

Privy Council Appeal No. 41 of 1981

Noel Riley and Others - - - - - - *Appellants*

v.

The Attorney-General and Another - - - - *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 28TH JUNE 1982

Present at the Hearing :

LORD CHANCELLOR (LORD HAILSHAM
OF ST. MARYLEBONE)
LORD DIPLOCK
LORD SCARMAN
LORD BRIDGE OF HARWICH
LORD BRIGHTMAN

[*Majority Judgment Delivered by LORD BRIDGE OF HARWICH*]

The five appellants are all under sentence of death following their several convictions for murder. It is convenient at the outset to indicate in tabular form the dates of the relevant criminal proceedings in Jamaica.

<i>Appellant</i>	<i>Date of Conviction</i>	<i>Date of dismissal of appeal to the Court of Appeal of Jamaica</i>
Noel Riley	7th March 1975	23rd February 1976
Anthony Forbes	7th March 1975	23rd February 1976
Clifton Irving	22nd March 1976	10th January 1977
Elijah Beckford	9th May 1975	6th November 1975
Errol Miller	28th October 1975	5th February 1976

Petitions for special leave to appeal to Her Majesty in Council were submitted on behalf of Riley, Irving and Miller. Miller's petition was dismissed on 9th December 1976, Riley's on 18th July 1978 and Irving's abandoned in October 1978.

Warrants for the execution of the appellants were issued in 1979. The dates set for the execution were, in the cases of Riley, Forbes and Irving, 29th May 1979, in the cases of Beckford and Miller, 12th June 1979. Thereupon application was made by each of the appellants to the Supreme Court of Jamaica pursuant to section 25(1) of the Constitution of Jamaica, as embodied in the Second Schedule to the Jamaica (Constitution) Order in Council, 1962 (hereinafter referred to as "the Constitution") seeking in each case :

“A declaration that the execution of [the appellant] at this time and in the circumstances leading up to and surrounding the issue of the death warrant, would be unconstitutional and illegal being contrary to section 17(1) of the Constitution.”

The applications were dismissed by the Full Court on 19th March 1980 and appeals from these decisions to the Court of Appeal of Jamaica were dismissed on 28th July 1980. The present appeals to Her Majesty in Council are brought pursuant to leave granted by the Court of Appeal of Jamaica on 25th September 1980.

The appellants contend that to execute the sentences of death passed upon them in 1975 and 1976 would now be, and indeed would have been at any time after the issue of the warrants in 1979, by reason both of the length and of the circumstances of the delay between sentence and execution, “inhuman or degrading punishment or other treatment”.

Section 17 of the Constitution 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 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.”

Apart from the delays necessarily occasioned by the appellate procedures pursued by the appellants (of which it could hardly lie in any appellant's mouth to complain), it is also the fact that political factors in Jamaica led to the execution of sentences of death being held in abeyance from April 1976 until early 1979 during a period of acute controversy over capital punishment. This was eventually resolved on 30th January 1979 by a vote by the narrow majority of 23 to 20 in the House of Representatives that capital punishment be retained, coupled with a recommendation that all outstanding sentences of death be reviewed. A resolution of the Senate on 9th February 1979 that “Capital Punishment be suspended for a period of eighteen months pending a detailed study, assessment and report of the sociological and psychological effect of Capital Punishment in to-day's Jamaican society” was carried by 10 votes to 5, but appears to have had no effect on the further policy pursued by the Executive, as the issue of the warrants for the execution of the present appellants demonstrates.

Section 90 of the Constitution provides for the prerogative of mercy to be exercised by the Governor-General, “in Her Majesty's name and on Her Majesty's behalf”, acting on the recommendation of the Privy Council of Jamaica. Their Lordships infer that the review recommended by the House of Representatives was carried out in the case of each appellant but that in no case was it decided to grant a reprieve.

Clearly the appellants cannot base their complaint on the prolongation of their lives by the delay in execution of their sentences. The only proposition capable of sustaining the contention that the execution of the sentences would now contravene section 17 of the Constitution must be that to carry out a death sentence *after* a certain delay, not occasioned by the appeal process invoked by the prisoner, would contravene the provisions of subsection (1) and could properly be held to do so notwithstanding the provisions of subsection (2).

Their Lordships fully accept that long delay in the execution of a death sentence, especially delay for which the condemned man is himself in no way responsible, must be an important factor to be taken into account in deciding whether to exercise the prerogative of mercy. But

it is not for this Board to usurp the function allocated by section 90 of the Constitution to the Governor-General acting on the recommendation of the Privy Council of Jamaica. The sole question for their Lordships' decision is whether the execution of sentence of death upon any of the appellants would contravene section 17 of the Constitution.

In the last analysis this question must depend on the language of section 17. But it is not to be construed in isolation. As was pointed out by Lord Hailsham of St. Marylebone, in his dissenting opinion in *Maharaj v. Attorney-General of Trinidad and Tobago* (No. 2) [1979] A.C. 385, at page 402, the constitutions of former British dependencies, based on conferences held prior to the enactment of independence, bear a strong family resemblance to each other, and both the Constitution of Jamaica and that of Trinidad and Tobago have come under scrutiny by this Board in contexts which called for consideration of the relationship between the entrenched rights conferred by the Constitution and the rights secured by the law in force immediately before independence. In *D.P.P. v. Nasralla* [1967] 2 A.C. 238, Lord Devlin, delivering the judgment of the Board, said, at pages 247, 248, of Chapter III of the Constitution of Jamaica, which is headed "Fundamental Rights and Freedoms", and includes section 17:

"This chapter . . . proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

In *de Freitas v. Benny* [1976] A.C. 239, Lord Diplock, delivering the judgment of the Board, pointed out, at page 244, that the corresponding chapter of the Constitution of Trinidad and Tobago proceeded upon a similar presumption. In that case the Board rejected an argument that sentence of death, which was the mandatory sentence for murder in Trinidad and Tobago before independence, had become unconstitutional since independence, on the ground, *inter alia*, that delay in carrying it out rendered it a "cruel and unusual punishment".

In Jamaica sentence of death is the mandatory sentence for murder under section 3(1) of the Offences against the Person Act which has not been amended in any respect material to the issue under consideration since its enactment in 1864. The manner of execution of the sentence authorised by law is by hanging, and the passing of the sentence also provides lawful authority for the detention of the condemned man in prison until such time as the sentence is executed. Quite apart from section 17 of the Constitution the continuing constitutional validity of the death sentence is put beyond all doubt by the provision of section 14(1) that

"No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted".

The question, therefore, is whether the delayed execution of a sentence of death by hanging, assuming it could otherwise be described as "inhuman or degrading punishment or other treatment"—a question on which their Lordships need express no opinion—can escape the unambiguous prohibition imposed by the words in section 17(2) emphasised as follows:—

“*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.*”

An act will fall within this prohibition if it satisfies three related conditions, viz:

- (a) It must be an act done under the authority of law;
- (b) It must be an act involving the infliction of punishment of a description authorised by the law in question, being a description of punishment which was lawful in Jamaica immediately before the appointed day;
- (c) It must not exceed in extent the description of punishment so authorised.

There can be no doubt whatever that a delayed execution would satisfy conditions (a) and (b). The only words in section 17(2) that are even arguably ambiguous are the words “to the extent that”. It seems to their Lordships that in their context these words pose the question: to what extent did the law in Jamaica before independence authorise the description of punishment which is under challenge? This question can only be answered by asking in turn the further question: if the like description of punishment had been inflicted in the like circumstances before independence, would this have been authorised by law? An obvious instance of a description of punishment exceeding in extent that authorised by law would be the execution of a death sentence by burning at the stake. But since the legality of a delayed execution by hanging of a sentence of death lawfully imposed under section 3(1) of the Offences against the Person Act could never have been questioned before independence, their Lordships entertain no doubt that it satisfies condition (c). Accordingly, whatever the reasons for or length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1). Their Lordships would have felt impelled to this conclusion by the language of section 17 alone, but they are reinforced by the consideration that their decision accords fully with the general principle stated in *D.P.P. v. Nasralla* (*supra*) and *de Freitas v. Benny* (*supra*).

Accordingly, their Lordships will humbly advise Her Majesty that these appeals must be dismissed.

Dissenting Judgment by LORD SCARMAN AND LORD BRIGHTMAN

These five appeals raise questions of importance as to the protection afforded by the Constitution of Jamaica to persons under sentence of death.

It is with great regret that we find it necessary to express our dissent from the majority opinion of their Lordships' Board. We do so only because of the constitutional importance of the matters in issue. The first question of constitutional importance is whether the carrying out after prolonged delay of a death sentence which has been lawfully passed by a court of competent jurisdiction can be a contravention of the convicted man's constitutional rights. If this question be answered in the affirmative, a second question, almost as important as the first, arises, namely the criterion for determining whether a punishment is inhuman or degrading. Finally, there is the question whether the

appellants have proved a delay of such length and in such circumstances as to render their execution a contravention of their constitutional rights.

The specific point of law in the five cases is as to the true meaning and effect of section 17 of the Constitution. Subsection (1) provides that "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment"—language which is almost identical with Article 3 of the European Convention on Human Rights (signed by the United Kingdom on 4th November 1950 and subsequently ratified). Subsection (2), however, restricts the generality of subsection (1) by providing that nothing done under the authority of any law shall be held to be in contravention of the section

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

The appointed day for the entry into force of the Constitution was 6th August 1962. These appellants were sentenced to death under the authority of a law in force before the appointed day, namely the (Jamaica) Offences against the Person Act 1864; sections 2 and 3 of the Act make murder a felony for which the mandatory penalty is death. It is submitted by the respondent and, as we understand it, accepted by the majority opinion that section 17(2) of the Constitution makes it impossible to hold that the infliction of the death penalty required by that Act for murder can be an inhuman punishment or treatment within subsection (1) because the punishment was of a description authorised by a law which was in force prior to the appointed day. With respect, we believe this view to arise from a wrong approach to the interpretation of a constitutional instrument and a failure to recognise that the act of the State which is challenged in these proceedings is not the sentence of the court but its execution after prolonged delay. The appellants' case is that this delay, which arose from the exercise of a power conferred not by the pre-existing law but by the Constitution, rendered subsequent execution a contravention of the Constitution.

The Constitution of Jamaica was brought into force on 6th August 1962 by an Order in Council made pursuant to an Act of Parliament of the United Kingdom: The Jamaica (Constitution) Order in Council 1962 made under the West Indies Act 1962. It is one of a family of constitutions (the family includes those of Trinidad and Tobago, Bermuda and many other countries which were previously British colonies) granted by Parliament, which embody a Bill of Rights or Charter of Fundamental Rights and Freedoms drafted on the model of the European Convention on Human Rights. We have no doubt that the proper approach to the interpretation of such constitutions is as described by Lord Wilberforce when he delivered the opinion of the Judicial Committee in *Minister of Home Affairs v. Fisher* [1980] A.C. 319. He drew a distinction between Acts of Parliament concerned with specific subjects and constitutional enactments, and then considered the Bermuda Constitution, which was in issue in that appeal. He said, at page 328:—

"Here, however, we are concerned with a Constitution, brought into force certainly by Act of Parliament, the Bermuda Constitution Act 1967 (U.K.), but established by a self-contained document set out in Schedule 2 to the Bermuda Constitution Order 1968 (U.K. S.I. 1968, No. 182). It can be seen that this instrument has certain special characteristics. 1. It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality. 2. Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this

chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. 3. Section 11 of the Constitution forms part of Chapter I. It is thus to 'have effect for the purpose of affording protection to the aforesaid rights and freedoms' subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice . . . the public interest'."

He elaborated, at page 329, what he meant by "a generous interpretation". It was:—

"to treat a constitutional instrument such as this as *sui generis* calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law."

As we shall endeavour to show, we believe that the majority opinion is in error because it has adopted in its construction of the Constitution an approach more appropriate to a specific enactment concerned with private law than to a constitutional instrument declaring and protecting fundamental rights. An austere legalism has been preferred to the generous interpretation which in *Fisher's* case was held to be appropriate. The Jamaican charter of fundamental rights and freedoms is to be found in Chapter III of the Constitution. It consists of 14 sections. Section 13 declares the fundamental rights and freedoms, which include, subject to respect for the rights of others and for the public interest, the right to life and the protection of the law. Sections 14 to 24 are the protective provisions, their purpose being to protect the rights and freedoms declared in section 13. The protection offered by these sections is to be enforced judicially. Section 25 enables any person who alleges a contravention of any of the protective provisions in relation to him to apply to the Supreme Court for redress. The court may make such order or give such directions as it considers appropriate for the constitutional protection of the applicant. But it shall not exercise its protective power if satisfied that adequate means of redress are or have been available under any other law.

It is, of course, clear, as Lord Devlin pointed out in *D.P.P. v. Nasralla* [1967] 2 A.C. 238 and as Lord Diplock later emphasised in *de Freitas v. Benny* [1976] A.C. 239, that Chapter III of the Constitution proceeds on the presumption that the fundamental rights and freedoms which it declares and protects were already recognised and acknowledged by the law in force at the commencement of the Constitution. It is further true that, generally speaking and subject to adaptations and modifications, the law was the law of England. The contribution which the Constitution makes to the jurisprudence of Jamaica is that it offers to every person in Jamaica the protection of a written constitution in respect of the rights and freedoms recognised and acknowledged by the law; and "law" means both the pre-existing law so far as it remains in force (see section 4(1) of the Constitution Order *supra*) and the new

law arising from the Constitution itself and from future enactment. However, the Constitution's introduction of a new judicial remedy negatives any presumption that the remedies available under the pre-existing law were necessarily sufficient: indeed, the enactment of new protection suggests that they needed strengthening.

In summary, the Constitution declares the fundamental rights and freedoms of every person in Jamaica and provides for their judicial protection if no adequate means of redress are available to the person concerned under any other law. Thus the Constitution ensures that in Jamaica "*ubi jus, ibi remedium*". The "*jus*" is the substantive law of fundamental rights and freedoms recognised by the law and practice of the State and now embodied by statute in sections 13 to 24 of the Constitution: the remedy is their judicial protection under section 25, if no means of redress is available to the victim under any other law.

It is also plain that the primary purpose of Chapter III of the Constitution, as too of the European Convention upon which it is modelled, is the protection of the individual against abuse of power by act of the State, whether the act be legislative, judicial or executive. It follows that the fact that in these five cases the death sentence when passed was in accordance with law cannot be determinative of the appeals. The challenge is not to the judicial sentence but to the decision of the executive to carry it out at the time fixed and in the circumstances which had arisen.

Adopting the principle of a generous interpretation and in the light of the objects of Chapter III of the Constitution, we do not find any real difficulty in determining the true effect of section 17(2) in the circumstances of these five appeals.

Trimmed of words inessential for present purposes, subsection (2) provides that

"Nothing . . . done under the authority of any law shall be held to be . . . 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 6th August 1962.

The execution of the appellants, had it taken place, would have been done under the authority of section 3 of the Offences Against the Person Act, which enacts that "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 . . .".

Section 3 of the Offences Against the Person Act is therefore "the law" in question for the purposes of section 17(2) of the Constitution. That law authorises the infliction of a "description of punishment", namely, death. That "description of punishment" was lawful in Jamaica immediately before 6th August 1962.

The problem which arises is this: given the premise that no person may lawfully be subjected to "inhuman treatment", and given the premise that the execution of sentences of death after the prolonged delays which have here taken place would have subjected and would now subject the appellants to "inhuman treatment", is such "treatment" cleared of inhumanity for the purposes of the section and thus legalised because "the law", namely section 3 of the Offences Against the Person Act, authorises the death sentence and the death sentence was a lawful punishment in Jamaica immediately before the appointed day?

With profound respect to those who take the opposite view, we consider that the question posed should be answered in the negative. The "treatment" which has to be considered is not the death penalty in isolation. The "treatment" which is *prima facie* "inhuman" under subsection (1) is the execution of the sentence of death as the culmination of a prolonged period of respite. That species of "treatment" falls outside the legalising effect of subsection (2). Subsection (2) is concerned only to legalise certain descriptions of punishment, not to legalise a "treatment", otherwise inhuman, of which the lawful punishment forms only one ingredient. Subsection (1) deals with "punishment" and "other treatment". In the instant case the punishment is the execution of the death sentence. Subsection (2) is directed both to "punishment" and to "other treatment". The "other treatment", if inhuman, is not validated by subsection (2), in our opinion, merely because lawful punishment is an ingredient of the inhuman treatment.

Accordingly, in our opinion, the execution of the respective death sentences in May and June 1979, against the background of the lapse of time since conviction, would have been "inhuman treatment" within the meaning of subsection (1) of section 17 and would not have been saved from being unconstitutional and illegal by subsection (2).

As we have indicated, it is necessary to identify the act of the State which is challenged. It is not the judicial sentence of death: that was and remains a lawful judicial act. If these proceedings were directed towards establishing the proposition that sentence of death is in itself a contravention of the Constitution as being an inhuman or degrading punishment, subsection (2) would be a complete answer. In Jamaican law a convicted man cannot be heard to say that sentence of death is itself a contravention of the Constitution, since it is authorised by a law which was in force when the Constitution came into effect and still remains in force.

But that is not the purpose of these proceedings. The challenge is to the duty of the Governor-General in the exercise of the powers conferred upon him by sections 90 and 91 of the Constitution. Though they derive as a matter of history from the Crown's prerogative of mercy, they are now statutory in character. They are part of the written Constitution. Significantly the sections appear in a chapter entitled "Executive Powers". Their effect is to require the Governor-General in every capital case (save in emergency) to seek the advice of the Privy Council of Jamaica so that he may be advised as to the exercise of his power to delay or commute the sentence: and he is obliged to act on the recommendation of the Privy Council. It is to be noted that this is an executive power subject to the sort of safeguard, *i.e.* the confidential advice of a distinguished independent body, which is a familiar feature in administrative and public law. The condemned man, though the power exists for his protection as well as for the protection of the public interest, has no right to be heard in the deliberations of the Privy Council and the Governor-General (who shall, so far as practicable, attend and preside at all its meetings: section 87). In short, the exercise of this executive power is a classic illustration of an administrative situation in which the individual affected has a right to expect the lawful exercise of the power but no legal remedy: that is to say, no legal remedy unless the Constitution itself provides a remedy.

In our view it is exactly the sort of situation with which the Constitution is concerned: what has been called a "*de facto* right" exists but there is no remedy available to the individual. Two recent cases before the Judicial Committee reveal how a written Constitution incorporating a charter of fundamental rights operates when a right exists but the individual has no remedy other than by invoking the Constitution.

Both cases arose under the Constitution of Trinidad and Tobago, which is similar, though not identical with, the Constitution of Jamaica. Both constitutions are, however, members of the family of which Lord Wilberforce spoke in *Fisher's case* (*supra*). The facts in the earlier of the two cases, *Maharaj v. Attorney-General of Trinidad and Tobago* (No. 2.) [1979] A.C. 385, are not material. It was a case in which the Board considered whether a right existed under the law before the Constitution came into force. Their Lordships' Board, allowing the appeal by a majority, said in the course of judgment, at page 397:

"Some of the rights and freedoms described in section 1 are of such a nature that for contraventions of them committed by anyone acting on behalf of the state or some public authority, there was already at the time of the Constitution an existing remedy, whether by statute, by prerogative writ or by an action for tort at common law. But for others, of which '(c) the right of the individual to respect for his private and family life' and '(e) the right to join political parties and express political views' may be taken as examples, all that can be said of them is that at the time of the Constitution there was no enacted law restricting the exercise by the individual of the described right or freedom. The right or freedom existed *de facto*. Had it been abrogated or abridged *de facto* by an executive act of the state there might not necessarily have been a legal remedy available to the individual at a time before the Constitution came into effect; as, for instance, if a government servant's right to join political parties had been curtailed by a departmental instruction. Nevertheless *de facto* rights and freedoms not protected against abrogation or infringement by any legal remedy before the Constitution came into effect are, since that date, given protection which is enforceable *de jure* under section 6(1): cf. *Olivier v. Buttigieg* [1967] 1 A.C. 115."

In our view, the right of these appellants to the proper exercise of the discretion vested by the Constitution in the Governor-General may be described as a "*de facto*" right in the sense used by their Lordships in *Maharaj's* case: it is a right for which no remedy exists, unless its infringement can be shown to be a contravention of one or more of the protective provisions in Chapter III of the Constitution.

The second case is *Abbott v. The Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R.1342. In that case the appellant sought constitutional redress by moving for a declaration that execution of sentence of death upon him would contravene his fundamental right to life protected by the Constitution. The ground alleged was inordinate delay between sentence and the issue of the death warrant. The period between the last judicial act (dismissal by the Judicial Committee of appeal against conviction) and the warrant was less than eight months. The period between sentence and warrant was somewhat less than four years. The total period between sentence and the Judicial Committee's decision on the constitutional motion was 5 years 11 months. In their judgment dismissing the condemned man's appeal from a refusal by the courts of Trinidad and Tobago to grant him relief, their Lordships made this comment, at page 1345, on the total period of waiting in that case:—

"That so long a total period should have been allowed to elapse between the passing of a death sentence and its being carried out is, in their Lordships' view, greatly to be deplored. It brings the administration of criminal justice into disrepute among law-abiding citizens."

Later in the judgment their Lordships analysed the period of delay and found that the period for which the appellant could in no way be said (*i.e.* by appeal or other legal proceedings) to be responsible was one of less than eight months. The critical provision in the Trinidad and

Tobago Constitution was that the right to life is "the right not to be deprived thereof except by due process of law": Chapter I, section 4(a) of the Constitution. After commenting that "'due process of law' does not end with the delivery of judgment in a civil matter or the pronouncement of sentence in a criminal matter; it includes enforcement of judgments and the carrying out of sentences", their Lordships said, at page 1347:—

"So, unless the applicant can establish that his execution after a lapse of time of between seven and eight months from the lodging of his petition for reprieve would be unlawful under the Criminal Procedure Ordinance read with sections 87 to 89 of the Constitution, he cannot point to any contravention of his rights and freedoms under section 4(a) of the Constitution for which he is entitled to apply for redress under section 14.

In their Lordships' view the proposition that, in the circumstances of the instant case, the fact that seven or eight months elapsed before the applicant's petition for reprieve was finally disposed of by the President made his execution at any time thereafter unlawful, is quite untenable. Their Lordships accept that it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'; but since nothing like this arises in the instant case, this question is one which their Lordships prefer to leave open."

Thus in *Abbott's* case the Judicial Committee recognised that inordinate delay might mean that the taking of the condemned man's life would not be "by due process of law". Significantly they commented that a case of delay so prolonged as to arouse a reasonable belief that he might be spared was "without precedent". *Abbott's* case, therefore, confirms us in the view not only that the period and circumstances of delay may be such as to put the taking of the man's life outside the due process of law (in other words, it is no longer justified by law) but also that the acknowledged proper practice of the State, so as to ensure due process of law, is not to allow execution after prolonged delay.

We are, therefore, of the opinion that the respondent cannot rely upon section 17(2). First, what is challenged is not the judicial sentence authorised by pre-existing law but the exercise by the executive of a power conferred upon it by the Constitution itself. Secondly, the appellants are able to show a "*de facto*" right to the proper exercise of that power.

We turn, therefore, to consider section 17(1). Clearly, it would be an improper exercise of the power conferred by sections 90 and 91 if it should result in subjecting a condemned man to inhuman or degrading punishment or treatment. Indeed it would be a travesty of the law if powers intended to enable mercy to be shown in appropriate cases were so used. It becomes necessary, therefore, to look closely at the practice which has developed and the views which have become recognised as to the proper use of the delaying power in the execution of the death sentence. We have already referred to *Abbott's* case, where inordinate delay was considered to be an affront to the administration of criminal justice and might become a denial of due process of law, but was said to be (fortunately) "without precedent".

British practice and thinking were to the same effect. It is well known that it was the practice of the Home Secretary, who had the duty of advising Her Majesty as to the execution of sentence of death, to ensure that a decision was taken and, if it was to allow execution, that the punishment was inflicted within a period of weeks after the last judicial act. The usual period was of the order of three weeks. Indeed, there is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1688.

Such research as we have been able to conduct shows that many judges in other countries have recognised the inhumanity and degradation a delayed death penalty can cause. We cite four instances (but there are many others). In *Furman v. State of Georgia* 408 U.S. 238 (1972), Justice Brennan, who concluded that capital punishment was unconstitutional in the United States of America (a conclusion with which we are not concerned and upon which differing opinions are held), commented, at page 288, that "the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death". The Supreme Court of California has acknowledged in two cases the cruel and degrading effect of delay: *People v. Chessman* 341 P.2d 679 (1959) at page 699, and *People v. Anderson* 493 P.2d 880, 894 (1972). In the latter case the Court expressly mentioned the dehumanising effects of lengthy imprisonment prior to execution. Mr. Justice Krishna Iyer of the Indian Supreme Court has expressed a similar view, when the delay after sentence was six years: *Rajendra Prasad v. State of Uttar Pradesh*, [1979] 3 S.C.R. 78 at page 130, with which should be read the comment of the same judge in an earlier Supreme Court case upon the "brooding horror of hanging" which had haunted a prisoner for over two years: *Ediga Anamma v. State of Andhra Pradesh* [1974] 3 S.C.R.329 at page 335. There is also a relevant case under the European Convention: *Tyrer v. United Kingdom* (Judgment, European Court of Human Rights, 25th April 1978, Series A. No. 26), (the Isle of Man case). It was a case of corporal punishment. The European Court of Human Rights noted a considerable delay of several weeks in carrying out the sentence of the juvenile court and commented that "Mr. Tyrer was subjected to the mental anguish of anticipating the violence he was to have inflicted on him": paragraph 33. It is interesting also to note the point made in the dissenting judgment of Judge Fitzmaurice that most of the delay was due to the time taken on Mr. Tyrer's appeal.

It is no exaggeration, therefore, to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading. As the Supreme Court of California commented in *Anderson's* case (*supra*), it is cruel and has dehumanising effects. Sentence of death is one thing: sentence of death followed by lengthy imprisonment prior to execution is another.

It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading. The anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of the individual are vividly described in the evidence of the effect of the delay in the

circumstances of these five cases. We need not rehearse the facts, which are not in dispute. We do not doubt that the appellants have proved that they have been subjected to a cruel and dehumanising experience. But whether this experience involves the further conclusion that it would have been inhuman and degrading to kill them at the time fixed by the warrants for their execution is another matter. The answer depends upon the true interpretation of the words of section 17(1).

The true interpretation of the subsection turns on the criterion to be used in determining what is meant by subjection to inhuman or degrading punishment or treatment. Is the test the effect of the delay in all the circumstances, or is it the reasonableness of the decision to delay execution? And, if effect be the test, is it actual effect or likely effect?

The Attorney-General submitted that the criterion was the reasonableness or otherwise of delaying execution: and he relied on the prolonged political and national debate as to the future of capital punishment in Jamaica. We accept that in the circumstances it was reasonable, while the debate continued, to refrain from executing the sentences. But whether it was reasonable ultimately to carry them out is another matter. We would think it clear, as their Lordships certainly recognised in *Abbott's* case, that a time will come when the delay is such that it would be intolerable and wrong in law to carry out the sentence. And we note that, if the criterion be the effect of the delay upon those subjected to it, the uncertainty engendered by the debate was an aggravating factor in the cruelty imposed upon them.

We, therefore, reject the Attorney-General's submission. It is not the "generous interpretation" the law requires of the Constitution. It is too austere because it fails to give priority to the suffering of the victim in the interpretation of the terms "inhuman" and "degrading". They are plainly terms apt to describe the effect of the punishment or other treatment on him who is subjected to it. We, therefore, would adopt as the criterion the effect of the delay in all its circumstances upon those subjected to it.

The cruel and dehumanising experience suffered by these appellants does meet the test. But we doubt whether *actual* effect should be the test. It would be quite unacceptable to differentiate in the application of section 17 between victims of strong character and those of weaker character. The test must be, in our view, that of the likely effect of the experience to which they have been subjected. Evidence, of course, of actual effect will be very relevant and, indeed, necessary in order to reach a conclusion as to likely effect.

We answer, therefore, the question as to the meaning and effect of section 17(1) as follows. Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment. It is, of course, for the applicant for constitutional protection to show that the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading. Such a case has been established, in our view, by these appellants.

Accordingly in our opinion these appeals should be allowed.

In the Privy Council

NOEL RILEY AND OTHERS

v.

**THE ATTORNEY-GENERAL
AND ANOTHER**

**MAJORITY JUDGMENT DELIVERED BY
LORD BRIDGE OF HARWICH**