Privy Council Appeals Nos. 23 and 27 of 1991

Lennox Phillip otherwise called Yasin Abu Bakr and 113 Others *Appellants*

v.

(1) The Director of Public Prosecutions and
(2) The Attorney General of Trinidad and Tobago *Respondents*

and

Lennox Phillip otherwise called Yasin Abu Bakr and 7 Others *Appellants*

v.

(1) The Commissioner of Prisons and
(2) The Attorney General of Trinidad and Tobago *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD ACKNER
LORD LOWRY
SIR MAURICE CASEY

*[Delivered by **Lord Ackner**]*

These are consolidated appeals from two judgments of the Court of Appeal of Trinidad and Tobago (Clinton Bernard C.J., S. Sharma and M. Ibrahim JJ.A.) dated 18th March and (Clinton Bernard C.J., S. Sharma and R. Hamel Smith JJ.A.) dated 8th July 1991. They raise for the first time the question how effect can be given to a pre-trial pardon. The first of these two judgments relates to what has been known for convenience sake as "the Constitutional Appeal" and the later judgment as "the Habeas Corpus Appeal". Both appeals raise closely related issues and arise out of the same but highly unusual facts, which for the purpose of these appeals can be stated very shortly.

[43]

On 27th July 1990 there occurred in Trinidad an insurrection which involved, *inter alia*, the armed occupation of the House of Representatives (The Red House) and the premises of the Trinidad and Tobago Television Company by members of the Jamaat Ali Muslimeen of which the appellants are members. The Prime Minister and a number of members of Parliament, together with some television company executives, were held captive.

There were communications between the appellants and their prisoners in The Red House and the Television station and with the State Authorities based at Camp Ogden. These were conducted through the agency of Canon Clarke of the Holy Trinity Cathedral, who had been requested by the State to act as mediator. The State Authorities included the Acting President, His Excellency Emmanuel Carter (the President himself was out of the country), the Deputy Prime Minister and a number of senators and leaders of the army and the police.

On the day after the insurrection started, viz. 28th July, the Acting President granted a pardon in the form of a general amnesty to the appellants. It is alleged by the appellants that in so doing the Acting President was exercising the powers of the President under section 87(1) of the Constitution of Trinidad and Tobago Act 4 of 1976. This section provides:-

> "The President may grant to any person a pardon, either free or subject to lawful conditions, respecting any offences that he may have committed. The power of the President under this subsection may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof."

The power given to the President to grant a pardon before a person is charged with any offence and before he is convicted is a new power (cf section 70 of the Trinidad and Tobago (Constitution) Order in Council 1962) modelled on the pardoning power given in the United States Constitution to the President of the United States. It is interesting to observe that in the American case of *Murphy v. Ford* decided in the United States District Court of Michigan (390 F. Supp. 1372 (1975)), in which the validity of a pardon granted by President Ford to former President Nixon was challenged, there is quoted the following observation of Alexander Hamilton in The Federalist No. 74 in 1788 explaining why the Founding Fathers gave the President a discretionary power to pardon:-

> "'The principal argument for reposing the power of pardoning ... [in] the Chief Magistrate,' Hamilton wrote, 'is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or

> rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.'"

The terms of the pardon read as follows:-

> "I, Joseph Emmanuel Carter as required of me by the document headed Major Points of Agreement hereby grant an amnesty to all those involved in acts of insurrection commencing approximately 5.30 p.m. on Friday 27th July 1990 and ending upon the safe return of all Members of Parliament held captive on 27th July, 1990.
>
> This amnesty is granted for the purpose of avoiding physical injury to the Members of Parliament referred to above and is therefore subject to the complete fulfilment of the obligation safely to return them."

Canon Clarke witnessed the signing of the pardon by the Acting President, who retained the original. A signed copy was given to Canon Clarke for delivery to the appellants, one of whom made a photocopy of it in the presence of the Honourable Mr. Kelvin Ramnath, Member of Parliament, who produced and identified that copy in the proceedings. The authenticity of the copy was proved by Canon Clarke.

The appellants, relying upon the terms of the pardon, took the necessary steps open to them to fulfil its conditions. The release of the captives and the physical surrender of the appellants were planned for 29th July, but had to be delayed until 1st August, because of the danger to everyone posed by some members of the security forces, who initially refused to accept the terms of the surrender.

Subsequent to the release of the hostages and the physical surrender of the appellants, the appellants were arrested and detained in the custody of the State (where they remain) and, on 10th August 1990, were charged at the Chaquaramas Magistrates Court with treason, murder, assault, and various other offences which the State alleges were committed while the appellants were jointly involved in acts of insurrection from 27th July 1990 to 1st August 1990.

For the purpose of the committal proceedings and the subsequent trials, the appellants have been divided into five "batches" to be proceeded against separately. Committal proceedings against the first group are still in progress and are unlikely to be completed until the middle of next year and the trial is unlikely to begin before 1994. Committal proceedings against the other four "batches" have not even commenced and the proceedings against them have been and are being adjourned from time to time. If the appellants are only

able to assert their pardon by way of a "plea in bar" at their eventual trial, as the Court of Appeal has held in both judgments the subject matter of these appeals, it follows that they are likely to remain in custody for many years on charges relating to offences for which, for the purpose of these appeals only, it must be assumed they have been validly pardoned.

The Constitutional Appeal. Section 14 of the Constitution provides:-

> "(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter 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 by way of originating motion.
>
> (2) The High Court shall have original jurisdiction
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1)."

In their Notice of Motion dated 8th October 1990, to which the Director of Public Prosecutions and the Attorney General were respondents, the appellants, numbering 114, alleged that their detention and prosecution for offences in relation to the insurrection contravened their right:-

(a) to liberty and/or security of the person and the right not to be deprived thereof except by due process of law and

(b) to the protection of the law.

Such rights are referred to as "fundamental human rights and freedoms" in section 4 of the Constitution which reads as follows:-

> "(4) 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 fundamental human rights and freedoms namely:-
>
> (a) the right of the individual to ... liberty, security of the person ... and the right not to be deprived thereof except by due process of law;
>
> (b) the right of the individual to ... the protection of the law."

The basis of the appellants' contentions was that they, being the beneficiaries of a valid pardon granted

by the Acting President, could not be lawfully arrested, charged or prosecuted by the State for offences encompassed by the pardon.

The Habeas Corpus Appeal. On 9th October 1990, 8 of the appellants in the Constitutional appeal made an application in the High Court of Trinidad and Tobago for leave to issue a Writ of Habeas Corpus directing the Commissioner of the State Prisons to show cause why the appellants should not be released immediately. The basis upon which the appellants contended that their detention was illegal was that a pardon had been granted to them by the Acting President under section 87(1) of the Constitution in respect of charges laid against them. It was argued on their behalf that leave to apply for the issue of the Writ of Habeas Corpus must be granted by the High Court in favour of an applicant who establishes a *prima facie* case for such leave. A *prima facie* case for such leave had been made out by the appellants by showing that they were the beneficiaries of an amnesty and that, notwithstanding such a grant, they were being detained and imprisoned by the State pursuant to charges for offences which were covered by the terms of the amnesty. In such circumstances the cause and validity of the detention must be investigated by the High Court as soon as this *prima facie* case arose, the burden of justifying the legality of the actions of the Executive then being placed upon the Executive.

The decisions of the High Court and the Court of Appeal.

(a) The Constitutional Appeal. The appellants' Notice of Motion was heard by Gopeesingh J. as he then was. The appellants had filed affidavits of evidence in support of their Notice of Motion but not in sufficient time to comply with the Rules. Accordingly when the matter came before the judge on 14th October 1990, the respondents were entitled to have the motion adjourned to enable them to consider evidence in reply. However, counsel for the respondents applied to the court for leave to make a preliminary objection to the effect that the court had no jurisdiction to entertain the motion, that it therefore constituted an abuse of the process of the court and should be struck out. The basis of the objection was that the grounds of the motion and the evidence in support of it did not disclose any infringement of the Constitution and accordingly the appellants were not entitled to any constitutional redress. The court agreed, without objection on the part of counsel for the appellants, to hear this objection. After hearing detailed argument, by a ruling dated 14th October, the judge upheld the objection and dismissed the appellants' motion with costs. The appellants appealed to the Court of Appeal and, by judgments delivered on 18th March 1991, the Court of Appeal unanimously dismissed the appeal.

Although the appeals to the Court of Appeal were heard over many days, and was the subject of lengthy and painstaking judgments, the essential issue, there being no challenge as to the validity of the pardon, was said by Sharma J.A. in his judgment, to be a very short one, namely, "whether a person who is the beneficiary of a pardon can be arrested, charged and prosecuted for the offences in respect of which the pardon is granted".

The basis of the decision at first instance and in the Court of Appeal can also be stated quite shortly. The procedure in criminal cases triable on indictment is governed by the Criminal Procedure Act (Cap 12:02) section 6 of which provides:-

> "Every person committed for trial shall be tried on an indictment and, subject to the provisions of this Act, every such trial shall be heard by and before a judge and jury."

Section 32 of that Act appears to be at the heart of the judgments. This provides:-

> "32. The accused on being arraigned on any indictment may plead the general issue ore tenus, or he may in writing demur or plead any matter of law or fact which he would be permitted to plead according to the law in force in England on the 30th August, 1962, upon which demurrer or plea in writing, the Registrar, on behalf of the State may instanter join in demurrer or demur, or reply."

It was accepted by the respondents that "due process of law" requires that a person, who desires to rely upon a pardon, should have an opportunity to do so. Both at first instance and in the Court of Appeal it was held that this opportunity is provided, and only provided, by section 32. Thus the plea can only be made when the accused is arraigned on the indictment. Before the time of arraignment the accused has no right to challenge the conduct of the State in respect of any offence for which he may be charged and which may be fully covered by the pardon. Since section 6(1) of the Constitution provides that nothing in section 4 shall invalidate an existing law, it cannot be contended that the procedure available under section 32 contravenes the Constitution, it being a law existing at the date of the Constitution. Accordingly it was held that the requirements of due process declared and enshrined by the Constitution contemplated that a person who claims the benefit of a pardon may be arrested, charged and prosecuted to the stage of arraignment upon the indictment before a judge and jury.

The Habeas Corpus Appeal. The application was made *ex parte*, but notice had been given to the respondents, the Commissioner of Prisons and the Attorney General, and Blackman J. had the benefit of

hearing submissions by counsel on their behalf. The point they took was similar to that taken in the Constitutional Appeal, namely that Habeas Corpus proceedings could not be brought on the basis of a pardon, since a pardon must be the subject of a special plea and this can only be taken upon arraignment. This submission was upheld by the learned judge and was the basis of the decision in the Court of Appeal.

The nature and effect of a pardon. Before considering how a person who has been arrested and charged with a crime can seek to obtain his liberty by relying upon the grant by the State of a valid pardon - which essentially raises a question of procedure - the first issue to consider is what is the true nature and effect of a pardon.

The matter is put quite shortly at paragraph 952 in volume 8 of Halsbury's Laws of England (4th Edition) in these terms:-

> "The effect of a pardon under the Great Seal is to clear the person from all infamy, and from all consequences of the offence for which it is granted, and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man, so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence for which he was convicted."

Support for the above propositions can be found as far back as 1795 in Hawkins Pleas of the Crown 7th Edition. In Chapter 37 it is said at page 354 section 48:-

> "I take it to be settled at this day, that the pardon of a treason or felony even after a conviction or attainder, does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness notwithstanding the attainder or conviction; because the pardon makes him as it were a new man; and gives him a new capacity and credit."

At page 355 section 51:-

> "Also it is said that the pardon of a felony will not make an arrest for it, by one who did not know of the pardon, unlawful, because such arrests being for the public good are to be favoured; and therefore shall not be actionable by reason of such a pardon, as scandalous words shall be, because they deserve no favour."

This would suggest that it was recognised nearly 200 years ago that an arrest by one who did know of the pardon would be an unlawful arrest.

R. v. Boyes (1861) 1 B. & S. 310 (121 ER 730) concerned a trial for bribery where a witness, who was called to prove the fact of his having received a bribe from the defendant, objected to giving evidence on the ground that the effect of the evidence which he was called upon to give would be to incriminate himself. Thereupon counsel for the Crown handed to the witness a pardon under the Great Seal. The witness, although accepting the pardon, still objected to give evidence. The judge who presided at the trial entertained doubts as to whether the witness could be properly compelled to answer, notwithstanding the pardon. An arrangement was therefore come to between counsel on both sides, with the agreement of the judge. The witness was directed to answer, but the opinion of the Court of Queen's Bench was to be taken as to the whether the privilege of the witness remained, notwithstanding the pardon, counsel for the Crown undertaking, that in the event of the court deciding the matter against him, to enter a nolle prosequi, if the defendant should be convicted.

In the Court of Queen's Bench it was argued on behalf of the Crown that the witness was rightly compelled to answer, since by answering he did not become subject to any criminal proceedings by reason of the pardon of the Crown "the effect of which was to make him a new man and consequently to bar any proceedings by or in the name of the Crown". For the defendant (who had been convicted) it was argued that it was wrong to assume that a pardon restores the party to the same state as he was before any offence had been committed, since the pardoned man may be indicted and put to the inconvenience of pleading his pardon; for unless pleaded it is of no avail.

Giving the judgment of the court, Cockburn C.J. observed at page 328 and 329:-

> "... that the pardon took away the privilege of the witness so far as regarded any risk of prosecution at the suit of the Crown."

And at page 331:-

> "It appears to us, therefore, that the witness in this case was not, in a rational point of view, in any the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings; and that it was therefore the duty of the presiding Judge to compel him to answer."

In *Cuddington v. Wilkins*, (1615) Hob 67 (80 ER 231) the plaintiff brought an action against the defendant for calling him a thief. The defendant justified, but the plaintiff pleaded a general pardon, and on demurrer it was adjudged (p.81) "that though he were a thief once, yet when the pardon came, it took away not

only, poenam, but reatum, ..." and that "when the King had discharged it and pardoned him of it, he hath cleared the person of the crime and infamy ...". This decision was quoted with approval by Pollock B. in *Hay v. Justices of the Tower Division of London* [1890] 24 Q.B.D. 561. That case concerned an application for a licence to sell spirits by retail, by a person who, although he had been convicted of felony, had received a pardon. In his judgment Pollock B. said at page 564:-

> "The general question of law next to be considered is, what was the effect of the pardon which John Hay obtained? By the prerogative of the Crown the pardon extends far beyond the mere discharge of the prisoner from any further imprisonment. It is a purging of the offence."

After citing *Cuddington's* case, he added at page 565, "it was forcibly argued that this does not show that to all intents and purposes the pardon is to be an absolute purgation of everything. That is quite true".

The question whether the conviction itself still subsists, after a grant of a pardon, was considered in two Commonwealth cases. The first is *R. v. Cosgrove* (1948) Tas SR 99, a decision of the Supreme Court of Tasmania. Following upon a Royal Commission appointed to enquire into and report upon whether a Mr. Sullivan gave or offered to Mr. Cosgrove - the then Premier of Tasmania - the sum of £5,400 as an inducement for showing favour to Mr. Sullivan, Mr. Cosgrove was charged with receiving from Mr. Sullivan a bribe as a Member of Parliament, and with official corruption in that, as Premier of the State of Tasmania, he corruptly received money from Mr. Sullivan and with conspiracy with Mr. Sullivan. After the conclusion of the Royal Commission and before the filing of the indictment, the Governor granted Mr. Sullivan a pardon. At the trial Mr. Cosgrove pleaded that, by reason of the pardon, he could not be adjudged guilty of any of the counts in the indictment. It is apparent from the report that the court had been referred to many of the authorities to which reference has been made above. In the course of giving judgment Morris C.J. said at page 105:-

> "Mr. Sholl [Counsel for Mr. Cosgrove] contends that if a conspirator is pardoned he is in the position of one who has never committed the crime and another person can no more be convicted of having conspired with him, than of having conspired with one who has been acquitted or discharged. The gist of his contention is that a pardon wipes out the crimes ab initio. I have examined the passages in Hawkins' Pleas of the Crown to which he referred and I think they do not go as far as he contends. At page 538 the learned author is really illustrating the fact that sometimes you may have the offence

of one so far dependent upon the offence of the other that one falls with the other, and he instances the state of the law in England at the time as to accessories. The authorities on libel and slander in my opinion do not establish that a pardon wipes out the crime ab initio. They are based on a special policy which the law has seen fit to adopt in relation to defamatory words.

Blackstone states the effect of a pardon in volume 4 page 402 as follows:-

> '4. Lastly, the effect of such pardon by the King, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new, credit and capacity.'

That passage is entirely consistent with what Hawkins says.

Accordingly, a pardon is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity. The plea in my opinion is not sustained."

In *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602, Thomas was granted a free pardon in respect of his conviction for two murders. Subsequently a Royal Commission enquired into and reported on the circumstances of Thomas' conviction. While it was sitting, the New Zealand Police Association and others applied for a judicial review of certain decisions of the Commission, for a writ of prohibition to prevent the Commission from continuing to consider the matters referred to it under the terms of reference, and an order declaring that the Commission be disqualified from continuing to consider those matters. Again it is obvious from the judgment that extensive submissions were made by counsel on the effect upon a conviction of a pardon. The High Court concluded that the effect of a pardon was to remove the criminal element of the offence named in the pardon, but not to create any factual fiction, or to raise the inference that the person pardoned had not in fact committed the crime for which the pardon had been granted.

It was not until 1984 that the Court of Appeal in England had to consider a similar question. In *R. v. Foster* [1985] 1 Q.B. 115, following a plea of guilty, the appellant was convicted, *inter alia*, of rape of a ten year old girl. Four years later another man pleaded guilty to offences of indecent assault on young girls; he also admitted and was convicted of the rape to

which the appellant had pleaded guilty. The appellant was granted a free pardon in respect of the rape. He subsequently appealed against his conviction. The appeal was allowed and the court, applying the reasoning in the *Cosgrove* and the *Thomas* cases, held that the effect of a pardon was to remove from the subject of the pardon the penalties and punishments ensuing from a conviction but that it did not eliminate the conviction itself. Accordingly an appeal against a conviction in respect of which a pardon had been granted might be properly brought.

How can effect be given to a pre-trial pardon? Where a person alleges that his detention or imprisonment is unlawful the classic remedy is to apply for a writ of habeas corpus ad subjiciendum. By its terms the High Court commands the production of the aggrieved subject and enquires into the cause of his imprisonment or detention. If there is no legal justification for the detention, the detained party is ordered to be released. The very basis of the writ is the allegation and the *prima facie* evidence in support of it, that the person to whom the writ is directed is unlawfully detaining another in custody (*Barnado v. Ford - Gossage's* case [1892] A.C. 326 per Lord Herschell at 339). The writ, for which, of course, application can be made in Trinidad and Tobago, is available as a remedy in all cases of wrongful deprivation of personal liberty.

Since "the incalculable value of habeas corpus is that it enables the immediate determination of the right to the applicant's freedom", (per Lord Wright in *Greene v. Secretary of State for Home Affairs* [1942] A.C. 284 at 302) their Lordships invited submissions from the Bar on the Habeas Corpus Appeal, prior to hearing submissions in relation to the Constitutional Appeal. This was accepted as a convenient course by Mr. George Newman Q.C. for the respondents who conceded that his success or failure on the latter appeal would depend upon how their Lordships determined the Habeas Corpus Appeal.

The basis of the appellants' application for the writ was a simple one. They had established a *prima facie* case that they were beneficiaries of a valid pardon granted pursuant to section 87(1) of the Constitution in respect of the charges laid against them for which they had been committed to prison. At no stage in the proceedings, either in the court below or in the Court of Appeal, had there been any attack upon the validity of the pardon. The decisions in the courts below proceeded upon the assumption that the pardon was a valid one. In the circumstances they were entitled as of right to the immediate determination as to lawfulness of their imprisonment. It was submitted on their behalf that the existence of a right under section 32 of the Criminal Procedure Act, exercisable some years hence, to raise the existence of the pardon as a

plea in bar when arraigned on the indictment, was totally irrelevant. The existence of an alternative but wholly unsatisfactory remedy did not disentitle them to the writ, which is a writ of right, and granted ex debito justitiae.

As their Lordships have already pointed out, it is the illegal detention of a subject which is the basis of jurisdiction in habeas corpus proceedings. Mr. Newman reluctantly, but in their Lordships' opinion entirely correctly, conceded that on the assumption that the pardon was a valid pardon and therefore not open to challenge, the magistrates would have had no jurisdiction to have remanded the appellants in custody. It therefore followed, that not only did Blackman J. have jurisdiction to enquire into the validity of the pardon but he should have granted the application to issue the writ in order to ascertain whether any challenge was to be made. Accordingly, the acceptance by the courts below of the submission of the respondents, that a person who claims to be a beneficiary of a pardon has, by reason of section 32 of the Criminal Procedure Act, one option and one option only, which he can elect to pursue if and when indicted for the particular offence of which he was allegedly pardoned, was clearly wrong. However, Mr. Newman manfully sought to persuade their Lordships not to set aside the orders made in the courts below because, in the return to the writ of habeas corpus, there was bound to be a challenge to the validity of the pardon, either on the ground that it had not been granted pursuant to section 87(1) of the Constitution Act and/or that it had been procured by duress. On such a challenge being made, it was submitted, the judge would be not competent to enquire further. In cases of imprisonment for criminal offences the judge was bound by the facts set forth in the return to the writ, and in this regard he drew their Lordships' attention to *Greene v. Secretary of State for Home Affairs* cit. *supra* per Viscount Maugham at page 292.

In their Lordships' view there are two answers to this submission. The first is that their Lordships do not consider it proper in this case to speculate as to what may occur, if leave is given to issue the writ. First of all it must be a matter of policy as to whether, even if the pardon was an invalid one, it would be politic to take the point. Their Lordships refer once more to the comments made some 200 years ago by Alexander Hamilton in the American decision of *Murphy v. Ford* quoted above. Further, the affidavits in the Constitutional Appeal indicate that there are important documents which, on discovery, will have to be produced by the respondents and which are likely to be of particular relevance to any assertion of duress. Secondly this case has no analogy with that of a case where the gaoler sets out in his return to the writ a series of facts to justify the imprisonment. In this case

the court is concerned as to whether, having regard to the existence of the pardon, there was jurisdiction to imprison the applicants. To decide that issue, it will be obliged to enquire into the validity of the pardon. Assuming there is ultimately to be a contest as to the validity of the pardon, Mr. Newman was not able to suggest any factual problems which might arise in deciding that issue. The factual allegations set out in the many affidavits in the Constitutional Appeal did not appear to be in dispute, although they may not provide the entire story - indeed the documents to which brief reference has been made above indicate that there is clearly further material to be considered. Their Lordships therefore envisage no great difficulty in Blackman J., or whoever has the task of deciding the issue, determining whether or not the pardon was a valid one.

Mr. Newman takes the further point, viz., that if it was decided in the habeas corpus proceedings that the pardon was an invalid one, this would not disentitle the appellants from raising the pardon as a plea in bar, as provided for by section 32, when some years hence they are arraigned. He submits that two bites of this cherry could prove highly inconvenient and should not be permitted. Their Lordships have no hesitation in saying that it is in the overall interest of justice that there should be the earliest possible decision as to the validity of the pardon, if it is to be challenged. If the pardon remains unchallenged or is held to be valid, then the unlawful imprisonment of the appellants will then cease. The injustice of the appellants remaining in prison, if they are the beneficiaries of a valid pardon, heavily outweighs the inconvenience of their raising again the pardon as a plea in bar at the trial, assuming they have not previously regained their liberty. If the pardon has been determined to be invalid, then so far as the law is concerned, this will no doubt facilitate the directions which the trial judge will give to the jury, leaving them to concentrate on such facts as remain in issue.

It is unfortunate that the application for habeas corpus did not receive the painstaking consideration given to the Constitutional Appeal. If this application had been taken first it might have been more readily appreciated that the appellants had made out a clear *prima facie* case that they were unlawfully imprisoned and therefore entitled to the writ as of right. The court has no discretion to refuse it. A *prima facie* case having been established that the appellants were unlawfully detained, it was clearly for the respondents to make a return justifying the detention. The appellants are not to be deprived of this fundamental right by the existence of some alternative, but in the circumstances, wholly unsatisfactory remedy. No civilised system of law should tolerate the years of delay contemplated by the courts below, before the

lawfulness of this imprisonment could be effectively challenged.

For completeness sake their Lordships should say that the industry of counsel has unearthed no English case in which an application for habeas corpus has been made relying upon a pardon to establish the unlawfulness of imprisonment.

However the case of Mrs. Rudd, heard as long as ago as 1775 and reported at 1 Cowp. 331 (98 ER 1114) is not without its interest. At that stage in the development of the law, pardons were used, *inter alia*, to encourage accomplices to help in securing the convictions of their fellow criminals. Mrs. Rudd applied for a writ of habeas corpus, having already given evidence as an accomplice and being ready to give further evidence to assist in convicting her partners in crime. It was urged that she was therefore entitled by law to the King's pardon, which would operate in bar to her own crime. Lord Mansfield observed at page 334:-

> "If she had such a right, we should be bound ex debito justitiae to bail her. If she had not such legal right, but yet came under circumstances sufficient to warrant the Court in saying, that she had a title of recommendation to the King for a pardon, we should bail her for the purpose of giving her an opportunity of applying for such pardon."

Their Lordships' attention was also directed to the case of *John A. Dominick v. B.C. Bowdoin* a case decided in the Supreme Court of Georgia (1871) 44 Georgia Reports 357. In that case the Governor of the State of Georgia granted an unconditional pardon to a party, who was afterwards arrested by the Sheriff upon a bench warrant for the same offence which had been pardoned by the Governor, and petitioned the court for the writ of habeas corpus. The court refused to receive the pardon as evidence in favour of the applicant. This was held to be a manifest error. At page 364/365 Chief Justice Lochrane said this:-

> "Holding as we do, the pardon to be properly within the constitutional power of the Executive of this State to issue, when the petitioner presented his pardon under the Great Seal of this State, reciting the offense and the party, and unconditionally pardoning him therefor, it was the duty of the Court to have received it in evidence upon the hearing of the habeas corpus, and to have respected it as the act of the chief magistrate of this Commonwealth. And the bench warrant and orders of the Justices of the Peace ought to have been set aside, and the party discharged. This was the clear duty of the Judge. In cases of pardon, there no longer exists in contemplation of law any offense for the party pardoned to answer; it is blotted out,

and ceases to be a cause to deprive him of his liberty. And, in any form, his right to present his pardon is unquestionable, and the duty of all Courts to respect it is not a matter for disputation, where there is nothing set up to render it invalid.

When, by suggestion of fraud in its procurement, the question of its validity is put in issue, or where the identity of the person pardoned, or the fact of its acceptance or delivery, are brought before the Court, in such case, if, upon habeas corpus, it is the duty of the Court to hear the testimony and pass upon the merits of the particular case, or, if pleaded upon the trial, then to hear evidence and let the jury pass upon the case under the proof. For while we hold the constitutional power exists in the Executive to grant pardons, we also hold that fraud in their procurement will render them void."

Their Lordships fully concur with these observations, allow both appeals and make the following order, the terms of which were agreed between counsel at the conclusion of the hearing:-

1. The judgments of the Court of Appeal of Trinidad and Tobago of 18th March and 8th July 1991, and of the High Court of 14th November and 4th December 1990, to be set aside.

2. The proceedings in High Court Actions Nos. 1311 and 1337 of 1990 to be consolidated and hereafter dealt with and tried together.

3. The appellants in Privy Council Appeal No. 23 of 1991, not already parties to action No. 1337 and 1990, to be treated from the date hereof as parties to action No. 1337 of 1990.

4. All the appellants to have leave to issue a writ of habeas corpus, and the Registrar of the Supreme Court of Trinidad and Tobago to do all such things as may be required for the hearing of the consolidated proceedings.

5. The respondents to pay the appellants' costs of these proceedings in the High Court, Court of Appeal and before their Lordships' Board.