12 of 1975

IN THE PRIVY COUNCIL No. 20 of 1974

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO BEING THE SECOND SCHEDULE TO THE TRINIDAD AND TOBAGO (CONSTITUTION) ORDER IN COUNCIL, 1962

AND

IN THE MATTER OF THE APPLICATION OF MICHAEL DE FREITAS ALSO CALLED MICHAEL ABDUL MALIK (A PERSON ALLEGING THAT CERTAIN PROVISIONS OF SECTIONS 1, 2, 3, 4, 5 and 7 OF THE SAID CONSTITUTION HAVE BEEN, ARE BEING OR LIKELY TO BE CONTRAVENED IN RELATION TO HIM) FOR REDRESS IN ACCORDANCE WITH SECTION 6 OF THE SAID CONSTITUTION

B E T W E E N :

MICHAEL DE FREITAS also called Michael Abdul Malik — Appellant

- and -

(1) GEORGE RAMOUTAR BENNY
(2) THE ATTORNEY GENERAL
(3) TOM ILES, Commissioner of Prisons — Respondents

CASE FOR THE APPELLANT

1. This is an appeal from a judgment of the Court of Appeal of Trinidad and Tobago (Hyatali C.J., Phillips J.A. and Corbin J.A.) dated 30th April 1974 dismissing the appeal of the appellant from the judgment of the trial judge (Braithwaite J.) dated 15th February 1974 whereby he dismissed the appellant's

application for certain declarations under Section 6 of the Constitution of Trinidad and Tobago. Conditional leave to appeal to Her Majesty in Council was granted to the appellant by the Court of Appeal of Trinidad and Tobago on 22nd May 1974, and final leave was granted on 10th October 1974

2. The main issue in the appeal is whether the death penalty for murder as administered in Trinidad and Tobago is cruel and unusual punishment both under Section 2(1)(b) of the Constitution and at Common Law; and whether the execution of the death penalty infringes the provision in Section 1 of the Constitution that no individual shall be deprived of his right to life except by due process of law. In the determination of these issues the following questions arise :

(a) Whether section 3(1) of the Constitution operates to exclude the application of sections 1 and 2 in respect of acts done in purported pursuance of a law enacted prior to the commencement of the 1962 Constitution.

(b) Whether the Statute, 1 William and Mary (commonly known as the Bill of Rights 1689) which, by virtue of Section 12, Supreme Court of Judicature Act 1962, remained part of the law of Trinidad and Tobago at the time of the commencement of the 1962 Constitution and continues to proscribe cruel or unusual punishment, is unaffected by section 3(1) of the Constitution, and operates on laws enacted prior to the commencement of the Constitution.

(c) Whether the punishment of death is, per se, cruel and unusual.

(d) Whether the imposition of the death penalty by the courts, and the actions of the Commissioner of Prisons and the Registrar of the Supreme Court in executing the death penalty are such as to infringe the Constitutional and/or common law prohibitions against cruel and unusual treatment or punishment.

(e) Whether the Appellant's right not to be deprived of his life other than by the process of law is infringed by the arbitrary and discriminatory operation of the reprieve procedure.

(f) Whether the procedure of the Advisory Committee on the Prerogative of Mercy, established pursuant to Section 71 and 72 of the Constitution, complies with the due process guaranteed to the Appellant by Section 1 of the Constitution.

(g) Whether in any event the Appellant should be granted a stay of execution, and an inquiry be instituted into the Appellant's present mental condition.

THE CONSTITUTION OF TRINIDAD AND TOBAGO

3. As from the 31st day of August 1962 Her Majesty's Government in the United Kingdom ceased to have responsibility for the Government of Trinidad and Tobago: Trinidad and Tobago Independence Act 1962 (10 & 11 Elizabeth 2 c.54). On that day the sections of the Trinidad & Tobago Constitution relevant to this appeal came into operation: c.f. The Trinidad & Tobago (Constitution) Order in Council (1962 No. 1875).

4. Chapter 1 of the Second Schedule of the Trinidad & Tobago (Constitution) Order in Council, 1962 is headed "THE RECOGNITION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS."

Section 1 reads, so far as is relevant to this appeal:

"1. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(d) the right of the individual to equality of treatment from any public authority in the exercise of its functions;"

Section 2 reads, so far as is relevant to this appeal :

"2. Subject to the provisions of Sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared and in particular no Act of Parliament shall -

(a) authorise or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorise the imposition of cruel and unusual treatment or punishment;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations . . .

(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection of the aforesaid rights and freedoms."

Section 3, which bears the marginal annotation "Saving as to certain laws", reads :

"3.(1) Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution.

(2) For the purposes of subsection (1) of this section a law in force at the

commencement of this Constitution shall be deemed not to have ceased to be such a law by reason only of -

(a) any adaptations or modifications made thereto by or under Section 4 of the Trinidad & Tobago (Constitution) Order in Council 1962, or

(b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reasons of its inclusion in such consolidation or revision."

4. The executive power to respite a sentence of death is set out in Chapter 5 of the Constitution. The relevant sections provide :

"70.(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 Trinidad and Tobago 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;

(c) substitute a less severe form of punishment for that imposed by any sentence for such an offence; or

(d) remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to Her Majesty on account of such an offence.

(2) The powers of the Governor-General under subsection (1) of this section shall be exercised by him in accordance with the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister."

"71. There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of :

(a) the Minister referred to in subsection (2) of Section 70 of this Constitution, who shall be Chairman;

(b) the Attorney-General; and

(c) not more than four other members appointed by the Governor-General, acting in accordance with the advice of the Prime Minister.

"72. (1) Where an offender has been sentenced to death by any court for an offence against the law of Trinidad and Tobago, the Minister 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 Minister may require, to be taken into consideration at a meeting of the Advisory Committee.

(2) The Minister may consult with the Advisory Committee before tendering any advice to the Governor-General under subsection (2) of section 70 of this Constitution in any case not falling within subsection (1) of this section.

(3) The Minister shall not be obliged in any case to act in accordance with the advice of the Advisory Committee.

(4) The Advisory Committee may regulate its own procedure.

(5) In this section "the Minister" means the Minister referred to in subsection (2) of section 70 of this Constitution."

5. The Appellant appealed to the Court of Appeal (No.13 of 1974) pursuant to Section 6(4) of the Constitution, which permits any person aggrieved by a determination of the High Court sitting in its original jurisdiction to enforce the protective provisions of the Constitution

(including those enumerated in paragraph 3 hereof) to appeal to the Court of Appeal. Section 6, so far as is relevant, reads :

> "6. (1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing sections or section 7 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 High Court for redress.
>
> (2) The High Court shall have original jurisdiction -
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) thereof 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 foregoing sections or section 7 to the protection of which the person concerned is entitled . . .
>
> (4) Any person aggrieved by any determination of the High Court under this section may appeal therefrom to the Court of Appeal . . ."

6. This appeal comes before the Judicial Committee of the Privy Council pursuant to section 81 of the Constitution which permits any person aggrieved by a decision of the Court of Appeal on any interpretation of the consideration to appeal to Her Majesty in Council in accordance with the Trinidad and Tobago (Procedure in Appeals to the Privy Council) Order in Council 1962.

7. <u>THE FACTS</u>

(1) The relevant facts, shortly stated, are as follows :-

a) The appellant and two co-defendants stood their trial before Rees J. and a jury on a charge of murder, in that during the period of 7th February 1972 to 22nd February 1972, at Port of Spain in the County of St.George, they murdered Joseph Skerritt. The appellant was found guilty, and on August 21st 1972, in accordance with Section 4(1) of the Offences Against the Person Ordinance Ch. 4 No. 9, was sentenced to suffer death as a felon.

b) On 22nd August 1972 the notice of application for leave to appeal was lodged. The appeal was heard in the Court of Appeal from 26th to 28th March 1973, and was dismissed, in a reserved judgment handed down on 17th April 1973. A certified copy of the record of proceedings was provided on 18th July 1973; the appellant's petition for special leave to appeal was refused by the Judicial Committee of the Privy Council on 26th November 1973.

c) The notice of motion (No.3290 of 1973) in the present proceedings was lodged in the High Court on 20th December 1973. By Order of Mr. Justice Kester McMillan, dated 21st December 1973, the motion was deemed fit for hearing during the vacation, and was so heard on 28th December 1973, when it was struck out as being frivolous and vexatious and an abuse of the process of the Court. The Respondents filed an affidavit of Sahedo Toolsie, solicitor in charge of the proceedings on behalf of the Respondents, to the effect that expedition of the hearing of the motion was highly desirable so as to remove any continuing uncertainty with regard to the carrying out of the death sentence upon the appellant.

d) On 7th January 1974 the High Court reinstated the motion on the application of the Solicitor General, and it came to be heard by Mr. Justice Braithwaite on 8th February 1974. It was then dismissed, for reasons set out in a written judgment delivered on 15th February 1974.

e) Since 21st August 1972 the appellant has been, and is still, in custody in a cell on "death row" in the Royal Gaol, Port of Spain, and no warrant for his execution has been issued in accordance with Section 59, Criminal Procedure Ordinance.

(2) The following affidavits were filed by the appellant in support of the motion No. 3290 of 1973 :

a) Affidavit of the appellant, Michael Abdul Malik, describing the conditions under which he has been held in cusotdy pending execution of his sentence, and his observations on the treatment of other prisoners who have suffered the death penalty.

b) Affidavit of Father Paschal James Tiernan, Roman Catholic Chaplain to H.M. Prison, Royal Gaol from December 1956 to May 1972, describing the administration of the death penalty throughout that 15 year period, and its effect upon the condemned men, the public at large and those obliged to officiate at executions.

c) Affidavits of Conrad Joseph Sanguinette, Solicitor for the appellant,

(i) verifying that no expert enquiry has been conducted into the appellant's mental condition;

(ii) appending a letter from the Permanent Secretary of the Ministry of National Security refusing permission for the appellant to be seen and interviewed by a psychiatrist;

(iii) appending a list of the names and dates of conviction of 19 condemned prisoners.

(3) The Respondents filed an Affidavit of George Ramoutar Benny, Registrar and Marshal of the Supreme Court of Trinidad and Tobago, indicating the manner in which the condemned prisoner suffered death by judicial hanging.

(4) No challenge was made by the Respondents to the facts as stated in Affidavits filed on behalf of the Appellant, and the contents thereof were accepted by Mr. Justice Braithwaite as "true and correct . . . for the purpose of this application". They compose the following picture of the carrying out of the death penalty in Trinidad and Tobago:

a) Prisoners condemned to death are housed in a special corridor of the Royal Gaol, adjacent to the room containing the gallows. The cells on this corridor are approximately 8 feet 4 inches by 5 feet 10 inches wide, and have no furniture apart from a mattress on the cockroach-infested concrete floor. The stench from the toilet pans in the cells is often revolting. The light in the Appellant's cell is never switched off.

Condemned prisoners are usually exercised for only one hour a week: no relief from broedom is provided other than a radio in the corridor. Prison Officers on duty in the condemned cells have no special training for their task of constant surveillance over the condemned prisoner; their educational standard is low. Condemned prisoners are allowed only two 15-minute visits per week conducted across a close mesh wire grill, and overheard by other prisoners and by prison officers. The mental anguish engendered by these conditions and by delays in execution has led to several suicide attempts ((Malik Affidavit, para.5, Tiernan Affidavit, paras. 5.1-3 and 6.1)).

b) Before the commencement of the 1962 Constitution the normal period between the passing of the sentence of death by the court of trial and execution was about five months. Since 1962 this period in the condemned cell has greatly increased. (Tiernan, 4.3).

The Appellant himself has been in a condemned cell since August 21st 1972 (Malik, 4.2). Of the 19 men at present in condemned cells, two were sentenced to death in 1970, one in 1971, six in 1972 and nine in the first seven months of 1973. (Sanguinette, Schedule attached to Affidavit).

c) Condemned prisoners are not informed of the deliberations of the Mercy Committee, and are in consequence unable to make satisfactory representations to it. (Tiernan, 10.1).

d) Hangings take place on Tuesday mornings. The condemned prisoner is not informed of his fate until the preceding Thursday afternoon when a senior prison officer enters the corridor and

stands outside the cell of the doomed man. He reads the execution warrant (the form of which is set out in the Third Schedule to the Criminal Procedure Ordinance Ch. 4 No.3) and concludes by offering the condemned man the food of his choice. Every Thursday afternoon is the climax of a period of intense mental anguish for each condemned prisoner, a state of apprehension which builds up earlier in the week and continues until the Friday. (Malik, para 7, Tiernan, para 7.1).

e) On the day following the reading of the warrant (i.e. the Friday) the doomed man is weighed and measured, an exercise which takes place every day until he is hanged (Malik, para 9). Respondents allege that this procedure ensures that at the execution loss of consciousness will be instantaneous on the drop (Benny, paras 2 and 3). Every day after the reading of the warrant the trap of the gallows is greased, and this sound is heard by all the condemned prisoners (Malik, para 11).

f) On the day before the execution relatives pay their last respects across the thick wire mesh - kissing or even touching the condemned man is prohibited. Other prisoners in "death row" must endure the ordeal as close relatives wail, scream and at times have to be carried away, overcome with grief.

g) At 5.30 a.m. on the morning of the execution the other condemned prisoners are removed to the end of the special corridor. The doomed prisoner is bathed, dressed in a white shirt and white trousers, his hands and feet are strapped, and a white hood is placed over his head. At 7.a.m. he is executed, the flying of the trap being heard distinctly by the other condemned prisoners. The dead body is left to hang for at least an hour (Malik, para 11).

h) Death is caused by compression of the spinal cord due to fracture disclocation of first and second cervical vertebrae. An autopsy on one prisoner executed in September 1973, tendered in evidence by the Appellant, noted ligature marks 16 inches long, 1 inch wide on the upper part of the neck, torn muscles, vessels and cartileges, congested lungs and a distended heart. The suffering inherent in the death penalty extends to eye-witnesses

of a hanging, the other condemned prisoners in the Royal Gaol and the relatives of the hanged man who are made objects of public curiosity. There is evidence that capital punishment has aroused morbid and unhealthy interest among the general public in Trinidad, encouraged by the mass media (Tiernan, para 9.).

i) There is no evidence that the Mercy Committee seeks expert advice on the psychological make-up of a condemned prisoner whose reprieve is under consideration. It appears that the mental state of condemned prisoners is not considered by the prison authorities: indeed there is evidence that the Minister of National Security has actually refused permission for the Appellant to undergo a psychiatric examination, requested by his legal advisers in order to provide evidence to assist the Court in his application.

THE JUDGMENT OF THE HIGH COURT

8. The reasoning of Mr. Justice Braithwaite in dismissing the motion relies upon the following propositions :

a) Section 3(1) of the 1962 Constitution expressly excludes the application of Sections 1 and 2 of the Constitution to laws in force at the time of commencement of the Constitution, and these laws include Section 4(1) of the 1925 Offences Against the Persons Ordinance (Judgment, p.2.).

b) Section 3(1) similarly preserves the execution procedures undertaken pursuant to Section 59 of the 1925 Criminal Procedure Ordinance Ch. 4 No. 3 (Judgment, p.3).

c) Runyowa v. The Queen (1967) 1 A.C. 26 is authority for the proposition that the Courts cannot interfere with the penalty for a crime if that penalty is fixed by a law which has been properly passed by the legislature (Judgment p.5).

"What happens after the sentence of the Court is passed and confirmed by the appellate courts clearly cannot be challenged

in the High Court of Trinidad and Tobago." (Judgment, p.6).

d) It is impossible to challenge, in the High Court, the procedures or decisions of the Advisory Committee on the Prerogative of Mercy, either for breaches of the rules of natural justice or for infringement of the human rights and fundamental freedoms guaranteed in Sections 1 and 2 of the Constitution (Judgment, p.8 and p.11).

e) The due process of law guaranteed to the individual by Section 1 of the Constitution relates only to Court proceedings. Consequently the Constitution does not protect the individual from actions taken by officials of any Government Department once the sentence of the Court has been imposed upon him and confirmed by appellate decisions (Judgment, p.9).

f) The Constitutional provisions for ameliorating the death penalty in certain cases (Sections 70-72) invite the "clearest possible implication" that the sentence of death is not "cruel and unusual treatment or punishment", or is in any other way contrary to the Constitution (Judgment, p.11).

g) Delay in carrying out executions, and several of the acts done in preparation for the execution, cause mental anguish to the condemned prisoner.

9. The reasoning of the Court of Appeal in dismissing the appeal relies upon the following propositions :

a) Section 3(1) of the 1962 Constitution expressly excludes the application of Sections 1 and 2 of the Constitution to laws in force at the time of the commencement of the Constitution, and these laws include both Section 4(1) of the Offences against the Persons Ordinance 1925 (imposing the death penalty for murder and section 59 of the Criminal Procedure Ordinance 1925 (which authorises the Marshal to carry out the warrant of execution of death).

b) the death penalty is executed under the authority of warrants issued in pursuance of Section 59 of the

Criminal Procedure Ordinance, irrespective of the time lag between the passing of the sentence of death and the date of execution; therefore, any delay in carrying out the penalty, however inordinate, is authorised by laws and is not an administrative act which might be impugned as unconstitutional (Hyatali C.J. p.10-11; Phillips J.A. p.7-8).

c) any delay in carrying out the death penalty is not cruel and unusual punishment, where such delay is caused by the pursuit of legal remedies by the condemned man himself (Hyatali C.J., p.10; Phillips J.A., p.8).

d) (per Corbin J.A., p.4) there was no sufficient evidence that there had been inordinate delay in carrying out the Appellant's execution of death.

e) Administrative acts performed after the commencement of the Constitution in pursuance of a pre-Constitution law was protected by section 3(1) of the Constitution from impugnability under sections 1 and 2 of the Constitution (Hyatali C.J., p.11).

f) The statutory imposition of the death penalty in the Offences against the Person Ordinance 1925 repealed or rendered nugatory any provision of the Bill of Rights proscribing cruel and unusual punishment (Hyatali C.J. p.14; Phillips J.A. p.5; Corbin J.A. p.3)

g) the reprieve procedure constituted under sections 70 72 of the Constitution is not susceptible to judicial review or control (Hyatali C.J. p.16; Phillips J.A. p.8).

h) The proceedings before the Advisory Committee on the Prerogative of Mercy are not judicial or quasi-judicial in character, and do not call for the observance of the provision in Section 1 of the Constitution requiring due process of law (Hyatali C.J. p.17-18; Phillips J.A. p.8-9; Corbin J.A. p.4).

i) (per Hyatali C.J. p.18) the Advisory Committee on the Prerogative of Mercy exercises no

prerogative power, but merely advises Her Majesty in the exercise of Her prerogative power.

j) There was no evidence before the Court to indicate that the Appellant was other than mentally fit to undergo sentence of death; accordingly, there was no power in the Court to order an inquiry into the Appellant's mental condition and to stay execution pending such inquiry. (Hyatali C.J. p.19).

SUBMISSIONS

JURISDICTION

10. S.3 (1) of the 1962 Constitution protects unrepealed statute law and common law, in force at the commencement of the Constitution, from being struck down as inconsistent with guaranteed rights and freedoms; it does not legitimise executive or administrative actions done in furtherance of protected legislation if these actions violate the guarantees in Sections 1 and 2 of the Constitution. It follows that Section 3(1) protects Section 4(1) of the Offences Against the Person Ordinance and S.59 of the Criminal Procedure Ordinance against Constitutional challenge, but does not so protect those acts or acts of omission of the Respondents which subject the appellant to discriminatory, or to cruel and unusual treatment or punishment, or which are calculated to deprive him of his life other than by due process of law.

a) The proper approach to the interpretation of Section 3(1) involves a consideration of the meaning of the words "apply" and "law" as used in the context of the Section. The word "apply" is used in the sense of "strike down", "negative", "nullify", "cause to be no longer operative." This meaning is reinforced by the marginal note to the Section, which described it as "Saving as to certain laws." (Side-notes cannot be used as an aid to construction of an Act of Parliament but are an aid in construing secondary legislation, such as an Order in Council that is not susceptible to Parliamentary amendment: Chandler v. D.P.P. (1964) A.C. 763.) The implication is clearly that the Section is meant to save (in the sense of "rescue" or "preserve")

certain laws which would otherwise be rendered inoperative by the guarantees in Sections 1 and 2. The interpretation of the word "law" is contained in Section 105(1); it "includes any instrument having the force of law and any unwritten rule of law". It includes both enacted law and the common law, but clearly does not include administrative actions, such as delaying execution, placing the appellant in an unhygienic cell, refusing him permission to address the Mercy Commission, and so forth: D.P.P. v. Nasralla (1967) 2 A.C. 238.

In considering the meaning of the word "law" in the Nigerian Constitution, a leading constitutional jurist concludes: ".....law includes regional constitutions, statutes, instruments made under statutory authority, and 'unwritten' rules of law..... It is doubtful whether the term includes administrative orders of a non-legislative character, and it would appear to exclude purely administrative acts". (S.A. de Smith, "The New Commonwealth and its Constitutions" Stevens & Sons, 1964 at p.190).

b) This submission is reinforced, in respect of Section 1, by the fact that the Section is not expressly made "subject to Section 3" as it is in Section 2, and by the affirmation that the rights therein set out "have existed and shall continue to exist." The Section expressly presupposes that the rights to due process and non-discriminatory treatment were present in all Trinidadian laws prior to the commencement of the Constitution: Section 3(1) cannot therefore operate to extirpate these rights, because they must, ex hypothesi, exist and continue to exist in all the pre-Constitutional legislation which it saves.

c) This submission is reinforced by the wording of Section 2, which provides that "subject to the provisions of Section 3.....no law shall ..... (b) impose or authorise the imposition of cruel and unusual treatment or punishment....." The provisions of Section 3 only go so far as to preserve the law itself; they do not preserve any cruel and unusual administrative action imposed under the purported authority of that law.

d) It is not a question of construing the word "law" in sections 2 and 3 in isolation, but of construing the whole phrase in which the word "law" is a part: Lord Wilberforce in R. v. Federal Steam Navigation Co.Ltd. (1974) 1 W.L.R. 505, 520-1. Section 7 of this Constitution has been, is being, or is likely to be contravened in relation to him....." The matter is put beyond doubt by the decision of the Privy Council in Oliver v. Buttigieg (1967) 1 A.C. 115, where an application was made pursuant to an identically worded provision in Section 16 of the Malta (Constitution) Order in Council. The issue was whether a circular issued by a hospital official on the authority of the Minister for Health, prohibiting the reading of certain left wing newspapers within hospital confines, contravened the applicant's constitutional right to freedom of expression. Lord Morris of Borth-y-Gest, delivering the Judgment of the Board, said: "In the Civil Court and in the Court of Appeal the appellants (the Minister of Health and the Chief Government Medical Advisor) raised the issue whether the circular in question was cognisable by the courts of Malta. It was contended (at p.127-8) that the issue of the circular was "a pure administrative act" and as such was not cognisable in the courts. The courts held that it was cognisable. No contention to the contrary was advanced in the submissions before their Lordships' Board." Professor de Smith supports the proposition that administrative acts and orders are governed by the guarantees of fundamental rights in the Nigerian Constitution, citing in support the case of Rotimi Williams v. Majekodumni (1962) W.N.L.R. 174 (The New Commonwealth and its Constitutions, supra., 191).

g) Further support for the proposition that the fundamental rights guaranteed extend to administrative actions and are unaffected in this respect by Section 3 may be derived from the implied intention of the framers of the Trinidad & Tobago Constitution. It is submitted :

(i) If it had been intended to preserve administrative action under pre-1962 legislation, a different drafting could, and would, have achieved this purpose. In 1962 there were in existence several variants of the "saving clause" available in the "Westminster export model" constitution.

One alternative, adopted in the Nigerian constitution, was to provide that any law inconsistent with guaranteed rights should be void to the extent of the inconsistency. (Nigerian Constitution S.1., c.f. de Smith supra., p.190). A less thoroughgoing alternative was to save the existing laws by the wording used in S.3(1). (see also S.26(8) and (9) Jamaica Constitution and S.26 Barbados Constitution). But where it was desired to go further and to save administrative actions pursuant to existing laws, as it was by the framers of, for example, the constitutions of Southern Rhodesia in 1961 and of Guyana in 1966, it was deemed appropriate to word the saving clause thus :

> "Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of..... (the Sections guaranteeing fundamental rights) to the extent that the law in question is in force at the commencement of the Constitution."

Compare, for example, the saving clauses in the Constitution of Southern Rhodesia (cited in Runyowa v. The Queen (1967) 1 A.C. 26 at p.45 D) and Guyana (cited in Brandt v. Attorney-General of Guyana (1971) 17 W.I.R. 448 at p. 460 H) with the saving clause (S.3 (1)) of the Trinidad & Tobago Constitution (see also S. 7 (2), the Constitution of Mauritius). Had the framers of the Trinidad Constitution wished to preserve administrative actions authorised by pre-1962 laws, they would have adopted the terminology of the former.

(ii) If any argument to the contrary were accepted, it would strip the elaborate Constitutional guarantees of the human rights and fundamental freedoms of almost any application. It would mean, for example, that if the Respondents decided to torture the Appellant by electric shock each day for a month before his execution, he would have

no constitutional redress. It would mean that any person arrested under any law in existence at the commencement of the Constitution could suffer whatever indignities the Respondents, in their unbridled discretion, inflicted upon him, without constitutional redress. It cannot, in the Appellant's respectful submission, have been the intention of the framers to render two crucial sections of the Constitution a 'brutum fulmen' by saving brutal or discriminatory practices by the Executive arm of Government.

g) The Judgment of the Court of Appeal should be reversed to the extent that it is inconsistent with the above propositions.

MERITS

11. Death by hanging is a cruel and/or unusual punishment in itself

a) Interpretation

The derivation of the phrase "nor cruel nor unusual punishment inflicted" in the Bill of Rights is found in the prevailing disquiet over the punishment meted out to Titus Oates after his conviction for perjury in 1688. The intention of the draftsman was to outlaw "cruel" (in the sense of "severe" or "hard") or "unusual" (in the sense of "unbecoming" or "inappropriate"). Oates, a Minister of the Church of England whose perjury had resulted in the execution of many innocent Catholics, was sentenced to life imprisonment, together with a heavy fine, whippings, pilloring and defrocking. This sentence, although justified both by the law of England and by the lex talionis, was widely felt to be harsh and degrading in its cumulative effect, and a particularly unbecoming fate for a prelate, (see generally Professor Granucci, "Nor Cruel and Unusual Punishment Inflicted: The Original Meaning" (1969) 57 U.Cal. L. Rev. 839, 857). As none of Oates' punishments were regarded at the time as torture, it is evident that the framers of I W & M intended to prohibit a much wider range of penal measures, using words of general import which would derive their impact from the prevailing moral climate.

The notions of "severity" and "unbecoming to human dignity", comprised in the original meaning of the phrase, are particularly appropriate to death by hangings in 1974.

b) The phrase has been consistently held to have an elastic meaning, responding to evolving concepts of decency and human progress:

The clause "may therefore be progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice" (Weems v. U.S. 217 U.S. 349 at 378 (1910). The clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (Trop v. Dulles 356 U.S. 44 (1958).

Consequently the finding of Mr. Justice Braithwaite, noted at paragraph 5(f), cannot be sustained. A similar attempt to imply Constitutional acceptance of the death penalty from Constitutional reference to a Mercy procedure was expressly rejected by the U.S. Supreme Court in Furman v. Georgia (Justice Brennan, p.27) and by the Californian Supreme Court in People v. Anderson (6 Cal. 3d 628, 493 P.20 880, 100 Cal. Rptr. 152 (1972). At p.639 the Court points out that

> "The Constitution expressly proscribes cruel or unusual punishments. It would be mere speculation and conjecture to ascribe to the framers an intent to exempt capital punishment from the compass of that provision solely because at a time when the death penalty was commonly accepted they provided elsewhere in the Constitution for special safeguards in its application."

The phrase has been given the following denotation in the U.S. Supreme Court :

> "The basic concept underlying the (phrase) is nothing less than the dignity of man. While the State has power to punish, the (clause) stands to assure that this power be exercised within the limits of civilised standards." (Trop v. Dulles, supra., p.100)

"The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual", therefore, if it does not comport with human dignity . . . The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings . . ." (Furman v. Georgia, judgment of Justice Brennan, p.14).

c) The Reality of Death by Hanging

The Royal Commission on Capital Punishment 1949-1953 (Cmnd. 8932) notes that hanging "causes death by a physical shock of extreme violence, and leaves the body with the neck elongated" (para.732). It explains that "Hanging inflicted a signal indignity on the victim in a uniquely conspicuous fashion. It displayed him to the onlookers in the most ignominious and abject of postures, and would thus be likely to enhance the deterrent effect of his punishment . . . Thus hanging came to be regarded as a peculiarly grim and degrading form of execution, suitable for sordid criminals and crimes" (para.701). But the report adds: "If capital punishment were now being introduced into this country for the first time, we do not think it likely that this way of carrying it out would be chosen." (para.708).

The other facts related to the necessary preliminaries to death by hanging are set out in paragraph 3 above. The appellant asks that judicial notice be taken of two further matters, namely,

(i) The accumulating scientific literature verifying the mental torture of apprehending one's own execution. In the Hearings before the Sub-Committee on Criminal Laws and Procedures of the Senate Judiciary Committee (90th Congress, 2nd Sessions 1968, p.127) one eminent psychiatrist has described Death Row as a "grisly laboratory - the ultimate experimental stress, in which the condemned prisoner's personality is incredibly brutalized." There are occasional suicides, despite the strictest precautions, and "the strain of existence on Death Row is very likely to produce . . . acute psychotic breaks."

Some inmates are driven to ravings or delusions, but the majority sink into a sort of catatonic numbness under the overwhelming stress (Bluestone and McGehee, "Reaction to Extreme Stress: Impending Death by Execution" American Journal of Psychiatry, Nov. 1962, at 393).

(ii) The abhorrent physical spectacle of the execution itself. This has been described by the Warden of San Quentin Prison to the Senate Judiciary Committee (supra., at p.20):

> "The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurements, et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his moth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heartbeat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few minutes there is **usually** considerable struggling in an effort to breathe."

d) <u>The Cruel and Unusual Aspects of Death by Hanging</u>

(i) "Capital punishment is something abhorrent in itself" (Lord Morris of Borth-y-Gest, Hansard, House of Lords, Vol.306 p.1168-17 December 1969).

"The penalty of death . . . is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity" (Furman v. Georgia per Justice Stewart). "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity . . . In comparison to all other punishments today (it) is uniquely degrading to human dignity." (Mr. Justice Brennan, ibid p.49).

(ii) All available evidence suggests that capital punishment has no deterrent effect on potential murderers. The latest United Nations report on the subject (cited by Justice Marshall, ibid, at p.40 and by Lord Gardiner, when Lord Chencellor of England, Hansard, House of Lords Vol.306 p.1118) concludes :

> "(it) is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime."

(iii) "Can we be sure that the utter and irrevocable finality of the death penalty can always be matched by positive certainty of guilt? In no country, with the fairest system of law, with the most humane and conscientious judiciary, do I feel that we can be satisfied of that" (Lord Morris of Borth-y-Gest, supra. And see details given by Baroness Wootton of Abinger, at p.1144, of four post-war mistaken convictions for capital murder).

(iv) The unmistakable trend of history is toward the abolition of capital punishment. Once in use everywhere, and for a wide variety of crimes it is today widely abolished in law and even more widely abandoned in practice. Most of the developed nations of the western world have abolished the death penalty, including Great Britain, West Germany, Italy, the Netherlands, all the Scandinavian countries, Switzerland, Austria and Portugal. Belgium retains the

death penalty on the statute books, but it has not been used since 1863. Capital punishment has been abolished either formally or in practice in many Latin American countries, including Argentina, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, Honduras, most of the federal states of Mexico, Nicarangua, Panama, Uruguay and Venezuela, Israel; the Australian states no longer use it. In Canada, the death penalty has been suspended for a five year period, except for the killing of policemen or prison guards. The only countries in Western Europe which still practice it are Spain and France, and in the latter the late President Pompidou, a strong abolitionist, has reprieved all but two murderers (convicted of the same murder, one of whom demanded his own execution).

(v) The continuation of the dath penalty entails freakish courtroom and jury behaviour in endeavours to avoid conviction (cf. Lord Gardiner, supra. p.1117).

(vi) "The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality and in its enormity. No existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive it appears that there is no method available that guarantees an immediate and painless death." (Justice Brennan, Furman v. Georgia, p.31. Note authorities there cited, especially People v. Anderson 6 Cal. 3d. 628). Hanging cannot be other than severe and degrading punishment, necessarily entailing physical and mental suffering.

(vii) "We heard much about the psychological harm said to be caused indirectly by executions - their distressing, some say brutalising, effect on those who have to carry them out, the nervous strain they impose on other prisoners in the gaol and the morbid interest they arouse in the public" (Royal Commission para. 733) See in particular Affidavit of Father Tiernan.

12. The death penalty as administered in Trinidad and Tobago constitutes cruel and unusual treatment or punishment

a) "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence" Francis v. Resweber 329 U.S..459, at p. 463. "No Court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives" (Justice Powell, concurred in by the three other dissenting Judges, in Furman v. Georgia at p.17 of his Judgment).

b) It is impossible to administer the death penalty without causing cruelty, suffering or degradation to the victim, his relatives or friends, and those who are obliged to kill him. Justice Brennan, at p.32 of his Judgment in Furman v. Georgia explains:

> ". . . death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for 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. Cf. Ex parte Medley 134, U.S. 160. 172 (1890). As the California Supreme Court pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constituting psychological torture." People v. Anderson 6 Cal. 3d 628 and 649.

c) The appellant specifically relies for this submission upon the finding of Mr. Justice Braithwaite, noted at paragraph 5(g) above, that the delay in carrying out executions in Trinidad & Tobago, and certain acts done in preparation for the eventual execution, cause mental anguish to the condemned prisoner. The appellant also relies upon the Affidavit of Sahedo Toolsie noted at paragraph 1(c) above, admitting that the uncertainty caused by delay, with regard to carrying out the appellant's death sentence, is undesirable.

d) The appellant submits that the facts set out in paragraph 4 subsections a - i above reveal many examples of cruel and unusual treatment in the administration of the death penalty. These include

(i) Increasing the poignancy of condemned prisoners' apprehensions of their fate by housing them in a single cell block, with the gallows in their midst, and intensifying this constant fear by greasing the trap (para. 4 (e)) and causing it to fly within their hearing (para. 4 (g)). These matters were explicitly condemned by the Royal Commission (paras. 782-785) which recommended that all executions take place within working hours and that no other prisoner be in the condemned cell block at the time of execution (Recommendation 86).

(ii) The lack of hygienic or humane conditions in the condemned cell block (para. 4(a)). Compare the Royal Commission para. 764 and Recommendation 69: "Every effort should be made to improve the standard of accommodation in the condemned cell in any prison where it is at present below the best."

(iii) The enforced monotony of life in the condemned cells, giving prisoners little to do but brood over their fate, increasing the danger of suicide or mental illness (para. 4 (a)).

(iv) The delay in execution extending in recorded cases upwards of three years (para. 4(b)). Compare the interest of public and prisoner affected by the Respondents in Toolsie's Affidavit. The Royal Commission recommended that the execution date be set within 15 to 21 days of sentence (Recommendation 65(b)) and noted that "In 1950, when there were 19 executions in England and Wales, the average period was about five weeks, in the 12 cases in which there was an appeal the average was slightly over six weeks, and in 7 where there was not, it was just under three" (para 763).

(v) Appellant's insistence on exercising appellate rights does not make delay any the less cruel and unusual. Self-induced delay is not a ground available to the Crown to justify delay, since it would qualify (and hence potentially deprive) the Appellant of his legal rights.

(vi) The condemned prisoner has no access to the Mercy Committee which decides his fate (para. 4(c)).

(vii) The procedure of reading the warrant on Thursday afternoon outlined in paragraph 4 (d) above is calculated to impose the maximum mental torture on all condemned prisoners.

(viii) The repeated weighing and measuring (para. 4(e)) is degrading and indecent. Respondents' contention that this simplified hangman's task is irrelevant.

(ix) The cruelty is inflicted on the condemned man's relatives by the circumstances described in paragraph 4(f).

(x) The mounting horror of the execution culminates in at least 90 minutes of mental anguish on the execution morning during a debased and obscene ritual which is ended by a short act of brutal violence (para. 4(g) and (h)).

(xi) Leaving the body hanging for an hour is a grotesque practice cruelly inflicted upon those obliged to witness it. It was deplored by the Royal Commission: "We have no hesitation in recommending that the practice should be discontinued . . . its only effect now is to add a final touch of ignominy which we think might well be dispensed with" (para. 773 and Recommendation 79).

(xii) This barbaric treatment tends to debase the prison officers who are obliged to assist in it and the public which learns of it in a sensationalised form through the mass media (para. 9 (i)).

(xiii) No psychiatric help is provided for the condemned prisoner, nor are any drugs made available to him to ease his suffering.

13. The reprieve procedure in Trinidad & Tobago operates in an arbitrary and discriminatory fashion, thereby depriving some condemned prisoners of their life other than by the due process of law and the equal treatment guaranteed by Section 1 of the Constitution.

a) Section 1 of the Constitution guarantees the right of the individual to due process of law, to equality before the law and to equality of treatment from any public authority in the exercise of any functions.

b) Section 1 overrides Sections 70-72 to the extent of any inconsistency. (see s.38(2) which entrenches sections 1, 2, 3 and 105, compared with S. 38(1)).

c) Before 1962, the death penalty for murder was mandatory. As such, murderers were guaranteed equality of treatment before the law, in that vis-a-vis one another each received the same punishment. The 1962 Constitution established an Advisory Committee on the Prerogative of Mercy, but omitted to provide clear and certain rules for the Committee's decisions. No such rules have been published by the Committee, or legislated by Parliament. Consequently the operation of the Committee has been and still is unpredictable, arbitrary and necessarily discriminatory, contrary to the guarantees of equality of treatment entrenched in Section 1. The membership of the Committee suggests that political pressure and prosecution bias may impinge upon the Committee's deliberations, contrary to the principle that justice must be seen to be done. The absence of any guidelines for the exercise of the Committee's discretion ensures that the decision to deprive a man of his life is based upon subjective considerations which are incapable of scrutiny or challenge by the appellant.

d) The majority of Judges in the United States Supreme Court have struck down death penalty statutes where circumstances are such that only some of those convicted under them are ultimately executed. In Furman v. Georgia (supra.) Justice Douglas held (at p.17 of his Judgement) "these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination, and discrimination is an ingredient not compatible with the idea of equal protection of the laws . . ."

> Any law which is non-discriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. Yick Wo v. Hopkins 118 U.S. 356. Such conceivably might be the rate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes.

Justice Stewart added (at p.5 of his Judgment)

> "These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

e) It follows that the appellant is entitled to relief from the operation of a procedure which, should it result in his execution, would involve an invidious discrimination between him and other persons convicted of the same crime who have been reprieved.

14. The procedure of the Advisory Committee on the Prerogative of Mercy infringes the common law rules of natural justice, contravenes the due process guarantee in Section 1 of the Constitution, and will operate to deprive the appellant of a 'fair hearing' in accordance with the principles of fundamental justice, for the determination of his right to life, contrary to Section 2(c) of the Constitution.

a) All death sentences must be referred to the Mercy Committee (Section 72(1)). The Mercy Committee is "a body vested with a discretionary power (which is) under an implied duty to observe natural justice before it acts or decides, (because) the impact of its act or decision will be particularly severe on the legally recognized interest of the person directly affected by it" (de Smith, "Constitutional & Administrative Law", 1971, p.565, citing Durayappa v. Fernando (1967) 2 A.C. 337). Since the court, exceptionally in cases of conviction for murder, has no discretion in passing sentence, it is imperative that the body responsible for deciding whether the convicted man should be deprived of life should comply with the requirements of "due process".

b) The guarantee of due process in Section 1 entails, according to English Law, "a fair and public hearing by an independent and impartial tribunal." Curr v. The Queen 26 D.L.R. (3d) at p.612 (below). The principle was expressed by Noel, A.C.J. in National Capital Commission v. Lapointe 29 D.L.R. (3d) at p.379.

> "The expression 'due process of law', or in French 'application reguliere de la loi' in the present case at least, means the existing law governing the rights of any owner of expropriated property, but should also include the holding of a hearing in which the principles of fundamental justice recognised by our legal system would be applied. The word 'law' here means not only the law to be found in the Statutes, but is also used in its

abstract or general sense; and includes what are known as the principles of natural justice."

c) Section 2(e) of the 1962 Constitution provides that no law shall infringe or authorise the infringement of the right to a fair hearing where a person's rights are being determined, and Section 2(h) ensures that he shall have the procedural provisions necessary to protect this right.

d) The operation of the Mercy Committee infringes each of the above rules in the following respects :

(i) There is a reasonable possibility of bias as a result of the presence on the Committee of the Attorney-General and the Minister for National Security. The Tribunal must be seen to be impartial, and no member must have any relationship with any party tothe proceedings: as one party is, in effect, the Crown, this principle is breached. Moreover, the Attorney-General is head of the department which prosecuted the Appellant; the Minister of National Security is responsible for the police force and the prison officials, both being groups of persons who have been criticised by the appellant - the former at his trial, the latter in the course of the present proceedings. Justice will therefore not be seen to be done: see Dimes v. Grand Junction Canal (1852) H.L.C. 759; Metropolitan Properties v. Lannon (1969) 1 Q.B. 577.

(ii) The deliberations of the Committee are secret; there is no opportunity afforded the appellant to state his case for a reprieve, nor is he allowed to be legally represented. He is not even given notice of the date when the Committee will decide his case. Consequently he will not be given a fair opportunity to correct any statement prejudicial to him, as required by Cooper v. Wandsworth Board of Works (1863) 14 C.B. (NS) 180 and

Board of Education v. Rice (1911) A.C.179

The procedures of the Committee are blatantly contrary to the House of Lords ruling in Ridge v. Baldwin (1964) A.C.40, where it was held that a man could not be dismissed from his office in the absence of reasonable noticeand an opportunity to be heard in his defence.

(iii) The Minister is not required to act on the Mercy Committee recommendation. This introduces a further capricious element into the decision as to the appellant's fate. It is submitted that the requirements noted in a - c above apply with equal force to the Minister, where duty is "to act in good faith and fairly listen to both sides, for that is a duty lying upon anyone who decides anything." (Cooper's case above).

Decisions in the cases Maradana Mosque Trustees v. Mahmed (1967) 1 A.C. 13, and Brandt v. A.G. of Guyana (1971) 17 W.I.R. 448 make it clear that the Minister is subject to the rules of natural justice; his failure to comply with these rules in respect of the appellant provides sufficient grounds for the court to order an indefinite stay of execution.

15. In the event of its rejection of the above submissions, then pursuant to Section 2(h) of the Constitution the Court should grant a stay of execution and order an enquiry into the appellant's present mental condition.

a) "It has for centuries been a principle of the common law that no person who is insane should be executed." Royal Commission on Capital Punishment, paragraph 41.

b) At common law there is a power in the Courts to grant a reprieve, after sentence of death has been pronounced. One of the purposes for which such a power is exerciseable is where a prisoner who had been sentenced to death is alleged to be mentally ill or disordered. See Kenny 16th ed. paragraph 783,

page 522. Re Tait (1963) VR 532, 548, 550-1, 554-5.

c) This Common Law power is part of the general law of Trinidad by reason of Section 12 of the Supreme Court of Judicature Act, 1962, and it is also specifically retained by Section 77 of the Criminal Procedure Ordinance, Ch.4 No.3. In England, this common law power was fortified by Statute. See Royal Commission, para. 360, 362 and 368. These statutory provisions are applicable to Trinidad & Tobago by virtue of Section 77, Criminal Procedure Ordinance Ch. 4 No. 3.

d) Section 28 of the Lunacy and Mental Treatment Ordinance Ch. 12 No. 10 does not affect the court's jurisdiction. This provision is merely to give statutory authority for the removal of insane persons from gaols to more appropriate places of detention: see Tait (supra. 557 et seq. per Smith J.)

The jurisdiction is not limited to cases in which insanity is obvious, nor is it confined to the forms of legal insanity relevant at the trial: per Smith J. in Tait 559/560.

Further, it is not necessary for the exercise of the power that the insanity be proved. At Common Law when there is an allegation of insanity, the Judge might swear a jury to determine the question. per Smith J. page 554.

e) No examination of the appellant has been made with respect of his mental condition. A request by his Solicitors has been refused. (see Sanguinette Affidavit). Thus a consequence of executing the appellant may be to hang an insane man, contrary to the Common Law, to the Constitutional guarantee of due process and to the Constitutional prohibition on cruel and unusual treatment or punishment.

f) The appellant has a right not to be deprived of life if he is in fact insane. He wishes to establish whether prima facie he has this right, and to do so requires examination by a qualified psychiatrist. His Solicitors have

been refused permission to arrange such an examination, which is necessary to establish the appellant's above-mentioned right. Section 2(h) entitles the appellant to such procedural provisions as are necessary for the purpose of giving effect and protection to his rights: it is, therefore, submitted that the Court should provide such a procedure by exercising its power to stay execution, and to order an enquiry into the mental health of the appellant.

16. The appellant humbly submits that, because of the reasons given in paragraphs 10 - 15 herein, the Court of Appeal was wrong in dismissing the Appellant's appeal and in determining that the Respondents were entitled to execute the Appellant, and that this appeal should be allowed with costs.

L. BLOOM COOPER

G.R. ROBERTSON

No. 20 of 1974

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO BEING THE SECOND SCHEDULE TO THE TRINIDAD AND TOBAGO (CONSTITUTION) ORDER IN COUNCIL, 1962

AND

IN THE MATTER OF THE APPLICATION OF MICHAEL DE FREITAS ALSO CALLED MICHAEL ABDUL MALIK (A PERSON ALLEGING THAT CERTAIN PROVISIONS OF SECTIONS 1, 2, 3, 4, 5 and 7 OF THE SAID CONSTITUTION HAVE BEEN ARE BEING OR LIKELY TO BE CONTRAVENED IN RELATION TO HIM) FOR REDRESS IN ACCORDANCE WITH SECTION 6 OF THE SAID CONSTITUTION

BETWEEN:

MICHAEL DE FREITAS
also called Michael
Abdul Malik — Appellant

- and -

(1) GEORGE RAMOUTAR BENNY
(2) THE ATTORNEY-GENERAL
(3) TOM ILES, Commissioner of Prisons

Respondents

CASE FOR THE APPELLANT

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