

IN THE PRIVY COUNCIL

No. 41 of 1981

O N A P P E A L

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

- and -

THE SUPERINTENDENT OF PRISONS

ST. CATHERINE DISTRICT PRISON

Respondents

CASE FOR THE RESPONDENTS

Record

1. This is an appeal by special leave from a Judgment of the Court of Appeal of Jamaica (Zacca, J.A. (Ag.), Melville, J.A. and Carberry, J.A.) dated 28th July 1980 which dismissed the Appellants' appeals against the Order of the Full Court of the Supreme Court (Parnell, Ross and Carey JJ.) dismissing with costs on March 19th 1980 a Motion filed by the Appellants under Section 25(1) of the Constitution of Jamaica (established by the Jamaica (Constitution) Order in Council 1962). By the said motion the Appellants had applied for redress alleging that their constitutional rights had been infringed by virtue, inter alia, of the delay in issuing warrants for their execution. It was alleged that the Appellants (all of whom had been convicted of murder and sentenced to death) had been subjected to torture or to inhuman or degrading punishment or treatment contrary to Section 17(1) of the Constitution.

2. Section 17 of the Constitution is as follows:

"(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

Record

(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 authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

Section 14(1), *ibid.*, provides:

"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." 10

The following sections of the Constitution may also be relevant :

76. The Prime Minister shall keep the Governor-General fully informed concerning the general conduct of the government of Jamaica and shall furnish the Governor-General with such information as he may request with respect to any particular matter relating to the government of Jamaica. 20

Prerogative of mercy

90. -(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -

- (a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions,;
- (b) grant to any person a **respite**, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence; 30
- (c) substitute a **less** severe form of punishment for that imposed on any person for such an offence; or
- (d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence. 40

(2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the

Privy Council.

Pardon in capital cases

10 91. -(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of Section 90 of this Constitution.

20 (2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.

3. Section 4 of the 1962 Order in Council contains the following saving for existing laws:

30 "All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

40 Section 2 of The Offence Against the Person Act (which was in force before the appointed day) provides :

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

4. The grounds for the Appellants' contention that their rights under Section 17(1) of the Constitution

Record

had been infringed were as follows:

p. 1-2 and  
p. 33-34

(a) Their execution was delayed for a considerable period of time, which delay was significantly caused and/or contributed to by the "de facto" suspension of the death penalty, and

(b) The Applicants were led reasonably to believe, and/or strongly hope, that their executions would not be carried out by virtue of -

(i) the aforesaid suspension of the death penalty

10

(ii) the fact that studies were undertaken into the question of suspending the death penalty by the National Security Committee of the House of Representatives, and

(iii) the debates and resolutions passed in the House of Representatives and the Senate on the 30th of January 1979 and the 9th February 1979.

5. The dates of the Appellants' convictions and the rejection of their appeals and (where applicable) their petitions are set out in tabular form hereunder:

20

No.	Applicant	Date Convicted	Date Appeal Dismissed	Judicial Comm. of Privy Council	Petition for Mercy	Rejection of Petition for Mercy	Execution Date
1.	Noel Riley	7.3.75	23.2.76	18.7.78	Not before 17.11.1978		29.5.79
2.	Anthony Forbes	7.3.75	23.2.76	Did not apply	-		29.5.79
3.	Clifton Irving	22.3.76	10.1.77	Abandoned October 1978	-		29.5.79
4.	Elijah Beckford	9.5.75	6.11.75	Did not apply	(1) 4 Mar. 1977 (2) Not known	(1)15.11.1977 (2)24.4.1979	12.6.79
5.	Errol Miller	28.10.75	5.2.76	8.12.76	(1) Feb. 1977 (2) 4 Mar. 1977	(1)15.11.1977 (2)15.11.1977	12.6.79

Record

6. It was common ground in the Courts below that no execution had taken place in Jamaica since April 1976. Prior to that date a Commission of Enquiry had been set up following an incident in the St. Catherine District Prison on the 27th December 1974. While the Commission of Enquiry sat a stay was granted to condemned men which ended on publication of the Commission's Report in June 1975. The political background is described in the judgment of Carberry J.A.
- p. 164 - p.165
- p. 121 Ministry Paper No. 19 of 1977, (a discussion document on capital punishment dated 4th May 1977) was referred by the House of Representatives to its Special Select Committee on National Security on the 19th May 1977. The Committee reported to the House of Representatives on the 15th November 1977 recommending that there be no change in the existing law relating to capital punishment. 10
- p. 126 The Committee reported a second time in October 1978 re-affirming its original view. Neither report was unanimous. On the 30th January 1979 the House of Representatives voted in favour of retaining the death penalty and recommended that the cases of all persons awaiting execution be reviewed. On the 9th February 1979 the Senate voted for a suspension of the death penalty for 18 months and for the carrying out of a study into the effect of capital punishment in Jamaica. Such a study was subsequently put into effect. 20
- p. 112 - 114
7. The Appellants filed affidavits in support of their applications for redress and the factors relied on by the Appellants were summarised by Parnell, J. as follows:- 30
- p. 66 "Each of the Applicants is contending that he has been subjected to torture, inhuman or degrading treatment or a combination of all these elements.
- Each has alleged that his execution was delayed for a considerable period of time and this was caused or contributed to by a "de facto" suspension of the death penalty;
- Hope was engendered within each breast that execution would not be carried out by virtue of:
- (a) The defacto suspension of the death penalty. 40
- (b) The fact that studies were undertaken into the question of suspending the death penalty by the National Security Committee of the House of Representatives;
- (c) The debate and resolutions passed in the House of Representatives and the

Senate on the 30th January 1979, and the  
9th February 1979 respectively."

Medical evidence was also filed on behalf of the  
Appellants, the effect of which was summarised by  
Parnell, J. in the following passage:

- 10                   "1. Clinical features of psychological                   p. 68  
                      disturbance in the five men were detected  
                      and are clearly related in a causative  
                      way to mental stresses during the time  
                      they had been under sentence of death.  
                      The stresses have been the result of  
                      discussion, comment and debate in the  
                      media, in the Senate and in the House of  
                      Representatives.
2. Anxiety and depression are prominent clinical  
                      features found in all the men.
- 20                   3. One doctor (F.W.H.) is of the opinion that  
                      a psychiatrist is eminently qualified and  
                      suited to assess the nature and degree  
                      of torture on an individual; that all  
                      five men could be regarded as having been  
                      subjected to acts which could be regarded  
                      as inhuman and degrading treatment. But  
                      the treatment could not be regarded as  
                      torture.
- 30                   4. The other doctor (F.K.) is of the view  
                      that the question of torture based on an  
                      examination of the alleged tortured victim  
                      is outside the scope of a medical report,  
                      as is the question of inhuman treatment  
                      since the latter raises moral issues and  
                      involves value judgments which are  
                      inappropriate in a medical report."

One Alwyn Harry, a priest, also filed an affidavit  
in paragraph 17 of which he stated:

p. 58

40                   "I am however clear in my own mind that in the  
                      particular circumstances of the delay, and  
                      the hope built up in the minds of these  
                      Applicants that the issue of the death warrants  
                      for their execution is inhuman and degrading,  
                      and amounts to torture, in the ordinary  
                      meaning of those words."

A report of a consultant psychologist on each of  
the Appellants was also filed in support of their  
application.

p. 216 - 226

8.                   The Full Court of the Supreme Court unanimously

Record

p. 172 dismissed the Appellants' motions with costs on the 19th March 1979.

p. 130 - 132 9. The Appellants appealed to the Court of Appeal by notice dated 27th March 1980. The appeals were heard by the Court of Appeal (Zacca, P. (Ag.), Melville, J.A. and Carberry J.A.) in July 1980 and on the 28th July the Court of Appeal unanimously dismissed the appeals.

p. 136 On 25th September 1980 the Appellants were granted special leave to appeal to Her Majesty in Council.

10. It is submitted that the sole question to be determined in these appeals is whether the delay between sentence and execution coupled with the political developments outlined in paragraph 6 above, infringed the Appellants' constitutional rights under Section 17(1) of the Constitution. It is submitted that the death sentence itself cannot be held to be unconstitutional in view of Sections 17(2) and 14(1) of the Constitution and section 4 of the 1962 Order in Council. Zacca, P. (Ag.) summarised the Appellants' arguments as follows:

10

20

p. 141

- "1. There has been undue delay
2. This delay has caused the Appellants anguish.
3. The Appellants reasonably believed that the death sentence had been commuted."

11. It is submitted that the delay did not and could not infringe the Appellants' constitutional rights for the reasons given by the Courts below. In particular it is submitted that the Appellants could not reasonably have expected their sentences to have been commuted to ones of life imprisonment since all the Appellants appealed and/or petitioned for mercy without success, while between 1976 and 1979 21 persons sentenced to death had their sentences commuted to life imprisonment:

30

p. 168-9

"Further, the fact that some of their number had in fact been reprieved in this period, while they had not, must have clearly brought home to the applicants their true position ....."

(per Carberry J.A.)

The authorities did nothing to cause the Appellants to believe that the sentence of death which had been pronounced upon them would not be carried out.

40

It is submitted that the Courts below were right to infer that the Governor General would be aware of the impending Parliamentary debates (in particular in view of Section 76



of the Constitution) and that to await the outcome was a prudent and humane course. It is further submitted that the Appellants' argument involves questioning the exercise of the discretion of the local Privy Council. This in turn amounts to questioning the prerogative of mercy, which it is submitted is not the subject of legal rights: see de Freitas v. Benny (1976) AC 239 at 247G per Lord Diplock. See also the judgment of Parnell J. at page 105 where the learned trial judge makes, it is respectfully submitted, a correct distinction between the constitutions of Jamaica and Trinidad and Tobago. Even if the prerogative were the subject of legal rights it is submitted that that would not be sufficient to give the Appellants a cause of action under the Constitution, since "delayed performance of a public duty for which no express time limit is set is not generally ultra vires" (per Lord Diplock in Abbott v. Attorney General of Trinidad and Tobago (1979) 1 WLR 1342 at 1347.

p. 105

12. The Supreme Court and the Court of Appeal considered the extent of the delay in the case of each of the Appellants and came to the unanimous conclusion that it was not unreasonable.

Although statistical evidence was produced to show that delays had been shorter between 1962 and 1970 in capital cases, it is submitted that Parnell, J. was entitled to find that:

p. 227 - 229

"The situation, as is a matter of common knowledge, has altered to a significant degree since those relative crime free days."

p. 105

It is submitted that the evidence does not disclose wanton or unreasonable delay on the part of the authorities and in the cases of all the Appellants it is arguable that no earlier dates for their execution could reasonably have been fixed having regard to their appeals and/or petitions and the possibility of the House of Representatives voting to abolish the death penalty. It is respectfully submitted that the findings of the learned judges in the courts below were based on knowledge of local practice and local circumstances and ought not lightly to be disturbed - see Abbott v. Attorney-General (ubi sup. at 1349A) per Lord Diplock.

13. On the question of medical evidence it is submitted that the judges in the Supreme Court and the Court of Appeal were right to hold that there was no evidence of torture or inhuman or degrading treatment; any anguish and depression suffered by the Appellants were, on their own admission, suffered from the moment sentence of death was pronounced upon them. It is further

Record

submitted that the stance taken by Dr. Kinght (page 211) was correct.

14. It is submitted that an act of clemency by the authorities in delaying the dates fixed for the execution of the Appellants (pursuant to section 90(1)(b) of the Constitution) until after the Parliamentary debate in the House of Representatives ought not to be prayed in aid as an act of torture, inhuman or degrading treatment. If such an argument were to succeed it would undermine the very rights it is the purpose of the Constitution to enshrine - see Chokolingo v. Attorney General of Trinidad and Tobago (1981) 1 W.L.R. 106 at 112 B-C. Insofar as the delay was caused by the Appellants' own actions in appealing and/or petitioning they can have no legitimate complaint: de Freitas v. Benny (1976) AC 239 at 243 E-G (In the case of the Appellant Anthony Forbes it is submitted that it would have been unreasonable to take a decision before the outcome of his co-accused's Petition to Her Majesty in Council was known). It is respectfully submitted that the passage in Abbott v. The Attorney-General of Trinidad and Tobago (ubi sup. at 1348C), per Lord Diplock, on which the Appellants relied cannot assist the Appellants on the facts of this case.

10

20

15. The Respondents respectfully submit that these appeals should be dismissed and the judgments of the Supreme Court and the Court of Appeal, Jamaica, should be affirmed for the following, among other

R E A S O N S

1. BECAUSE the Appellants suffered no inhuman or degrading treatment or torture.
2. BECAUSE the sentences imposed on the Appellants were authorised by the Constitution of Jamaica.
3. BECAUSE the Appellants seek in substance to question the exercise of the prerogative of mercy which is not under the Constitution of Jamaica a justiciable matter at all or on the ground of delay.
4. BECAUSE the Appellants have not established any legal right which has been infringed.
5. BECAUSE the Appellants have failed to establish that there were any acts of the State which gave rise to the infringement alleged.
6. BECAUSE the relief sought challenged, in

30

40

essence, the constitutional validity of the death penalty.

7. BECAUSE the finding that there was no unreasonable delay (being based on a knowledge of local practice) ought not to be disturbed.
8. BECAUSE the Appellants were responsible for a large part of the delay.
9. BECAUSE a respite from execution cannot amount to torture or inhuman or degrading treatment.
10. BECAUSE the Appellants were never given any indication that their sentences were to be commuted to life imprisonment.
11. BECAUSE the judgments of the learned trial Judges and the Court of Appeal were right.

GEORGE WARR

IN THE PRIVY COUNCIL

No. 41 of 1981

---

O N A P P E A L

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

- AND -

THE SUPERINTENDENT OF PRISONS  
ST. CATHERINE DISTRICT PRISON

Respondents

---

CASE FOR THE RESPONDENT

---

CHARLES RUSSEL & CO  
Hale Court  
Lincolns Inn  
London WC2A 3UL

Solicitors for the Respondent