JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 53/91

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	EARL PRATT IVAN MORGAN	PLAINTIFFS/ APPELLANTS
A N D	THE ATTORNEY-GENERAL FOR JAMAICA	DEFENDANTS/ RESPONDENTS
A N D	THE SUPERINTENDENT OF THE ST. CATHERINE DISTRICT PRISON	

Dennis Daly Q.C., Dr. Lloyd Barnett, Richard Small, Donald Gittens & Mrs. Sandra Minott-Phillips for Appellants

Lennox Campbell, Miss Denier Little & Lackston Robinson for Respondents

March 25-27; 30-31 and June 8, 1992

ROWE P.:

Pratt and Morgan were sentenced to death on January 15, 1979 in the St. Catherine Circuit Court, upon their conviction for murder. Their applications for leave to appeal against convictions were dismissed by the Court of Appeal on December 5, 1980. Their further appeal against convictions by way of an application for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on July 17, 1986. At that hearing, Lord Templeman expressed the Board's disquiet at the unexplained delay by this Court whereby the written reasons for the dismissal of the appeal, promised on December 5, 1980 were not delivered until September 24, 1984. There was absolutely no merit in the substantive appeal, but the enormity of the unexplained delay, prompted Lord Templeman to comment thus:

> "On 5th December, 1980 the Court of Appeal dismissed the petitioner's appeal against conviction and the sentence of death for murder and promised to put their reasons for so doing in writing. Those reasons were not delivered until three years and nine months later namely on 24th September, 1984. During the whole of that period the appellant had sentence of death hanging over him and, of course, no action could be taken on his behalf, or on behalf of the authorities, pending the possibilities of an appeal to this Board which could only be considered when those reasons had been delivered."
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> [Emphasis added]

It will be necessary to comment upon the emphasized sentence later in this judgment especially as it assumed great importance in the further progress of the appellants' attempts to cause the sentence of death to be set aside in relationship to them.

Earl Pratt, applied to the Inter-American Commission on Human Rights on June 12, 1981 for redress on the ground that he was arrested, accused of a crime of murder of which he had no knowledge, tried, convicted and sentenced to death, by an unfair trial process. By Resolution No. 1/85 of July 1, 1985, the Commission resolved to declare that there existed no evidence of the alleged violations of the American Convention on Human Rights as claimed by Pratt but went on to recommend "that the Government of Jamaica suspend the execution of those persons sentenced to death, commute the sentence of Earl Pratt and request, in accordance with its Regulations and the spirit of Article 4(3) of the American Convention on Human Rights as well as for humanitarian reasons, that the Government take definite steps to abolish the death penalty as has been done in various countries."

The matter did not rest there as on July 9, 1987, the Executive Secretary of the Inter-American Commission on Human Rights wrote to the Minister of Foreign Affairs of Jamaica, confirming a telegram of July 7, in these terms:

> "I have the honor to refer to Your Excellency's note dated March 12, 1987, your reference 51/200/146, concerning Earl Pratt and Ivan Morgan on death's row in Jamaica.
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> Please be advised that the Inter-American Commission on Human Rights, at its 70th period of sessions, held in Washington, D.C., decided on June 30, 1987 that Messrs. Pratt and Morgan suffered a denial of justice during the period 1980-1984 violative of Article 5(2) of the American Convention on Human Rights. The Commission found that the fact that the Jamaican Court of Appeal issued its decision on December 5, 1980 but did not issue the reasons for that decision until four years later, September 24, 1984, was tantamount to cruel, inhuman and degrading treatment because during that four year delay the petitioners could not appeal to the Privy Council and had to suffer four years on death's row awaiting execution.
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> The Inter-American Commission on Human Rights, pursuant to its cable of July 7, 1987 requests that the execution of Messrs. Pratt and Morgan be commuted for humanitarian reasons."

I draw attention to one of the reasons advanced by the Inter-American Commission for their decision, viz. that during the period of nearly four years delay the appellants could not have appealed to the Judicial Committee of the Privy Council, and to the further fact that the above letter specifically referred to both appellants. It is unclear how and when Morgan's case was presented to the Commission, but in para. 7 of his affidavit of March 1, 1991 Morgan admitted having made such an appeal.

Prior to this second decision of the Inter-American Commission on Human Rights, the appellants, Pratt on 28th January 1986 and Morgan on 12th March 1987, made representations to the Human Rights Committee of the United Nations which, after considering replies and representations from the Government of Jamaica, expressed its views under Article 5, paragrpah 4, of the Optional Protocol. These views included the following:

(a) There was delay in the appeal process and that the right to review of convictions and sentences must be made available without undue delay.

(b) In the absence of a written judgment of the Court of Appeal, the appellants were not able to proceed to appeal before the Privy Council, thus entailing a violation of Article 14 paragraph 3(c) and Article 14 paragraph 5.

(c) In capital punishment cases, Jamaica had an imperative duty to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant.

(d) That the appellants were entitled to a remedy for the violations of the Covenant in Article 14 paragraphs 3(c) and 7 and that their sentences should be commuted.

Death warrants were signed by the Governor-General on three occasions in respect of each of the appellants - first on February 13, 1987, second on March 8, 1988 and third on March 7, 1991. Execution of the first and second warrants was stayed on the representations by and on behalf of the appellants. Consequent upon the issue of the third warrant, the appellants filed separate Motions for Constitutional Redress under Section 25 of the Constitution of Jamaica. These Motions were consolidated and after a hearing in April 1991, the Motions were dismissed giving rise to these appeals.

Three broad issues were argued before us:

(1) Were the appellants denied a fair hearing within a reasonable time as required by Section 20(1) of the Constitution?

(2) Would the infliction of the Death Penalty on them some twelve years after it was pronounced constitute, in the circumstances of their case, inhuman and degrading treatment contrary to Section 17(1) of the Constitution?

(3) Was the decision of the Governor-General in Privy Council not to commute the Death Penalty in their case, unreasonable, arbitrary and in breach of natural justice and the Constitution?

ISSUE 1

WERE THE APPELLANTS DENIED A FAIR HEARING WITHIN A REASONABLE TIME AS REQUIRED BY THE CONSTITUTION?

Section 20(1) of the Constitution provides that whenever a person is charged with a criminal offence he shall be afforded a fair hearing within a reasonable time. It has always been considered oppressive for an accused person to have a criminal charge hanging over his head for an inordinate period of time before being brought to trial. Between trial and the handing down by the Court of its decision there may be a further period of inordinate delay. The majority of the Supreme Court of Nigeria in Ifezue v. Mbadugha et al [1985] L.R.C. (Const.) 1141, identified that between 1979 and 1984 some judges in that country had become notorious for very long adjournments of judgments leading to a deprivation from them of the advantage of forming fair impressions of witnesses and evaluation of evidence. With that factual background the Court went on to hold that when the Amended Constitution of 1979 replaced the phrase "a fair hearing within a reasonable time by a Court" with the provision that "Every Court ... shall deliver its decision not later than 3 months and shall furnish all parties ... with duly authenticated copies of the decision on the date of delivery" the latter provision was mandatory.

On the facts the judgment in Ifezue's case was delivered more than 3 months after the completion of the hearing and consequently the appeal was allowed and the case remitted to the Court of Appeal.

The report of the Supreme Court's decision does not indicate what instructions that Court gave to the Court of Appeal. What is now clear, however, is that the discretion of a Court in Nigeria to postpone the handing down of a judgment whether at first instance or on appeal is restricted to three months.

The judgment of Powell J. of the Supreme Court of the United States of America in Barker v. Wingo 407 U.S. 514 (1972) was approved and applied by the Judicial Committee of the Privy Council in Bell v. D.P.P. (1985) 32 W.I.R. 317 and was followed by the Judges in the Court below. Powell J. identified four factors which a Court ought to assess in determining whether a particular defendant had been deprived of his rights to a fair trial within a reasonable time, viz.:

(1) Length of delay.

(2) The reasons given by the prosecution to justify the delay.

(3) The responsibility of the accused for asserting his rights.

(4) Prejudice to the accused.

In Bell (supra) the Privy Council accepted the position that the fundamental rights guaranteed to individuals under Chapter III of the Constitution must be balanced against the societal interest in the preservation of law and order. Lord Templeman said:

> "Their Lordships accept the submission of the respondents that, in giving effect to the rights granted by sections 13 and 20 of the Constitution of Jamaica, the Courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica."

A similar balancing attitude has been adopted by the Supreme Court of Canada in their interpretation of Section 11(b) of the Charter of Rights and Freedoms which provides for the trial of accused persons within a reasonable time. The societal interest in the speedy resolution of a criminal charge was eloquently expounded by Cory J. in R. v. Askov [1990] 74 D.L.R. (4th) 355:

> "I agree with the position taken by Lamer J. that s. 11(b) explicitly focuses upon the individual interest of liberty and security of the person. Like other specific guarantees provided by s. 11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by s. 7 of the Charter. There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.
>
> Although the primary aim of s. 11(b) is the protection of the individual's rights and the provision of fundamental justice for the accused, none the less there is, in my view, at least by inference, a community or societal interest implicit in s. 11(b). That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Secondly, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both these aspects of the community interest. A trial held within a reasonable time must benefit the individual accused as the prejudice which results from criminal proceedings is bound to be minimized. If the accused is in custody, the custodial time awaiting trial will be kept to a minimum. If the accused is at liberty on bail and subject to conditions, then the curtailments on the

"liberty of the accused will be kept to a minimum. From the point of view of the community interest, in those cases where the accused is detained in custody awaiting trial, society will benefit by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law. If the accused is released on bail and subsequently found guilty, the frustration felt by the community on seeing an unpunished wrongdoer in their midst for an extended period of time will be relieved.

There are as well important practical benefits which flow from a quick resolution of the charges. There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time, but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employer, or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses too are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs on the minds of witnesses and is a source of worry and frustration for them until they have given their testimony.

It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law.

> "The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community. Continued community support for our system will not endure in the face of lengthy and unreasonable delays."

Cory J. went on to focus on the four factors identified in Barker v. Wingo (supra). Delay may be attributable to the Crown or its officers or by systemic or institutional limitations. Such delays will enure to the benefit of the defendant and weigh against the Crown. But to decide "how long is too long" will require an enquiry into all the circumstances of a particular case and where possible a Court should look to the appropriate ranges of delay to determine what is a reasonable limit. As to delay on the part of an accused person Cory J. said that the burden always rests on the Crown to bring the case to trial and that the mere silence of the accused is not sufficient to indicate a waiver of Canadian Charter Rights. He went on to say that an accused must take some direct action from which a consent to delay can be properly inferred. He concluded that where there is delay on both sides, the onus rests upon the Crown to establish on a balance of probabilities that the actions of the accused constitute a waiver of his or her rights.

Cory J. also quoted from Sopinka J. in R. v. Smith [1899] 52 C.C.C. (3rd.) 97 where it was said at p. 111 that:

> "Having found that the delay is substantially longer that can be justified on any acceptable basis, it would be difficult indeed to conclude that the appellant's s. 11(b) rights have not been violated because the appellant has suffered no prejudice. In this particular context, the inference of prejudice is so strong that it would be difficult to disagree with the view of Lamer J. in Mills and Rahey that it is virtually irrebuttable."

He accepted this principle but went on to suggest ways in which the rebuttal could take place. He said:

> "Nevertheless, it will be open to the Crown to attempt to demonstrate that the accused has not been prejudiced. This would preserve the societal interest by providing that a trial would proceed in those cases where despite a long delay no resulting damage had been suffered by the accused. Yet, the existence of the inference of prejudice drawn from a very long delay will safely preserve the pre-eminent right of the individual. Obviously the difficulty of over-coming the inference will of necessity become more difficult with the passage of time and at some point will become irrebuttable. Nonetheless, the factual situation presented in Conway serves as an example of an extremely lengthy delay which did not prejudice the accused."

I unreservedly accept that inordinate delay in bringing an accused person to trial is presumptively prejudicial, but that this presumption is rebuttable by evidence which can include the conduct of the accused and the nature of the proceedings.

In Kakis v. Government of the Republic of Cyprus and Others [1978] 2 All E.R. 634, the House of Lords refused to sanction the extradition of the appellant to Cyprus on the ground that it was unjust and oppressive so to do as vital defence witnesses had become unavailable due to lapse of time and that the government of Cyprus had acted in such a manner that the appellant could justifiably believe that he would not have been prosecuted for the alleged offences. Lord Diplock gave his understanding of the term: "unjust and oppressive" at p. 638. He said:

> "'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration, but there is room for overlapping and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied on as a ground for holding it to be either unjust or oppressive to return him."

Kakis had lost the support of vital defence witnesses and had settled in England for several years before the demand for extradition.

All the cases referred to by Dr. Barnett on this aspect of the appeal were concerned with trial at first instance. Procedure for such trials normally include arrest, pre-trial incarceration, release on conditional or unconditional bail; gathering of evidence and a witness trial before Judge alone or before Judge and jury. It is here taken as axiomatic that the fundamental principle of the presumption of innocence applies, even in the face of a potentially overwhelming case against the accused. When, however, a properly constituted tribunal hears and determines the criminal trial, the position dramatically changes. There is no longer an onus on the prosecution to take positive steps to initiate an appeal or to prosecute that appeal. The presumption, if any, must at that stage be that the prosecution has fully discharged its onus to remove the mantle of innocence which hitherto clothed and shielded the accused. It is now the turn of the convicted person to assert, if he wishes, his right to appeal. In such circumstances matters of utmost relevance to the trial process have no bearing upon the appeal process. This is not to say that a proper system for receiving appeals and for hearing

and determining such appeals ought not to be established and maintained by the government. But of course there is no complaint that a proper appellate process was not provided in Jamaica.

As the Record discloses, the Court of Appeal endeavours to hand down written judgments within three months after the hearing of appeals. In some cases judgment is reserved. Their consideration, preparation and delivery would ordinarily have highest priority. In other cases judgment is delivered immediately upon the conclusion of oral arguments preceded by short oral statements by the presiding judge. The practice whereby all the submissions in criminal cases are made orally in Court enables counsel for the appellant to know at once which if any of his arguments find favour with the Court and at the end of the day no one is or can be in any doubt as to why the appeal has been dismissed. Ten years or so ago, it was the practice of the Court, on occasions, to invite shorthand writers into Court to make a verbatim record of the oral judgment of the Court. Where that was not done for whatever reason, reasons for judgment would be prepared and delivered in open Court at a subsequent sitting of the Court. In the instant case the reasons for judgment were not delivered for some forty-five months due to the failure of the judge to whom its preparation was assigned to separate these bundles from other concluded cases.

Although there was no evidence in support, the practice is so well documented that I can say that within a few days of the passing of a sentence of death on a person convicted of murder, the trial judge prepares a Report concerning the case for the use of the Governor-General in Privy Council in accordance with Section 91 (1) of the Constitution. If there is no appeal or if the appeal is dismissed that Report is forwarded to the Governor-General.

There is considerable evidence to show that once the appeal is dismissed, many convicted murderers take no further step in the proceedings until they receive information that the Governor-General

on the recommendation of the Privy Council has decided that the law should take its course. At that stage the usual step is for the condemned man to seek a stay of execution while he applies for leave to appeal to Her Majesty in Council. Consequently, between the time that the appeal is determined in this Court and the time when the condemned man aplies for leave to appeal may be several years and in excess of forty-five months. A recent example of such an application is provided by Privy Council Appeal No. 43/90, Kenneth Evans v. The Queen. A man was murdered on 18th February, 1980. Evans was convicted for this crime on May 5, 1981. His application for leave to appeal was dismissed on December 2, 1982. Special leave to appeal from the Order of this Court was granted by the Judicial Committee of the Privy Council on March 14, 1990 and the appeal was eventually allowed on July 23, 1991. Written reasons, handed down on August 8, 1991, recalled that special leave to appeal was "against the Order of the Court of Appeal of Jamaica made on 2nd December, 1982, which in an unrecorded oral judgment dismissed the appellant's application for leave to appeal against his conviction of murder in the Home Circuit Court on May 5, 1991." [Emphasis added].

No point whatsoever was taken to the hearing of the application for leave to appeal on the basis that there were no written reasons for judgment or that the oral reasons were not recorded. The appeal was allowed.

The Judicial Committee Rules 1957 which were referred to by the Judges in the Court below were revoked by the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 which came into operation on February 7, 1983. Neither in the 1957 Rules as amended nor in the 1983 Rules was there a provision that the application for special leave to appeal to Her Majesty in Council should be accompanied by the reasons given by the Court for the decision appealed from. Rule 3 of the 1957 Rules as reproduced in Rule 3 of 1983 Rules, with minor stylistic changes, now provides that:

"3(1) A petition for special leave to appeal shall:

(a) state succinctly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise Her Majesty whether such leave ought to be granted;

(b) deal with the merits of the case only so far as is necessary to explain the grounds upon which special leave to appeal is sought; and

(c) be signed by the Counsel who attends at the hearing or by the party himself if he appears in person."

Rule 4 which is also relevant provides in part:

"A petitioner for special leave to appeal shall lodge:

(a) six copies of the petition and of the judgment from which special leave to appeal is sought;

(b) an affidavit in support of the petition as prescribed by Rule 50;"

and Rule 50, is in these terms:

"50(1) A petition not relating to any pending appeal, and any other petition containing allegations of fact which cannot be verified by reference to the registered Record or any Certificate or duly authenticated statement of the Court appealed from, shall be supported by affidavit.

(2) Where the petitioner prosecutes his petition in person, the affidavit shall be sworn by the petitioner himself and shall state that, to the best of the petitioner's knowledge, information and belief, the allegations contained in the petition are true.

(3) Where the petitioner is represented by an agent, the affidavit shall be sworn by the agent and shall, besides stating that, to the best of the deponent's knowledge, information and belief, the allegations contained in the petition are true, show how the deponent obtained his instructions and the information enabling him to present the petition."

Frivolous petitions should be discouraged and to this end a circular letter was issued from the Registrar of the Privy Council to the Registrar of the Supreme Court of Jamaica on June 27, 1973 reminding of the principles established in Muhammad Mawaz v. The King Emperior LXVIII I.A, 126 and requesting the Chief Justice to "draw to the attention of practitioners in Jamaica the serious nature of the signing of a certificate that a petitioner has reasonable grounds of appeal to Her Majesty in Council."

The appellants knew that they had a right to apply to Her Majesty in Council for leave to appeal and that they could do this through the agency of their Attorneys-at-Law. They wrote to the Registrar of this Court asking that their "case be set in a position so that whenever my attorney Mr. Noel B. Edwards wishes to further his argument of appeal to the Privy Council of England he can do so. Furthermore he and his colleagues Mr. Frater and Miss Lightbourne is sole responsible for our case at this present moment."

Many years elapsed and not a word was addressed to the Court of Appeal by the appellants or any of the three Attorneys-at-Law named in the letter of January 1, 1981. To this day no competent Court has ever said there was a tittle of merit in the grounds of appeal argued before this Court or in the petition belatedly presented to the Judicial Committee of the Privy Council. Can it be that no responsible Attorney-at-Law was willing in 1981 to sign a certificate that the appellants had reasonable grounds to appeal to Her Majesty in Council and could that be the real reason why no application for leave to appeal was filed between 1981 and 1984?

An application for leave to appeal to Her Majesty in Council can be facilitated by the written reasons for judgment of the Court of Appeal but such an application is not and has never been dependent upon such reasons as a condition precedent to its presentation. The relevant Privy Council Rules of procedure do not require the lodgment of the reasons for judgment at the petition stage. It

is entirely possible that if Counsel had brought the 1957 or the 1983 Privy Council Rules to their attention, their Lordships in the Privy Council would not have included the sentence:

> "During the whole of that period the appellant had sentence of death hanging over him and of course, no action could be taken on his behalf, or on behalf of the authorities, pending the possibility of an appeal to this Board which could only be considered when those reasons had been delivered." [Emphasis added]

Between 1980 and 1984 the appellants took active steps to have their conviction and/or sentence set aside by their application to the Inter-American Commission on Human Rights and to the Human Rights Committee of the United Nations. Both of these international bodies were profoundly affected by the passage in the Privy Council judgment to the effect that the applicants were powerless to initiate their appeal before the Judicial Committee of the Privy Council until the written reasons for judgment became available. One is left to speculate if the final recommendation from these international Committees would have been the same if they had before them the relevant Rules of Procedure governing applications for leave to appeal to Her Majesty in Council and the practice in Jamaica of condemned men waiting for years before approaching Her Majesty in Council for leave to appeal in circumstances where no irregularity in the issue of judgment was involved.

The appellants were represented on appeal by Counsel who were assigned under the Legal Aid System in force in Jamaica which Scheme provided a fee for advice to the convicted person as to whether he has any ground for an application for leave to appeal to Her Majesty in Council and for the drafting of all the necessary documents where the convicted person appeals or applies for leave to appeal. True the fee involved bore no true relationship to the economic cost of the service to be performed but it was the same fee

offered for appearance before this Court. As the affidavit of Ms. O'Connor shows, the Jamaica Council for Human Rights acts as a charitable agency for receiving, processing and forwarding applications for leave to appeal in murder cases to London solicitors for filing at the Privy Council. One step in that procedure is the service of the intended petition upon the Clerk to the Jamaican Privy Council, the Registrar of the Court of Appeal, the Ministry of Justice and the Director of Public Prosecutions. This procedure is obviously necessary to alert all these functionaries that the condemned person intends to appeal or apply for leave to appeal to Her Majesty in Council.

It must also be recalled that a provision is made in Section 35 of the Judicature (Appellate Jurisdiction) Act for this Court to grant leave to Her Majesty in Council. Such an application must be made within twenty-one days after the judgment of the Court and consequently cannot always depend upon the reasons contained in a written judgment. No application for leave to appeal to Her Majesty in Council was ever made by the appellants to this Court.

In my view the appellants did not suffer any prejudice in the presentation and prosecution of their appeal to Her Majesty in Council by reason of the failure of this Court to deliver the reasons for judgment over the period December 5, 1980 to September 24, 1984. Neither appellant showed a tittle of interest in petitioning Her Majesty in Council during this time and when they did arouse themselves to so petition they acted with such lethargy as to indicate that this procedure was given lowest priority in their quest to stay alive. I find that there was no breach of Section 20(1) of the Constitution in that the forty-five month delay did not amount to a denial of the right to a fair hearing within a reasonable time as required by Section 20(1) of the Constitution.

ISSUE II

INHUMAN AND DEGRADING TREATMENT

Dr. Barnett submitted that capital punishment is authorised by law to the extent only that it involves the infliction of death but it is not authorised where physical or psychological suffering over and above what is inherent in the very infliction of death is added. He relied upon dicta from Furman v. Georgie 408 U.S., 238 [1972] 33 L. Ed. 2d. 346 and Louisiana v. Resweber 329 U.S., 459, 67 Sup. Ct. 374, 91 L. Ed. 422 [1947]; People v. Anderson [1972] 493 p. 2d. 880; 100 Cal. Rept. 192. Long delay in the execution of the sentence, he said, amounts to that "something more" and renders execution after such delay to be cruel and inhuman treatment.

Delay was considered by the Privy Council in three fairly recent cases, deFreitas v. Benny [1975] 3 W.L.R. 388; Abbott v. Attorney General for Trinidad and Tobago [1979] 1 W.L.R. 1342; Riley et al v. Attorney General of Jamaica et al [1982] 3 All E.R. 469.

deFreitas was convicted of murder on August 21, 1972. His appeal was dismissed on April 17, 1973. His petition to the Privy Council was dismissed on December 12, 1973. deFreitas started fresh proceedings seeking relief for contravention of certain of his fundamental rights and freedoms. That case was dismissed at the trial and appellate levels. Next came a second petition to Her Majesty in Council, complaining, inter alia, of the delay in the execution of the death sentence. It was argued that if the death sentence was per se constitutional, the average lapse of time between sentence and execution had become considerably greater since the commencement of the Trinidad and Tobago Constitution and this had the effect of making it unconstitutional to carry out the death sentence. This argument was rejected. The only delay which was attributable to the government was a period of eight days; the remaining periods were due to the appellant's attempts to have his conviction or sentence set aside.

The delay attributable to the government in Abbott's case was eight months. There was delay of five years between conviction and the hearing of the petition in the Privy Council due wholly to the action of the appellant in challenging the decision of the Court.

Lord Diplock (who had earlier delivered the opinion of the Board in DeFreitas v. Benny) said:

> "In their Lordships' view the proposition that, in the circumstances of the instant case, the fact that seven or eight months elapsed before the applicant's petition for reprieve was finally disposed of by the President made his execution at any time thereafter unlawful, is quite untenable. Their Lordships accept that it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not by 'due process of law'; but since nothing like this arises in the instant case, this question is one which their Lordships prefer to leave open."

Riley's case was argued by leading Counsel from Jamaica (R.N.A. Henriques Q.C. and Dennis Daly). All the leading cases were cited before the Privy Council. There had been a delay caused by the appeal process and a further delay from April 1976 to early 1979 during a period of acute controversy in the Jamaican Parliament over the retention or otherwise of capital punishment. The petition was dismissed. Lord Bridge of Harwich who delivered the majority opinion said:

> "... since the legality of a delayed execution by hanging of a sentence of death lawfully imposed under s. 3(1) of the Offences Against the Person Act could never have been questioned before independence, their Lordships entertain no doubt that it satisfies condition (c). Accordingly, whatever the reasons for, or length of, delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of s. 17(1) [of the Constitution]."

The door which the Privy Council left open in Abbott's case was shut firmly in Riley. Here was a case where the delay was measured in years, there was no pending appeal and Parliament was actively considering whether or not to abolish capital punishment. Furthermore two of their Lordships were persuaded by the appellants to dissent from the majority judgment and in a vigorous dissent had this to say:

> "Thus in Abbott's case the Judicial Committee recognized that inordinate delay might mean that the taking of the condemned man's life would not be 'by due process of law'. Significantly they commented that a case of delay so prolonged as to arouse a reasonable belief that he might be spared was 'without precedent'. Abbott's case, therefore, confirms us in the view not only that the period and circumstances of delay may be such as to put the taking of a man's life outside the due process of law (in other words, it is no longer justified by law) but also that the acknowledged proper practice of the state, so as to ensure due process of law, is not to allow execution after prolonged delay."

But the majority of the Board was not moved by this attitude of Lords Scarman and Brightman, and firmly and definitely held that delay for whatever reason in the execution of a sentence of death can never amount to a contavention of Section 17 of the Constitution which provides that:

> "17(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorise the infliction of any description of punishment which was lawful in Jamaica before the appointed day."

Dr. Barnett urged us to say that the decision of the Privy Council in Riley was per incuriam or alternatively that the facts of the instant case are such that they can be distinguished from Riley's case. He submitted that the inarticulate premise of the majority opinion in Riley is that where a statute authorises an act to be done, as in this case the infliction of death, it means that that statute authorises that act to be done in all circumstances and in any manner. With this proposition, I dissociate myself completely. The majority of the Board in Riley were highly conscious of the powers of the Governor-General in Privy Council under Section 90 of the Constitution and were not purporting to decide whether or not the sentence of death should be executed. They said:

> "Their Lordships fully accept that long delay in the execution of a death sentence especially delay for which the condemned man is himself in no way responsible, must be an important factor to be taken into account in deciding whether to exercise the prerogative of mercy."

The question before the Board in Riley was whether delay could amount to a contravention of Section 17 of the Constitution. That is the identical question raised in this appeal. It has already been decided in Eaton Baker and Another v. The Queen [1975] 13 J.L.R. 169, that the Jamaican Court is not empowered to treat a decision of the Privy Council as per incuriam. Lord Diplock said:

> "Although the Judicial Committee is not itself strictly bound by the ratio decidendi of its own previous decisions, courts in Jamaica are bound as a general rule to follow every part of the ratio decidendi of a decision of this Board in an appeal from Jamaica that bears the authority of the Board itself."

Later, Lord Diplock added:

> "Strictly speaking the per incuriam rule as such, while it justifies a court which is bound by precedent in refusing to follow one of its own previous decisions (Young v. Bristol Aeroplane Co.) does not apply to decisions of courts of appellate jurisdiction superior to that of the court in which the rule is sought to be invoked (Broome v. Cassell & Co.). To permit this use of the per incuriam rule would open the door to disregard of precedent by the court of inferior jurisdiction by the simple device of holding that decisions of the superior courts with which it disagreed must have been given per incuriam."

It seems to me therefore that the interesting arguments raised by Dr. Barnett on the principles of constitutional interpretation are not relevant to the facts of the instant case. In so far as delay simpliciter is concerned I feel myself bound by Riley's case.

Dr. Barnett argued that the repeated issuance of death warrants and their late withdrawals constituted inhuman treatment within the meaning of Section 17(1) of the Constitution. The first of the three death warrants was issued on February 13, 1987. At that time the applications for special leave to appeal to Her Majesty in Council had already been dismissed and the convictions and sentences were therefore affirmed.

Dr. Barnett did not, and could not, argue that the recommendations of the Inter-American Commission on Human Rights and the Human Rights Committee of the United Nations were binding upon the Governor-General in Privy Council. At each stage of their deliberations the Privy Council would have been bound to give the fullest consideration to the views and recommendations of these prestigious international Human Rights Organizations before tendering their advice to the Governor-General. The second set of death warrants was only issued after the

Inter-American Commission had rendered its recommendation and finally the death warrants of March 7, 1991 were issued nearly two years after the Human Rights Committee of the United Nations had handed down their recommendation. The appellants petitioned for the suspension or stay of the death warrants and each petition was granted by the Governor-General to enable them to continue their applications to the international Human Rights bodies. There was no suggestion that the death warrants were issued with the intention of torturing the appellants and indeed no credible evidence was led that the appellants were only notified of the stay of execution at the last possible moment. The issue of the death warrants was in the ordinary course of seeking to enforce the sentence of death, a process which enabled the appellants to make representations for a stay of execution.

ISSUE III

JUSTICIABILITY AND VALIDITY OF THE DECISION OF THE GOVERNOR-GENERAL IN PRIVY COUNCIL

Under the Constitution of Jamaica a Privy Council is established which consists of the Governor-General and six members and its powers, privileges and duties are enumerated in the Constitution. In Section 90 the Governor-General, acting on the recommendation of the Privy Council, of which he is President, is empowered in Her Majesty's name and on Her Majesty's behalf to substitute a less severe form of punishment for that imposed on any person for such an offence. Jamaica is a Parliamentary democracy whose Parliament consists of Her Majesty, a Senate and a House of Representatives. The Governor-General is appointed by Her Majesty, holds office during Her Majesty's pleasure and is Her Majesty's representative in Jamaica. (Sections 34 and 27 of the Constitution).

In order to exercise the prerogative of mercy in case of a person who has been sentenced to death, Section 91 provides that:

> "(1) ... the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the Provisions of section 90 of this Constitution.
>
> (2) The power of requiring information conferred on the Governor-General by sub-section (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.

It was contended on behalf of the appellants that having regard to the constitutional scheme adopted for Jamaica the treaty making power of the State, the power to grant pardons, reprieve or commute sentences form part of the executive power and are subject to the Constitution. Further, that with respect to pardon and commutation of sentences, the constitutional provisions cover the entire field and no residue of prerogative power remains. The Constitution, it was said, specifically regulates by whom and in what manner the power should be exercised and consequently the power has become a part of the constitutional scheme and its exercise must conform with the principles of the Constitution and is reviewable by the Courts. It was submitted that, from these contentions, in exercising the power to commute sentences, the Governor-General in Privy Council was bound to (a) conform with the Wednesbury principles of reasonableness; (b) give due weight to all relevant considerations; (c) conform to the rules of natural justice.

For the respondents Mr. Campbell in relying upon the decisions of the Privy Council and of the House of Lords, to be referred to below, submitted that on principle and authority, the exercise by the Governor-General of the prerogative of mercy is not reviewable by the Court because it is an aspect of the prerogative power of the Crown the nature of which does not make it amenable to determination by the Court.

Lord Roskill commented upon the power of the Court to review the prerogative of mercy in England in Council of the Civil Service Unions vs. Minister for the Civil Service [1985] 1 A.C. 374 at 418. He said:

> "Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of Ministers as well as others are not, I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process."

Counsel for both sides had conceded as much in argument. Blom-Cooper Q.C. is reported as saying:

> "In general terms, all prerogative powers are reviewable. Some may not be; the nature of the prerogative determines whether they are or not."

and Robert Alexander Q.C. added:

> "As to specific prerogative (of mercy, etc.; there are numerous areas), where reviewability has been claimed, it has been rejected."

deFreitas v. Benny (supra) was decided on a consideration of the Constitution of Trinidad and Tobago as it stood in 1962. Under the provisions of that Constitution the prerogative of mercy was exercised by the Governor-General in Her Majesty's name and on Her Majesty's behalf. The Governor-General exercised this power on the advice of a Minister of Government who was obliged to consult an Advisory Committee before tendering his advice to the Governor-General. Their Lordships in the Privy Council held that the Governor-General's functions were purely discretionary and were not in any sense quasi-judicial. Lord Diplock after reviewing the relevant constitutional provisions said:

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

There is a marked similarity between the 1962 provisions in the Trinidad and Tobago Constitution referred to above with those in Sections 90 and 91 of the Jamaican Constitution. In the Jamaican situation the Governor-General was made President of the Privy Council but he was not given a vote. Lord Diplock equated the position in Trinidad and Tobago with that which exists in England when he said:

> "Section 70(1) of the Constitution makes it clear that the prerogative of mercy in Trinidad and Tobago is of the same legal nature as the royal prerogative of mercy in England. It is exercised by the Governor-General but 'in Her Majesty's name and on Her Majesty's behalf.' By section 70(2) the Governor-General is required to exercise this prerogative on the advice of a Minister designated by him acting in accordance with the advice of the Prime Minister. This provision does no more than spell out a similar relationship between the designated Minister and the Governor-General acting on behalf of Her Majesty to that which exists between the Home Secretary and Her Majesty in England under an unwritten convention of the British Constitution."

In their dissenting opinion in Riley's case, Lords Scarman and Brightman seem to have accepted the position of the Privy Council in de Freitas v. Benny that under the Jamaican Constitution the prerogative of mercy was non justiciable.

They said:

> "The challenge is to the duty of the Governor-General in the exercise of the powers conferred on him by ss. 90 and 91 of the Constitution. Though they derive as a matter of history from the Crown's prerogative of mercy, they are now statutory in character. They are part of the written Constitution. Significantly the sections appear in a Chapter entitled 'Executive Powers'. Their effect is to require the Governor-General in every capital case (save in emergency) to seek the advice of the Privy Council of Jamacia so that he may be advised as to the exercise of his power to delay or commute the sentence: and he is obliged to act on the recommendation of the Privy Council. It is to be noted that this is an executive power subject to the sort of safeguard, ie the confidential advice of a distinguished independent body, which is a familiar feature in administrative and public law. The condemned man, though the power exists for his protection as well as for the protection of the public interest, has no right to be heard in the deliberations of the Privy Council and the Governor-General (who shall, so far as practicable, attend and preside at all its meetings: see s. 87 of the Constitution). In short, the exercise of this executive power is a classic illustration of an administrative situation in which the individual affected has a right to expect the lawful exercise of the power but no legal remedy: that is to say, no legal remedy unless the Constitution itself provides a remedy."

I understand the passage quoted above to be indicating that unless one can find a remedy conferred by the Constitution, the exercise of the prerogative of mercy in Jamaica is a non-justiciable issue. As I said earlier the majority opinion in Riley was that the Privy Council would be usurping the power of the Governor-General in Privy Council if they attempted to determine the manner in which the prerogative of mercy ought to be exercised. The clear implication is that that issue is not a justiciable one.

It seems to me that in relation to the question of the justiciability of the exercise of the prerogative of mercy by the Governor-General in Privy Council under Sections 90 and 91 of the Constitution, the matter has been judicially settled and without disrespect to the wide-ranging arguments of Dr. Barnett and the cases relied upon by him, I need only say that they have no relevance to the prerogative of mercy.

I cannot accept Dr. Barnett's submissions to the effect that the condemned man is entitled to a hearing within a reasonable time of his application for clemency or commutation of his sentence, and that the Governor-General in Privy Council is obliged to indicate to him the basis on which the petition for clemency was refused. Mercy begins where legal rights end. If Dr. Barnett was correct then a new cycle of appeals could commence whenever a decision is arrived at in the Privy Council and there could be no end to the litigation until the Governor-General in Privy Council bows to the wishes of the condemned man and exercises the prerogative of mercy in his favour or when the Court in defiance of the provisions of the Constitution directs the Governor-General in Privy Council how to exercise the prerogative of mercy.

Essentially for the reasons given in the Court below and the gloss thereon provided in this judgment, I am of the opinion that the appeals should be dismissed.

FORTE, J.A.

I have had the opportunity of reading in draft the judgment of Rowe, P and though agreeing with the conclusions and reasons therein, I nevertheless make some comments of my own.

The appellants protesting the long duration of time between their conviction for murder in 1979 and the execution of the sentence, have, in seeking these orders, relied on several sections of the Constitution, their rights under which, they maintain have been breached.

In summary, and in keeping with the design of the submissions made before us, counsel for the appellants argued the following issues:

1. That they had been denied a fair hearing within a reasonable time as was their right by virtue of section 20 (1) of the Constitution.

2. That the infliction of the death penalty on them some twelve (12) years after it was pronounced, constituted, in the circumstances of their case inhuman and degrading treatment contrary to section 17 (1) of the Constitution; and

3. The decision of the Governor-General in Privy Council not to commute the death penalty was in their case unreasonable, arbitrary and in breach of the principles of natural justice and the Constitution.

1. FAIR HEARING WITHIN A REASONABLE TIME

Section 20 (1) of the Constitution states as follows:

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

On the face, the words of this section appear to be concerned with a trial within a reasonable time rather than post-trial occurrences, the latter of which, is relevant to the instant case.

In the chronology of events, for which I express gratitude to Wolfe, J it is revealed that both appellants were convicted on the 15th January, 1979 from which conviction they appealed. The appeal was heard and determined against the appellants on the 5th December, 1980. However, the written reasons for the judgment of the Court, was not presented until the 24th September, 1984 or three years and nine months subsequently. It appears that the decision having been given at the end of the hearing, the record thereafter found itself among "matters concluded", and faded from the attention of those whose responsibility included the writing of the judgment. The appellants cannot therefore complain, that at the Court of Appeal, insofar as the hearing was concerned, they did not receive a fair-hearing within a reasonable time. At the end of the appeal their fate was conclusively determined. The gravamen of the complaint therefore concerns the delay of three years, and nine months in which they waited to be informed as to the reasons for the failure of their appeal to the Court of Appeal. It should be noted however, that the Judicial Committee of the Privy Council were well aware of the long delay. They expressed that they were disquieted by the fact that in a case involving a capital sentence there should be such a long delay between the date of the hearing and the date of the reasons. Nevertheless, they found no merit in the petition for leave to appeal, and consequently advised Her Majesty that the petition ought to be dismissed.

Against this background, the arguments of the appellants must be considered. Dr. Barnett in pursuing this argument relied very strongly on the application of the principles adopted in **Bell v. Director of Public Prosecutions** [1985] 32 W.I.R. 317 which were borrowed from those enunciated by Powell, J in the

American case of **Barker v. Wingo,** Warden 407 U.S. 514 [1972]. The four factors which Powell, J in **Barker v. Wingo** (supra) thought the Court should assess in determining whether a particular defendant has been deprived of his right to a speedy trial were as follows:

1. Length of delay;
2. The reasons given by the prosecution to justify the delay;
3. The responsibility of the accused for asserting his rights;
4. Prejudice to the accused.

Dr. Barnett, both before us and in the Court below sought support from those principles, maintaining that all four were applicable to the circumstances of this case.

The learned judges below, however, all found that in the circumstances of this case, the length of the delay was not presumptively prejudicial, which as a result did not necessitate an examination of the other factors. They nevertheless undertook such an examination, and came to conclusions adverse to the appellants.

The significance of the prejudicial effect of the delay was explained by Lord Templeman in **Bell v. Director of Public Prosecutions** (supra) at page 325 as extracted from the dicta of Powell, J in **Barker v. Wingo** (supra). In dealing with (1) length of delay, Powell, J said:

> "Until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an enquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."

The first examination therefore must be to determine whether in the circumstances of a particular case, the length of the delay is such that prejudice to the accused, can be presumed. When this stage is reached, other factors are looked at that is to say, the reasons given by the prosecution for the delay, whether the accused has done anything to "force" the prosecution to bring the case on for trial, and most importantly, any actual prejudice that may have been done to him such as the unavailability of his witnesses due to the delay. Inherent in all these aspects of the examination, is an attempt to determine whether an accused, can, in the future receive a fair hearing in a reasonable time given the existing circumstances. In the instant case the trial, and both stages of appeal having all been completed, the only determination that can be made is whether the appellants received a fair-hearing within a reasonable time. The question of whether the length of delay is presumptively prejudicial is no longer relevant, and the real question at this stage is whether because of the delay there was actual prejudice to the appellants, as any presumption of prejudice would be rebutted by a demonstration that there was in fact no prejudice to the appellants.

Was there any prejudice to the appellants?

Dr. Barnett advanced two submissions in this regard?

1. Because of the long delay, he maintained, the appellants could not file grounds of appeal to support their position for leave to appeal, as no reasons for the dismissal in the Court of Appeal had been given.

2. He relied strongly on one element of the fourth factor - that factor being in the words of Powell, J in **Barker v. Wingo** (supra) as referred to by Lord Templeman in **Bell v. Director of Public Prosecutions** (supra) at page 326:

'(4) Prejudice to the accused

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last ..." [Emphasis added]

It is to (ii) that Dr. Barnett directed his argument, maintaining that the long delay in waiting on the reasons, caused great anxiety and concern to the appellants. Counsel of course could only advance arguments in relation to (ii) as (i) and (iii) would be irrelevant in the circumstances of this case. In my view, however, his contention in relation to (ii) is not supported by the conduct of the appellants. It has been agreed on both sides that the imposition of the death penalty on anyone must per se cause great trauma, and anxiety to the person on whom it has been imposed. Anxiety and concern are indeed inherent in the circumstances. In any event the appellants in this case demonstrated no anxiety and concern in relation to their desire to proceed with an appeal to the Judicial Committee of the Privy Council. Indeed, while awaiting the reasons, rather than pursuing process in an effort to hasten the delivery of the reasons, the appellant Pratt was occupied with pursuing his petition to the Inter-American Commission on Human Rights. In fact although they received the reasons in September 1984, they did not lodge notice of intention to appeal to the Judicial Committee of the Privy Council until the 13th March, 1986. There is no evidence disclosed in the record, that the appellants suffered any anxiety which was directly attributable to the failure of the Court of Appeal to deliver its reasons in a shorter time, and consequently

no weight can be given to Dr. Barnett's contention in this regard.

In so far as the filing of grounds is concerned, assuming that Dr. Barnett's contention, with which I do not agree for the reasons expressed in the judgment of Rowe, P that counsel representing a petitioner in a petition to Her Majesty in Privy Council cannot competently do so without knowledge of this Court's reasons for dismissing an application, what prejudice has the appellants shown that has accrued to them as a result of the delay? The decision of this Court was given on December 5, 1980. On 12th June, 1981, the appellants petitioned the Inter-American Commission on Human Rights and though the reasons were delivered on the 24th September, 1984 it was not until after their petition to the Inter-American Human Rights Commission was rejected on October 3, 1984 that they filed notice of intention to appeal to Her Majesty in Privy Council i.e. in March 1986, and this after the appellant Pratt had petitioned to the United Nations Human Rights Commission in January 1986. Clearly then, the appellants demonstrated no anxiety to pursue their right to petition Her Majesty in Privy Council. In my view the record, demonstrates, that rather than suffering any prejudice, the appellants used their legal rights as they are entitled to do, to defer the day of reckoning in the hope that they would be able to extend their lives, while the legal processes continued.

In any event the petition was heard in the Privy Council, and at that time no complaint was apparently made in relation to any alleged breach of the appellants' constitutional right under section 20 of the Constitution. As already indicated, the petitions were heard and dismissed, with the learned Law Lords per Lord Templeman cognizant of the long delay in the handing down of the reasons for the judgment of the Court.

The appellants have therefore exhausted all their appellate rights, during the course of which they made no complaint of any prejudice which the delay of 3 years and 9 months could have caused.

In conclusion, and for the reasons heretofore stated, no evidence exists upon which it could be correctly concluded that the appellants' constitutional right to "a fair hearing within a reasonable time" has been breached.

2. IS DELAY IN CARRYING OUT THE SENTENCE OF DEATH INHUMAN AND DEGRADING PUNISHMENT OR TREATMENT CONTRARY TO SECTION 17 (1) OF THE CONSTITUTION?

Section 17 (1) of the Constitution states -

> "17 (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

The contention made on behalf of the appellants is that in excess of twelve years having passed, since their convictions and sentence of death, and given certain circumstances, which will be outlined later, that to execute the death sentence upon them at this time, would amount to inhuman and degrading treatment by virtue of section 17 (1).

In dealing with the very question in so far as it relates to long delay in carrying out the death sentence Lord Bridge of Harwich in delivering the speech of the majority of the Board of the Privy Council in **Riley and others v. Attorney General of Jamaica** and another [1982] 3 All E.R. 469 at 472 answered it thus:

> "In Jamaica sentence of death is the mandatory sentence for murder under s 3(1) of the Offences against the Person Act which has not been amended in any respect material to the issue under consideration since its enactment in 1864. The manner of execution of the sentence authorised by law is by hanging, and the passing of the sentence also provides lawful authority for the detention of the condemned man in prison until such time as the sentence is executed.
> Quite apart from s 17 of the Constitution the continuing constitutional validity of the death sentence is put beyond all doubt

"by the provision of s 14(1)"

> 'No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.'

The question, therefore, is whether the delayed execution of a sentence of death by hanging, assuming it could otherwise be described as inhuman or degrading punishment or other treatment, a question on which their Lordships need express no opinion, can escape the unambiguous prohibition imposed by the words in s 17(2) emphasised as follows:

> 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day'."

It was then concluded that the death penalty being a penalty 'authorised' by law, and which was lawful in Jamaica immediately before the appointed day, could not therefore be in breach of section 17 (1).

Lord Bridge thereafter answered the specific question in the negative in the following terms at page 473:

> "But since the legality of a delayed execution by hanging of a sentence of death lawfully imposed under s 3(1) of the Offences against the Person Act could never have been questioned before independence, their Lordships entertain no doubt that it satisfies condition (c). Accordingly, **whatever the reasons** for, or length of, delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of s 17(1)" [Emphasis added]

In my view this dicta, which this Court is bound to follow, really determines this issue against the appellants.

Dr. Barnett, however, contends that for two reasons the decision of the Privy Council in **Riley's** case ought not to bind the Court, in the circumstances of the instant case.

1. That in the instant case, in addition to the long delay there were other circumstances which distinguish the facts from those in the case of **Riley** (supra).

2. That the majority in **Riley's** case (supra) ignored propositions enunciated in the case of **Abbott v. Attorney General of Trinidad & Tobago** [1979] 1 W.L.R. 1342, and other cases and applied strict principles of interpretation of the Constitution contrary to the case of **Minister of Home Affairs & Fisher** [1979] 1 All E.R. 21 [1979] 2 W.L.R. 889 and to that extent the decision is per incuriam and should not be followed in the instant case.

In advancing this argument, Dr. Barnett submitted that:

> "The evidence is clear that by reason of long delays, arising from official lapses and not from culpable neglect or time-wasting tactics on the part of the Appellants, the repeated issue of death warrants, the late communication of stays and the tantalizing insinuation of hope and its withdrawal caused the Appellants' acute suffering and extreme psychological distress, thus altering the nature of the treatment contemplated by the law for persons under sentence of death and rendered the imposition of the death penalty in those circumstances, cruel inhuman and unconstitutional."

In summary, the submission contends that not only was there a long delay, attributable, not to the appellants, but to the State, but the issue of death warrants during the period of appeals to the Inter-American Human Rights Commission and the United Nations Human Rights Committee and withdrawals of same, together amounted to inhuman and degrading treatment. The appellants emphasized that their complaint addressed not the penalty but the

treatment and maintained that the majority in the **Riley** case (supra) did not consider whether lengthy delay would amount to inhuman and degrading 'treatment'.

To deal firstly with whether the majority judgment in the **Riley** case (supra), considered whether 'long delay' would fall within the words "or other treatment", it is necessary only to refer again to the speech of Lord Bridge where he outlined the subject matter for decision in that case. He said:

> "... The present appeals to Her Majesty in Council are brought pursuant to leave granted by the Court of Appeal of Jamaica on 25 September 1980.
> The appellants contend that to execute the sentences of death passed on them in 1975 and 1976 would now be, and indeed would have been at any time after the issue of the warrants in 1979, by reason both of the length and of the circumstances of the delay between sentence and execution, inhuman or degrading punishment or other treatment."
> [Emphasis added]

And in concluding he stated:

> "Accordingly, whatever the reasons, for, or length of, delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of s 17(1) (Emphasis mine)

As it is clear then, that long delay per se in executing the sentence of death lawfully imposed, cannot amount to a contravention of section 17 (1), what are the other circumstances which the appellants maintain distinguish this case from that of **Riley.**

They contend:

1. That the delay was due not to their own actions but to the lapse in responsibility by the State. This again is answered by Lord Bridge in **Riley,** where he indicates with great clarity that the length of delay for whatever reasons cannot be in breach of section 17 (1).

Nevertheless, the facts disclose that the only laches for which the State could be held responsible, was in the tardiness of the Court of Appeal to give reasons for its decision for dismissing the appeal i.e. 3 years and 9 months. The complaint of the appellants in relation to this period loses any real significance as during that period the appellant Pratt was pursuing his petition to the Inter-American Human Rights Commission the result of which would necessarily have affected the appellant Morgan. Significantly, Pratt had first petitioned that body on June 12, 1981, approximately six months after the dismissal of their appeals. At the time when this Court eventually handed down its reasons on September 24, 1984, the petition before this International body was still pending and was not decided upon until October of 1984. The Human Rights Commission apparently took a period of 3 years and 4 months to make their determination, a period during which the appellants were quite willing to wait, for they did not proceed with their appeals to Her Majesty in Privy Council until March of 1986, i.e. 18 months after the reasons for judgment had been given, approximately the same (i.e. 18 months) after the appeal to the Inter-American Human Rights Commission had been rejected and in the case of the appellant Pratt approximately three months after he had appealed to the United Nations Human Rights Committee on January 28, 1986; the appellant Morgan not taking that course until March 1987. Soon after, on the 17th July, 1986, the Judicial Committee of the Privy Council dismissed their petitions but the United Nations Human Rights Committee, on the 21st July, 1986 (a few days later) requested the Government of Jamaica to issue a stay of execution of any death warrant, and at the same time requested further information which was supplied on November 18, 1986 approximately 4 months later. Up until then, no warrant had been issued for the execution of the penalty lawfully imposed by the Court, and in my view, certainly during this period the

appellants were pursuing their legal remedies and it is more than strange that they now complain for having been allowed the prolongation of their lives, in order to pursue those rights. But to this point in time it is only July 1986. What happened thereafter?

On the 13th February 1987, the first death warrant was issued. At this time, in the case of Morgan, there were no appeals or petitions pending, the Privy Council having dismissed his petition on July 17, 1986. It appears however that the Inter-American Human Rights Commission was reviewing its decision of the 3rd October 1984, for it later handed down a revised decision on the 9th July, 1987. Morgan nevertheless, the warrant of the 13th February 1987 having been stayed on the 21st February, 1987, then petitioned the United Nations Committee on the 12th March 1987. At the date of the issue of this warrant Pratt's case was under consideration apparently by both human rights bodies. In his affidavit, the appellant Pratt deposed that "after protests against the issue of the said warrant were made on my behalf, the Governor-General in Privy Council of Jamaica on the 23rd February, 1987 at about midday granted a stay of execution of the said warrant." The execution programmed to be carried out on the 24th February, 1987 was therefore stayed, as a result of representation made on the appellants' behalf, the reason for the acquiescence being clearly the pending consideration of their petitions by the International bodies. In so far as this prolonged the duration of time - the appellants cannot therefore be heard to complain.

On the 21st February, 1988 warrants were issued for the second time. This is approximately, one year after the issue of the first warrant, but still no decision had been received from the United Nations Committee. Execution was to take place on the 8th March, 1988, but again a stay was granted, no doubt, although not clear on the record, because the petition to the United Nations Committee was still under consideration. Once again the lives of the appellants were prolonged. Then on the 6th April, 1989 the United

Nations Committee handed down its decision.

The above summary indicates clearly that throughout the period from 1980 when their appeals were dismissed and 6th April, 1989, the appellants were pursuing legal representations with the purpose of preventing the execution of their sentences. In my view in so far as that period is concerned, it was the result of the actions of the appellants that created and lengthened the delay, the Government, at certain stages, demonstrating a desire to carry out the sentences imposed by the Court.

Dr. Barnett however also contends -

2. That the issue of the warrants at a time when the petitions of the appellants were being considered by the International bodies, and late communication of stays, amounted to a breach of section 17(1).

The repeated issue of warrants relates of course to the two occasions already referred to, on the 13th February 1987, and again on the 23rd February 1988, a third being the subject of this action. The late "communication of stays" related to one such allegation in respect of the warrant of the 13th February 1987, where it was contended by the appellants that having been taken to the death cell, and the stay having been granted on the 23rd February 1987, they were not so informed until the 24th February 1987, a mere 45 minutes before the execution was due to take place. The learned trial judges, however, preferred the evidence proffered by the Government that the information was given to the appellants on the 23rd February 1987, when they were then removed from the "death cells". This allegation is therefore of no relevance, but it is worthy of note that this was one of the points that led the United Nations Committee to conclude that the constitutional rights of the appellants were breached - that evidence not having been challenged before the Committee.
Dr. Barnett, however, contended that the issuing of these two warrants, and their withdrawals caused the appellants acute

suffering and extreme psychological distress, thus altering the nature of the treatment contemplated by the Law. The evidence of one witness i.e. Fr. Bryan Massie which sought to support the allegation of "suffering" went to nought when he admitted in cross-examination that his evidence in his affidavit that he had seen the appellants on the day of the 23rd February, 1987 when he alleged they had not been informed of the stay of execution, was not factual, as he was not at the prison on that day.

It appears to me that the appellants, cannot successfully maintain this argument, which on the one hand, puts blame and responsibility on the State for lengthening the time within which to execute the punishment of the Court, while they pursued their various petitions, and on the other "cry foul" when the State attempts to carry out that sentence. In my view the learned trial judges in the Court below were correct in holding that in the circumstances of the case, taking all the matters complained of into consideration, the issuing of the warrants were in accordance with the responsibility of the State to execute the sentence authorised by law and that the case of **Riley** is binding authority which cannot be effectively distinguished on the facts from the present case.

2A. INCONSISTENCY OF RILEY'S CASE WITH ESTABLISHED LINE OF AUTHORITY

The contention of Dr. Barnett is that the majority judgment in **Riley's** case ignored certain propositions in the case of **Abbott v. Attorney General of Trinidad and Tobago and Others** [1979] 1 W.L.R. 1342, and consequently is per incuriam. It is true that the learned Lords who were in the majority did not treat with this case in the speech delivered by Lord Bridge, but that the case was cited for their consideration is without doubt as it formed part of the reasoning in the speech of the minority.

The passage upon which Dr. Barnett relies in his submission in respect of the **Abbott** case (supra) appears in the speech of Lord Diplock who delivered the judgment of the Board and reads as follows:

> "Their Lordships accept that it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'; but since nothing like this arises in the instant case, this question is one which their Lordships prefer to leave open."
> [Emphasis added]

To begin with, the statement presupposes a situation where the period is prolonged without any reason existing therefor and consequently arousing in the condemned, "a reasonable belief" that his sentence would be commuted. In the instant case throughout the period, except for the period April 1989 to 21st February, 1991 (which will be dealt with later) there was always in process for the most part some proceeding initiated by the appellants. Different considerations would therefore by necessity apply. In any event, their Lordships, gave no definitive conclusion on the matter, and left it open for decision at a future date. In the **Riley** case, that day came, and the Board, answered by saying that delay for whatever reason, cannot be ground for holding that section 17 (1) was contravened.

2B. **Minister of Home Affairs v. Fisher** [1979] 1 All E.R. 21. Dr. Barnett, like the minority judgment in **Riley's** case contends that the majority failed to apply the liberal principles of interpretation, as was enunciated in the **Fisher** case, and instead applied "austere legalism" in its interpretation of section 17 of the Constitution.

I am not persuaded that the interpretation by the majority was the result of an approach, applying "austere legalism" and find that the conclusions therein are in keeping with my own views, and appear to be quite consistent with the principles laid down in the **Fisher** case for the interpretation of Constitutions. Lord Wilberforce in his speech explained what he meant by generous interpretation as follows:

> "... to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law."

In their interpretations, the majority did follow well settled principles already pronounced by their own Board in cases such as **Maharaj v. Attorney General of Trinidad and Tobago (No. 2)** [1978] 2 All E.R. 670; **Director of Public Prosecutions v. Nasralla** [1967] 2 All E.R. 161; **deFreitas v. Benny** [1976] A.C. 239, all of which dealt with the interpretation of West Indian Constitutions and which Lord Wilberforce in the **Fisher** case recognized to be of the same family as that of the **Constitution** of Bermuda with which he was dealing.

In summary, nothing in the arguments advanced on this issue persuaded me to the view that the principle laid down in the **Riley** case is not applicable to the instant case and consequently I would conclude that long delay in the execution of the death penalty imposed by lawful authority, in the circumstances of this case cannot amount to breach of the rights preserved under section 17 (1) of the Constitution. This issue in my view must therefore be decided against the appellants.

3. Was the decision of the Governor-General unreasonable, arbitrary and in breach of natural justice and the Constitution?

The gravamen of the submission in this regard concerns the contention that the exercise of the powers of the Governor-General under section 90 of the Constitution is justiciable, and consequently, the manner of the exercise of the powers can be challenged in the Courts, and be subject to the orders of the Court. The power under section 90, of course relates to the prerogative of mercy. It states:

> "90. (1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -
>
> (a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;
>
> (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
>
> (c) substitute a less severe form of punishment for that imposed on any person for such an offence; or
>
> (d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.
>
> (2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council."

The appellants contend that the power having been provided for in the Constitution, and in particular that part of the Constitution which deals specifically with "executive powers", and covering as it does, in so far as pardon and commutation are concerned, the entire field, no residue of prerogative power remaining,

the power has therefore become a part of the constitutional scheme and its exercise must therefore conform with the principles of the Constitution and consequently is reviewable in the Courts.

This argument is based on what Dr. Barnett described as "the new development in the law", where the exercise of prerogative powers is not automatically treated as outside the scope of judicial review but now depends on the nature of the subject matter. In this respect the appellants' contention is sound, and is indeed supported by the authorities. The issue which is for determination in the instant case, however, is whether the exercise of the prerogative of mercy is of such a nature, as to be subject to judicial review by the Courts.

In advancing these submissions Dr. Barnett cited in support inter alia **CCSU v. Minister for the Civil Service** [1984] 3 All E.R. 935. Dealing with the subject of the reviewability of the exercise of the royal prerogative Lord Scarman in delivering his speech in the House of Lords said:

> "... Like my noble and learned friend Lord Diplock, I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. ... Just as ancient restrictions in the law relating to the prerogative writs and orders have not prevented the courts from extending the requirement of natural justice, namely the duty to act fairly, so that it is required of a purely administrative act, so also has the modern law, a vivid sketch of which my noble and learned friend Lord Diplock has included in his speech, extended the range of judicial review in respect of the exercise of prerogative power. Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."
>
> [Emphasis supplied]

Lord Diplock (at page 950), was of the opinion that it mattered not whether the exercise of the prerogative derived its power from statute or from the common law. He recognized that there are still remaining a residue of the prerogative powers which derive power not from statute and stated thus:

> "Nevertheless, whatever label may be attached to them there have unquestionably survived into the present day a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent on any statutory authority but nevertheless have consequences on the private rights or legitimate expectations of other persons which would render the decision subject to judicial review if the power of the decision-maker to make them were statutory in origin. ... My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source it should for that reason only be immune from judicial review."

That Lord Diplock held the opinion that the exercise of the prerogative in certain cases, was not justiciable is demonstrated in the following passage of his speech:

> "The reason why the Minister for the Civil Service decided on 22 December 1983 to withdraw this benefit was in the interests of national security. National security is the responsibility of the executive government; what action is needed to protect its interests, is, as the cases cited by my noble and learned friend Lord Roskill establish and common-sense itself dictates, a matter on which those on whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."

Lord Roskill was also of the same view. In his speech, he uttered the following:

> "But I do not think that that right of challenge can be unqualified. It must, I think, depend on the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process."
> [Emphasis mine]

In my view the exercise of the royal prerogative of mercy, is a subject matter, the nature of which is such as not to be amenable to judicial review.

Lord Fraser of Tullybelton, in the **CCSU** case (supra) apparently accepting the submissions of counsel for the Minister recognized that in so far as prerogative powers are concerned there were two propositions:

> "(1) that the prerogative powers are discretionary, that is to say they may be exercised at the discretion of the sovereign (acting on advice in accordance with modern constitutional practice) and the way in which they are exercised is not open to review by the courts;
>
> (2) that an instruction given in the exercise of a delegated power conferred by the sovereign under the prerogative enjoys the same immunity from review as if it were itself a direct exercise of prerogative power."

Dealing with the first proposition Lord Fraser, examined some of the authorities, and then continued thus:

> "... As De Keyser's case shows, the courts will inquire into whether a particular prerogative power exists or not and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise. That is undoubtedly the position as laid down in the authorities to which I have briefly referred and it is plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts. ..."

However, having based his conclusion on the second of the propositions which was relevant to that case Lord Fraser preferred "to leave the question open until it arises in a case where a decision on it is necessary" and "assumed without deciding that the first proposition was correct and that all powers exercised directly under the prerogative are immune from challenge in the courts."

The powers exercised under section 90 (1) of the Constitution are powers which were, before Independence, exercised by a Governor, who was then the representative of Her Majesty and who exercised those powers on her behalf. On attaining independence, the Governor, was replaced by a Governor-General, who is appointed by Her Majesty and holds office during Her Majesty's pleasure. In actual fact in making the appointment Her Majesty acts on the recommendation of the Prime Minister who may consult with, but is not bound by the views of the Leader of the Opposition. The Governor-General is Her Majesty's representative in Jamaica. (See section 27 of the Constitution.) Section 90 is therefore an enshrinement in the Constitution of the common law powers that already existed before the attainment of independence. Indeed the very words of the section, make it abundantly clear that the Governor-General exercises those powers "in Her Majesty's name and on Her Majesty's behalf."

In my view, the exercise of the prerogative of mercy would fall within Lord Fraser's first proposition, as it is an exercise of a discretionary power by the Governor-General, acting on the advice of the Privy Council. The provisions of section 32 (4), which prohibits any enquiry as to whether the Governor-General, acted with the advice of the Privy Council is support for the fact that the very nature of the subject matter prohibits any enquiry into the manner in which it was exercised.

The provisions of section 90 do not create a legal right in condemned persons, to be beneficiaries of the power with which the Governor-General is thereby endowed. The power is discretionary and relates to a consideration of whether or not the circumstances of a particular case warrant the granting of mercy to the convicted. The words of Lord Diplock in **deFreitas v. Benny** [1975] 3 W.L.R. 388 supports this view. In dealing with the provisions of the Constitution of Trinidad and Tobago he stated at page 394:

> "... At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function. While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought might help him to make up his mind as to the advice that he would tender to the

> "sovereign in the particular case. But it never was the practice for the judge's report or any other information obtained by the Home Secretary to be disclosed to the condemned person or his legal representatives." [Emphasis added]

In Jamaica, by virtue of section 91 (1) of the Constitution in the case of persons sentenced to death, the Governor-General is required 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 he may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provision of section 90. He was never required to disclose any of this information to the condemned man nor his legal representatives, and though written representations would be considered, there was never any right for the condemned man or his legal representative to be heard. The procedure in Jamaica is in great similarity to the practice that existed in England when the death penalty was lawful, and so the words of Lord Diplock are applicable. The exercise of the prerogative of mercy is a purely discretionary act, designed to offer "mercy" in appropriate and deserving cases. It is a discretion reserved for the exercise of the Governor-General on the advice of the Privy Council, and in my view, not a matter that is amenable to judicial review. The dicta of Lord Bridge of Harwich, delivering the majority verdict in the **Riley** case (supra) also recognized that the Courts should not in any way usurp the Constitutional functions allocated to the Governor-General. In dealing with the question of delay between sentence and execution thereof, he stated:

> "Their Lordships fully accept that long delay in the execution of a death sentence, especially delay for which the condemned man is himself in no way responsible, must be an important factor to be taken into account in deciding whether to exercise the prerogative of mercy. But it is not for this Board to usurp the function allocated by s 90 of the Constitution to the Governor-General acting on the recommendation of the Privy Council in Jamaica."

In any event, accepting the criteria as laid down by Lord Diplock in the **CCSU** case (supra) by which an executive decision would qualify for judicial review, I would find that the exercise of the prerogative of mercy, quite apart from not being amenable to judicial review, would not in the circumstances of this case so qualify.

At page 949, of that case Lord Diplock said:

> "To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation' rather than a 'reasonable expectation', in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' man, would not necessarily have such consequences."

It is unarguable that the provision in (a) is in anyway applicable to the circumstances of this case, and no such argument was advanced. The appellants contend however that the provisions of (b) (ii) would apply, giving the right to judicial review, because the conduct of the Executive raised in the appellants a legitimate expectation that the discretion would be exercised in their favour.

In support of this, the appellants exhibited several newspaper reports which, in summary, disclosed that the Government was reviewing the whole question of the death penalty, and in the meantime no executions were taking place.

The appellants pointed specifically to the period 1989 to 1991, during which, their appeals and petitions had all been exhausted. During this period, according to the newspaper articles exhibited by the appellants, the Government in addition to reviewing capital punishment was giving specific attention to whether the sentences of some categories of prisoners should be commuted to life imprisonment.

Apart from demonstrating that the whole matter was under review, nothing was disclosed in these articles to show either directly or inferentially that the Executive had held out any assurance to the appellants that their death penalties would be commuted. In addition, however Dr. Barnett contended that Jamaica as a member of the international community has accepted relevant international treaty obligations relating to the death penalty, and also in respect to fundamental human rights and that with that background, the result of the petitions of the appellants to the Inter-American Human Rights Commission; and the United Nations Human Rights Committee i.e. recommendations for commutation of the sentences, the appellants had a legitimate expectation that the death penalties would be commuted.

The appellants in this regard relied on a statement allegedly made by the Secretary to the Governor-General that since Jamaica was a party to certain Human Rights Conventions, care had to be taken that there were no breaches of these conventions. The conduct of the Governor-General in issuing death warrants after the recommendations by the international human rights organizations

to the contrary, indicates that these recommendations had no effect on his decision. Treaty obligations are not enforceable unless there are statutory provisions to give them authority. There are no statutes which give any legal recognition to the obligations under the treaties upon which the appellants rely, and consequently the treaties have no domestic legal effect. But even so, the appellants in their affidavits quite apart from alleging that they were possessed of legitimate expectation, deposed that -

> "I and other persons awaiting execution were given cause to hope that our executions would not be carried out."

And again referring to a resolution adopted in the Senate to suspend capital punishment for 18 months swore -

> "As a result of the adoption of the resolution I was once led to believe and/or to hope that my execution would not be carried out and that a committee would be established to carry out such a study and assessment."

The above words show unequivocally that all the publications, statements etc to which the appellants alluded, did nothing more than give them some hope that at the end of the wait, while the Executive deliberated and the Committee worked to make recommendations re retention of the death penalty, and they pursued their petitions internationally, their lives would be spared. In my view the contention of the appellants that the circumstances of this case falls within (b) (ii) of the criteria laid down by Lord Diplock (supra) is untenable.

Having held then that the exercise of the prerogative of mercy under section 90 of the Constitution is not justiciable, there is no need to determine whether there was any "procedural impropriety" in its exercise, as is contended for by the appellants.

For the reasons stated herein, I would dismiss the appeals and affirm the judgment of the Court below.

GORDON, J.A.:

On 15th January, 1979 the appellants were convicted in the Home Circuit Court for murder committed on 16th October, 1977 and sentenced to suffer death in the manner authorised by law. Their applications for leave were heard on divers dates between 30th September, 1980 and 5th December, 1980 and refused. The Court of Appeal then promised to deliver written reasons for its decision.

By a letter dated 7th January, 1981 and signed by both appellants, the appellants asked the Registrar of the Court of Appeal to make available to their attorneys-at-law the necessary papers so that they may, whenever they wished to further "argument of appeal" to the Privy Council in England, be able so to do. On 30th January, 1981 the Registrar of the Court of Appeal replied thus:

> "I am in receipt of your recent correspondence, and have since spoken to your attorney-at-law, Mr. Eric Frater. Mr. Frater advised me that he is endeavouring to take your matter to the Privy Council in England.
>
> Enclosed please find two copies of Criminal Form 17".

Pratt petitioned the Inter-American Commission on Human Rights (The Commission) on 12th June, 1981 and on 17th February, 1983 The Commission requested of the State a copy of the proceedings. These were supplied on 15th July, 1983. The Commission, by note dated 14th October, 1983 repeated its request for notes of appeal, and criminal Form 17 detailing the results of the application for leave to appeal was forwarded on 6th March, 1984. By resolution dated 3rd October, 1984 The Commission found:

> "1. The information and documentation submitted to the Commission indicate that all domestic legal remedies, have been exhausted and none of the conditions of inadmissibility established in the American Convention on Human Rights were present, therefore, there exists no reason not to declare this case admissible;

"2. A study of the transcripts of the Home Circuit Court and the Court of Appeal as well as of the conduct of the trial of Earl Pratt and review of his case show that the rules of criminal procedure were observed and that the plaintiff received a fair trial;

3. That the plaintiff informed the Commission that he lost his appeal in December, 1980;

4. During his trials, Earl Pratt was assisted by defence counsel;

5. The documents submitted to the Commission show that the requirements of due process have been fulfilled."

"**RESOLVES:**

1. To declare that there exists no evidence of the alleged violations of the American Convention on Human Rights as claimed by the plaintiff;"

On 16th August, 1984 Pratt wrote to the Registrar of the Court of Appeal requesting the filing of the reasons for the refusal of their applications on 5th December, 1980. The letter was received by the Registrar on 16th September, 1984 and the reasons were handed down on 24th September, 1984.

On 13th March, 1986 Morgan lodged in the Court of Appeal a notice of intention to petition for special leave to appeal to the Judicial Committee of the Privy Council. This notice was dated 13th April, 1985. A similar notice dated 12th March, 1986 was lodged by Pratt in the Court of Appeal on 13th March, 1986. Prior to the filing of these notices, Pratt on 28th January, 1986 appealed to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights (U.N.H.R.C.).

On 17th July, 1986 the Judicial Committee of the Privy Council dismissed the applications for special leave to appeal. The U.N.C.H.R. requested a stay of execution of the death sentence against Pratt on 21st July, 1986 and sought clarification of the judicial remedies available to him. By submission dated 18th November, 1986 the Government supplied the information requested.

On 13th February, 1987 the first warrants advising execution on 24th February, 1987 were issued for the appellants. On 23rd February, 1987 execution of the warrants was stayed. On 12th March 1987 Morgan appealed to the U.N.H.R.C. and on 20th March, 1987 this Committee requested further information from the Jamaican Government. This was supplied on 10th June, 1987. On 9th July, 1987 the Commission reviewed its decision of October 3, 1984 (supra) and advised the Jamaican Government as follows:

> "Pleased be advised that the Inter-American Commission on Human Rights, at its 70th period of sessions, held in Washington, D.C., decided on June 30, 1987 that Messrs Pratt and Morgan suffered a denial of justice during the period 1980-1984 violative of Article 5 (2) of the American Convention on Human Rights. The Commission found that the fact that the Jamaican Court of Appeals issued its decision on December 5, 1980 but did not issue the reasons for that decision until four years later, September 24, 1984, was tantamount to cruel, inhuman and degrading treatment because during that four year delay the petitioners could not appeal to the Privy Council and had to suffer four years on death's row awaiting execution. ... requests that the execution of Messrs Pratt and Morgan be commuted for humanitarian reasons."
> [Emphasis added]

A second warrant was issued in respect of each applicant on 21st February, 1988 advising execution on 8th March, 1988. On 1st March, 1988 a stay of execution was granted. The U.N.H.R.C. handed down its views, with a recommendation for the commutation of the sentences, on 6th April, 1989. A third warrant was issued on 21st February, 1991 for each applicant to be executed on 7th March, 1991. The applicants filed for constitutional redress on 28th February, 1991 and a stay of execution was granted on 6th March, 1991.

The redress sought by each applicant was:

> "1. A Declaration that the APPLICANT has been denied the right to a fair hearing within a reasonable time as required under Section 20 (1) of the said Constitution, by reason of the delay in the completion of the judicial proceedings respecting his case.
>
> 2. A Declaration that the APPLICANT has been, and is being subjected to inhuman or degrading treatment in contravention of Section 17 (1) of the said Constitution ..."

The bases of these applications were (a) the delay occasioned by the failure of the Court of Appeal to give reasons promptly, (b) the issuing of death warrants during the pendency of proceedings before International Human Rights bodies (c) the purported late communication of a stay of execution granted in February 1987, (d) failure of the state to effectuate the recommendations as to commutation of sentences made by the International Human Rights bodies.

> "3. A Declaration that the APPLICANT will be subjected to inhuman or degrading punishment and treatment in contravention of Section 17 (1) if the sentence of death is carried out in the aforesaid circumstances leading up to and surrounding his planned execution.
>
> 4. An Injunction against the SECOND RESPONDENT restraining the execution of the APPLICANT pending the outcome of these proceedings."

The Constitutional Court (Wolfe, Patterson and Harrison, JJ.) heard submissions between 29th April, 1991 and 7th May, 1991 and on 14th June, 1991 unanimously dismissed the actions. On appeal the appellants sought the reliefs claimed in the court below including an order:

> "D. Declaring that the Governor-General in Privy Council is legally and/or constitutionally bound by the determination, recommendation and/or decision of the Inter-American Commission on Human Rights and the United Nations Human Rights Committee.
>
> E. Declaring that the refusal of the Governor-General in Privy Council to commute the sentences of death in the circumstances of the Plaintiff's case constitutes an unreasonable, arbitrary and/or invalid exercise of the constitutional power and is an unconstitutional denial of the Plaintiffs' right to a proper consideration of their case.
>
> F. Declaring that the sentences of death passed on the Plaintiffs be commuted to life imprisonment."

Dr. Barnett made submissions on behalf of both appellants. In the Constitutional Court the appellants' contentions were:

> "(i) A Death warrant was first issued on the 13th day of February, 1987 for the execution of the Plaintiffs on the 24th day of February, 1987 after a delay of approximately eight years and one month after the sentence of death was passed on the Plaintiffs on the 15th day of January, 1979, which delay included three years and nine months during which the Jamaican Court of Appeal failed to give written reasons as aforesaid;
>
> (ii) The said warrant was issued while appeals by the Plaintiffs were pending before the United Nations Human Rights Committee and after the said Committee had by decision dated July 21, 1986 requested the Government of Jamaica to stay the execution of the Plaintiffs pending the determination of their appeals to the said commission;

"(iii) The stay of the first warrant aforesaid, granted by the Governor-General of Jamaica on the 23rd day of February, 1987, was not communicated to the Plaintiffs until the 24th day of February, 1987 and only 45 minutes before the scheduled executions."

DELAY

Section 20 (1) of the Constitution requires that a person charged with a criminal offence shall be afforded a fair hearing within a reasonable time. The appellants contended that this provision was breached in that although their appeals were refused on 15th December, 1980 they were unable to present a petition to the Privy Council before 24th September, 1984. This delay was occasioned by the failure of the Court of Appeal to give reasons for their decision before that date. The Constitution, it was submitted, imposes an obligation on the organs of State to complete the judicial proceedings within a reasonable time. The State had a duty to justify institutional delay and the longer the delay, the more difficult it is to justify it. The judges of the Full Court erred, it was submitted, in the application of the principles in that:

"(a) they failed to appreciate that in a situation where the sentence of death was hanging over the head of the subject, any substantial delay was presumptively prejudicial; and

(b) the fourth factor [see **Barker v. Wingo**] was particularly important in these circumstances, namely, the lengthening, aggravation or intensifying of anxiety and mental distress.

Their Lordships acknowledged that delay of the nature being considered might be prejudicial but nevertheless restricted prejudice to effects which would be detrimental to the argument on appeal and did not assess the nature of the responsibility of the State Organ in relation to the gravity of the subject-matter. Although unable to find any justification for the delay, their Lordships treated this factor as inconsequential and confused it with the first factor related to impact on the actual hearing whereas on the basis of **Barker v. Wingo**, this should be treated as significant."

It was further submitted that the Full Court erred in law and on the facts in attributing responsibility for the delay on the appellants as within a very short time of the decision of the Court of Appeal, they made a request which could only be reasonably treated as a request for reasons for judgment.

The cases of **Barker v. Wingo** Warden 407 U.S. 514 [1972], **Bell v. D.P.P.** [1985] 32 W.I.R. 317, **R. v. Ackov** [1990] 74 D.L.R. (4th) 355, **Kakis v. Government of the Republic of Cyprus** [1978] 1 W.L.R. 779 and **Tryer v. U.K.** [1979] 2 E.H.R.R. 1 - are cases in which the delay complained of was pre-trial delay and it was held in these cases that the delay was prejudicial to the defendants. It affected their right to a fair hearing within a reasonable time and prejudiced their defence. These cases differ from the instant one in that the delay complained of is post-trial and after their appeals had been dismissed. There was no scope for suggesting that the prejudice which arose in the abovementioned cases existed in the instant case. Dicta from these cases were however relied on as supporting the submission that it is relevant to consider whether the delay caused personal distress or anxiety to the appellants.

Uncontroverted Facts

(1) The applications for leave to appeal were refused on 5th December, 1980 and the Court of Appeal did not deliver reasons for this refusal until 24th September, 1984.

(2) Pratt and Morgan knew they had a right to petition Her Majesty in Privy Council and they intimated that they contemplated doing so by letter to the Registrar of the Court of Appeal dated 7th January, 1981.

(3) (a) The Registrar replied by letter dated 30th January, 1981 that Mr. Eric Frater, attorney-at-law had been contacted and he advised he was endeavouring to take the matter to the Privy Council.

(b) The Registrar gave the appellants copies of Criminal Form 17 which contained particulars of the proceedings to date.

(4) Earl Pratt petitioned the Inter-American Commission on Human Rights on 12th June, 1981.

(5) Earl Pratt, on 16th September, 1984 by letter dated 16th August, 1984 requested reasons for judgment from the Court of Appeal.

(6) The Reasons were delivered in the Court of Appeal on 24th September, 1984.

(7) The Commission rejected the petition of Pratt on 3rd October, 1984.

(8) Pratt appealed to the United Nations Human Rights Committee on 28th January, 1986 (Morgan appealed on 12th March, 1987.)

(9) Notice of intention to petition for special leave to appeal to the Judicial Committee of the Privy Council was lodged in the Court of Appeal on 13th June, 1986, Pratt's notice was dated 12th June, 1986 - Morgan's notice was dated 13th April, 1985.

(10) Application for special leave to appeal to the Privy Council was dismissed on 17th July, 1986.

The chronicled facts show clearly that the appellants were aware of their right to petition the Judicial Committee of the Privy Council subsequent to the dismissal of their applications for leave to appeal. They intimated their desire so to do within five weeks of this right accruing. Pratt thereafter petitioned the Commission, Morgan did nothing. A prompt response was given to their request for the Court of Appeal's reasons for judgment. This was delivered on 24th September, 1984 yet neither appellant acted thereon promptly. Instead of pursuing this right of appeal by way of petition to the Privy Council, the appellant Pratt

petitioned the U.N.H.R.C. on 28th January, 1986. This was a period of six years after this latter right of appeal had accrued. When they both exercised this right on 13th March, 1986, a further two months had been added to this period.

There is no doubt that the appellants had the benefit of legal advice in their representations. This is intimated in the correspondence with the Registrar of the Court of Appeal. There was however, this delay of over six years and two months in the presentation of the petition to the Privy Council.

On the matter of delay, I endorse the observations of Wolfe, J.,:

> "It is patently clear that the Plaintiff Earl Pratt was not interested in asserting his right of appeal to the Judicial Committee of the Privy Council. He was using the delay to invoke the jurisdiction of Human Rights bodies such as the Inter-American Commission on Human Rights which he petitioned on June 12, 1981 and the United Nations Human Rights Committee which he petitioned on January 28, 1986. Further having received the Reasons for Judgment in 1984 the petition to the Privy Council was not filed until 1986. In any event both Plaintiffs have only raised the complaint about delay since February 28, 1991 after the issuing of the third warrant for execution. So after a period of eleven years and for the first time the Plaintiffs have complained that the delay have denied them the right to a fair hearing within a reasonable time."

Despite my endorsement however the question to be resolved remains: Can the delay by the Court of Appeal in delivering reasons for judgment be regarded as prejudicial or the denial of constitutional right to a fair hearing within a reasonable time? The delay by the Court of Appeal in delivering reasons for judgment appears to be inexcusable but did this by itself prevent the appellants from pursuing their right to petition Her Majesty in Privy Council? The answer to this seems to be in the procedure laid down for these petitions. The Judicial Committee Rules 1957 were repealed and

replaced by the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 which came into operation on 7th February, 1983. At the time when the appellants' right to petition arose, the repealed rules were extant. Rules 3 and 4 provide:

> "3. A Petition for special leave to appeal to Her Majesty in Council shall state succintly and clearly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise Her Majesty whether such leave ought to be granted and shall be signed by Counsel who attends at the hearing or by the party himself if he appears in person. The petition shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought.
>
> 4. The Petitioner shall lodge at least six copies of his Petition for special leave to appeal together with the Affidavit in support thereof prescribed by Rule 50 hereinafter contained, and also six copies of the Judgment from which leave to appeal is sought. ..."

Rule 1 defined judgment as including decree, order, sentence or decision of any court judge or judicial officer. This definition includes the Form 17 sent by the Registrar to the appellants under cover of her letter dated 30th January, 1981. Rule 11 required that when the appeal is admitted the record should be transmitted to the Registrar of the Privy Council promptly. The record should contain the reasons for judgment given by the tribunal from which the appeal is taken - Rule 16.

From these provisions in the rules which have not been affected by revision, it is patent that a petition may be commenced without there being a written judgment delivered in the case and only after the petition is admitted the reasons may be required to form part of the record. I find support for this view in section 10 of Chapter LXIX of the Judicial Committee Act 1844 which states:

> "It shall be lawful for the said judicial committee to make an order or orders on any court in any colony or foreign settlement, or foreign dominion of the crown, requiring the judge or judges of such court to transmit to the clerk of the Privy Council a copy of the notes of evidence in any cause tried before such court, and of the reasons given by the judge or judges for the judgment pronounced in any case brought by appeal or by writ of error before the said judicial committee."

Rule 16 of the 1982 rules which were in force when the petition was heard does indicate that "there shall be included in the record the reasons given by the judge, or any of the judges ...". The clear interpretation is that the reasons must be a part of the record after the petition has been admitted.

It follows from these provisions that the non-delivery of the reasons for judgment cannot be invoked as the cause of the failure of the appellants to pursue their right of appeal. If advised that the reasons were a prerequisite for the prosecution of their right of appeal then they could have requested it as they eventually did. If on request, it was not forthcoming, then this would have fortified their claim. On the contrary, it was promptly supplied on request and thereafter the appellants sat on their rights for a further eighteen months.

Lord Templeman in delivering the advice of the Board of the Privy Council on 17th July, 1985 said:

> "On 5th December, 1980, the Court of Appeal dismissed the petitioner's appeal against conviction and the sentence of death for murder and promised to put their reasons for so doing in writing. Those reasons were not delivered until three years and nine months later, namely on 24th September, 1984. <u>During the whole of that period the appellant had sentence of death hanging over him and, of course, no action could be taken on his behalf, or on behalf of the authorities, pending the possibility of an appeal to this Board which could only be considered when those reasons had been delivered.</u>

> "The result which we wish to draw to the attention of the appropriate authorities is that this man has had a sentence of death hanging over him ever since January, 1979, and the reason for the last three years and nine months of the delay was the delay of the Court of Appeal in giving their reasons for dismissing the appeal." [Emphasis added]

The Board had before it the petition inclusive of the record which contained the reasons. It appears from the transcript of the proceedings before the Board that there was no reference to the procedure by which petitions came to be heard and the provisions of the rules adverted to (supra) were not in the contemplation of the parties or the Board. The rules provide the procedure for the presentation of petitions. It is clear that the appellants were aware of their right but instead of pursuing the right of appeal to the Privy Council, the appellant Pratt sought the intervention of the Commission. The delay complained of was the result of the appellants' failure to act in pursuance of their rights.

INHUMAN OR DEGRADING PUNISHMENT OR OTHER TREATMENT

The appellants contended that in a proper interpretation of the Constitution, the delays and repeated issue of the death warrants, their withdrawal at a time when they had undergone the agony of impending execution constituted inhuman treatment. Dr. Barnett submitted in support of this contention that in issuing the warrants, contemplation should have been given to the Government's obligation under the treaty and to issue warrants when matters were pending before the international organs could only result in torture to the individual.

It must be borne in mind that the only bodies that could have given positive directions on sentence are the Court of Appeal and the Privy Council. They, by their finding, could have affected the result of the case and hence the sentence but they dismissed the appeals. The sentence of the trial court then stood to be

enforced. The only thing that the international bodies could have done they did; they recommended commutation of the sentences. Although Jamaica is a signatory to the convention we are not subject to its dictates because we have not incorporated the articles in our legislation. The recommendations therefore fall to be considered by the Governor-General in Privy Council in the exercise of the prerogative of mercy.

Capital punishment was in existence as a sentence prior to the promulgation of the Constitution. As a sentence, it was preserved by section 14 (1) of the Constitution. This being so, how should section 17 (1) be viewed? This section provides "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment." The proviso respects the death penalty as preserved by section 14 (1).

Public policy demands that execution of this penalty be delayed to allow for appeals and representations on behalf of the prisoners. It is generally accepted that the imposition of the sentence of death on any person carries with it stresses, pressures, psychological distress and anxieties. The hope of reprieve whether it springs from efforts on the prisoner's behalf to have the sentence reversed or that the death penalty will be abolished; or the expectation that the sentence might be commuted is an inherent factor.

On three separate occasions, the Governor-General issued warrants for the execution of the appellants on a given date. On each occasion strenuous and sustained efforts were made to have the execution of the warrants stayed and the success of these efforts speak well for the system of justice which we observe. The anxieties and hopes of the appellants may have been heightened by these efforts but they must have contemplated that if their submissions failed then the ultimate penalty as imposed on conviction,

would be their lot. For them to hope for or expect reprieve in a permanent form is understandable but they cannot be heard to complain if this hope fails to materialise. They had no **legitimate** expectations. (**CCSU v. Minister of the Civil Service** [1984] 3 All E.R. 935.

It is not cruel and inhuman to extend life or life expectancy. A person with a terminal ailment will readily undergo medical treatment to extend his lease on life; persons have been known to undergo several **operations** to achieve this end. This certainly has not been considered inhuman. The appellants by their efforts, aided in some measure by the State, have had their lives extended for a number of years and until now through proceedings, initiated by them. Their tenure on life was determined on conviction, the execution of the sentence of death was deferred and has yet to be exacted. The delay in execution cannot be regarded as inhuman and degrading punishment or other treatment. While statements were made by officials and Ministers of Government and a debate on the abolition of the death penalty was taking place the execution of the sentence was suspended. This was the only humane thing to do. There was a hope that had the arguments gone their way, their lives would have been spared. This was not to be so the sentence stands. The phrase "or other treatment" was considered by Dr. Barnett who submitted that it was necessary to examine whether the relevant combination of factors in this case **falls** within this clause. Dr. Barnett referred to these cases in which the peculiar nature of the death penalty and the relevance of **delay** has been judicially recognized.

People vs. Anderson 493 P. 2d 880 (1972) a case from the Supreme Court of California, **Furman vs. Georgia** 408 U.S. 238 (72) 33 L. Ed. 346, **Louisiana vs. Resweiler** 329 US 459. From these cases he extracted this principle "Capital punishment is authorised to

the extent that it involved the infliction of death but is not authorised where physical or psychological suffering over and above that which is inherent in the very infliction of death is added."

The suggestion here is that suffering over and above that which is inherent in the execution of the sentence amounts to "other treatment." The delays coupled with the issue and stay of the death warrants would, if I assess Dr. Barnett's submissions correctly, qualify as "other treatment" proscribed by s 17 of the Constitution.

The cases referred to supra deal with provisions of the Constitution of the United States of America with particular reference to the 8th amendment. **In Constitutional Reference by the Morobe Provincial Government** [1985] LRC (Const) p. 642, Papua New Guinea, Kidu, C.J. compared the 8th amendment with the corresponding provision of his Constitution thus:

> "(a) Section 36 (1) of the Constitution of Papua New Guinea.
>
> 'No person shall be submitted to torture (whether physical or mental), or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person.'
>
> (b) 8th Amendment to the U.S.A. Constitution
>
> 'Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishment inflicted.'

He isolated the differences and said:

> "In view of such obvious differences, decisions of the American Courts on the meaning of the 8th Amendment should be approached with caution and not readily accepted as guides to the interpretation of section 36 (1) of the Papua New Guinea Constitution."

The Court here upheld the constitutionality of minimum custodial sentences. I accept the dicta of Kidu, C.J. as applicable to a comparison of section 17 (1) with the 8th Amendment. It is instructive to note two reports recently out of the U.S.A. a Reuter Report dated 21st April, 1992 from San Quentin California states:

> "California carried out its first execution in 25 years on Tuesday putting murderer Robert Alton Harris to death only hours after freeing him from a locked gas chamber so that the U.S. Supreme Court could decide his fate. The Court ruled 7 to 2 against allowing further appeals by Harris convicted of killing two teenagers in 1979". (Daily Gleaner 22/4/92)

The other report datelined 15th May 1992 from Storke Florida told of the execution on 12th May 1992 of Nottie Lee Martin convicted in June 1977. The report said it was the 28th execution in that state since the resumption of executions in 1979.

The common factor in both reports is that the death penalty was in suspension at the time of conviction of each prisoner. The Courts in America jealously guard the rights of individuals guaranteed by the constitution but the fact is these executions were carried out.

The issue of delay and section 17 (1) of the Constitution were considered by the Privy Council in **Riley and others v. Attorney General of Jamaica and another**[1982] 3 All E.R. 469. **Riley and others** complained that the prolonged delay in the execution of sentences, due to factors beyond their control had caused them sustained mental anguish thereby rendering the punishment inhuman and degrading. Lord Bridge of Harwich in delivering the majority opinion of the Board said at page 471:

> "Clearly the appellants cannot base their complaint on the prolongation of their lives by the delay in execution of their sentences. The only proposition capable of sustaining the contention that the execution of the sentences would now contravene s 17 of the Constitution must be that to carry out a death sentence after a certain delay, not occasioned by the appeal process invoked by the prisoner, would contravene the provisions of sub-s (1) and could properly be held to do so notwithstanding the provisions of sub-s (2)."

He further said that the legality of the delayed execution cannot be questioned. He continued:

> "Accordingly, whatever the reasons for, or length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of s 17(1). Their Lordships would have felt impelled to this conclusion by the language of s 17 alone, but they are reinforced by the consideration that their decision accords fully with the general principle stated in **D.P.P. v. Nasralla [1967] 2 All E.R. 161, [1967] 2 AC 238 and deFreitas v. Benny** [1976] AC 239." [Emphasis added]

Dr. Barnett submitted that the dissenting opinion of Lord Scarman and Lord Brightman should be preferred to that of the majority. They said at page 480:

> "Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment. It is, of course, for the applicant for constitutional protection to show that the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading. Such a case has been established, in our view, by these appellants."

The delay by the Court of Appeal in delivering reasons was enhanced by the failure of the appellants to pursue the right of appeal. In the meantime the appellant Pratt prosecuted a petition before the committee. This and subsequent delays were occasioned by the appellants and by way of stays of execution The delay caused by the suspension of the death penalty while the government considered its fate cannot be considered an infringement of section 17 (1) of the Constitution.

I hold that the constitutional court did not err in applying the majority opinion in **Riley's** case.

JUSTICIABILITY OF THE GOVERNOR-GENERAL'S EXERCISE OF THE PREROGATIVE

Section 90 (1) of the Constitution invests the Governor-General with the power of the exercise of the Royal Prerogative of mercy. Section 91 (2) directs that the Governor-General acts on the recommendation of the Privy Council. Section 32 (4) provides that in exercising the powers under section 90 (1) the question whether he has exercised the functions in accordance with the directions in section 90 (2) 'shall not be enquired into in any court."

The appellants contended that as a result of developments in the law the exercise of a prerogative power is not automatically treated as outside of the scope of judicial review but it depends on the nature of the subject matter. The exercise of the prerogative of mercy is justiciable Dr. Barnett submitted.

In **CCSU v. Minister for Civil Service** [1985] 1 A.C. 374, the House of Lords examined extensively the question of Judicial Review of the Crown Prerogative. It was accepted that there existed a right to challenge the exercise of the prerogative power by way of judicial review. It was determined that the justiciability

depended on the subject matter as there were matters which are unsuitable for discussion or review in the Law Courts: per Lord Fraser. Lord Roskill at page 418 said:

> "Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process."

In **Riley's** case Lord Bridge of Harwich said at page 471-472:

> "Their Lordships fully accept that long delay in the execution of a death sentence especially delay for which the condemned man is himself in no way responsible, must be an important factor to be taken into account in deciding whether to exercise the prerogative of mercy. But it is not for this Board to usurp the function allocated by s 90 of the Constitution to the Governor-General acting on the recommendation of the Privy Council of Jamaica."

It is my view that their Lordships are eminently correct. The exercise of the prerogative of mercy by the Governor-General is not justiciable.

The further submission that the Governor-General in Privy Council must -

(i) conform with the Wednesbury Principles of reasonableness;

(ii) give due weight to all relevant consideration;

(iii) conform with the rules of natural justice

is in my view subsumed under the non-justiciability principle. Section 91 (1) of the Constitution provides:

> "91 (1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution."

The words "other information derived ... elsewhere as the Governor-General may require" invests the Governor-General with power to regulate the procedure in submissions to the Privy Council. The wording of sections 90 and 91 (1) indicate that petitions by or on behalf of convicted persons are accepted by the Governor-General in Privy Council; these petitions indubitably are in writing; there is no requirement that a petitioner has a right of audience in personam. The presumption is that the rules of natural justice are observed - see section 32 (4).

The recommendations of the Commission and the United Nations Human Rights Committee are in the main based on the paragraph from Lord Templeman's opinion, extracted above. There are assertions deposed to as facts in paragraphs 15 of the affidavit of Father Massie S.J. in which he commented on the mental and physical degeneration of the appellants as he saw them on the afternoon of the 23rd February, 1987. They were then scheduled to be executed on the 24th idem. The contention of the appellants is that a stay of execution had been granted earlier in the day of the 23rd February, 1987 and this fact was not told to them until 45 minutes before the scheduled executions. The U.N.H.R.C. accepted this as factual. The respondents challenged the contention of the appellants and the accuracy of Father Massie's evidence and he was cross-examined before the Constitutional Court. Of his evidence Harrison, J said:

> "Under cross-examination Father Massie admitted that he did not go to the prison on the 23rd day of February 1987 and that 'it was incorrect information I gave.' He therefore negated the detailed description of the alleged mental condition of the plaintiffs on the 23rd day of February 1987, which he sought to highlight in his affidavit. His evidence is not easily relied on, to say the least."

There are no statutory provisions making the recommendations of these international bodies enforceable in Jamaica. The recommendations are not binding on the Governor-General in Privy Council. In law the convictions and sentences of the appellants stand unassailable. There is no legal basis for this Court to interfere. This Court has no power to direct the Governor-General to exercise the prerogative of mercy. The contentions of the appellants fail.