

**(1) Peter Bradshaw and
(2) Denzil Orlando Roberts**

Appellants

v.

**(1) The Attorney General
(2) Superintendent of Glendairy Prison and
(3) The Chief Marshall**

Respondents

FROM

THE COURT OF APPEAL OF BARBADOS

REASONS FOR REPORT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE
22ND FEBRUARY 1995, Delivered the
24th May 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Lane
Lord Slynn of Hadley
Lord Steyn
Sir Ralph Gibson

[Delivered by Lord Slynn of Hadley]

On 8th November 1985 Peter Bradshaw was convicted of the murder on 14th December 1984 of Cyril Sisnett. He was sentenced to death. In January 1986 Denzil Roberts was tried with one Trotman for the murder on 2nd July 1985 of Michael Cox. Trotman was convicted but the death sentence passed on him was subsequently commuted to life imprisonment. The jury were not able to agree as to whether Roberts was guilty and he was tried again. On 24th April 1986 Roberts was convicted and sentenced to death.

Both men appealed to the Court of Appeal - Bradshaw by notice lodged on 20th November 1985, Roberts by notice lodged on 27th April 1986, that is each within a few days of his sentence. Roberts' appeal was dismissed on 11th March 1988 and the reasons were given on 17th June 1988, two years two months after

conviction. Bradshaw's appeal was dismissed on 31st May 1988, some two years six months after conviction.

Each man's lawyer began very shortly after the reasons were given by the Court of Appeal to prepare for an appeal to the Privy Council. On 9th June 1988 solicitors in London were instructed on behalf of Bradshaw. Following a request from a different firm of solicitors in London to be put in funds in order to instruct counsel to prepare Roberts' petition for special leave, on 13th July 1988 an application was made to the Attorney General of Barbados for funds to be made available. Neither this letter nor subsequent letters to the same effect dated 6th September 1988 and 17th October 1988 were answered. On 19th October the Director of Public Prosecutions was told that Mr. Shepherd, a lawyer in Barbados, was now acting for both Roberts and Bradshaw, each of whom was waiting for a decision on the earlier letters. On 28th October Mr. Shepherd was told that the execution of Roberts would be postponed until 18th November pending proof pursuant to the Rules that an English solicitor had been instructed.

From then until 16th March 1989 Mr. Shepherd wrote complaining about the delay in dealing with the application for financial assistance. It was only on 16th March 1989 that the Government agreed to meet the cost of appeals to the Privy Council by both men and not until, it seems, August 1989 that funds were received by solicitors in England in respect of Roberts. Financial aid for Bradshaw was never received so that the preparation of his appeal could not proceed. Advice was taken from English counsel as to the prospect of Roberts succeeding before the Privy Council in setting aside his conviction. As a result of that advice Roberts abandoned his appeal to the Privy Council on 15th March 1990.

Whilst these attempts to appeal to the Privy Council had been proceeding, Mr. Shepherd had on 23rd February 1989 written asking that the Barbados Privy Council should follow the usual procedures in considering the two men's petitions for mercy and on 16th April 1991 Mr. Shepherd asked whether legal aid was available to prepare a petition for commutation of sentences. No response was received to that letter and no petition was in fact submitted specifically relating to the cases of the two men. Instead, without the men being notified, on 1st April 1992 the Barbados Privy Council considered a petition received from eleven prisoners in January 1988, including the present two appellants, asking for capital punishment to be abolished and at the same time considered a letter pleading for mercy for their son written by Bradshaw's parents received 11th January 1989. The Barbados Privy Council advised the Governor-General that Bradshaw and

Roberts should be executed. It rejected not only a plea that the death penalty be commuted but also rejected a request that execution be stayed pending the determination by the United Nations Human Rights Committee ("UNHRC") of a petition by Bradshaw submitted to it on the basis that the International Covenant on Civil and Political Rights had been violated.

On 6th May 1992 the UNHRC accepted Bradshaw's petition and called for a reply by the Government of Barbados. On 18th May the Governor-General signed the warrant for Roberts and Bradshaw to be hanged between 6.00 a.m. and noon on 25th May 1992. That warrant was read to the two men on the morning of 23rd May but the next day the Chief Justice granted a stay of execution.

The two men immediately began these proceedings for a declaration that to execute them would be in breach of the Constitution of Barbados. On 29th September 1992 the High Court dismissed that application. An appeal from that decision was dismissed by the Court of Appeal on 2nd April 1993 but on 28th June 1993 Husbands J. granted Bradshaw leave to appeal to the Privy Council and granted a stay of execution pending final determination. A similar order was made in respect of Roberts on 21st July 1993.

On 12th August 1994 the parties were told that Bradshaw's complaint to the UNHRC was inadmissible since domestic remedies had not been exhausted, the appeal to their Lordships' Board still pending.

In their case, in the present appeals, the appellants raised two grounds: first, that the delays between the sentences and the intended execution constituted breaches of section 15(1) of the Constitution of Barbados in that they amounted to torture, or inhuman or degrading punishment or other treatment, and that the remedy under section 24(2) of the Constitution for those breaches should be commutation of the sentence of death to sentence of life imprisonment; and second, that the common law felony murder rule (abolished by statute in Barbados in 1994) was unconstitutional in that it enabled a defendant to be convicted of murder even in the absence of an intention to cause death or grievous bodily harm.

Having heard full argument on the first ground their Lordships concluded that the appeals should be allowed on that ground. They indicated that they would humbly advise Her Majesty that the sentences of death be commuted to sentences of life imprisonment, reasons in writing to be given later. Accordingly no argument was heard on the second ground.

Section 15(1) of the Constitution of Barbados 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 punishment or the administration of any treatment that was lawful in Barbados immediately before 30th November 1966."

By section 24 of the Constitution any person who alleges that that provision (amongst others) has been contravened may apply to the High Court for redress. When the application came before Waterman J. in 1992 he was referred to the decision of their Lordships' Board in *Riley v. The Attorney-General of Jamaica* [1983] 1 A.C. 719 where the majority of the Board held at page 726:-

"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)."

Section 17(1) of the Constitution of Jamaica is in the same terms as section 15(1) of the Constitution of Barbados. Waterman J. concluded that although there had been some delay on the part of the State in the execution of the death sentences, such delay could not be considered as an infringement of section 15(1) on the basis of the majority decision in *Riley*. The Court of Appeal in its judgment on 2nd April 1993 also followed the majority opinion in *Riley*, rejecting arguments that in the present case *Riley* could be distinguished. They held that the three tests indicated by Lord Bridge in relation to section 17(2) (here section 15(2)) were satisfied in that the delayed execution would be an act done under the authority of law, would 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 Barbados immediately before the appointed day and which did not exceed in extent the description of punishment so authorised. The Court of Appeal, however, on 28th June 1993 (Bradshaw) and on 21st July (Roberts) gave both appellants leave to appeal.

Subsequent to these two decisions their Lordships' Board on 2nd November 1993, in *Earl Pratt and Another v. Attorney-General for Jamaica* [1994] 2 A.C. 1, at page 29 humbly advised Her Majesty that in relation to section 17(2):-

"Before independence the law would have protected a Jamaican citizen from being executed after an unconscionable delay, and their Lordships are unwilling to

adopt a construction of the Constitution that results in depriving Jamaican citizens of that protection."

They further concluded in relation to section 17(1) that "... we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time" (page 29) but subject to an examination of the reasons for the delay, and particularly at pages 29-30 whether the delay:-

"... is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process [when] the defendant cannot be allowed to take advantage of that delay for to do so would be to permit the defendant to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime,"

In *Pratt*, it was said at page 33, that "to execute these men now after holding them in custody in an agony of suspense after so many years would be inhuman punishment within the meaning of section 17(1)". They finally concluded at page 35 that:-

"... in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'."

The appellants rely on that opinion in the present case. Even at the date when these proceedings were commenced on 25th and 26th May 1992 more than five years had elapsed since Bradshaw was sentenced to death on 8th November 1985 and since Roberts was sentenced to death on 24th April 1986. A further two years nine months had elapsed by the hearing of this appeal.

It is to be noted that both men escaped from prison on 5th September 1991, Bradshaw being recaptured on 5th November 1991 and Roberts on 21st February 1992. Since the appeal to the Privy Council had come to an end and since no reply had been received to Mr. Shepherd's letter of 16th April 1991, asking if legal aid was available for a petition for the death sentences to be commuted, these periods when they were out of prison had no effect on the conduct of the domestic proceedings. At most it can be said that it might have delayed Bradshaw's petition to the UNHRC by some two months.

Even, however, if the periods of escape are deducted from the total period of time which has elapsed, *prima facie* this case falls squarely within the principle enunciated by their Lordships in *Pratt and Morgan*.

The respondents, however, contend that *Pratt and Morgan* should not be applied in this case.

In the first place they submit that what was said in *Pratt and Morgan* about delays occasioned by complaints to the UNHRC and to the Inter-American Commission on Human Rights ("IACHR") should be reviewed. They say that appeals against conviction (leaving aside the constitutional proceedings) take approximately three and a half years; applications to the Human Rights bodies take on average two years. It follows that five years is too short a period for the presumption of inhuman treatment to arise. Accordingly either the periods of time relating to applications to the Human Rights bodies should be excluded from the computation of delay or the period of five years should be increased to take account of delays normally involved in the disposal of such complaints. If this is not done it is said that execution will never be possible or the State in question will "consider revocation of the Optional Protocol to the International Covenant on Civil and Political Rights".

Their Lordships do not accept either of these suggested revisions of what was said in *Pratt and Morgan*. It is plain from the judgment delivered by Lord Griffiths that the Board (consisting of seven members) considered carefully the question of applications by prisoners to the UNHRC and the IACHR. Whilst wishing to do nothing to discourage continued acceptance of the Protocol the Board considered at page 33 that "petitions to the two Human Rights bodies do not fall within the category of frivolous procedures disentitling them to ask the Board to look at the whole period of delay in this case". They added at page 35 "It is reasonable to allow some period of delay for the decision of these bodies in individual cases but it should not be very prolonged".

Their Lordships consider that it would be wrong in principle to exclude altogether any time taken to pursue such petitions. The acceptance of international conventions on human rights has been an important development since the Second World War and where a right of individual petition has been granted, the time taken to process it cannot possibly be excluded from the overall computation of time between sentence and intended execution.

Secondly, as the Board stressed in *Pratt and Morgan*, if domestic procedures require reasonable expedition then they can be carried out in approximately two years. That will avoid the argument that there has been such unreasonable delay in domestic proceedings as to ground a petition to e.g. the UNHRC. In the few cases where a petition would still be admissible then it should be possible for it to be dealt with in less than the two years relied on by the respondents.

Their Lordships accordingly see no reason to vary the period of five years after sentence following which there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment".

Then it is said that the periods of time between the dismissal of their appeals by the Court of Appeal and the abandonment of their appeals to the Privy Council should be excluded from the period of delay. There are two periods here - from the Court of Appeal to the provision of funds which is fourteen months and from the receipt of funds until the abandonment of the appeal by Roberts which is seven months. It is quite clear that during the first of these periods the appellants' attorney was pressing an answer to his request for funds and not receiving one. It is also clear that some time was needed for solicitor and counsel in London to consider whether the appeal had any chance of success. Moreover it was open to the respondents, once the funds had been provided, to ask the Privy Council to dismiss the appeal unless the procedures were followed with despatch.

The respondents say that funds did not have to be provided until the appellants had complied with Rules made by the Governor-General in 1967 relating to applications to the Privy Council by persons under sentence of death for special leave to appeal. In those Rules it is provided either that the necessary funds and the necessary papers should be sent to London and that the Minister should be informed whereupon he must inform the High Commissioner's office by telegram. Alternatively where the application is made *in forma pauperis* an affidavit of means and a certificate of counsel that the petitioner has reasonable grounds of appeal have to be produced. In the present case the procedure to apply *in forma pauperis* was not followed, nor since the necessary funds had not been obtained until August 1989 were they sent to London as required by Rule 2. Even if the Rules were not strictly followed so that no obligation arose on the Minister to send a telegram to the High Commissioner in London the fact remains that the Government department well knew that the appellants were seeking funds in order to appeal and they failed to respond to that application. Had the application been acceded to the procedure under Rule 2 could have been complied with; without such funds there was no way that the appellants could comply with Rule 2. Their Lordships do not consider that any failure (if there was a failure) to comply with the Rules means that the period in question must be excluded from the overall period of time in view of the Government's failure to deal with the application.

A meticulous effort was made to deduct periods when it could be said that the appellants were not getting on with proceedings

or complying with the Rules and to show that enough months could be deducted to reduce the relevant delay to below five years.

Their Lordships wish to discourage the minute examination of weeks and even months when such delay can be said to have occurred and to be the responsibility of one or other party or of both so that it must be apportioned as was suggested here. The right approach is to take the total period of time which has elapsed and then to ask, as indicated in *Pratt and Morgan*, whether the "delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process" (pages 29-30). If they do the defendant cannot take advantage of delay. It is right to recall what was said in *Pratt and Morgan* at page 33:-

"It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it."

That assessment does not depend on considering whether the time which has elapsed "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", one possible exception referred to by Lord Diplock in *Abbott v. Attorney General of Trinidad and Tobago* [1979] 1 W.L.R. 1342 at page 1348. The test is the wider objective one laid down in *Pratt and Morgan*.

The remedy thus lies in the hands of the State. Their Lordships do not consider that any of the period between dismissal of the appeal by the Court of Appeal and abandonment of the appeal to the Privy Council falls to be deducted from the total period of time which has elapsed.

The respondents seek to draw a distinction between the wording of section 17(2) of the Jamaican Constitution which they contend should lead to a different result in the present case from that in *Pratt and Morgan*. The Jamaican Constitution reads:-

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

Section 15(2) of the later Constitution of Barbados added after the word "punishment" the words "or the administration of any treatment".

Sir Godfray Le Quesne Q.C. contends that section 17(2) did not legalise "treatment" whereas section 15(2) of the Barbados Constitution does legalise, after the Constitution came into force, treatment which was lawful before that date. To keep in prison pending execution, he says, was not unlawful prior to 1966. Their Lordships do not accept that keeping a man in prison pending his execution following a conviction and sentence by a court is "the administration of ... treatment" within the meaning of section 15(2). The punishment is the sentence of death; the detention in prison is ancillary to that punishment and is not a separate treatment. In any event even if detention in prison were treatment, over long detention would not have been lawful. As in *Pratt and Morgan* it could have been prevented in Barbados. There is thus no valid distinction between this case and *Pratt and Morgan* in that regard.

Their Lordships, for these reasons, humbly advised Her Majesty that these appeals should be allowed and that a sentence of life imprisonment should be substituted for the sentence of death. The respondents must pay the appellants' costs before their Lordships' Board.