to special parliamentary procedures, prevail over any other law, which shall, to the extent of any inconsistency, be void. This broadly corresponds with section 2 of the 1976 Constitution of Trinidad and Tobago and section 1 of the Constitution of Barbados. We find in Chapter III a series of sections protecting fundamental human rights and freedoms, introduced by section 13 (which Lord Hope summarises in paragraph 17), broadly corresponding with section 4 of the 1976 Constitution of Trinidad and Tobago and section 11 of the Constitution of Barbados. We find in section 17(1) (quoted by Lord Hope in paragraph 18) the prohibition of inhuman or degrading punishment or other treatment, corresponding to section 5(2)(b) of the 1976 Constitution of Trinidad and Tobago and section 15(1) of the Constitution of Barbados. We find in section 26(8) a savings clause (quoted by Lord Hope in paragraph 19). We find in section 4(1) of the Jamaica (Constitution) Order in Council 1962 (SI 1962/1550) (quoted by Lord Hope in paragraph 15) a modification duty, more elaborately worded but for present purposes similar in effect to section 5(1) of the 1976 Constitution Act of Trinidad and Tobago and section 4(1) of the Barbados Independence Order 1966.

57. In their written Case (paragraph 45), the respondents put their submission on construction very clearly and succinctly:

"In particular, it is submitted that no question of modification under section 4 of the Jamaica (Constitution) Order in Council 1962 arises. This is because the mandatory death sentence prescribed by section 3(1) of the Offences against the Person Act is saved by section 26(8) of the Constitution. Section 3(1) is

therefore not inconsistent with the Constitution and there is nothing to bring 'into conformity with' the provisions of the 1962 Order in Council. The Order includes the Constitution, which is contained in a schedule to it."

This is in all essentials the same argument as was advanced by the respondent States in *Matthew and Boyce and Joseph*. The majority accepted the argument in those cases, but we rejected it and would reject it in this case also, for very much the same reasons as have led us to dissent in the other cases.

58. In our opinion section 26(8) of the Constitution of Jamaica, despite differences of wording, operates (so far as relevant for present purposes) in the same way as section 6(1) of the 1976 Constitution of Trinidad and Tobago and section 26(1) of the Constitution of Barbados. We draw attention to the recognition in section 26(9) of the Constitution of Jamaica (quoted by Lord Hope in paragraph 19) that an existing law may have been the subject of adaptations or modifications made under as well as by section 4 of the Jamaica (Constitution) Order in Council 1962. Section 4(1) requires existing laws to be construed with such adaptations and modifications as may be necessary to bring them into conformity with the Constitution. It cannot therefore be said that section 4 has no application to laws bearing on human rights and in force immediately before the appointed day. Had the draftsman intended such a result, he would have had no difficulty in expressing it, as has been done elsewhere in the Constitution. Thus subsections (4) and (6) of section 24 provide that subsections (1) and (2), prohibiting discrimination, "shall not apply" in the circumstances specified. Subsection (8) of the same section provides that nothing in subsection (2) "shall affect" the exercise of certain discretions relating to proceedings in court. The proviso to section 25(2) prohibits the Supreme Court from exercising its power to grant relief where other means of redress were or are

available. Section 32(4), in Chapter IV of the Constitution, provides that a certain matter "shall not be enquired into in any court". Section 58(4) and 59(5), in Part 2 of Chapter V of the Constitution, provide that certain certificates "shall be conclusive for all purposes and shall not be questioned in any court". Language could have been used which would have made it quite plain that the human rights provisions in Chapter III of the Constitution were not to apply to existing laws, but this was not done and we cannot regard the omission as inadvertent.

59. It has in the past been generally thought that the effect of section 26(8) of the Constitution of Jamaica immunised any law in force in Jamaica immediately before the appointed day against any challenge based on the human rights protected by Chapter III of the Constitution. This view was largely based on the decision of the Board in *Director of Public Prosecutions v Nasralla* [1967] 2 AC 238, which it is accordingly necessary to consider. The respondent had shot and killed an escaping felon and was arraigned on an indictment charging him with murder. At the end of the trial the jury found him not guilty of murder but were unable to agree on the lesser charge of manslaughter which the judge had left to them. The judge discharged the jury and, despite objection by the defence, adjourned the trial on the issue of manslaughter to another court. The respondent then applied for relief under section 20(8) of the Constitution which so far as relevant provided:

"No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence."

The respondent had been tried by a competent court for a criminal offence, and had been acquitted of murder. It was, of course, accepted that he could not be tried for murder again. But it was held, unsurprisingly, that he had been neither convicted nor acquitted of manslaughter and that there was accordingly no objection to retrial of the respondent for manslaughter under section 20(8) of the Constitution. The contrary argument for the respondent, "based on high technicalities", was rejected. It is in that context that Lord Devlin, delivering the judgment of the Board, made the observations, at pp 247-248, which Lord Hope has quoted in paragraph 41.

60. It was submitted for the Director of Public Prosecutions in that case (page 240) that section 20(8) of the Constitution conferred no right upon the respondent (Nasralla) which he had not enjoyed before independence, and the Board expressly adopted that view (page 247). Lord Devlin's judgment was very largely devoted to consideration of how the common law of jury verdicts had developed over the centuries, and he draw attention to no disconformity between the common law, applicable in Jamaica, and section 20(8). It was not, therefore, necessary for the Board to make any ruling on the effect of section 26(8), and it is perhaps significant that no reference was made to the duty to modify under section 4 of the Jamaica (Constitution) Order in Council 1962, either by Lord Devlin or (as would appear from the report) by counsel. In any event, we respectfully consider that more has been read into Lord Devlin's words than he can have intended. The Constitution did no doubt proceed upon the presumption that the fundamental rights which it covered were already secured to the people of Jamaica by existing law. We can accept that the laws in force were not to be subjected to scrutiny in order to see whether or not they conformed to the precise terms of the protective provisions. It was an object of the provisions to ensure that no future enactment should in any matter which Chapter III

covered derogate from the rights which at the coming into force of the Constitution the individual enjoyed. It was not however said that the presumption referred to was conclusive and irrebuttable. The Board did not have to consider a case in which an existing law was found to infringe a guaranteed human right of the individual. And although the Board roundly rejected (page 248) the respondent's argument that, if section 20(8) expressed the law on autrefois acquit differently from the common law, section 20(8) must prevail, it had already held that there was no disconformity between the two. It would in our opinion be surprising if the Board intended to treat laws in force at the time of independence as incapable of judicial development or adaptation to bring them into conformity with evolving understanding of human rights, the more so since the judgment traced the history of important changes in jury trial, and Cockburn CJ was quoted with approval (page 254) as having said that a statement of Blackstone was not "a true or correct exposition of the law as practised in our day" and that a statement of Lord Holt was "not in conformity with modern views upon the subject". The Board can scarcely have contemplated that human rights in Jamaica were to be frozen indefinitely at the point they had reached in August 1962. It would undoubtedly have been familiar with the observations of Lord Sankey LC in *Edwards v Attorney-General for Canada* [1930] AC 124, 136.

61. If, contrary to our view, the Board did hold in *Nasralla* that the effect of section 26(8) is to prohibit judicial modification or adaptation of any existing law to bring it into conformity with the human rights guarantees in Chapter III, we respectfully think that that decision should no longer be followed. The killing in question took place only two months, and the hearing by the Board took place some four years, after adoption of the Constitution. The decision was made at a time when international jurisprudence on human rights was even more rudimentary than

when *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 was heard nearly fourteen years later.

The modern approach to constitutional interpretation, heralded by *Minister of Home Affairs v Fisher* [1980] AC 319, had yet to take full effect. No argument was addressed and no consideration given to the principles which should guide the interpretation of constitutional guarantees and savings clauses, to the special character of human rights guarantees, or to the duty to modify (of which there was as yet little experience). No reference was made to obligations binding on Jamaica in international law, nor could it have been: at the date of the hearing Jamaica was party to no international human rights instrument other than the Universal Declaration of Human Rights, and that contains no article bearing on the right not to be tried twice for the same offence.

62. Since we consider the provisions to be interpreted in this case, like those in *Matthew* and *Boyce and Joseph*, to be capable of bearing two meanings, it is in our judgment appropriate to have regard to the international obligations undertaken by Jamaica so as to give the provisions that interpretation which will conform to those obligations in preference to that which will conflict with them. The respondents laid emphasis on the facts that Jamaica had never accepted the compulsory jurisdiction of the Inter-American Court of Human Rights and that decisions of that court in cases involving other states are not binding on Jamaica. These points are correct, but in our judgment unhelpful. Jamaica became bound by the Universal Declaration of Human Rights in September 1962, by the International Covenant on Civil and Political Rights in October 1975 and by the American Convention in August 1978. All these instruments prohibited the imposition of inhuman or degrading punishment or other treatment or contained a prohibition to similar effect. For reasons summarised by Lord Hope, the Board is unanimously of opinion that the imposition of the mandatory death penalty on the appellant subjected him

to inhuman or degrading treatment. It must follow that if (contrary to our unanimous opinion) section 3(1A) of the 1864 Act were an existing law, and if (contrary to our view) section 26(8) precluded modification of section 3(1A) to bring it into conformity with the Constitutional prohibition of inhuman or degrading punishment or other treatment, the effect would necessarily be to put the State in violation of its international obligations. This is an additional reason why we should, even if section 3(1A) were an existing law, favour the interpretation we have outlined.

63. This interpretation avoids what we see as a gross anomaly when the outcome of this appeal is compared with that in *Matthew and Boyce and Joseph*. On becoming independent, Trinidad and Tobago, Barbados and Jamaica all inherited, from the colonial governments they succeeded, nineteenth century laws imposing the mandatory death penalty for murder. Those laws reflected the mediaeval common law of England. In Trinidad and Tobago and Barbados these laws have remained, in all essentials, unchanged. In Jamaica the law was changed, because the inhumanity of requiring the death penalty to be imposed on all defendants convicted of murder was recognised. So an attempt was made to confine the mandatory death penalty to the most serious categories of murder. The attempt has not proved to be effective, but it was a bona fide move in the direction of seeking to protect the human rights of individual defendants. One strange, and to our mind regrettable, implication of the majority decision in *Matthew, Boyce and Joseph* and the present appeal is that Jamaica would have succeeded in maintaining an objectionable nineteenth century law if it had not attempted to mitigate its harshness.

64. We mention one last matter. In the Court of Appeal and in argument much emphasis was laid on the very high incidence of murder and the widespread use of firearms in Jamaica. These facts are well known to the Board and are, regrettably, notorious. Criminal conduct

of the kind described is not unknown in the United Kingdom. So long as those conditions prevail, and so long as a discretionary death sentence is retained, it may well be that judges in Jamaica will find it necessary, on orthodox sentencing principles, to impose the death sentence in a proportion of cases which is, by international standards, unusually high. But prevailing levels of crime and violence, however great the anxiety and alarm they understandably cause, cannot affect the underlying legal principle at stake, which is that no one, whatever his crime, should be condemned to death without an opportunity to try and persuade the sentencing judge that he does not deserve to die.

65. For these reasons, we would advise that the appeal be allowed and the order made which Lord Hope proposes.