Privy Council Appeal No. 20 of 1974

Michael de Freitas also called Michael Abdul Malik – – *Appellant*

v.

(1) **George Ramoutar Benny**
(2) **The Attorney General**
(3) **Tom Iles, Commissioner of Prisons** – – – – *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST MAY 1975

Present at the Hearing:
LORD DIPLOCK
LORD MORRIS OF BORTH-Y-GEST
VISCOUNT DILHORNE
LORD KILBRANDON
LORD SALMON

[*Delivered by* LORD DIPLOCK]

At the conclusion of the hearing of this appeal on 1st May 1975, their Lordships announced that they would humbly advise Her Majesty that the appeal should be dismissed. They now give their reasons for tendering that advice.

The history of the matter starts on 21st August 1972 when the appellant was convicted of murder and sentenced to suffer death as a felon. By section 4 (1) of the Offences against the Person Ordinance passed in 1925, this is the mandatory penalty for murder in Trinidad and Tobago. He appealed against his conviction to the Court of Appeal. By section 51 of the Supreme Court of Judicature Act, 1962, this had the effect of staying execution of the death sentence until his appeal was disposed of and dismissed on 17th April 1973. He then petitioned Her Majesty for special leave to appeal to the Privy Council—a right preserved to him by section 82 (3) of the Constitution of Trinidad and Tobago. His petition was dismissed by Order in Council dated 12th December 1973.

On 20th December 1973, having by now exhausted all his remedies against his conviction, he started the fresh proceedings which have given rise to the present appeal. They took the form of an application to the High Court under section 6 (1) of the Constitution for redress for an

alleged contravention of certain of his human rights and fundamental freedoms under sections 1 and 2 of the Constitution, which he claimed would be violated if the death sentence on him were carried out. This application was dismissed by the High Court on 15th February 1974. His appeal from this decision to the Court of Appeal was dismissed on 30th April 1974. From the decision of the Court of Appeal he exercised his right under section 82 (1) (*c*) of the Constitution to appeal to Her Majesty in Council.

In view of the complaint that has been made on his behalf about the long delay in execution of the death sentence, their Lordships draw attention to the fact that for the first fifteen months between 21st August 1972 and 12th December 1973 the delay was due to the pendency of proceedings brought by the appellant himself in an unsuccessful attempt to have his conviction set aside; and that all subsequent delay, apart from the period of eight days between 12th and 20th December 1973, was due to the pendency of fresh proceedings brought by the appellant himself in an unsuccessful attempt to obtain a stay of execution of that sentence. The initiative for securing expedition in all these proceedings lay with the appellant; procrastination on the part of the Crown or the Courts is not alleged.

The Constitution of Trinidad and Tobago came into force on 31st August 1962. Chapter I on which the appellant's claim is founded is headed "The Recognition and Protection of Human Rights and Fundamental Freedoms". Section 1, so far as is relevant to the present appeal, is in the following terms:

> "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; ".

The paragraphs that follow, (*c*) to (*k*), specify other familiar rights and freedoms which form the subject of the Universal Declaration of Human Rights.

Sections 2 and 3, so far as relevant, read as follows:

> "2. Subject to the provisions of sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared and in particular no Act of Parliament shall—
>
> . . . .
>
> (*b*) impose or authorise the imposition of cruel and unusual treatment or punishment;
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> . . . .
>
> (*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 to the aforesaid rights and freedoms.

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 purpose 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 and Tobago (Constitution) Order in Council 1962. . . ."

" Law " is defined in section 105 (1) as including " any instrument having the force of law and any unwritten rule of law ". The " unwritten law " in force in Trinidad and Tobago at the commencement of the Constitution was the common law and doctrines of equity that were in force in England on 1st March 1848 in the case of Trinidad, and on 1st January 1889 in the case of Tobago, so far as these had not been abrogated by enacted law. This unwritten law has been preserved after the commencement of the Constitution by section 12 of the Supreme Court of Judicature Act, 1962.

Chapter I of the Constitution of Trinidad and Tobago, like the corresponding Chapter III of the Constitution of Jamaica (see *D.P.P. v. Nasralla* [1967] 2 A.C. 238), proceeds on the presumption that the human rights and fundamental freedoms that are referred to in sections 1 and 2 are already secured to the people of Trinidad and Tobago by the law in force there at the commencement of the Constitution. Section 3 debars the individual from asserting that anything done to him that is authorised by a law in force immediately before 31st August 1962 abrogates, abridges or infringes any of the rights or freedoms recognised and declared in section 1 or particularised in section 2.

Section 2 is not dealing with enacted or unwritten laws that were in force in Trinidad or Tobago before that date. What it does is to ensure that subject to three exceptions no future enactment of the Parliament established by Chapter IV of the Constitution shall in any way derogate from the rights and freedoms declared in section 1. The three exceptions are: Acts of Parliament passed during a period of public emergency and authorised by sections 4 and 8; Acts of Parliament authorised by section 5 and passed by the majorities in each House that are specified in that section; and Acts of Parliament amending Chapter I of the Constitution itself and passed by the majorities in each House that are specified in section 38.

The specific prohibitions upon what may be done by future Acts of Parliament set out in paragraphs (*a*) to (*h*) of section 2 and introduced by the words " in particular ", are directed to elaborating what is meant by " due process of law " in section 1 (*a*) and " the protection of the law " in section 1 (*b*). They do not themselves create new rights or freedoms additional to those recognised and declared in section 1. They merely state in greater detail what the rights declared in paragraphs (*a*) and (*b*) of section 1 involve.

The appellant's claim that it would be unlawful to carry out the sentence of death pronounced on him on 21st August 1972 was based on the contention that this would constitute an " imposition of cruel and unusual punishment " upon him such as is prohibited by section 2 (*b*) of the Constitution, and so would infringe his right under section 1 (*a*) not to be deprived of life except " by due process of law ". Their Lordships agree with the Court of Appeal that this contention fails *in limine*. Sentence of death for murder, as their Lordships have already pointed out, is

mandatory under the Offences against the Person Ordinance which was in force at the commencement of the Constitution. Although in the High Court it had been contended that the death sentence itself was unconstitutional, before the Court of Appeal and before this Board Counsel for the appellant felt constrained to concede that the pronouncement of the sentence by the judge at the conclusion of the trial did not offend against the Constitution. He focussed his attack upon the act of the executive in carrying out an admittedly lawful order of a court of law. The attack upon the constitutionality of carrying out the death sentence was based upon two alternative grounds. The first was that capital punishment was *per se* a cruel and unusual punishment and that although the pronouncement of the death sentence by the Court was mandatory the executive act of carrying it out was not authorised by any law that was in force before 31st August 1962. The alternative ground was that even if the carrying out of the death sentence is not *per se* unconstitutional, the average lapse of time between sentence and execution has become substantially greater since the commencement of the Constitution and this has the effect of making it unconstitutional to carry the death sentence out.

In their Lordships' view neither of these contentions can bear examination. Section 4 (1) of the Offences against the Person Ordinance is not confined to the pronouncement of sentence. What it says is: "Every person convicted of murder shall suffer death as a felon". The carrying out of the sentence of death is provided for by section 59 of the Criminal Procedure Ordinance which was also passed in 1925. This section provides for the issue by the Governor-General of warrants in the forms set out in the Third Schedule directed to the Marshal and the Keeper of the Royal Gaol respectively. The warrant directed to the Keeper requires him at a date and hour specified to deliver the prisoner to the Marshal. The warrant directed to the Marshal requires him to receive the prisoner into his custody at that date and time and forthwith convey him to the usual place of execution and there cause execution to be done upon him. The section itself provides that this warrant "shall be carried into execution by such Marshal or his assistant at such time and place as shall be mentioned in such warrant", and contains a proviso authorising the Governor-General to respite the execution and issue a fresh warrant specifying some later time or other place of execution. The method of execution, *viz.* by hanging, is specified in the warrant and is in accordance with the common law of England that was in force in Trinidad and Tobago at the commencement of the Constitution. It is in their Lordships' view clear beyond all argument that the executive act of carrying out a sentence of death pronounced by a court of law is authorised by laws that were in force at the commencement of the Constitution.

Their Lordships find some difficulty in formulating the alternative argument based upon delay. It is not contended that the executive infringed the appellant's constitutional rights by refraining from executing him while there were still pending legal proceedings that he himself had instituted to prevent his execution. There was no law which compelled the executive to refrain from executing him at any time after 12th December 1973, but the Criminal Proceedings Ordinance leaves the date of execution in the discretion of the Governor-General who under section 70 (2) of the Constitution acts on the advice of a designated Minister.

The argument for the appellant, however, does not depend upon the delay which actually occurred in the instant case. So far as their Lordships have been able to understand it, it runs thus: (1) There is evidence that prior to Independence the normal period spent in the condemned cells by prisoners before execution was about five months. (2) The very fact

that this occurred in practice was sufficient to have given rise to an " unwritten rule of law " in force at the commencement of the Constitution that the executive must so organise the procedure for carrying out the death sentence upon prisoners that the *average* lapse of time between sentence and execution is not more than about five months. (3) Since the coming into force of the Constitution the *average* lapse of time has increased substantially beyond five months. (4) The very fact that this increase in the *average* lapse of time has occurred in practice has given rise to the substitution for the previous unwritten law of a new " unwritten rule of law " which was not in force at the commencement of the Constitution. (5) This new " unwritten rule of law " is not exempted from scrutiny by section 3 of the Constitution.

This, so the argument goes, entitles and requires the court to consider whether capital punishment, now that in practice it involves a delay between sentence and execution which *on the average* exceeds five months, is incompatible with the right of the individual under section 1 (*a*) of the Constitution not to be deprived of life " except by due process of law ", because it involves the imposition of " cruel and unusual punishment " within the meaning of section 2 (*b*).

Their Lordships have emphasised the word " average " because, according to the argument, it matters not that in the individual cases from which the average lapse of time is calculated there has been a wide range of variation in the length of the delay between the death sentence and its execution. It is the alteration in the average lapse of time which changes the nature of the death penalty and by doing so substitutes a new " unwritten rule of law " relating to the death penalty for that which was in force at the commencement of the Constitution. If this new law can be struck down as unconstitutional, there is nothing left to legalise the carrying out of any death sentences, however expeditiously it is intended to execute them and whatever may be the reasons for delay.

This contention in their Lordships' view needs only to be stated to be rejected. Not only does it involve attributing to the expression " unwritten rule of law " in section 105 (1) of the Constitution a meaning which it is incapable of bearing, but it conflicts with the very concept of the nature of a law.

Their Lordships are accordingly of opinion that there is nothing in the Constitution which would render unlawful the carrying out of the death sentence on the appellant in the instant case.

They turn next to the contention that before advice is tendered to the Governor-General as to the exercise of the prerogative of mercy in the appellant's case, the appellant will be entitled (1) to be shown the material which the Minister who tenders that advice has placed before the Advisory Committee on the Prerogative of Mercy and (2) to be heard by that Committee in reply at a hearing at which he is legally represented. It is submitted on behalf of the appellant that under sections 70 to 72 of the Constitution the functions of the Advisory Committee on the Prerogative of Mercy established under section 71 are quasi-judicial in their nature and that accordingly any failure to grant to the appellant the rights he claims would contravene the rules of natural justice and infringe his right not to be deprived of life except by due process of law that is secured to him by section 1 (*a*) of the Constitution.

Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law.

At common law this has always been a matter which lies solely in the discretion of the sovereign who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates Her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function. While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought might help him to make up his mind as to the advice that he would tender to the sovereign in the particular case. But it never was the practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representatives.

Section 70 (1) of the Constitution makes it clear that the prerogative of mercy in Trinidad and Tobago is of the same legal nature as the royal prerogative of mercy in England. It is exercised by the Governor-General but "in Her Majesty's name and on Her Majesty's behalf". By section 70 (2) the Governor-General is required to exercise this prerogative on the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister. This provision does no more than spell out a similar relationship between the designated Minister and the Governor-General acting on behalf of Her Majesty to that which exists between the Home Secretary and Her Majesty in England under an unwritten convention of the British Constitution. It serves to emphasise the personal nature of the discretion exercised by the designated Minister in tendering his advice. The only novel feature is the provision in section 72 (1) and (2) that the Minister before tendering his advice must, in a case where an offender has been sentenced to death, and may, in other cases, consult with the Advisory Committee established under section 71 of which the Minister himself is chairman; but section 72 (3) expressly provides that he is not obliged in any case to act in accordance with their advice. In capital cases the Advisory Committee too must see the judge's report and any other information that the Minister has required to be obtained in connection with the case but they still remain a purely consultative body without any decision-making power.

In their Lordships' view these provisions are not capable of converting the functions of the Minister, in relation to the advice he tenders to the Governor-General, from functions which in their nature are purely discretionary into functions that are in any sense quasi-judicial. This being so the appellant has no legal right to have disclosed to him any material furnished to the Minister and the Advisory Committee when they are exercising their respective functions under sections 70–72 of the Constitution.

Finally, lest it be thought that they have overlooked an additional argument addressed to them which does not depend upon the Constitution, their Lordships would add that the reference to cruel and unusual punishment in the Bill of Rights (whether or not that English Act of Parliament is only declaratory of the common law) cannot avail the appellant in view of the express provision of section 4 (1) of the Offences against the Person Ordinance which makes death a mandatory penalty for murder in Trinidad and Tobago.

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In the Privy Council

MICHAEL DE FREITAS also called
MICHAEL ABDUL MALIK

v.

(1) **GEORGE RAMOUTAR BENNY**
(2) **THE ATTORNEY GENERAL**
(3) **TOM ILES, COMMISSIONER OF PRISONS**

DELIVERED BY
LORD DIPLOCK

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