Privy Council Appeal No. 11 of 1995

Lincoln Anthony Guerra *Appellant*

v.

Cipriani Baptiste and Others *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DATED THE 4TH JULY 1995.
Delivered the 6th November 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Goff of Chieveley
Lord Slynn of Hadley
Lord Nolan
Lord Nicholls of Birkenhead

*[Delivered by **Lord Goff of Chieveley**]*

On 18th May 1989 the appellant, Lincoln Guerra, together with Brian Wallen, was convicted of the murder of Leslie Ann Girod and her baby son, Gregg, and was sentenced to death. The crime was one of shocking brutality. Their Lordships quote from the judgment of the Court of Appeal delivered by Hamel-Smith J.A. on 27th July 1994, at page 8:-

> "The murders for which Guerra and Wallen were convicted were heinous and abominable in the extreme. Quite apart from the fact that violent robberies and kidnapping were committed in the course of these murders, Leslie was raped and afterwards bludgeoned. Her infant baby, Gregg, was decapitated and her husband who was with them had his throat slit."

Following their conviction and sentence the two men were placed in cells on death row in the State Prison at Port of Spain. On 7th April 1990 the appellant, together with other prisoners on death row, escaped from prison. After the escape a prison guard then on duty was found strangled to death. However on 25th June 1990 the appellant was recaptured and returned to death row. On 29th July 1994 Brian Wallen died in prison of natural causes. It is for that reason that Lincoln Guerra alone is the appellant in the present proceedings. Meanwhile, on 7th June 1989, the two men gave notice of application for leave to appeal against their convictions. But it was not until 12th October 1993 that their appeals were heard by the Court of Appeal - nearly four and a half years after their conviction and sentence. Their Lordships will return later to the cause of this delay. The hearing was concluded on 2nd November, when the appeals were dismissed. The Court handed down reasons for the decision on 25th November 1993. A petition by the two men for leave to appeal to the Privy Council was dismissed on 21st March 1994, the formal order being drawn up on 30th March. On 21st March attorneys acting for the two men wrote to the United Nations Human Rights Committee ("UNHRC") and to the Inter-American Commission on Human Rights ("IACHR"), seeking a determination that their constitutional rights had been violated by reason of the delay which had elapsed since their conviction and sentence to death on 18th May 1989, four years and ten months before. The Attorney-General of Trinidad and Tobago was duly informed of these applications.

After the dismissal on 21st March of the petition of the two men for leave to appeal to the Privy Council, the authorities moved with great speed. Two days later, on 23rd March, the Advisory Committee on the Power of Pardon (with whom, pursuant to section 89(1) of the Constitution, the designated Minister consulted before advising the President whether to reprieve the two men) met to consider the question of commutation of their death sentences. Following the consultation, the Minister must have recommended that the law should take its course. The warrants for their execution were read to them at 1440 hours on the next day, 24th March, for execution at 0700 hours on the following morning, 25th March. It follows that less than 17 hours' notice was given to them of their impending execution.

Even so, following the reading of the warrants of execution, those advising the two men succeeded in filing a constitutional motion on the same evening on behalf of the two men alleging that their execution pursuant to the warrants would constitute a violation of their constitutional rights.

A summons was immediately issued for a stay of execution pending the determination of the constitutional motion. Lucky J. dismissed the application at 2200 hours that evening. Very early the following morning a single judge of the Court of Appeal, Hosein J.A., also dismissed the application for a stay, but granted leave to appeal to the Privy Council from his order and further granted a stay of execution for 48 hours pending an appeal to the Privy Council. Their Lordships find it unnecessary to recount in detail the events of the next few days, which were largely concerned with steps taken with a view to obtaining stays of execution pending the hearing of the constitutional motion or of any appeal from an order dismissing the motion. It is enough to record that, pursuant to the leave to appeal granted by Hosein J.A., a stay was granted, and continued, by the Privy Council until 25th April 1994. On 18th April 1994 Jones J. heard and dismissed the constitutional motion, and refused a stay of execution pending an appeal; but on 29th April Sharma J.A., by consent, granted a stay of execution until after the determination of the appeal from Jones J. to the Court of Appeal, the intervening period since 25th April having been covered by an undertaking by the Attorney-General that no execution would take place. On 9th June the Court of Appeal, having heard the appeal, reserved judgment. On 25th July, following the execution of Glen Ashby during the hearing by the Court of Appeal of his appeal from the dismissal of a constitutional motion, no stay of execution being then in place, the Privy Council, in order to preserve its jurisdiction as the final Court of Appeal for Trinidad and Tobago, granted a stay of execution of the appellant and Brian Wallen in the event of the Court of Appeal dismissing their appeal from the decision of Jones J. On 27th July 1994 the Court of Appeal dismissed their appeal from Jones J. but, since the stay granted by the Privy Council then took effect, they themselves found it unnecessary to order a stay. Two days later, as already recorded, Brian Wallen died in prison.

On 6th September 1994 the State of Trinidad and Tobago submitted to the UNHRC that the appellant's communication to the Committee was inadmissible for non-exhaustion of domestic remedies. On 4th April 1995 the Committee accepted that submission but stated that they would reconsider the appellant's communication after the appeal on his constitutional motion had been disposed of. That appeal came before their Lordships' Board on 27th June 1995.

The following issues were the subject of submissions to their Lordships:

(1) Whether the lapse of 4 years and 10 months between 18th May 1989 (when the appellant was convicted and sentenced) and 21st March 1994 (when the appellant's petition for leave to appeal to the Privy Council was dismissed) had the effect that the execution of the appellant would have been in breach of his constitutional rights, on the principle established in *Pratt*.

(2) Whether the very short notice (17 hours) given to the appellant of his impending execution was in breach of his constitutional rights.

(3) Whether there was a breach of the appellant's constitutional rights in failing to allow him an opportunity to make representations to the Advisory Committee.

(4) Whether the failure of the State to adopt a procedure which permitted the appellant to make representations to the UNHRC or the State to take into account the advice of the UNHRC, constituted a breach of the appellant's constitutional rights.

(5) Whether the courts below erred in failing to grant a stay of execution pending the hearing and determination of the appellant's constitutional motion.

Of the above issues, that arising from the decision in *Pratt* [1994] 2 A.C.1 was plainly the central issue in the case. At the close of argument, their Lordships concluded that the appellant's appeal on this issue was well-founded; and they therefore announced immediately that the appeal would be allowed and the appellant's sentence of death commuted to a sentence of life imprisonment. Their Lordships' reasons for reaching this conclusion are set out below.

Their Lordships are however faced with the situation that four other issues were raised before them. The second issue (relating to notice of execution) is a discrete issue within a comparatively narrow compass, on which there are conflicting decisions of the Courts of Trinidad and Tobago. Their Lordships have accordingly concluded that they should decide that issue. The fifth issue (concerned with failure to grant a stay of execution) is academic in the sense that a stay of execution was eventually granted; and in any event the point is now covered by the decision of the Privy Council in *Reckley v. Minister of Public Safety and Immigration* [1995] 3 W.L.R. 390, which the respondents accept is applicable in Trinidad and Tobago. It is therefore unnecessary for their Lordships to deal with this issue.

There remain the issues relating to the Advisory Committee and the UNHRC. Each of these issues raises a fundamental question of great importance; indeed the former involves a challenge to the decision of the Privy Council in *De Freitas v. Benny* [1976] A.C. 239. Moreover, having regard to the decision that the appellant's death sentence should be commuted to a sentence of life imprisonment on the principle in *Pratt* [1994] 2 A.C. 1, the issue relating to the Advisory Committee does not arise for decision, since even if it was decided in favour of the appellant it could lead to no more than a direction that the matter should be reconsidered by the Committee; and the issue relating to the UNHRC too does not arise for decision, because the UNHRC determined that the appellant's communication to the Committee on 21st March 1994 was inadmissible for non-exhaustion of domestic remedies, i.e. until after the determination of the present appeal. In all the circumstances, their Lordships do not consider that it would be appropriate for them to deal with either of these issues in the present case.

(1) Delay

Their Lordships turn first to the issue of delay. It has been urged on behalf of the appellant that such delay occurred in the appellate process, between the date of his conviction and sentence on 18th May 1989, and the date when his petition for leave to appeal was dismissed by the Privy Council on 21st March 1994, that to execute him after the period of time spent by the appellant on death row would constitute a breach of his rights under the Constitution of Trinidad and Tobago, on the principles established by the Privy Council in *Pratt v. Attorney-General for Jamaica* [1994] A.C. 1.

The constitutional position

Under section 17(1) of the Constitution of Jamaica, it is provided that "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment". It was held in *Pratt* that to execute a man after a prolonged period of delay could constitute inhuman punishment contrary to that provision. There is no exact parallel to that provision in the Constitution of Trinidad and Tobago of 1976. However, sections 4 and 5 of the Constitution provide as follows:-

"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist....the following fundamental human rights and 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;

. . . . . .

5.(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and declared.

(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not -

. . . . . .

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

Before the coming into force of the Constitution of Trinidad and Tobago of 1976 (and indeed the Constitution of 1982) capital punishment was accepted as a punishment which could lawfully be imposed, so that execution pursuant to a lawful sentence of death could amount to depriving a person of his life by due process of law, and could not of itself amount to a cruel and unusual punishment contrary to section 5(2)(b). However, as was recognised by the Privy Council in *Pratt* [1994] 2 A.C. 1 at page 19C (following a suggestion of Lord Diplock in *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342, 1348), applying the common law the judges of Jamaica would have had power to stay a long delayed execution as not being in accordance with the due process of law. Their Lordships have no doubt that the same is true of the judges of Trinidad and Tobago, and that such execution, if not stayed, would constitute cruel and unusual punishment with the effect that not only would any attempt by Parliament to authorise it be contrary to section 5(2)(b) of the Constitution, but also that, on the principles stated by Lord Diplock in *Thornhill v. Attorney-General for Trinidad and Tobago* [1981] A.C. 61 (to which their Lordships will refer in more detail in the next section of this judgment), such execution would not be in accordance with the due process of law under section 4(a) of the Constitution which recognises the right of the individual to life and the right not to be deprived thereof except by the due process of law. For these reasons, their Lordships conclude that the principles stated in *Pratt* are applicable in Trinidad and Tobago as they are in Jamaica, the only difference (which is of no importance) being that in Jamaica such execution would constitute inhuman punishment, whereas in Trinidad and Tobago it would constitute cruel and unusual punishment.

The facts

The following account of the relevant events occurring after the conviction and sentence of the appellant is taken from the chronology supplied by the respondents, and evidence submitted by the respondents before the courts below.

The appellant (with Brian Wallen) was convicted and sentenced to death on 18th May 1989. He and Wallen gave notice of application for leave to appeal to the Court of Appeal, which was filed with the Court on 7th June 1989. As already recorded, the appellant was at large between 7th April and 25th June 1990.

In November 1990 the appellant applied for legal aid for his appeal. On 20th March 1991 a judge granted a certificate for legal aid for the appellant. On 15th April 1991 the Legal Aid and Advisory Authority (L.A.A.A.) asked Mr B. Dolsingh to appear for the appellant on legal aid; though it appears that it was not until 10th May 1993 that the L.A.A.A. received the judge's certificate for the appellant's legal aid.

The transcript of the summing-up was available on 13th February 1990, but the notes of evidence were not. Mr Gonsalves, the Clerk of Appeals who has been attached to the Appeal Division since January 1993, has stated that there is no evidence when the notes of evidence became available. At all events, on 10th May 1993 Mr Gonsalves notified Mr Dolsingh and the attorney for Wallen that the notes of evidence and the summing-up were available, and that the date for the hearing of the appeals of the appellant and Wallen was fixed for 25th May 1993. Mr Gonsalves has also stated that a copy of the summing-up was sent to Mr Dolsingh on 13th May, and that on 21st May Mr Dolsingh informed Mr Gonsalves that he had received the notes of evidence but that, as he had only received them that day, an adjournment of the hearing would be necessary. The hearing was in fact adjourned first to 21st July, and again over the long vacation to 5th October, on each occasion on the application of Wallen's attorney. With the date fixed for October, Mr Dolsingh filed the appellant's grounds of appeal on 24th August, and amended grounds of appeal on 10th September. It appears that Wallen's grounds of appeal were not filed until 4th October and for that reason the hearing was adjourned for one more week. The appeal began on 12th October and continued until 2nd November, when the Court of Appeal announced that the appeals would be dismissed. The reasons for their decision were handed down on 25th November. As is plain both from the length of the hearing and the reasons of the Court, the issues raised were of some complexity. On 5th

November 1993 the appellant gave notice of his intention to petition the Privy Council for leave to appeal, his application for leave being dismissed on 21st March 1994.

The cause of the delay

From the foregoing chronology of events, it is plain that the principal cause of delay was the lapse of time between the end of the trial on 18th May 1989 and the furnishing to the appellant's attorney on 21st May 1993 of the notes of the evidence at the trial - a lapse of time of four years. However, their Lordships think it right to mention at this stage that, in their judgment on the appellant's constitutional motion, the Court of Appeal stated that in their view "the period between sentence and final appeal must be discounted by some five months to take into account the delay occasioned by the appellants in prosecuting their appeals. The Court of Appeal, in what can be considered a departure from its normal practice, highlighted the delay in its judgment...as it was quite evident that an attempt was being made to deliberately postpone the hearing". Their Lordships confess that they have found this statement rather puzzling. The only statement made in the earlier judgment of the Court of Appeal is that the appeals began on 12th October 1993 "after a number of adjournments made for one reason or another at the request of attorneys and stretching from 25th May 1993". Moreover it is difficult to see what blame could attach to the first adjournment (from 25th May to 21st July) which, on the respondents' evidence, resulted from the late furnishing of the notes of evidence. The only adjournments which could possibly be criticised were those from 21st July over the long vacation to 5th October, and from 5th October to 12th October - a total period of two and a half months. However, as will appear hereafter, this comparatively short period of delay is not, in their Lordships' view of the case, relevant to the outcome on the issue of delay.

The judgments of Jones J. and the Court of Appeal

Jones J. set out the facts of the present case, and then turned to the problems involved in Trinidad in preparing notes of evidence. Here he referred to an affidavit of Mr Gonsalves, who described the difficulties involved in the following passage:-

> "The Notes of Evidence taken at such trials are recorded in long hand by the Trial Judge in a note book. These notes are then given to the Judge's secretary to be deciphered, sometimes with extreme difficulty, since the Trial Judge usually writes at a rapid pace which inevitably results in a deterioration of his handwriting. The Judge's secretary then produces a typescript of the Notes of Evidence which is then submitted to the Judge for checking during the Judge's

> busy High Court schedule. Judges sit in court continuously during the Court term and may even sit as vacation judges during the Court vacation. Apart from the main seat of the High Court in Port of Spain, High Court Judges are also assigned to the Courts in San Fernando and in the island of Tobago and while so assigned it is difficult for them to give the necessary assistance in checking the transcripts. Having regard to the factors stated herein and the resources available generally, there is usually a lapse of time before the Notes of Evidence become available."

Mr Gonsalves went on to describe the efforts being made to introduce a more efficient system based on computer aided transcription.

Jones J. also cited passages from judgments of Bernard C.J., in which he described the problems facing the judiciary, and especially the Court of Appeal, in Trinidad, having regard to the small number of judges and their lack of administrative support staff and the increasing workload which they have to bear, especially in criminal appeals as a result of the spate of violent crime, including murders, in the country. Their Lordships have of course studied this material with great care, and with sympathy and understanding for the great difficulties which face the judges of Trinidad and Tobago. Jones J. stated that it was against this background that delays in the jurisdiction must be viewed. He also accepted an argument that while the appeal is pending the condemned man could entertain no fear of execution. He concluded that the period between conviction and reading of the death warrants was not unreasonable or such as to amount to cruel or unusual treatment or punishment, and in any event was within the five year period considered by the Privy Council in *Pratt.*

The Court of Appeal, whose judgment was delivered by Hamel-Smith J.A., set out the reasoning of Jones J., and proceeded to reinforce it by observations of their own. They indicated that, in their opinion, the five year "time limit" laid down in *Pratt* was inappropriate for Trinidad and Tobago because it was too short. Furthermore, it could not be said that the appellants' case was simply shelved and forgotten as appears to have been the case in *Pratt.* They stressed the increased workload which has resulted from the crime wave in Trinidad, and maintained that, although the condemned prisoner may expect a certain amount of expedition in the hearing of his appeals, he must recognise that his appeal is not the only one and that a balance must be maintained. They continued:-

"But this Court is not blind nor is it blinkered to the cries of the law abiding citizens...that the laws of this country must be enforced. They perceive the scales of justice not simply to have tipped but overbalanced in favour of the criminal element in this country. When due process has run its course they expect that the penalty prescribed by law will be enforced and enforced with despatch...

For the appellants to complain that the period in question is sufficient to constitute the imposition of cruel and unusual punishment on them is to ignore reality, more so when there has been no delay whatsoever between final appeal and the reading of the death warrant, that time period which all other jurisdictions which maintain the death penalty recognise to be the most critical in determining whether there has been a breach of the right in question."

They concluded by stating that, in the final analysis, the period in question had not exceeded the time limit imposed in *Pratt* and as a result the appeal must fail on the ground of delay.

The approach of the Judicial Committee

Their Lordships turn first to the principles established in *Pratt*. The fundamental principle is to be found at pages 33B-D of the judgment of the Judicial Committee in that case, as follows:-

"In their Lordships' view a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence."

It follows that the mere fact that the appellant takes advantage of the appellate procedures open to him will not of itself debar him from claiming that the delay involved has contributed to the breach of his constitutional rights. But if the delay has occurred as a result of exploiting the available procedures in a manner which can be described as frivolous or an abuse of the court's process, the delay incurred cannot be attributed to the appellate

process and is to be disregarded.

It also follows that no fixed time is specified for the period within which execution should take place after conviction and sentence. On the contrary, the period is to be ascertained by reference to the requirement that execution should follow as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve.

In the judgments delivered by the courts below in the present case, much emphasis was placed on the problems created for the courts by the shortage of resources available to them, especially in the difficult conditions now prevailing in Trinidad and Tobago. Their Lordships were already aware of the difficulties facing those who administer justice in Trinidad and Tobago, and of the very serious wave of violent crime which now afflicts the country. They have been much assisted by the authoritative account of the present position set out in the judgments of Jones J. and of the Court of Appeal, and also in passages from the judgments of Bernard C.J. quoted by them. Their Lordships have also been impressed by the steps which have already been taken to tackle the present problems, and in particular, following *Pratt*, to reduce the backlog of cases and to curtail the long delays which have occurred in the past between sentence of death and completion of the appellate process. Indeed their Lordships were informed by leading counsel for the respondents in the present appeal that the backlog had been almost overcome. Even so, when considering to what extent regard may be had to problems facing the judicial system in assessing a reasonable time for appeal for present purposes, it is necessary to refer to the following passage in the judgment of the Board in *Pratt* at pp. 34F-35A:-

> "Their Lordships are very conscious that the Jamaican Government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated to an appellant at an early stage. The aim should be to hear a capital appeal within 12 months of conviction....[If] there is to be an application to the Judicial Committee of the Privy Council it must be made as soon as possible...In this way it should be possible to complete the entire domestic appeal process within approximately two years. Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets..."

This passage is, in their Lordships' opinion, as applicable to Trinidad and Tobago as it is to Jamaica, and demonstrates the limited extent to which regard can be had in the present context to problems facing the judicial system. It follows that such problems cannot be allowed to excuse long delays. If capital punishment is to be carried out it must be carried out "with all possible expedition". It is in this sense that a "reasonable time" for appeal is to be understood. In the assessment of such reasonable time, great importance must be attached to ensuring that, consonant with the tradition of the common law and the recognition of the inhumanity involved in prolonging the period awaiting execution in a condemned cell on death row, such delay will not occur and any delay which does occur will be curtailed.

In *Pratt* at page 35G, the Board also concluded that:-

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

It is to be observed that this period was not specified as a time limit. Its function was to enable the Jamaican authorities to deal expeditiously with the substantial number of prisoners who had spent many years on death row, without having to deal with all such prisoners individually following constitutional proceedings. It follows that the period of five years was not intended to provide a limit, or a yardstick, by reference to which individual cases should be considered in constitutional proceedings. With great respect to the Court of Appeal in the present case, they erred in so regarding it.

Having regard to the foregoing considerations, their Lordships approach the present case as follows. They start with the fact that the time which had elapsed between sentence of death and completion of the hearing by the Court of Appeal was four and a half years, and that the time which elapsed between sentence and the completion of the entire domestic appellate process (i.e. until after dismissal of the appellant's petition for leave to appeal to the Privy Council) was four years and ten months. These figures are to be compared with realistic targets of approximately 12 months and two years respectively. The result of that comparison is that each of the target periods was very substantially exceeded. Furthermore examination of the facts reveals that the overwhelming reason for this excess was the failure to make available the judge's notes of the evidence at the trial until four years after the trial was over. The respondents submitted that this was a not unreasonable time having regard to the conditions prevailing in Trinidad as described by Mr Gonsalves in his affidavit. Their Lordships feel driven to state that they do not see

how it could be said that an appellate process is being carried out with all possible expedition if it takes four years to produce the notes of the evidence at the trial. In any event, any such contention is impossible to sustain in the present case, because nobody appears to know why it took so long to produce the notes. No doubt the trial judge, like all trial judges in Trinidad, was very fully occupied; but that of itself cannot explain why this relatively humdrum though laborious task should take such a very long time, especially as the judge had the assistance of a secretary. In all the circumstances, their Lordships are bound to conclude that there has been a substantial and unjustifiable period of delay in the disposal of the appellant's appeal, a period which in all probability exceeds three years. The fact that the appellant was at large for about two months, during which time he was spared the anguish of mind suffered by those on death row, has no significant bearing on this long period of delay, nor has the similar period arising from the adjournment of the hearing of the appeal over the long vacation in 1993, assuming (which their Lordships respectfully doubt) that it is of any relevance.

Brief reference was made in the respondent's written case to the moratorium on the reading of death warrants pending the Prescott Commission's Report on the death penalty. The Report, which recommended that the death penalty should be retained, was made available on 27th September 1990, and was accepted by the Cabinet and laid before Parliament on 20th October 1990. However the point was not pursued in argument, presumably because the period of the moratorium fell within the two year target period for consideration of appeals by the appellant, and so does not appear to have been of any relevance.

Bearing in mind that the unjustified period of delay runs into a period of years, and has led to a lapse of time since sentence of death was imposed far in excess of the target periods of 12 months and two years and indeed close to the period (five years) from which it may be inferred, without detailed examination of the particular case, that there has been such delay as will render the condemned man's execution thereafter unlawful, their Lordships have no doubt that to execute the appellant after such a lapse of time would constitute cruel and unusual punishment contrary to his rights under sections 4(a) and 5(2)(b) of the Constitution.

It follows that their Lordships are unable to accept the reasoning of the courts below on this aspect of the case. It was for the above reasons that their Lordships came to the conclusion, announced at the conclusion of the hearing, that the

appeal must be allowed and the appellant's death sentence commuted to a sentence of life imprisonment.

Finally on this aspect of the case their Lordships wish to refer to the view expressed both by Jones J. and by the Court of Appeal that little if any regard should be paid to the period spent by a condemned man on death row before his final appeal has been dismissed. Their Lordships do not feel able to subscribe to this philosophy which, if accepted, would inevitably lead to toleration of the death row phenomenon in circumstances where a number of avenues of appeal can be pursued by an appellant. The simple fact is that, following conviction and sentence to death, the condemned man is placed on death row and has there to contemplate the prospect of execution even though, in some cases but not in others, he may have a real hope of a successful appeal. This fact alone is enough to justify the conclusion that the period before the appellate process has been finally exhausted must be taken into account in deciding whether there has been such delay since the death sentence was imposed as to render execution thereafter cruel and unusual punishment.

(2) Failure to give sufficient notice of execution

The warrant for the appellant's execution was read to him at 1440 hours on Thursday 24th March 1994, for his execution at 0700 hours on the following day, 25th March. This gave him less than 17 hours notice of his execution. It was submitted that so short a notice of execution constituted a breach of the appellant's constitutional rights. This submission was rejected by the courts below.

In considering this aspect of the present appeal, their Lordships are guided by the authoritative exposition of the principles embodied in chapter 1 of the Constitution of Trinidad and Tobago (concerned with the recognition and protection of fundamental human rights and freedoms) in the judgments of the Judicial Committee in *De Freitas v. Benny* [1976] A.C. 239 and *Thornhill v. Attorney-General for Trinidad and Tobago* [1981] A.C. 61, the judgment in each case being delivered by Lord Diplock. In those cases, the judgments were given with reference to the Constitution of 1962; but the same principles apply to the Constitution of 1976 which is applicable in the present case, and their Lordships will refer to the relevant sections in chapter 1 of the latter Constitution.

Chapter 1, and sections 4 to 6 in particular, proceed on the presumption that the rights and freedoms referred to in sections 4 and 5 are already secured to the people of Trinidad and Tobago

by the law in force at the commencement of the Constitution of 1976. Consistently with that presumption, section 6(1)(a) has the effect of debarring a citizen from asserting that anything done to him which was authorised by the law in force immediately before the coming into effect of that Constitution infringes any of the rights and freedoms recognised in section 4 or which are the subject of section 5(2). The operative effect of section 4 for the future is that the rights and freedoms there recognised and declared to have existed before the coming into effect of the Constitution shall continue to exist as provided in the section; and section 5(1) outlaws the future abrogation, abridgement or infringement of those rights and freedoms by laws made thereafter.

In *Thornhill* at page 70, Lord Diplock drew a distinction between the rights and freedoms recognised and protected under subsections (a) to (k) of section 4 (section 1 of the 1962 Constitution), and the types of conduct specified in subsections (a) to (h) of section 5(2) (section 2 of the 1962 Constitution). The former are in general terms, and it may sometimes be necessary to have regard to the law in force when the Constitution came into force to determine the limits of the rights and freedoms there set out. The latter however are particularised in greater detail, their function being to spell out (though not necessarily exhaustively) what is included in the due process of law and the protection of the law in section 4(a) and (b) (section 1(a) and (b) of the 1962 Constitution) respectively.

The question at issue in *Thornhill* was whether the appellant, who for three days after his arrest was refused the opportunity of communicating with his lawyer, could complain of a breach of his rights under section 2(c)(ii) of the 1962 Constitution (section 5(2)(c)(ii) of the present Constitution). The Judicial Committee, restoring the decision of Georges J., held that there was such a breach since, having regard to section 2(c)(ii), the appellant was deprived of his rights to the due process of law and the protection of the law. However Lord Diplock went on to state (at p. 71A-D) that, even if the treatment complained of had not been specifically described in section 2, nevertheless:-

> "In the context of section 1, the declaration that rights and freedoms of the kinds described in the section have existed in Trinidad and Tobago, in their Lordships' view, means that they have in fact been enjoyed by the individual citizen, whether their enjoyment by him has been *de jure* as a legal right or *de facto* as the result of a settled executive policy of abstention from interference or a settled practice as to the way in which an administrative or judicial discretion has been exercised."

The *de facto* enjoyment of the right in question as a matter of settled practice could in that case be derived from the adoption by the Judges of Trinidad and Tobago of the English Judges' Rules 1964. In the result, the respondent could only succeed if he was able, invoking section 3, to show that the practice of allowing an arrested person to consult a lawyer of his choice at the earliest opportunity was contrary to law at the time of commencement of the Constitution. Obviously he was unable to discharge that burden.

Their Lordships turn to the facts of the present case. Here they are concerned with the period of notice given to the appellant of his impending execution. The essential submissions advanced on behalf of the appellant were that the period of notice was so short that execution in such circumstances would constitute cruel and unusual punishment contrary to section 5(2)(b), or that it would deprive him of his life otherwise than by due process of law or deprive him of the protection of the law contrary to section 4(a) or (b) respectively. In relation to the latter submission it must be borne in mind that, as Lord Diplock stated in *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342, 1347F-G, the due process of law must continue to be observed in the case of a condemned man after sentence of death has been passed upon him, and indeed embraces the carrying out of the sentence itself.

Their Lordships are of the opinion that justice and humanity require that a man under sentence of death should be given reasonable notice of the time of his execution. Such notice is required to enable a man to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best he can, to face his ultimate ordeal. Their Lordships understand that this principle was long recognised in England in the days when capital punishment was still in force; and, for reasons which will shortly appear, the like principle appears to have long been accepted in Trinidad and Tobago. In these circumstances they are satisfied that to execute a condemned man without first giving him such notice of his execution would constitute cruel and unusual punishment contrary to section 5(2)(b) of the Constitution.

The matter can however be taken further because in *Thomas (Andy) v. The State* (unreported) 29th July 1987, Nos. 6346 and 6347 of 1985, it was held by Davis J. that there was a settled practice in Trinidad and Tobago for a condemned man to be advised of the time and date of his execution by the reading of a death warrant to him on a Thursday for execution on the following Tuesday. This practice amounted, in his opinion, to an

established custom which was well known, so much so that he would, if invited to do so, have held that he had judicial notice of that custom. It is plain that, on the evidence before him, he must have been satisfied that the custom extended back long before the coming into effect of the Constitution of 1976, and indeed the Constitution of 1962.

In the present case, however, Jones J. declined to follow the decision of Davis J. on this point. He referred to section 57 of the Criminal Procedure Act (ch. 12:02), which provides as follows:-

> "(1)Every warrant for the execution of any prisoner under sentence of death shall be under the hand and Seal of the President, and shall be directed to the Marshal, and shall be carried into execution by such Marshal or his assistant at such time and place as mentioned in the warrant....
>
> (2) The President may, by warrant under his hand and seal directed to the Marshal ... order such execution to be carried into effect at such time and place as shall be appointed and specified in the warrant, in which case the execution shall be done at such time and place as shall be so appointed."

He commented that nowhere in this or any other law is it laid down that a death warrant is to be read on a Thursday for execution the following Tuesday, and that the time and place for execution falls squarely within the province of the executive. He further understood the effect of Lord Diplock's judgment in *Thornhill* to be that, for a custom to be elevated to a right under the Constitution, that custom must be described and declared in the Constitution.

The Court of Appeal found it difficult to follow the reasoning of Davis J. in holding that there was a settled practice, forming part of the due process of law, that warrants for execution should be read on a Thursday for execution the following Tuesday. But in any event they considered that to hold that any such practice formed part of the due process of law would be inconsistent with section 57 of the Criminal Procedure Act, under which the fixing of the time for execution was purely within the discretion of the President. To hold otherwise would be an interference with executive powers conferred upon the President by law.

With all respect, their Lordships are unable to accept the reasoning of Jones J. and the Court of Appeal. First, in their opinion, Jones J. erred in his interpretation of the judgment of

Lord Diplock in *Thornhill*. Indeed, it appears from Lord Diplock's judgment in that case (at p. 71B-E) that if, at the time when the Constitution came into force, citizens have *de facto* enjoyed a right or freedom as a matter of settled practice, such a right or freedom may be recognised and protected under chapter 1 of the Constitution as forming part of the due process of law, even if it is not specified as such in section 5(2) of the Constitution. Second, their Lordships do not accept that section 57 of the Criminal Procedure Act has the effect attributed to it by Jones J. and the Court of Appeal. No doubt under section 57 a warrant of execution under the hand and seal of the President constitutes the manner authorised by law for fixing the date of execution. But their Lordships are unable to see how the provisions of section 57 are inconsistent with the existence of a settled practice relating to the period of notice to be given to a condemned man of his execution, or with the proposition that *de facto* enjoyment of such settled practice at the time when the Constitution came into effect led to its forming part of the due process of law recognised and protected under chapter 1 of the Constitution. Such a conclusion does not, in their Lordships' opinion, amount to a fetter upon administrative discretion any more objectionable than any other settled practice which may be given effect to upon the principle stated by Lord Diplock in *Thornhill*.

It follows that their Lordships accept the reasoning of Davis J. on this point. Even so, they doubt if the settled practice found by him to exist goes so far as to require the warrant to be read on any particular day of the week, or to prevent the warrant from being read on a day more than four clear days before the date of execution specified in the warrant. In their Lordships' opinion the effect of the settled practice as found by Davis J. is that the warrant of execution must be read at a date which gives the condemned man the benefit of at least four clear days between the reading of the death warrant and his execution, and that those four clear days should include a weekend, no doubt to ensure that, so far as is reasonably practicable, the condemned man's family should be free to visit him; and the effect is that the reasonable time referred to by their Lordships in relation to the prohibition against cruel and unusual punishment should be so interpreted. Customarily, as appears from the evidence before Davis J., this requirement is fulfilled by reading the warrant on a Thursday for execution on the following Tuesday; and, in the absence of any evidence to the contrary, there seems to be no reason why, as a matter of practice, that custom should not continue to be observed in Trinidad and Tobago.

The giving of reasonable notice to a condemned man of his impending execution has another distinct purpose to perform, which is to provide him with a reasonable opportunity to obtain legal advice and to have resort to the courts for such relief as may at that time be open to him. The most important form which such relief may take in the circumstances is an order staying his execution. If the condemned man is not given reasonable notice of his execution, he may be deprived of the opportunity to seek such relief, with the effect that his right not to be deprived of his life except by due process of law may be infringed, contrary to section 4(a) of the Constitution. In this connection it must not be forgotten that, by virtue of section 5(2)(h), the right to the due process of law includes the right not to be deprived of "such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms". It follows that, in their Lordships' opinion, the due process of law requires that a reasonable time should be allowed to elapse between the reading of a warrant of execution and the execution itself, not only for the humanitarian purposes which their Lordships have previously described, but also to provide a reasonable opportunity for the condemned man to take advice and if necessary seek relief from the courts. The settled practice that a period of at least four clear days (including a weekend) will be necessary to constitute such reasonable time should be regarded as applicable as much to the latter purpose as to the former.

Fortunately, in the present case, those acting for the appellant succeeded in filing the necessary proceedings later in the evening of 24th March, and in obtaining a stay of his execution early the following morning. Even so, the giving of less than 17 hours' notice to the appellant of his execution constituted a breach of his constitutional rights, under sections 4(a), 5(2)(b) and 5(2)(h) of the Constitution. However since their Lordships have already concluded that the appellant's sentence of death must be commuted to a sentence of life imprisonment on other grounds, it is unnecessary that any further relief should be granted by reason of the above breaches of his constitutional rights.