

IN THE PRIVY COUNCIL

No.41 of 1981

ON APPEAL  
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

NOEL RILEY, ANTHONY FORBES,  
CLIFTON IRVING, ELIJAH BECKFORD  
and ERROL MILLER

Appellants

- and -

THE ATTORNEY GENERAL OF JAMAICA,  
THE SUPERINTENDENT OF PRISONS -  
SAINT CATHERINE DISTRICT PRISON

Respondents

C A S E FOR THE APPELLANTS

1. This is an Appeal from the Judgments of the Court of Appeal of Jamaica dated the 25th day of February 1981, dismissing the Appellants Appeal for a declaration that the execution of the Appellants at this time would be unconstitutional being contrary to section 17(1) of the Jamaican Constitution, that in all cases the Appellants had been charged with murder and were convicted and sentenced to execution.
2. The principal issues of this Appeal are:
  - (a) Whether or not the Appellants have been subjected to inhuman or degrading treatment in breach of section 17(1) of the Jamaica (Constitution) Order-In-Council 1962.
  - (b) Whether or not the delay in carrying out the execution of the Appellants and/or defacto suspension of the death penalty and the debates and resolutions on Capital punishment in Parliament constitutes an infringement of the constitutional rights of the Appellants under section 17(1) of the Jamaica (Constitution) Order-In-Council 1962.

- (c) Whether or not the taking of the Appellants life and/or the threat of the taking of the Appellants' life at this time and in the circumstances amounts to a denial of their constitutional rights under section 17(1) of the Jamaica (Constitution) Order-In-Council 1962.

3. Section 17 of the Jamaica (Constitution) Order In Council 1962 is as follows:-

17-(1)- No person shall be subject 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.

4. The principal facts of the case in respect of each Appellant appears from the Affidavit Evidence tendered at the hearing of the Notice of Motion and the Judgments of the Full Court and the Judgments of the Court of Appeal, insofar as they relate to each Appellant they may be summarised as follows:-

- (a) NOEL RILEY - was convicted on the 7th day of March 1975 in the Home Circuit Court of Jamaica on a charge of Murder and was sentenced to death being the penalty prescribed by law.

On the 23rd day of February 1976 an application for leave to Appeal was dismissed by the Court of Appeal of Jamaica and he applied for special leave to Appeal to Her Majesty in Council, and the said application was refused on the 18th day of July 1978.

That a Warrant was issued scheduling the date for his execution on the 29th day of May 1979.

- (b) ANTHONY FORBES - was convicted on the 7th day of March 1975 in the Home Circuit Court of Jamaica on a charge of Murder and was sentenced to death being the penalty prescribed by law.

On the 23rd day of February 1976 his application for leave to Appeal was dismissed by the Court of Appeal of Jamaica and he took no further steps in the matter.

That a Warrant was issued scheduling the date for his execution on the 29th day of May 1979.

- (c) CLIFTON IRVING - was convicted on the 22nd day of March 1975 in the Home Circuit Court of Jamaica on a charge of Murder and was sentenced to death being the penalty prescribed by law.

His Appeal was heard in the Court of Appeal of Jamaica from the 15th to 19th day of November 1976, and 13th to 17th day of December 1976 and was dismissed on the 10th day of January 1977.

His Counsel apparently contemplated applying to Her Majesty in Council for special leave to appeal but did not pursue the application and in or around October or November 1978 informed the local Privy Council that he was no longer proceeding with the application.

That a Warrant was issued scheduling the date for his execution on the 29th day of May 1979.

- (d) ELIJAH BECKFORD - was convicted on the 9th day of May 1975 in the Hanover Circuit Court on a charge of Murder and was sentenced to death being the penalty prescribed by law.

That an application for leave to Appeal was dismissed by the Court of Appeal of Jamaica on the 6th day of November 1975 and he took no further steps in the matter.

That a Warrant was issued scheduling the date for his execution on the 12th day of June 1979.

- (e) ERROL MILLER - was convicted on the 28th day of October 1975 in the Home Circuit Court of Jamaica on a charge of Murder and was sentenced to death being the penalty prescribed by law.

An application for leave to Appeal was refused by the Court of Appeal of Jamaica on the 5th day of February 1976 and he applied for special leave to Appeal to Her Majesty in Council, which was dismissed on the 8th day of December 1976.

That a Warrant was issued scheduling the date for his execution on the 12th day of June 1979.

5. That the undisputed facts which are relevant to the Appeal and which appears from the Affidavits filed by the Appellants and on their behalf which were never challenged by the Respondents may be summarised as follows:

- (a) That prior to 1972 - in particular between 1958 and 1972 - the average period between the final Appeal and execution was 9.44 weeks.
- (b) That there were no executions from April 1976 to the time of issue of the death Warrants in respect of the appellants.
- (c) That in May 1977, a Ministry Paper was tabled in the House of Representatives in respect of Capital Punishment and the matter was referred to the National Security Committee of the House, and on the 18th day of October 1978, the House Committee recommended that there should be no change in the law.
- (d) That the matter was debated in the House of Representatives on the 13th day of January 1979 and defeated by a vote of 23 to 20.
- (e) That on the 9th day of February 1979 the Senate passed a resolution that Capital Punishment should be suspended for eighteen (18) months pending a detailed study and assessment and report on the sociological and psychological effects of Capital Punishment in today's Jamaica.
- (f) That the debate in the House and the Senate was published by the Press in Jamaica.

6. That the Appellants contend that their constitutional right and protection from inhuman or degrading treatment and/or punishment guaranteed by section 17(1) of the Jamaican Constitution has been infringed by reason of the following inter alia -

- (a) The considerable length of time that elapsed between the date of dismissal of their final Appeal and the notification to them that the sentence of death was to be carried out was so prolonged as to arouse in them a reasonable belief that the sentence of death would not be carried out having regard also to the other circumstances that transpired during the said period.
- (b) The fact that whereas the average period in Jamaica prior to 1972 between the final Appeal and execution was an average of 9.44 week, in the case of the Appellants, there was an excessively long period of time in which no steps were taken to carry out the sentence of death pronounced on the condemned men.
- (c) That a prolonged period of time elapsed in the case of some of the condemned men between the tabling of the Ministry Paper in the House of Representatives in May 1977 and the Debate in the House of Representatives in October 1978 was such, that it aroused in the Appellants a reasonable belief that the sentence of death would not be carried out.
- (d) That when the House of Representatives passed a Resolution on the 30th day of January 1979 requesting a review of all cases of persons awaiting execution, and the Senate on the 9th day of February 1979 debated a Resolution which was carried that Capital Punishment be suspended for eighteen (18) months and thereafter the period of time which elapsed before the notification was such as to further confirm their belief that the sentence of death would not be carried out.
- (e) That the Appellants sustained and suffered grave mental anguish and depression as a consequence of the prolonged period of time that they were kept

under the sentence of death and which was injurious to their health which was supported by Medical Evidence tendered on their behalf and which unchallenged or contradicted by the Respondents.

7. That no evidence was tended for and on behalf of the Respondents as to the cause or reason for the prolonged period of delay in carrying out the sentence of death and the only evidence tendered on behalf of the Respondents related to dates of petitions by the condemned men seeking the exercise of the prerogative of mercy.

8. That the Appellants applied to the Full Court for a declaration that their Constitutional Rights under section 17(1) of the Jamaican Constitution had been infringed on the 13th day of June 1979, and the Full Court dismissed the application on the preliminary point that the Court had no jurisdiction to hear the matter.

9. That the Appellants appealed to the Court of Appeal of Jamaica against the decision of the Full Court which was heard on the 5th and 6th days of December 1979 and the Court of Appeal allowed the Appeal and remitted the matter to the Full Court for hearing.

10. That the matter came up for hearing before the Full Court on the 17th, 18th, and 19th day of March 1980 and was dismissed on the 23rd day of March 1980.

11. The Appellants appealed from the decision of the Full Court which was heard on the 16th to the 23rd days of July 1980 and the Court of Appeal dismissed the Appeal but did not give its decision in writing until the 25th day of February 1981.

12. That both the Full Court and the Court of Appeal of Jamaica dismissed the Appellants' application primarily on the basis that the Governor General acted reasonably in delaying the execution of the Appellants because of the Debate which was taking place in the House of Representatives in relation to Capital Punishment, and as a consequence there was an explanation for the prolonged delay.

13. It is respectfully submitted that both the learned Judges of the Full Court and of our Court of Appeal erred as a matter of law and fact when they dismissed the Appellants' application on the ground that the Governor General acted reasonably in the circumstances.

14. It is respectfully submitted that both the Judges of the Full Court and the Court of Appeal failed to appreciate where a Constitutional right and protection is guaranteed by the State to the Citizen, then such right cannot be abrogated, abridged or infringed by any Act of Executive Legislature or Judiciary, and if there is an infringement of a Constitutional protection or guarantee, then it is irrelevant whether such infringement or abrogation is caused by a reasonable or unreasonable Act.

15. It is respectfully submitted that the Constitutional right is guaranteed to the Citizen and any infringement thereof is abreach of that right and that whether the reason for the breach is reasonable or unreasonable is totally irrelevant, as what the State guarantees is that the Citizen is protected from any infringement or abrogation of the right guaranteed or enshrined in the Constitution.

16. It is respectfully submitted that both the learned Judges of the Full Court and the Court of Appeal failed also to appreciate that a constitutionally protected right cannot depend on the exercise of a discretion. It is either that the right exists and is enshrined in the Constitution or does not exist, and if the right is one that is protected and guaranteed by the Constitution, then any infringement or abrogation thereof is a breach of the Appellants Constitutional right.

17. It is respectfully submitted that both the learned Judges of the Full Court and the Court of Appeal failed to appreciate that while some rights in the Constitution are qualified with certain exceptions, that the Appellants right enshrined and guaranteed under section 17(1) of the Jamaican Constitution against inhuman or degrading treatment and/or punishment is in absolute terms and not subjected to any qualification. Further, that if any Citizen is subjected to inhuman or degrading treatment and/or punishment then his Constitutional right has been infringed. It is irrelevant whether or not such infringement or abrogation is caused by reasonable or unreasonable conduct as the Constitution in mandatory terms protects the Citizen from suffering any such inhuman or degrading treatment and/or punishment for any cause whatsoever.

18. It is respectfully submitted that both the Judges of the Full Court and the Court of Appeal failed to apply the proper test to determine whether or not the Appellants right under section 17(1) of the Jamaica (Constitution) Order-in-Council 1962 was infringed.

19. It is respectfully submitted that the correct test which the learned Judges of the Full Court and the Court of Appeal should have applied is as follows:

- (a) Whether or not inordinate or prolonged delay between the last Judicial Act and the notification of intention to carry out the sentence of death, which is such as to raise a reasonable belief in the condemned men's mind that the sentence would not be carried out can constitute inhuman or degrading treatment and/or punishment under section 17(1) of the Jamaica (Constitution) Order-in-Council 1962;
- (b) If (a) above be answered in the affirmative was the time between the last Judicial Act for which the Appellants are responsible and the notification of intention to carry out the sentence in the case of the Appellants or any of them such as to constitute inhuman or degrading treatment and/or punishment.

20. It is respectfully submitted that if the learned Judges of the Full Court and the Court of Appeal applied the proper test, then they would have appreciated that the question of whether the executive acted reasonably or unreasonably was an erroneous consideration to the matter before them, for if this were not so, then the Appellants' Constitutional right would depend on whether or not an arm of the State acted reasonable or unreasonable and not on the basis of what was enshrined in the Constitution and guaranteed to the Appellants.

21. It is respectfully submitted that the learned Judges of the Full Court and the Court of Appeal failed to apply the proper test to determine whether or not the Appellants' rights under section 17(1) of the Jamaica (Constitution) Order-in-Council 1962 were infringed and failed to properly adjudicate



on the matter and erred when they held that as there was good reason for the delay, the Appellants Constitutional rights were not infringed.

22. It is respectfully submitted that both the learned Judges of the Full Court and the Court of Appeal erred when they held that on the evidence before them there was a satisfactory explanation for the delay for the following reasons, inter alia:

- (a) The Respondents tendered no evidence to explain the inordinate delay and the Affidavits filed on behalf of the Respondents did not give as the reasons for the delay, the reasons on which the learned Judges based their decision, namely, that it was as a consequence of the matters before the House of Representatives which caused the delay of the issuing of the warrant for execution.
- (b) That the learned Judges failed to appreciate that there was a considerable lapse of time in the case of some of the Appellants between the final Judicial Act and the tabling of the Ministry Paper in May 1977 for which no explanation has been given and for a period far in excess of what was the average time after the final Judicial Act in Jamaica prior to 1972.

23. It is respectfully submitted that both the learned Judges of the Full Court and the Court of Appeal furnished there own reasons to explain the inordinate delay and relied on matters which were not put before the Court by either the Appellants or Respondents and which were not germane to the issue before the Court, such as Minutes of the House of Representatives and the Senate.

24. It is respectfully submitted that Mr. Justice Carberry failed to appreciate that the Appellants were not contending that the death penalty was unconstitutional, as this was conceded by the Appellants as can be seen from both the Judgments of the Full Court and other Judges of the Court of Appeal.

25. It is respectfully submitted that Mr. Justice Carberry also erred as a matter of law and constitutional interpretation when he failed to appreciate that the protection of the right to life as guaranteed by section 14(1) of the Constitution of Jamaica is a separate and distinct right from the protection of inhuman or degrading treatment under section 17(1) and as a consequence came to the erroneous conclusion that because under section 14(1) a persons life can be taken by a sentence of a Court the Appellants Constitutional right under section 19(1) could not be infringed.

26. It is further respectfully submitted that Mr. Justice Carberry erred when he came to the conclusion that the Appellants complaint was that the House of Representatives did not abolish the death penalty or suspended it or that the Governor General did not grant a reprieve when the Debate was concluded, and further erred as a matter of law when he held that neither the House of Representatives nor the Governor General is answerable to the Appellants or the Constitutional Court and thereby failed to appreciate that under the written Constitution of Jamaica any act by an arm of Government whether legislative, executive or judicial which infringes or abrogates the Appellants Constitutional rights is answerable to the Constitutional Court as it is expressly provided that by virtue of the provisions of section 25(1) and (2) of the Jamaica (Constitution) Order-in-Council 1962 reads as follows:

25(1) - " Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress",

25(2) - " The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of,

- any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".

27. It is respectfully submitted that both the Judges of the Full Court and Mr. Justice Carberry of the Court of Appeal erred when they failed to appreciate that the Appellants were not seeking an order directing the Governor General to exercise the prerogative mercy in their favour, but what the Appellants sought was a declaration that the execution of the Appellants at this time and in the circumstances relating up to and surrounding the issue of the death warrants would be unconstitutional and illegal being contrary to section 17(1) of the Jamaica (Constitution) Order-in-Council 1962, and that if the Court granted such declaration, the Constitution by virtue of the powers conferred on the Court under section 25(2) empowered the Court in the circumstances to make such orders, issue rights and give such directions as it may consider appropriate for the purpose of securing the enforcement of the Appellants Constitutional rights.

28. That the Appellants respectfully submit that this Appeal should be allowed and that a declaration be granted with the Appellants rights under section 17(1) of the Jamaica (Constitution) Order-in-Council 1962 have been infringed and that the matter be remitted to the Full Court to make what order it thinks appropriate under section 25(2) of the Constitution of Jamaica for the protection of the Appellants Constitutional rights for the following reasons:

R E A S O N S

- (i) BECAUSE it is inhuman and degrading treatment and/or punishment for a citizen or person on whom sentence of death has been pronounced to be kept for a prolonged period of time before the carrying out of the sentence and in the circumstances which aroused in them a reasonable belief that the sentence will not be carried into effect.

- (ii) BECAUSE the period of time between the determination of the final Appeal of the Appellants and the notification to them of the intention was so prolonged that the effect was to raise a reasonable belief in them that the sentence would not be carried into effect and also that during the period they sustained mental anguish and depression.
- (iii) BECAUSE to take the Appellants' lives at this time would be unconstitutional as the Appellants have been subjected to and suffered inhuman and degrading treatment and have sustained mental anguish and depression and were led to reasonable belief that the death sentence would not be carried into effect because of the prolonged period of time that elapsed between the last Judicial Act and the notification of the intention to carry out the sentence.

R. N. A. HENRIQUES, Q.C.

DENNIS V. DALY