[2016] JMFC Full 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2013 HCV 03746

CORAM: THE HONOURABLE MR. JUSTICE L. HIBBERT
THE HONOURABLE MISS JUSTICE C. MCDONALD
THE HONOURABLE MR. JUSTICE K. LAING

BETWEEN	**PATRICK WHITELY**	**CLAIMANT**
A N D	**THE ATTORNEY GENERAL**	**DEFENDANT**

Dr. Lloyd Barnett, Miss Gilliam Burgess and Phillip Cross instructed by Miss Gilliam Burgess for the Claimant.

Miss Carlene Larmond and Miss Carla Thomas instructed by Director of State Proceedings for the Defendant.

HEARD: 27, 28 and 29 April, 2015 and 28 July, 2016

Murder, Death, Sentences, Section 29 of the Juvenile's Act, Detention at Her Majesty's pleasure, Revue, Constitution- Sections 17, 13 and 15.

HIBBERT, J

Background

[1] On 9 January 1981 at about 7:30 p.m. Mr. Oswald Lindsay was driving his motor car from church along Windward Road towards his home at Bull Bay in the parish of Saint Andrew. Mr. Lester Case was a passenger in this motor car. After he

turned off from the Bull Bay main road, Mr. Lindsay was stopped by a group of three men, each of whom was armed with a firearm. They entered the car and ordered Mr. Lindsay to return to the main road and on their instructions he drove to Subway Beach, also in Bull Bay. There Mr. Lindsay and Mr. Case were taken from the car. Shortly afterwards four men emerged from nearby bushes. They included Lester Williams, Patrick Whitely, the claimant herein, and Anthony Robinson, each of whom had a firearm.

[2] Two of the men who had initially accosted Mr. Lindsay left the scene then returned with two pieces of rope which were used to tie Mr. Lindsay and Mr. Case. After this, Lester Williams gave a signal and a boat came to the beach. In it were Clyde Williams and another man. They spoke to the men who were already there then went back to the boat and left. Lester Williams untied Mr. Case saying that Case was his "boy". Mr. Lindsay and Mr. Case were taken to a section of the beach behind Clyde McAnuff's yard. The boat then returned. Anthony Robinson and two other men then went into Clyde McAnuff's yard and returned with a shovel. Lester Williams told Mr. Case that if he talked he and his family would be killed.

[3] Mr. Lindsay was then taken away by the claimant and two other men. Mr. Case was taken by Lester Williams to a tree along the beach road. While they were there Mr. Lindsay's car with two men came by then left. Shortly afterwards explosions were heard. Lester Williams and Mr. Case then walked to the main road where Lester Williams told Mr. Case that if anyone asked him about Mr. Lindsay he should say that Mr. Lindsay dropped him off and turned back to town.

[4] Mr. Case subsequently made a report to the police. The police later found the body of Mr. Lindsay in a shallow grave on the beach. His hands were tied behind him and he had a gunshot injury to his head. After a post mortem examination the pathologist concluded that death was as a result of shock and haemorrhage due to gunshot injury to the head.

[5] Consequent on their investigations the police charged the claimant, Lester Williams, Clyde McAnuff and Anthony Robinson for the murder of Mr. Lindsay. At the trial in the Home Circuit Court both Patrick Whitely and Lester Williams were, found guilty of murder and were on 28 February 1983, each sentenced to suffer death.

[6] Both the claimant and Lester Williams appealed against their convictions and the claimant also appealed against his sentence. The appeals against convictions were dismissed. At the hearing of the appeal on 26 September 1986 the court accepted as credible, evidence which showed that at the time of the commission of the murder Whitely was under the age of 18 years. Applying the provisions of section 29(i) of the Juveniles Act, the court ruled that "the sentence of death imposed on the applicant Whitely should be set aside and, instead, he should be detained during Her Majesty's pleasure."

[7] Consequent on the decision of the Privy Council in **D.P.P. v. Mollison** [2003] 2 WLR 1160, in which the claimant intervened, the claimant in May 2007 petitioned the Governor General who referred the matter to the Court of Appeal. The court ruled:

> "Request granted. The petition is allowed. The sentence imposed is quashed and substituted therefor is a sentence of detention at the court's pleasure."

[8] On 26 January 2010 the claimant applied for a review of his detention. The application was heard on 24 January 2012 by Pusey, J who ordered that:

> "1. The applicant Mr. Patrick Whitely, who is detained at the court's pleasure, be released on parole and on successful termination of the parole, be released from detention at the court's pleasure, unconditionally thereafter.
>
> 2. Mr. Patrick Whitely shall be on parole for a period of four years from 31st January 2012 to 31st January 2016 on the following special conditions:

(a) He shall report without delay (that is within seven days of release) to the parole officer in the parish of St. Elizabeth and shall keep in touch with that officer in accordance with the officer's instructions;

(b) He shall reside in the parish of St. Elizabeth during the period of parole and shall not change his parish of residence without obtaining the prior permission of the Parole Board;

(c) He shall receive visits at his place of residence from the parole officer, if the parole officer so requires;

(d) He shall be of good behavior and lead an honest and industrious life;

(e) He shall advise the parole officer, if he is arrested or questioned by the police.

3. The Parole Board is empowered to see to the proper enforcement of this order pursuant to the Parole Act and the Rules made thereunder, and they may revoke any special conditions prescribed at the paragraphs above.

4. Any breach of this order or any decisions made by the Board to revoke the parole must be notified to the court in writing without delay."

[9] The claimant was however, not released from custody until 13 March 2012 as legal advice was being sought as to how the claimant's release was to be effected.

The Claim

[10] On 24 June 2013 the claimant filed a Fixed Date Claim in which he claimed the following:

"1. The Claimant, Patrick Whitely of Pepper District, Pepper P.O., St. Elizabeth claims damages against

the Defendant for false imprisonment and for breaches of his fundamental human and constitutional rights in respect of his incarceration and/or detention in the prisons or correctional centres of the Government of Jamaica by virtue of unconstitutional orders made by the Courts of Jamaica and/or unconstitutional actions taken by the Correctional Services of the Government of Jamaica (hereinafter referred to as "The Government Authorities").

2. The Claimant claims breaches of the following:

(i) his rights under the Constitution of Jamaica prior to its amendment by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011;

(a) to liberty, security of the person and the protection of the law as set out in section 13(a) and 15;

(b) not to be subjected to torture or to inhuman or degrading punishment or other treatment as set out in section 17;

(ii) his rights under section 5 of the Fundamental Rights (Additional Provisions) (Interim) Act to fair and humane treatment by any public authority in the exercise of any of its functions;

(iii) his rights under the Constitution of Jamaica as amended by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011;

(a) to liberty and security of the person as set out in section 13(3)(a);

(b) to freedom of the person as set out in sections 13(3)(p) and 14;

(c) to due process as set out in sections 16(11) and 16(12);

3. The Claimant further claims aggravated and exemplary damages.

4. The Defendant is sued as the legal a representative of the State and/or under and by virtue of the Crown Proceedings Act 1959 for reason that the acts complained of were done by the judicial and public authorities purporting to act in the course of their duties.

5. Part 56 of the civil Procedure Rules applies to this claim."

[11] The claim also contained the particulars of alleged breaches which were:

(i) The Claimant was sentenced to death in violation of section 29(1) of the Juveniles Act 1951 and his constitutional rights;

(ii) The Claimant was detained under the unconstitutional sentence of detention at Her Majesty's pleasure from September 1986 until July 23, 2007 with no legal provision for applying to the Court for a review of his detention;

(iii) The Government Authorities delayed the substitution of the unlawful detention of the Claimant at Her Majesty's pleasure as the adjournment of the Claimant's application for a writ of habeas corpus ad subjiciendum of July 17, 2001 had no basis in law;

(iv) The Government Authorities failed to substitute the Claimant's unconstitutional sentence of detention at the Governor General's pleasure until June 5, 2007 despite the decision in ***The Director of Public Prosecutions v. Kurt Mollison*** on June 22, 2003;

(v) The Government Authorities failed to make provision for aggrieved persons to have access to the court for a review of the unconstitutional detention until September 18, 2006 despite the decision in **The Director of Public *Prosecutions v.* Kurt Mollison** on June 22, 2003;

(vi) The Government Authorities failed to comply with the Order of May 4, 2011 of the Supreme Court to provide reports from a Superintendent of the Department of Correctional Services and in breach of the said Order did not provide the said reports until July 4, 2011;

(vii) The Government Authorities failed to comply with the Order of May 4, 2011 of the Supreme Court to provide reports from the Department of Correctional Services in that the reports provided on July 4, 2011 were not in compliance with Part 75 of the Civil Procedure Rues;

(viii) The Government Authorities failed to comply with the Order of [January 24, 2011] of the Supreme Court to release the Claimant on parole from January 31, 2012 to January 31, 2016 and in breach of the said Order kept the Claimant detained until March 13, 2012;

(ix) The Government Authorities delayed the release of the Claimant on parole as the Supreme Court would have ordered that he be released on parole on the first hearing of his application had the Order of May 4, 2011 of the Supreme court been properly complied with.

As a result of the unlawful conduct of the Government Authorities the Claimant has suffered breaches and contraventions of his fundamental human and constitutional rights and has sustained injury, loss and damage."

[12] In his affidavit in support of the claim the claimant stated:

> "My time on death row awaiting execution was the most terrifying, distressing and traumatizing experience of my life. I had difficulty sleeping and eating. Each time the cell door opened I feared that the death warrant would be read to me. I lived in a constant state of agonizing nightmare and hopelessness."

He further stated that as a result of being unlawfully sentenced to death and remaining on death row for over three years, he endured pain and suffering.

[13] In addressing the question of damages he stated that as a farmer, since his release, he earned approximately $50,000 per month. Additionally he earned $29,000 per fortnight from his job as a supervisor with the National solid Waste Management Agency.

Submissions

[14] Dr. Barnett submitted that the pronouncement of the sentence of death upon the Claimant, who at the time of the commission of the offence was under the age of eighteen years, and his incarceration on death row were unlawful and constituted torture and/or inhuman or degrading punishment or other treatment within the meaning of section 17 of the Constitution of Jamaica. In supporting his submission that time spent on death row may constitute a violation of section 17 of the Constitution Dr. Barnett cited for the court's consideration the decisions **in Pratt and Morgan v. Attorney General** [1993] 43 WIR 340 and **Soering v. UK** 11 EHRR 439.

[15] Dr, Barnett also submitted that the court should view the claimant's youthfulness as an aggravating factor in determining the extent to which the claimant

suffered and that the decision in **Richards v. Attorney General of St. Christopher and Nevis** [1992] 44 WIR 141 should provide a basis for this assessment. He further submitted that any extended period or death row could only be justified if it is necessary for allowing the prisoner to exhaust all avenues of appeal. For this he cited **Henfield v. Attorney General of the Bahamas** [1997] AC 413.

[16] In treating with the sentence which the Court of Appeal substituted for the death penalty which was originally imposed, Dr. Barnett submitted that detention at Her Majesty's pleasure which was later held to be unconstitutional in the case of **The Director of Public Prosecution v. Kurt Mollison** was in breach of the claimant's constitutional rights to humane treatment and due process.

[17] Dr. Barnett further submitted that that it had become clear from 1999, based on the decision of the Privy Council in **Greene Browne v. The Queen** (1999) 54 WIR 213 which followed **Reg. v. Secretary of State for the Home Department, Exparte Venables and Thompson** [1998] AC 407; [1997] WLR 23 that this sentence was unlawful. Consequently this sentence should not have been allowed to remain until 2007.

[18] Concerning the detention at Her Majesty's pleasure Dr. Barnett submitted that, integral to any sentence of indefinite detention, should be the provision of a system of review in order that assessments can be made of the progress of youthful offenders. The absence of legal provisions and official procedures in Jamaica prior to 2006 and the fact that no proper review was carried out in respect of the claimant, Dr. Barnett submitted, was in violation of the claimant's rights under sections 13(a) and 15 of the Constitution.

[19] Dr. Barnett further submitted that the decision of the Supreme Court to adjourn, pending the appeal to the Privy Council by the Director of Public Prosecution, in **DPP v. Mollison**, the application for a writ of habeas corpus which was filed by the claimant as a result of the Court of Appeal's ruling that the detention

at Her Majesty's pleasure was unconstitutional, amounted to a further violation of the claimant's rights under sections 13(a) and 15.

[20] Furthermore, Dr. Barnett submitted, despite assurances given by the D.P.P. that a regime could be devised without undue difficulty to regularise the sentence of the claimant and others consequent upon the ruling in **D.P.P. v. Mollison**, no steps were taken within a reasonable time to terminate the unlawful detention.

[21] Dr. Barnett was also critical of the time taken by the court to deal with the application of the claimant for a review made pursuant to Part 75 of the Civil Procedure Rules (CPR). He submitted that this resulted directly in the continued detention of the claimant.

[22] Having submitted that the fundamental rights of the claimant viz:

(1) the right to freedom of the person;
(2) the right to freedom of movement;
(3) the right to fair treatment;
(4) the right to be protected against cruel or inhumane treatment or punishment and;
(5) the right to due process

have been breached, Dr. Barnett further submitted that the claimant would be entitled to redress under section 25 of the Constitution.

[23] The redress, Dr. Barnett submitted should take the form of an award of damages and that the extent of the losses, the range of suffering, the importance of the right and the deliberate or negligent disregard of its importance should be taken into account. For this he cited **Attorney General of St. Christopher, Nevis and Anguilla v. Reynolds** (1979) 43 WIR 108; **Tynes v. Barr** (1992) 45 WIR 7; **Jorsingh v. Attorney General** (1998) 52 WIR 501; **Fuller v. Attorney General** (1997) 56 WIR 337; **Cole (Angella) v. Attorney General** (1999) 58 WIR 59; **Morson v. Cartwright** (2005) 67 WIR 17 and **Attorney General v. Ramdeen** (2005) 67 WIR 264.

[24] Dr. Barnett further urged the court to consider the views expressed in **Attorney General v. Siewchand Ramanoop** (2005) 66 WIR 334; **Ramesh Lawrence Maharaj v. Attorney General of Trinidad and Tobago** (No. 2) (1978) 30 WIR 310 and **Attorney General v. Ramdeen (Angella)** (2005) 67 WIR 264.

[25] Responding to Dr. Barnett's submissions concerning the imposition of the death sentence on the claimant and his subsequent incarceration on death row, Miss Larmond, conceded that the sentence of death imposed on the claimant was in breach of section 29 of the Juveniles Act. She, however, submitted that this would not inexorably lead to the conclusion that the detention was also illegal. She submitted that upon the conviction of the claimant for the offence of murder the inevitable consequence would be his incarceration, hence his detention was therefore lawful. As a consequence, his rights under section 15 of the constitution was not breached and he was not entitled to be released. For this she cited **Paul Walker v. Commissioner of Corrections and the Superintendent of the Gun Court Prison** (1974) 24 WIR 411 and **Greene Browne v. The Queen** [2000] 1AC 45.

[26] Miss Larmond also submitted that the sentence of death and consequent incarceration or death row could not amount to torture or to inhuman or degrading punishment or other treatment. She submitted that in **Pratt and Morgan v. A.G.** the court did not consider that the circumstances of the condemned men whose situation was much more severe than that of the claimant amounted to torture or to inhuman or degrading punishment or treatment. It would be their execution after such a lapse in time and after what they had undergone that would constitute a breach of section 17 of the Constitution.

[27] As it concerns the absence of provisions for the periodic review while the claimant was detained, Miss Larmond submitted that even if, as was held in **Seepersad and Panchoo v. The Attorney General of Trinidad and Tobago** [2012] UKPC4, this amounted to a breach of the claimant's constitutional rights the award of

damages should not be automatic. She argued that based on the claimant's role in the murder and his record during his incarceration it does not necessarily mean that he would have been released from custody by 2004 as his accomplice was.

[28] Miss Larmond also responded to Dr. Barnett's submissions concerning the delay in substituting detention "at the court's pleasure" for detention "at Her Majesty's pleasure'. She submitted that the claimant's application for a writ of habeas corpus was ill-conceived. For this she relied on **Paul Walker v. Commissioner of Corrections** and **Another** and **In re Featherstone** [1953] 37 Cr. App. Rep. 146. Furthermore, she argued, the court acted correctly in adjourning the application to await the decision in **D.P.P. v. Mollison** in which the claimant participated before the Privy Council.

[29] Regarding the period between 2003 when **D.P.P. v. Mollison** was decided and 2007 when the Court of Appeal substituted the sentence Miss Larmond submitted that this failure to promptly adjust the sentence did not amount to a breach of the claimant's rights and this relied on **Maharaj v. Attorney General of Trinidad and Tobago** and **Forbes v. Attorney General** [2003] 1 LRC 350. Furthermore, the claimant who had intervened in the case of **D.P.P. v. Mollison** took no steps to regularise his sentence until May 2007 when he petitioned the Governor General.

[30] Miss Larmond also submitted on the length of time taken in court before the review under Part 75 of the Civil Procedure Rules implemented. She stated that the time taken was not unreasonable as the court needed to have the required reports and even requested a further report in order to make its assessment. She further stated that it would be speculative to say that had the application been heard earlier the claimant would have been released earlier than was ultimately ordered.

[31] Miss Larmond also urged that the court, in considering the quantum of damage for the claimant's detention between 31 January 2012 and 13 March 2012, should consider that the action of the correctional authorities was bereft of malice.

Analysis

[32] At the time of the conviction of the claimant section 3-(1) of the Offences against the Person Act stated:

> "3.-(1) Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried unto execution as heretofore has been the practice; and every person so convicted, shall, after sentence, be confined in some safe place within the prison, apart from all other prisoners.
>
> Where by virtue of this subsection a person convicted of murder is sentenced to death, the form of the sentence shall be to the effect only that he is to "suffer death in the manner authorized by law."

[33] Section 29.-(1) of the Juveniles Act which was then in force, however stated:

> "29.-(1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place (including, save in the case of a child, an adult correctional centre) and under such conditions as the Minister may direct, and while so detained shall be deemed to be in legal custody." [Emphasis added]

[34] It is quite clear from the record of proceeding that, most unfortunately, neither the prosecuting authorities not the Defence brought to the attention of the judge the fact that the claimant was under the age of eighteen years at the time of the commission of the murder. The judge therefore, being unaware of this fact had no option but to impose the sentence which he did. Consequently the incarceration of the claimant on death row could not be deemed to be unlawful.

[35] Even if it is said that the trial judge had an obligation to enquire into the age of the claimant at the time of the murder and that his failure to do so rendered the sentence unlawful, would this amount to a contravention of the claimant's rights recognized by Chapter 3 of the Jamaican Constitution?

[36] In **Ramesh Lawrence Maharaj v. Attorney General of Trinidad and Tobago** [No. 2] Lord Diplock at page 321 stated:

> "……..no human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s (I)a, and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."

[37] He further stated:

> "……..even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within s 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on an appeal to an appellate court."

[38] Dr. Barnett, in responding to Lord Diplock's pronouncements, submitted that the dictum went too far and was no longer good law. This submission was not supported by any authorities. In **Forbes v. Attorney General** [2003] 1 LRC 350 the decision in **Maharaj v. AG.** was again considered. This was a case which also had its origin in Trinidad and Tobago. The appellant was convicted for possession of cannabis and was sentenced to be imprisoned for a period of five years. This sentence exceeded the then statutory maximum. Nineteen months after his conviction the appellant was granted bail pending his appeal. The appeal was heard nearly ten years after his conviction. His appeal against conviction was dismissed but the court varied the sentence to one of eighteen month imprisonment to commence from the date on which the decision was given. His appeal to the Privy Council was allowed and his conviction quashed because of the magistrate's failure to comply with his statutory duly to state the reason for his decision.

[39] The appellant then sought declarations that he was deprived of his constitutional rights to due process and the protection of the law. The judge at first instance dismissed his motions and his appeal to the Court of Appeal was also dismissed. Both courts found that the magistrate's failure to give reasons and the approach adopted by the Court of Appeal to the question whether that invalidated the

conviction were errors of law which were remediable within the judicial system itself and which, having been remedied on appeal were not susceptible of forming a continuing basis for constitutional relief.

[40] On appeal to the Privy Council, their Lordships, at paragraph 11 of the judgment observed that:

> "the statutory duty of the magistrate to state the reasons for his decision and the right of the convicted person to be provided with such a statement arises only once a notice of appeal has been given. The statement is, therefore required for the purpose of the contemplated appeal. It follows that the magistrate's failure to provide the appellant with such a statement does not of itself vitiate the trial which has already taken place or invalidate the conviction."

[41] Their Lordships, after examining citations from decided cases, including the one from **Mahanaj v. A.G. No. 2**, in dismissing the appeal stated at paragraph 18:

> "Their Lordships do not think that it would be helpful or desirable to add their own observations to the foregoing citations. They establish that it is only in rare cases where there has been a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However the exceptional case is formulated it is clear that the constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error. This is the reason for the appellate process. In this case the appellant was deprived of his liberty after a fair and proper trial before the magistrate, that is to say by due process of law. The appellant was able to challenge his conviction by way of appeal to the Court of Appeal and when the Court of Appeal wrongly failed to quash the conviction,

> by way of further appeal to the Board. The appeals were conducted fairly and without procedural error, let alone any subversion of the judicial process. The appellant thus enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process. His constitutional rights have not been infringed, and the courts of Trinidad and Tobago were right to dismiss his constitutional motions."

[42] Even if it is said that the imposition of the sentence of death and the consequent incarceration on death row could give rise to a claim for constitutional redress could it be held that the sentence and incarceration amount to torture or inhuman or degrading punishment in breach of section 17-(1) of the Constitution as claimed by the claimant?

[43] An inevitable consequence of a conviction for murder is incarceration. Having been sentenced to death, by virtue of section 3-(1) of the Offence Against the Person Act, the claimant was required to be kept in a safe place within the prison apart from all other prisoners.

[44] The evidence of the claimant was that his time on death row was terrifying, distressing and traumatizing. He also stated that he feared that the death warrant would be read to him. Having filed an appeal against his conviction and sentence on 7 March 1983, the claimant must have known or ought to have known that the sentence of death could not have been carried out while the appeal was pending. He has not complained of anything being done to him to cause injury or physical discomfort.

[45] I do not believe that the Privy Council decision in **Pratt and Morgan v. Attorney General** and **Another** can be of much assistance to the court in deciding whether or not the claimant's incarceration on death row after he was sentenced to

death could be deemed to be torture or inhuman or degrading punishment or other treatment in violation of section 17(1) of the Constitution. What was considered in that case was whether or not section 17(1) would be breached if the death sentence should be carried out after a lengthy delay.

[46] Assistance in deciding whether or not the claimant could be said to have endured torture or inhuman or degrading punishment or other treatment is to be found in the decision of the Court of Appeal of Jamaica in **Fuller v. Attorney General** (1998) 56 WIR 337. At page 412 Harrison J.A. stated:

> "Torture is not defined in the Constitution. However because of the history of the origin of the Constitution and the fact that it was influenced by the conventions which were adopted primarily to deal with the atrocities of the Second World War, the decisions of international tribunals and bodies can provide assistance in interpretation, despite the *sui generis* nature of the Constitution.
>
> The European Court of Human rights in **Republic of Ireland v. United Kingdom** (1978) 2 EHRR 25 by a majority made a distinction between 'torture' on the one hand and 'inhuman and degrading treatment' on the other. Torture that court found, involved…. deliberate inhuman treatment causing very serious and cruel suffering..…. of a particularly high level of intensity."

[47] In **Gafgen v. Germany** (2010) 28 BHRC 463, the court after considering the decisions in **Ireland v. U.K**., **Aksoy v. Turkey** (1996) 1BHRC 625 and **Selmouni v. France** (1999) 7 BHRC 1 at paragraph 90 of the judgment stated:

> "In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which in

> art. 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia of obtaining information, inflicting punishment or intimidating (see **Akkoc v. Turkey** [2000] ECHR 22947/93 at para 115)."

[48] The court in **Gafgen v. Germany** also considered what would constitute inhuman or degrading treatment at para. 88 the court stated:

> "In order for ill treatment to fall within the scope of art 3 it must attain a minimum level of severity….. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it……."

[49] At para. 89 the following was said:

> "The court has considered treatment to be 'inhuman' because, inter alia it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering (see **Lobita v. Italy** [2000] ECHR 26772/95 at para. 120 and **Ramirez Sanchez v. France** [2006] ECHR 59450/00 at para. 118). Treatment has been held to be 'degrading' when it was such as to arouse in its victims feeling of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience….."

[50] I am of the view that the claimant has failed to provide any evidence upon which it can be said that he was subjected to torture or inhuman or degrading punishment or treatment.

[51] The decisions of the Privy Council in **Greene Browne v. R** and **DPP v. Mollison** formed the basis for the claim for damages consequent on the court of Appeal setting aside the death sentence which was imposed on the claimant and substituting therefor that the claimant be "detained during Her Majesty's pleasure".

[52] In **Browne v. R** the Privy Council considered the validity of section 3(i) of the Offences against the Person Act of St. Christopher and Nevis. This section contained terms similar to section 29(1) of the Juveniles Act of Jamaica. The Board found that a sentence of detention "during the Governor General's pleasure" was inconsistent with the separation of legislative, executive and judicial powers and was therefore unlawful. The Board noted that the validity of the provision was not saved by any provision in the Constitution which preserves the validity of previous laws. It therefore amounted to deprivation of liberty in contravention of the Constitution as the length of the sentence should be determined by the court and not the executive. Their Lordships then went on to say:

> "It follows from this, that what is required to make the provision comply with the Constitution is that the decision should be made by a court. If this is done the only objectionable part of the sentencing process is removed."

The appeal against sentence was allowed and the case remitted to the Court of Appeal for the appropriate sentence to be passed.

[53] On 29 May 2000 the Court of Appeal of Jamaica by a majority decision set aside on constitutional grounds a sentence of detention during the Governor General's pleasure which was imposed on Kurt Mollison after he was convicted for a murder committed by him when he was aged 16. From this decision the Director of Public Prosecutions appealed. The Director and the Solicitor General who appeared with him contended that the provisions of section 29(1) of the Juveniles Act which were held to be unconstitutional were saved by section 26(8) of the Constitution.

[54] No doubt mindful of the obstacle presented by section 26(8), on behalf of the respondent, unlike the approach taken in **Browne v. R**, the primary attack on section 29 was based not on its incompatibility with specific rights guaranteed by sections 15(1)(b) and 20(1) of Chapter 111. Instead it was based on its incompatibility with the separation of judicial from executive power which was, as contended, a fundamental principle upon which the Constitution was built.

[55] Their Lordships considered the contention of the Director, in reliance on section 26(8) of the Constitution, that since section 29 of the Juveniles Act was a law in force immediately before independence it could not be held to be inconsistent with any of the provisions of Chapter III of the Constitution, including sections 15(1)(b) and 20(1). Further, the Director contended, the validity of section 29 could not therefore be impugned, even though it was inconsistent with those subsections. In answer their Lordship stated:

> "Subject to the argument considered in paragraphs 18 and 19 below, that submission is plainly correct and explains the respondent's reliance on the general separation of powers challenge considered above."

[56] Their Lordships therefore concluded that section 4(1) of the Jamaica (Constitution) Order in Council 1962 gives the court power to modify section 29 of the Juveniles Act so as to bring it into conformity with the Constitution. Consequently their Lordships stated:

> "Since the vice of section 29 is to entrust this decision to the executive instead of the judiciary, the necessary modification to ensure conformity with the Constitution is (as in **Browne v. The Queen** [2000] 1 AC 45) to substitute "the court's" for "Her Majesty's" in subsection (1) and "the court" for each reference to "the Governor General" in subsection (4)."

[57] The Board also considered the alternative argument mounted by the respondent that section 4(1) of the Jamaica (Constitution) Order in Council 1962 could be used to modify section 26(8) of the Constitution. Their Lordships, however, declined to express a final view on this argument as it was unnecessary for the respondent to succeed in order to resist the appeal.

[58] Based on the decisions in **Browne v. R** and **D.P.P. v. Mollison** could it be held "that it was as a result of the unlawful actions and omissions of the Government Authorities that the unlawful sentence was imposed and aggravated resulting in an excessively long and unjustifiable period of detention of the Claimant in breach of the constitutional rights to humane treatment and due process?"

[59] It is to be noted that although in **Browne v. R** and **D.P.P. v. Mollison** it was held that detention at Her Majesty's/Governor's pleasure was unconstitutional the Board did not, in **D.P.P. v. Mollison** hold that any of the rights under Chapter III of the Constitution were breached.

[60] The imposition of the sentence that the claimant be detained at Her Majesty's pleasure was imposed by the Court of Appeal in 1986 based on the statutory provisions in existence at that time. The right to humane treatment was introduced into the constitutional framework of Jamaica on 26 March 1999 by The Fundamental Rights (Additional Provisions) (Interim) Act, Section 5 states:

> "Every person shall have the right to fair and humane treatment by any public authority in the exercise of any of its functions."

This could not, therefore, apply to acts done in 1986. Furthermore the definition of "public authority" which is contained in section 2 could not include the judiciary.

[61] Throughout his period of incarceration the claimant had at his disposal and used the several avenues open to him to challenge the decisions of various courts. As was said in the extracts at paragraphs 36, 37 and 41 this satisfied the right to due

process. Neither can it be said that the Court of Appeal imposed a sentence of a greater severity than the maximum sentence which it could impose [Sec. 16 (11) and 12 of Charter of Rights].

[62] It is, therefore, my opinion that the imposition of the sentence of detention "at Her Majesty's pleasure" and the subsequent incarceration of the claimant thereunder could not amount to a breach of the claimant's right to humane treatment and due process.

[63] The next issue to be addressed was whether or not the continuation of the sentence that the claimant be detained at Her Majesty's pleasure amounted to a deprivation of the claimant's rights to "life, liberty, security of the person, the enjoyment of property and the protection of the law" which was guaranteed by section 13(a) of the Constitution. Additionally did this infringe on his right not to be deprived of his personal liberty?

[64] As was stated earlier, the Board being mindful of the saving provision of section 26(8) of the Constitution declined to hold that, in **D.P.P. v. Mollison,** any of the respondent's rights under Chapter III of the Constitution was breached.

[65] When on 29 May 2000 the Court of Appeal held that the sentence of detention at Her Majesty's pleasure was unconstitutional the sentence was set aside and a sentence of life imprisonment was substituted. The D.P.P. appealed the decision of the Court of Appeal. While the appeal to the Privy Council was pending the claimant applied for a writ of habeas corpus. The court adjourned this application pending the outcome of the case before the Privy Council. This, it was submitted, also amounted to a breach of the claimant's rights under sections 13(a) and 15 of the Constitution.

[66] In re **Featherstone** (1953) 37 Cr. App. Rep. 146 the court held:

> "The court does not grant and cannot grant writs of habeas corpus to persons who are in execution, that is to say

> persons who are serving sentences passed by courts of competent jurisdiction. Probably the only case in which the court would grant habeas corpus would - if it were satisfied that the prisoner was being held after the term of sentence passed on him had expired."

[67] Again, in **R v. Governor of Pentanville Prison**, exparte Azam [1973] 2 All E.R. 741 Stephenson L.J. at page 759 said:

> "Where a person is detained in custody pursuant to the sentence of a court of law I agree with counsel for the respondents that he must challenge the legality of his detention by the prescribed procedure for appealing to a higher court or higher courts and not by an application for habeas corpus."

[68] These passages were considered by the Full court of the Supreme Court of Jamaica in **Paul Walker v. Commissioner of Corrections and the Superintendent of the Gun Court Prison**. In that case the applicant was convicted in the Gun Court and was sentenced to detention during the Governor General's pleasure. The applicant did not appeal within the time allowed under the Judicature (Resident Magistrate's) Law and his application for extension of time was refused by the Court of Appeal. Arising from convictions in similar cases the Privy Council declared that the sentence of detention at the Governor General's pleasure was unconstitutional as it offended the principle of the separation of powers. (see **Hinds and Others v. The Queen**; **Director of Public Prosecutions v. Jackson**; **Attorney General of Jamaica** (Intervener) [1976] 1 All ER 353). The appeals against sentence were remitted to the Court of Appeal.

[69] Their Lordships in the Full court held that the applicant could not be in a better position than Hinds and the others who had appealed, and that he, like Hinds and the others, would, subsequent to the decision of the Privy Council be treated as

convicted persons awaiting the imposition of the appropriate sentence by the Court of Appeal. The application was accordingly dismissed.

[70] In **Browne v. R** their Lordships rejected the submission that upon the provisions authorizing detention at the Governor General's pleasure being deemed to be unconstitutional the appellant should be released from custody. This case was also remitted to the Court of Appeal for the appropriate sentence to be passed.

[71] Similarly in **D.P.P. v. Mollison** the Board considered that the only objectionable part of section 29(1) of the Juveniles Act was to entrust the decision as to the duration of the detainees punishment to the executive. Therefore, upon section 29(1) being modified by virtue of the powers given to the court under section 4(1) of the Jamaica (Constitution) Order in Council 1962 the respondent remained in lawful custody in accordance with the untainted portions of that section.

[72] It is quite clear that the declaration that provisions similar to those of section 29(1) were unconstitutional did not render the detention of the properly convicted persons unlawful. Further, as the decision of the court of Appeal was being challenged, I cannot envisage any court releasing the claimant on the basis of the Court of Appeal's decision before the appeal to the Privy Council was heard. In the circumstances I believe the court, in adjourning the application, acted prudently. I find, therefore, that this could not properly be said to have breached the claimant's rights under the Constitution.

[73] In **D.P.P. v. Mollison** the Board, having quashed the sentence of life imprisonment and substituted a sentence of detention during the court's pleasure, as in **Venables** and **Browne** emphasized that where young persons are sentenced to an indefinite period of incarceration their progress and development in custody should be periodically reviewed so as to judge when their release or licence may properly be ordered. Accordingly the Board advised that the release of the

respondent be determined by the court in accordance with section 29(4) of the Juveniles Act 1951 as modified in accordance with the opinion of the Board.

[74] Section 29(4) of the Juveniles Act, as modified, then stated:

> "(4) The court may release on licence any person detained under subsection (1) or (3). Such licence shall be in such form and contain such conditions as the court may direct and may at any time be revoked or varied by the court……"

[75] Although the legislative framework existed, no formal mechanism was put in place to facilitate reviews until Part 75 of the Civil Procedure Rules was introduced in 2006. No review of the claimant's detention was commenced until 19 July 2011 as a result of the claimant's application which was filed on 28 January 2010.

[76] Did the absence of periodic reviews of the claimant's sentence from 1986 to 2011 constitute a breach of the claimant's constitutional rights under sections 13(a) and 15 of the Constitution? This issue did not arise in **Browne** nor **Mollison.** It did, however, arise in **Seepersad and Panchoo v. The Attorney General of Trinidad and Tobago** [2012] U.K.P.C. 4 in which a claim or redress was made on the basis that no effective review of the appellants' sentences of detention while they remained in custody.

[77] On behalf of the appellants it was argued that the claim was based not on a challenge to the statute itself but on the state's failure to execute the indeterminate sentence in a manner which accorded with their fundamental nature which required periodic review. It was further submitted that the challenge was not precluded by section 6(1) (the saving laws clause) as it did not extend to acts or omissions done under the authority of the law which contravened any of the provisions in section 4 and 5. It was also submitted that as the statute was silent as regards review, the right to review is to be found in the common law principle. This common law right was already part of the bundle of rights protected by sections 4 and 5 of the

Constitution when it took effect. Section 6(1) does not preclude challenge based on rights enshrined in those sections which is directed to a failure to do what the common law requires.

[78] Their Lordships at paragraph 37 of the judgment stated:

> "For these reasons the Board holds that the Court of Appeal erred in law in finding that section 6(1)(a) of the Constitution precluded the appellants from challenging the manner of the execution of their detention on the ground that the failure to review their sentence and detention resulted in a breach of their rights under sections 4(a) and (b) and 5 (2)(h). The appellants are entitled to a declaration that their constitutional rights were breached by the failure to conduct such reviews."

[79] As the provision contained in sections 4(a) and (b) 5(2)(h) and 6(1) of the Constitution of Trinidad and Tobago are similar to those to be found in sections 13(a) 15 and 26(8) of the Jamaican Constitution, I find that the decision in **Seepersad and Panchoo v. A.G.** would also be applicable to Jamaica. Accordingly the claimant is entitled to a declaration that his rights under sections 13 and 15 have been breached because of the absence of the periodic review of his sentence and detention.

Redress

[80] Should the claimant, as a consequence of these breaches be entitled to damages? In **Seepersad and Panchoo v. A.G.** their Lordships stated that "a court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively." Following the Board's decision in **D.P.P.** v. **Mollison**, the sentence of detentiion at the court's pleasure is deemed to have taken effect on 26 September 1986 when the Court of Appeal quashed the death

sentenced which was originally imposed. It is my view that the complaint that the claimant was prejudiced by the fact that the Court of Appeal did not change the sentence to detention at the court's pleasure is without merit. As an intervener in **D.P.P. v. Mollison** it must have been understood that the decision of the Board directly applied to him.

[81] An approach to the question of redress for a breach of constitutional rights is to be found at paragraph 38 of the decision of the Board in **Seepersad and Panchoo. v. A.G.** It states:

> "38. It is well established that the power to give redress under section 14 of the Constitution for a contravention of the applicant's constitutional rights is discretionary: **Surratt v. Attorney General of Trinidad and Tobago** [2008] UKPC 38, para 13, per Lord Brown of Eaton-under Heywood. The rights protected by section 4 are, as Lord Bingham of Cornhill said in the first stage of the appeal before the Board in that case, at least in most instances, not absolute: **Surratt v. Attorney General of Trinidad and Tobago** [2007] AC 655, para. 33. There is no constitutional right to damages. In some cases a declaration that there has been a violation of the constitutional right may be sufficient satisfaction for what has happened: **Inniss v. Attorney General of St. Christopher and Tobago** [2008] UKPC 42, para. 21; **James v. Attorney General of Trinidad and Tobago** [2010] UKPC 23, para. 37. In others it will be enough for the court to make a mandatory order of the kind that was made in this case, when Madam Dean-Armorer ordered that the terms of the appellants' detention should be determined by the High Court. As Lord Kerr said in **James v. Attorney General of Trinidad and Tobago**, para. 36, to treat entitlement to monetary compensation as automatic

where violation of a constitutional right has occurred would undermine the discretion that is invested in the court by section 14. It will all depend on the circumstances."

[82] In **Maharaj v. A.G. No. 2** at page 321 the following was said:

"Finally, their Lordships would say something about the measure of monetary compensation recoverable under S.6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment (under which the damages recoverable are at large and would include damages for loss of reputation). It is a claim in public law for compensation for the deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience suffered by the appellant during his incarceration."

[83] In **Everton Welch v. The Attorney General of Antigua and Barbuda** [2013] 1 UKPC 21 their Lordships stated at para. 13:

"It has also been accepted by the respondent that the appellant is entitled (at least) to nominal damages, in that he was detained under an order of the court that has been subsequently found to be invalid. But compensatory damages beyond nominal compensation may only be awarded if it is shown that the appellant has been detained for a longer period than he would otherwise have been if the appropriate and lawful sentence had been passed."

[84] Having determined that the claimants constitutional rights have been breached by the absence of periodic reviews and the continued incarceration beyond the release date ordered by Pusey, J., the court now needs to consider the circumstances of this case, as have already been stated, in order to determine the nature of the redress.

[85] Firstly the court needs to examine the actions of the agencies of the state. I find no evidence to suggest that any of these agencies acted maliciously or with any improper motive. The absence of reviews since 1986 was due to absence from the Juveniles Act of any legislative process under which reviews could be undertaken. Consequently, no punitive award of damages would be merited.

[86] Secondly the court needs to look at the claimant's conduct to see whether or not he contributed to his continued incarceration. Consequent on the Boards advice in **DPP v. Mollison** that the release of the respondent be determined by the court in accordance with section 29(4) (as modified), of the Juveniles Act it was open to the claimant as an intervener to apply to the court for his release on licence. In my view he need not have waited for the Court of Appeal to substitute the sentence as the decision in **DPP v. Mollison** applied equally to all the interveners. The claimant made no attempt to have the Court of Appeal record the correct sentence until 2007. Again, although Part 75 of the Civil Procedure Rules came into force in 2006, the claimant made no application until 2010.

[87] The submission that had there been periodic reviews the claimant would have been released either in 2004 when his accomplice Lester Williams was released, or before, has not been supported. There was no evidence produced concerning the circumstances leading to Williams' release. The evidence at the trial clearly showed that the claimant played a more significant part than Williams in the death of Mr. Lindsay. Evidence was given of his conduct while incarcerated showing several breaches. Further, even at the time when his release was ordered Pusey J was not

of the view that he should be unconditionally released but instead released him on parole for four years. In my view, in taking into consideration the circumstances surrounding the murder of Mr. Lindsay, a incarceration for a period of twenty five years would not be excessive.

[88] Part 75 of the CPR contemplates that on an application being made for a review a decision would be made within a few months. The claimant's application which was filed was on 26 January 2010 was not determined until 24 January 2012, due largely to the non-compliance with the provisions of the CPR and orders made by the court. In the circumstances the claimant was detained beyond the period of his likely release. Consequently I think an award of two million dollars ($2,000,000.00) would be adequate compensation.

[89] Concerning the claimant's detention between 31 January and 13 March 2012, Dr. Barnett urged the court to consider the awards made in this court in the following cases:

(a) **Mervin Fearon v. Attorney General and Constable Brown** (unreported) Claim No. CL 1990 F.046 delivered on 31 March 2005.

(b) **Baugh v. Courts Jamaica Ltd**. and the **Attorney General** (unreported) Claim No. CL B099 of 1997 delivered on 6 October 2006 and

(c) **Maxwell Russell v. Attorney General and Corporal McDonald** Claim No. 2006 HCV 4024 delivered on 18 January 2008.

Miss Larmond, however, submitted that those cases should not be relied on as they concern damages in tort for false imprisonment.

[90] The cases cited by Dr. Barnett can only be used as a guide in determining what award is to be made (see **Maharaj v. Attorney General;** and **Attorney General v. Ramanoop** (2005) 66 WIR 334). Having examined the cases cited I believe an award of seventy five thousand dollars ($75,000.00) per day should be awarded to the claimant for the period of incarceration between 31 January 2012 and 18 March

2012 (43 days) totaling three million two hundred and twenty-five thousand dollars ($3,225,000.00).

[91] The claim for special damages must be refused. There was no evidence that the claimant was ever gainfully employed before his incarceration and so could not have lost any earnings while incarcerated. His claim is based on earnings after his release. This could not constitute special damages.

MCDONALD, J

I have read the judgment of Hibbert, J. and agree with the reasoning and findings.

LAING, J.

I have also read the judgment of Hibbert, J and concur with his reasoning and findings.

Order

(1) The defendant is hereby ordered to pay to the claimant the sum of $5,225,000 for breaches of his constitutional rights under sections 13 and 15 of the Constitution.

(2) Costs to the claimant to be taxed if not agreed.