Thomas Reckley *Petitioner*

v.

(1) The Minister of Public Safety and Immigration
(2) The Advisory Committee on the Prerogative of Mercy and
(3) The Attorney-General of The Bahamas *Respondents*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL UPON A PETITION FOR A STAY OF EXECUTION

Delivered the 13th June 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Browne-Wilkinson
Lord Hoffmann

*[Delivered by **Lord Browne-Wilkinson**]*

This is an appeal from a judgment of the Court of Appeal of the Commonwealth of The Bahamas (The Honourable Acting Chief Justice Cyril Fountain sitting ex-officio) dated 30th May 1995 dismissing an appeal from the refusal of the Supreme Court (Mr. Justice Emmanuel Osadebay) to grant the petitioner a stay of execution of the sentence of death passed upon the petitioner pending a hearing of a Constitutional Motion to the Supreme Court of the Commonwealth of The Bahamas which alleges that the carrying out of that sentence would be unconstitutional.

On 4th May 1989 Thomas Reckley (the petitioner) was charged with the offence of murder. On 7th November 1990 he was convicted and sentenced to death. He appealed against both conviction and sentence to the Court of Appeal which dismissed his appeal on 3rd May 1991. He petitioned for special leave to appeal against his conviction to this Board. His application for leave was dismissed by their Lordships on 12th March 1992.

Article 90 of the Constitution of the Commonwealth of The Bahamas confers on the Governor-General a power of pardon. Articles 91 and 92 establish an Advisory Committee on the Prerogative of Mercy ("the Advisory Committee"). Where an offender has been sentenced to death the relevant Minister is bound to 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. The Minister is not bound to act in accordance with the advice of the Advisory Committee.

At the time of the dismissal by their Lordships of the petitioner's petition for leave to appeal against conviction there were constitutional proceedings pending before the Bahamian courts, *Larry Jones v. The Attorney General of the Commonwealth of The Bahamas*. In those proceedings, the plaintiffs (who were all under sentence of death) were challenging the legality of the carrying out of the death sentence in The Bahamas on three different grounds, none of which are directly relevant to these proceedings. However, if the *Larry Jones* proceedings had been successful they would have established that the carrying out of the death sentence in The Bahamas was unlawful. As a result of those pending proceedings in the *Larry Jones* case, the Attorney General indicated that no death sentences would be carried out until the *Larry Jones* proceedings had been determined. The *Larry Jones* proceedings ended on 11th April 1995, when Her Majesty in Council approved the Board's judgment delivered on 3rd April 1995 that the appeal ought to be dismissed. In their judgment their Lordships rejected the attack on the legality of carrying out the death sentence in The Bahamas.

On 8th May 1992 the lawyers acting for the petitioner wrote to the Advisory Committee inviting them to take into account certain features of his case. They received no acknowledgment or response to that letter, despite a reminder. In fact, the petitioner's case was not referred to the Advisory Committee until after the dismissal of the appeal in the *Larry Jones* case on 3rd April 1995 which led to the possibility of a resumption of executions. The Advisory Committee met on 18th May 1995. On 25th May 1995 a death warrant was signed by the Governor-General directing that the sentence of death be carried out on 30th May 1995 at 8.00 a.m. The warrant was read to the petitioner at 7.28 a.m. on the morning of Friday, 26th May 1995. At that time he had still not been informed of the outcome of the proceedings before the Advisory Committee or the Minister's advice to the Governor-General: the certificate of the reading of the warrant records that he was under the apprehension that his case was to be considered by the Advisory Committee. The petitioner was not informed of

the outcome until he received a letter, dated 25th May 1995, at approximately 6.00 p.m. on 26th May.

On 26th May 1995 the petitioner launched a Constitutional Motion in the Supreme Court alleging that the execution of the sentence of death would be a contravention of his constitutional rights under Articles 15 to 27 of the Constitution including, in particular, his right under Article 17 not to be subjected to inhuman or degrading punishment or treatment. On 29th May, application was made to Mr. Justice Emmanuel Osadebay for an order preventing the implementation of the sentence of death until final determination of the Constitutional Motion. After a long hearing, the judge at about 10.10 p.m. on the same day refused to grant any stay stating that he would give his written reasons in due course. An appeal against the refusal of the stay was heard by the Acting Chief Justice of the Supreme Court, sitting ex-officio as a single judge of the Court of Appeal, who, at 1.05 a.m. in the morning of 30th May 1995 dismissed the appeal and declined to grant a stay of execution pending the hearing of an appeal to the Board. On 30th May 1995 at approximately 6.00 a.m. Bahamas time (11.00 a.m. London time) the Board made a conservatory order directing that the petitioner be not executed pending the hearing of his petition of appeal against the decision of the Chief Justice. That petition was heard by the Board on Thursday, 8th June 1995.

The petitioner's case, both before the courts in The Bahamas and before their Lordships, has been based on the fact that Article 28 of the Constitution gives him a constitutional right to bring proceedings in the Supreme Court alleging infringement of the basic rights assured to him by Article 16 to 27 of the Constitution and a constitutional right of appeal in such cases, if necessary to the Privy Council. It is argued that in death penalty cases it must follow that a stay of execution must be granted pending the disposal of the Constitutional Motion (including all rights of appeal) since otherwise the constitutional right is rendered nugatory.

Their Lordships accept that, if the Constitutional Motion raises a real issue for determination, it must be right for the courts to grant a stay prohibiting the carrying out of a sentence of death pending the determination of the Constitutional Motion. But it does not follow that there is an automatic right to a stay in all cases. If it is demonstrated that the Constitutional Motion is plainly and obviously bound to fail, those proceedings will be vexatious and could be struck out. If it can be demonstrated to the court from whom a stay of execution is sought that the Constitutional Motion is vexatious as being plainly and obviously ill founded, then in their

Lordships' view it is right for the court to refuse a stay even in death penalty cases. Since the decision of their Lordships in *Pratt and Morgan v. A.G. for Jamaica* [1994] 2 A.C. 1 the postponement of the carrying out of the death penalty can have a profound effect on the question whether it would be inhuman or degrading treatment or punishment to execute the convicted man given the lapse of time since conviction and sentence. As *Pratt and Morgan* itself makes clear, delay caused by "frivolous and time wasting resort to legal proceedings" by the accused provides no ground for saying that execution after such delay infringes the constitutional right: see at pages 29-30. However, their Lordships would emphasise that a refusal of a stay in a death penalty case is only proper where it is plain and obvious that the Constitutional Motion must fail. In cases where the Motion raises a fairly arguable point, even if the court hearing the application for a stay considers the Motion is ultimately likely to fail, the case is not appropriate to be decided under the pressures of time which always attends applications for a stay of execution.

In the present case Osadebay J. adopted an entirely correct approach to the application for a stay. After a long hearing lasting until 10.00 p.m. at night he reached the conclusion that the grounds on which it was alleged that the petitioner's rights had been infringed were plainly bad: he accordingly refused the stay. Shortly stated the two substantial grounds on which the petitioner relied and relies are as follows. First (the *Pratt and Morgan* point) that given that 4½ years has elapsed since sentence of death was passed, to execute him now would conflict with his right under Article 17 of the Constitution not to be subjected to inhuman or degrading treatment. Second (the Advisory Committee point) that the petitioner was entitled to be informed of the judge's report and other materials put before the Advisory Committee and to make oral or written representations to the Committee before it tendered its advice.

As to the *Pratt and Morgan* point, their Lordships entirely agree with the judge's reasons for his decision. These are set out in an admirable judgment produced by him with exemplary speed on 1st June 1995. The total lapse of time since conviction is now 4½ years. The process of exhausting the domestic rights of appeal, including an appeal to their Lordships, was completed in 16 months. No possible complaint could be made that this was unjustifiable delay being well within the two year target envisaged in *Pratt and Morgan*: see pages 34H-35. After the dismissal of the petitioner's petition for leave to appeal to their Lordships, following the guidance in *Pratt and Morgan* the next step would normally have been the prompt reference of the case to the Advisory Committee. However the decision in *Pratt and Morgan*, at page 21, shows that it is not necessary to make such a reference

where "a decision is awaited in another case ... that may affect the view of" the Advisory Committee. In the present case there was an even better reason for not referring the matter to the Advisory Committee since, until the *Larry Jones* case was finally decided, there was no question of carrying out any death sentence in The Bahamas: the lawfulness of carrying out the sentence of death was in question and the Attorney General had given an undertaking or assurance that no executions would take place. Almost immediately after the *Larry Jones* case had been resolved, prompt steps were taken to refer the matter to the Advisory Committee. In the circumstances, there was no possible blame attaching either to the legal system or to the Government for any delay which has occurred. Moreover, even given the special circumstances, the delay does not amount to the period of five years mentioned in *Pratt and Morgan*. In their Lordships' view, as the judge held, the *Pratt and Morgan* point is plainly hopeless.

As to the Advisory Committee point, the judge held that the case advanced was rendered unarguable by the decision of this Board in *de Freitas v. Benny* [1976] A.C. 239. That was an appeal from Trinidad and Tobago, the Constitution of which contains provisions as to the role of an Advisory Committee in relation to pardons virtually identical with those contained in Articles 90-92 of the Constitution of The Bahamas. This Board rejected a submission that the condemned man was entitled to be shown the material placed before the Advisory Committee and to be heard by that Committee at a hearing at which he was legally represented. It was submitted that the functions of the Advisory Committee were quasi-judicial and that accordingly any failure to grant the appellant the rights claimed would contravene the rules of natural justice. Their Lordships held that the function of the Advisory Committee and the Minister were purely discretionary and not in any sense quasi-judicial. Therefore the condemned man had no right either to see the materials or to make representations. Their Lordships agree with the courts below that, so long as the law stated in *de Freitas* remains unchanged, the Advisory Committee point advanced by the petitioner in the present case was unarguable in the courts below.

However, a fresh point was available to the petitioner before their Lordships. There is an appeal pending before the Board from Trinidad and Tobago, *Guerra v. Baptiste and Others*. That appeal is due to be heard at the end of June 1995. The appellant in that case is contending that, in the light of the developments in public law since 1976, the *de Freitas* case is no longer good law. In particular it is said that the emergence of the ability to review the exercise of prerogative powers and the decision of the House of Lords in *R. v. Secretary of State for the Home Department,*

Ex parte Doody [1994] 1 A.C. 531 indicates that the condemned man does have legal rights to know what material is being considered by the Advisory Committee and to make representations. Their Lordships express no view on the merits of the arguments to be advanced in the *Guerra* case. But if the appeal in that case were to succeed, it would undoubtedly affect the merits of the petitioner's Constitutional Motion in the present case. In the circumstances, their Lordships are of the view that it would be wrong to permit the sentence of death on the petitioner to be carried out until the outcome of the *Guerra* appeal is known. Their Lordships will therefore direct that a conservatory order be granted directing that the sentence of death be not carried out on the petitioner until seven days after the determination of the appeal in the *Guerra* case. Their Lordships will also stand over the further hearing of this petition until after the determination of the *Guerra* case.

Finally, their Lordships would add a word as to the procedure to be adopted in cases where application is made for a stay of execution in a death penalty case. If the first instance judge or the Court of Appeal reach the view that the Constitutional Motion is so hopeless that no stay should be granted, it does not follow that it is inappropriate to grant a short stay to enable their decision to be challenged on appeal. In the present case, great difficulty was encountered by the petitioner in convening a Court of Appeal in The Bahamas and a Board of the Privy Council with sufficient speed to deal with the appeals in the short time available before the time fixed for execution. In the view of their Lordships, even if a court decides in such a case not to grant a full stay until determination of the Constitutional Motion itself, the court should grant a short stay (a matter of days) to enable its decision to be tested on appeal. Execution of a death warrant is a uniquely irreversible process. It is neither just nor seemly that a man's life should depend upon whether an Appellate Court can be convened in the limited time available.