THE REPUBLIC OF TRINIDAD & TOBAGO

THE HIGH COURT OF JUSTICE

HCA # 51 of 1997

BETWEEN DARRIN ROGER THOMAS
NATASHA DE LEON

-v-

THE STATE

RULING ON MOTIONS TO STAY

BEFORE THE HONOURABLE MR. JUSTICE IAN STUART BROOK (Ag.)

IN THE SAN FERNANDO FOURTH ASSIZE

MS. N. RAMSUNDAR & MS. M. JOSEPH on behalf of the STATE

MS. M. ROSE & MRS. R. RAMJIT on behalf of the FIRST APPLICANT

MR. L. ALLEYNE-FORTE & MS. A. PANDAY on behalf of the SECOND APPLICANT

Brook J. (Ag.):

THE MOTIONS

1. By Notice of Motion re-filed on the 6 January 2006, the First Applicant sought to have criminal proceedings, against him, for the murder of Ruben Paul Jaskaran, contained in Indictment No. 51 of 1997 ("the Indictment") quashed and/or stayed on the grounds that:

    a) the continued prosecution of the Applicant in the circumstances of this case constitutes a breach of the Applicant's right to a fair trial within a reasonable time in accordance with the Constitution and/or settled principles of the common law;

    b) the continued prosecution of the Applicant in the circumstances of this case amounts to an abuse of the process of the Court.

2. By Notice of Motion filed on the 4 January 2006, the Second Applicant sought:

    1. to have criminal proceedings against her contained in the Indictment stayed on the grounds that:

        a) the unreasonable delay of about Thirteen (13) years elapsing from the date of the alleged offence to the date of trial or the period of approximately twelve (12) years from the date of committal constitutes an abuse and/or misuse of the process of the Court; and

        b) the continuation of the prosecution herein is manifestly unfair and unjust and tends to bring the administration of criminal justice into disrepute; and

        c) the continuation of the prosecution is contrary to the principles of fundamental justice and is in breach of the applicant's constitutional right to a fair trial within a reasonable time or without unreasonable delay in accordance with the provisions of section 4 (a) and (b) and 5 (2) (e) and (h) of the Constitution; and

        d) the continuation of the prosecution herein in light of procedural breaches is manifestly unfair and unjust and attacks the fundamental blocks of the administration of justice.

    2. the committal Order in these proceedings be quashed on the following grounds:

        a) the Applicant was without lawful reason or excuse not informed by the presiding Magistrate of her right to call witnesses on her behalf during the conduct of the Preliminary Enquiry contrary to section 18 of the Indictable Offences (Preliminary Enquiry) Act Chapter 12:01 nor was she assisted in her cross-examination by the presiding Magistrate in accordance with the principles of a fair hearing; and

        b) in making the said committal order the presiding Magistrate acted without jurisdiction.

AFFIDAVITS & SUPPORTING ARGUMENTS

3. In support of his Motion, the First Applicant relied upon an affidavit, with 23 Exhibits, sworn to on the 6, and filed, on the 7 April 2005, in support of his original Motion. When the Motion came before me, on the 13 February 2006, his Counsel, Ms Margaret Rose,

was granted leave to rely on an amended, draft affidavit, upon her undertaking to cause the same to be sworn, filed and served that day[1]. In substance, the latter amended paragraph 47, of the original, by the addition of a single sentence, inserted 2 new paragraphs, 48 and 49, and incorporated the 23 Exhibits, originally filed.

4. Additionally, the First Applicant relied upon an affidavit of Barbara Whitier, his mother, filed on the 13 February 2006[2], in substitution for her previous, filed, on the 7 April 2005, in support of the original Motion. The latter, in time, incorporated an additional, albeit hearsay, phrase, contained within paragraph 6 thereof, to the effect that one Mr. Lee Young was with the First Applicant, at the material time, which the First Applicant has deposed to, himself, in any event.

5. In support of her Motion, the Second Applicant relied upon an affidavit sworn to and filed on the 4 January 2006.

6. At the hearing of this Motion, the State relied upon an affidavit of Dianne Pierre Henry, together with 3 exhibits, sworn to and filed the 14 April 2005 ("the Henry affidavit"), an affidavit of Janice Rigsby sworn the 14, and filed the 15 April 2005, in relation to the Second Applicant, and an affidavit of Janice Rigsby, with two exhibits sworn the 10, and filed on the 11 of January 2006, in substitution for what appears to be an affidavit, in identical terms, sworn the 13, and filed on the 14 April 2005, in relation to the First Applicant. At the hearing, Ms Ramsundar, one of the two attorneys appearing on behalf of the State, indicated that she intended to cause to be sworn, filed and served a further affidavit in substitution of the Henry affidavit, from another officer attached to the Supreme Court of Judicature, in identical terms and producing the relevant exhibits. There being no objection from Counsel for the defence, the Court proceeded with the Henry affidavit, in anticipation that it would be provided with the replacement, as a matter of formality, in due course.

7. Although those filed by the State were entitled "Skeleton Arguments", I had placed before me, in advance of and at the hearing of the Motion, full written *submissions* on behalf of the First and Second Applicants *and* the State, filed 6 January 2006, 9 January 2006 and the 15 April 2005 respectively. Upon being informed that I had read the same, together with all relevant authorities, with which I am familiar, referred to in the various written submissions, in advance of the hearing of the Motion, all Counsel agreed that the hearing took the form of my clarifying one or two points which had arisen in the written submissions, together with my receiving supplementary, oral submissions from each of the attorneys such as they might care to present. Additionally, Ms Ramsundar, on behalf of the State, provided me with an unfiled, update of her original skeleton arguments which, *inter alia*, incorporated material from the previously aborted first trial, in respect of the Indictment, in 2005, together with certain conclusions of, Rampersad, J. (Ag.) when considering similar Motions, together with arguments on section 18 *ibid*, in light of those included by Counsel for the Second Applicant, in his written submissions. State Counsel indicated that the amended skeleton would be filed, in due course[3], and there was no objection by Counsel for the Applicants, for my having recourse to an un-filed copy, in advance thereof.

THE RELEVANT LAW

8. In, *R. v. Derby Crown Court, ex parte Brooks*, (1985) 80 Cr.App.R. 164, 168, it was held that the power to stop a prosecution arises only when it is an abuse of the process of the

[1] The affidavit was duly sworn on the 24th February and filed on the 1st March 2006.
[2] This affidavit was not in proper form, but this was rectified with the re-filing of the affidavit, on the 1st March, sworn on the 24th February 2006.
[3] This was filed on the 2nd March 2006.

court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable.

9. On the issue of delay, the Court was guided, in its deliberations, by the common-law, in respect of this issue. The cases of *Attorney-General's Reference (Number 1 of 1990)* [1992] 3 All ER 169 and *Tan v. Cameron* [1993] 2 All ER 493 were instructive. The judgments in the cases of *Director of Public Prosecutions and another v. Jaikaran Tokai and others* (1995) 48 WIR 376 and *Sookermany v. Director of Public Prosecutions and another* (1996) 48 WIR 346, although emanating from constitutional motions, also provided useful guidance. From the cases, the following principles can be distilled:

   - A stay should only be imposed in exceptional circumstances.

   - The burden of proof of proving serious prejudice to the extent that a fair trial was impossible, so that a continuance of the prosecution would be an abuse of the process of the Court, rests on the accused on a balance of probabilities and the burden is an onerous one.

   - While lengthy, inexplicable delay raises the question of presumptive prejudice that alone is not sufficient to warrant a stay but the real issue is whether, in all the circumstances, given the trial Court's dominion over the admissibility of evidence and directions to the jury the accused could be afforded a fair trial.

   - A further, distinct consideration arises on an issue broader than prejudice and that is the discretionary power of a Court in cases of inordinate delay to stay proceedings where to allow them to proceed would amount to oppression or misuse of the court process - an accused may exceptionally be granted a stay of criminal proceedings for delay at common law even if he cannot show that he has suffered any actual prejudice in the presentation of his defence as a result of the delay if: (a) there has been something oppressive or unconscionable in the conduct of those responsible for the prosecution in procuring or (where there is an option) permitting the delay; or (b) the time which has elapsed since the alleged offence was committed or since the accused was charged (or both), is so long that, after considering whatever explanation or excuse for the delay (including a lack of institutional resources) is offered, the court regards the continued prosecution of the accused as unconscionable or oppressive and a misuse of the court's process. This residual discretion will only be exercised in the most exceptional cases.

HISTORY OF THE PROCEEDINGS

10. The Applicants deposed that they were arrested, in March 1993, for the murder of the deceased, Ruben Paul Jaskaran, the victim, particularised in the Indictment. The Second Applicant deposed that she was charged for a murder that occurred in or about February 1993, on the 25th May 1994 (deceased: Chandranath Maharaj). She also deposed that she was charged for another murder that occurred on the 10 March 1993 (deceased: Lambert Dookoo).

11. The First Applicant deposed that arising out of the same arrest in March 1993, he was also charged with two other murders. It is common ground that these were those in respect of Chandranath Maharaj and Lambert Dookoo.

12. The Henry affidavit produces as exhibits, the various Court flysheets in respect of the

hearings in respect of these three cases. Although the First Applicant deposed that it was on the 15th of November 1995, the Second, together with Henry, deposed that they were found guilty of the murder of Chandranath Maharaj, and sentenced to death by hanging, on the 9th November 1995. Both Applicants deposed that they have exhausted their appeals in respect of this matter and that the ruling in *Pratt and Morgan,* (1993) 43 WIR 340, applies to their current status, as condemned prisoners.

13. The First Applicant deposed that a Death Warrant was read, to him, on the 25th June 1998[4]. Ultimately, the death sentence imposed upon him was stayed, by the Privy Council, pending the determination of his petition to the IACHR[5].

14. The Court flysheets indicate that the matter the subject of the Indictment and the Lambert Dookoo matter came before the San Fernando Assizes, in separate courts, on the 9 March 2000. According to the record, the First and Second Applicants, but not their co-accused in the latter, *were present* and, accordingly, the matter was adjourned, to the 20 March 2000 "for all parties to be present". The record indicates that the other matter, the subject of the Indictment, was adjourned "generally", by Baird J. On the other hand, both Applicants have deposed that this matter was called on, before Mae Weekes J. (as she then was), on the 20 March 2000, *in their absence*, and that they were informed, subsequently, that the matter had been adjourned generally/indefinitely.

15. Whilst there is no evidence before me, as to the reasons why this matter was adjourned "generally", Ms Ramsundar indicated, in argument, on the 13th of February 2006, that a decision had been taken by her Department, to try the Lambert Dookoo matter, before this, as the third accused, in that matter, was a minor.

16. In respect of the Lambert Dookoo matter, both Applicants depose that the First, was acquitted of this allegation and the Second, was found guilty of manslaughter, sometime in March 2001. The Court flysheets confirm that, in fact, this was at a hearing on the 5th of February 2001 and that the Second Applicant was ordered to be imprisoned for life, not to be released before the expiration of 20 years from the date on which the sentence was pronounced, viz., the 1 March 2001.

17. The First Applicant deposed that, having regard to the length of time that had elapsed and to the fact that over the years there were three different murder charges pending against him, he had difficulty in remembering exactly what occurred on the adjourned dates of each of the matters, and he sought, as best he could, to put together, from his recollection and documents in his possession, what transpired during the course of these proceedings.

18. It is common ground that the first Cause List hearing, in this matter, at which the Applicants appeared, albeit unrepresented, was held on the 30 September 1997. The Court flysheet is endorsed that both defendants requested [the services of an attorney at law through the Legal Aid and Advisory Authority ("LAAA")], on that occasion. Whilst the First Applicant deposed that "[this] matter was finally set down for trial on the 4 April 2005", the Court flysheets record that on the next adjourned hearing, the 20 October 1997, notwithstanding the fact that the First Applicant was absent, with only the Second, present, albeit unrepresented, the matter was fixed for trial for the 20 November 1997.

19. The Court flysheets record that, thereafter, the matter came before the Court on the 8th December 1997, 8th and 14th January and the 2nd and 3rd of February 1998, with intermittent legal representation, when, on two occasions, the Court was engaged with another matter in progress.

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[4] Ms Ramsundar's written submissions indicate that such a warrant was read to both.
[5] Presumably this is what occurred with the Second Applicant too.

20. Legal representation, for both Applicants, seems to have crystallised, for the first time, on the 4th March 1998, when the Court appointed AR to represent the First Applicant, the Second, being represented by MC. The appointment of AR was confirmed by the LAAA, on the 22 April 1998.

21. The First Applicant deposed that:

    a) thereafter, the matter, came up on a Cause List, on the 24th July 1998 and that he cannot recollect what occurred on that date. The Court flysheets indicate that interim hearings took place on the 16th and 27th March, 23rd April and 15th May 1998. On at least two of those occasions, trial counsel did not attend and, on one occasion, the Court had another matter in progress.

    b) AR never took instructions from him, insisted that he plead guilty to the capital offence of murder and, when he refused to do so, withdrew from the matter, on a date that he cannot recall, during 1998. The Court flysheet records that, on the 24 July 1998, [the First Applicant] was present and unrepresented and informed the Court that arrangements were being made for an English barrister to represent him. MC appeared on behalf of the Second Applicant and was ready. The matter was fixed, presumably for trial, on the 6 October 1998.

    c) on the 6 October 1998, the matter came up on a Cause List, but he cannot recall what occurred on that date. The Court flysheets indicate that he was still unrepresented and informed the Court that an attorney from England might be representing him, after the matter before the Privy Council was completed. In any event, another matter was in progress and the matter was adjourned to the 23rd October 1998. On that occasion, the flysheet records that the First Applicant was unrepresented and was to apply for Legal Aid.

    d) the Court appointed attorney at law, SR, to represent him, on the 3rd December 1998, but the flysheets indicate that this was on the 1st.

    e) that the matter came up again, on the Cause List, on the 3 May 1999. According to the Court flysheets, there were interim hearings on the 1st and 25th of February 1999, and, on the latter occasion, the First Applicant is recorded as having informed the Court that SR was representing him but that he did not know his whereabouts that day. The record shows that, on the 3 May 1999, SR had to withdraw from the defence of the First Applicant, when objection was taken, thereto, by the Second.

    f) sometime during the course of 1999, SR withdrew from this matter, because of a conflict of interest, as he had represented the Second Applicant, on another of her murder charges, in which he was a co-accused.

    g) on the 30 November 1999, the Court appointed attorney at law, IG, to represent him, and the appointment was ratified, by the LAAA, on the 18 January 2000.

22. In the interim, the Court Flysheets record that there had been hearings on the 28th July, 24th and 27th September, 11th October and 12th and 17th November 1990, when, respectively: the First Applicant requested the Court to reappoint SR, the Clerk was to correspond with LAAA to verify if an attorney was appointed, the Clerk was to contact SR, he was unrepresented, he was un-represented (again), and the Court was to call SR

to be present on the next occasion and, when he was not, Mr. G. was to consider his position as to representing him after a perusal of the depositions.

23. The Court flysheets confirm that which the First Applicant has deposed, viz., that IG was appointed on his behalf, by the Court, on the 30 November 1999 and that, the defence having indicated that they would be ready by a fixed date, the matter was fixed for trial on the 12 January 2000.

24. The First Applicant deposed that, when the matter was called before the Court, for trial, on the 12 January 2000, attorney at law IG had not visited him to obtain his instructions. The Court record indicates that "IG [who was present] is not fully instructed". The matter was adjourned to the 18th of January 2000, for Mention.

25. The Court record for the 18th January 2000, is endorsed to the effect that "Mr. G. informed the Court that after he receives instructions today, he will be able to proceed on the 9 March 2000." The First Applicant deposed that, on that occasion, IG visited him, in the cell block, of the Court, and that they were able to hold a conference for approximately 45 minutes.

26. The next entry, in the Court record, is that in respect of the 9th of March 2000, when the matter was adjourned generally, when the Second Applicant's present attorney at law held for MC, *but, no attorney was recorded as being present on behalf of the First Applicant*. The record is not marked as to whether the matter was so adjourned, on the application of any party, or at the behest of the Court, *ex proprio motu.*

27. Thereafter, the matter came up on several cause list hearings on the 27th May, 18th of June, 12th of July, 4th November 2004 and the 4th January, 10th and 24th February 2005 when, finally, it was set for trial, on the 4th April 2005. The First Applicant's recollection of the dates of these hearings is somewhat at variance with what is shown in the Court flysheets, doubtless due to his reliance on memory.

28. On the 27 May 2004, the Court record indicates that the State was not ready to proceed, the Applicants appeared, but were unrepresented, and that the Director Of Public Prosecutions was to make a decision on whether or not to proceed with this matter. The record does not state any reason why the Director was to review the further continuance of the case; however, the First Applicant deposed that this was with regard to the fact that he was already convicted of murder and because of the amount of time that had elapsed.

29. On the next hearing there were problems with legal representation in so far as Miss Rose was absent for the First Applicant and the attorney, Mr. J., appearing for the Second, indicated that he had been appointed merely as *an instructing attorney* to Mr. R.

30. On the next occasion, the State was not ready to proceed and there were similar problems with legal representation.

31. On the next occasion, the 4 November 2004, a representative appeared to hold on behalf of Miss Rose and indicated that she was ready to proceed, but Mr.J., indicated that advocate attorney, Mr.R. had had to return his brief to the LAAA. On that occasion, the State indicated that it would not be ready to proceed, until February 2005.

32. On the 4th January 2005, Miss Rose appeared for the First Applicant, ready to proceed. The Second Applicant was represented by Mr. J. and Ms. P., holding for Mr. P. The latter was said to be unable to represent the Defendant and the brief was to be returned to the LAAA.

33. On the 10th February 2005, the State was not ready to proceed, Miss Rose was, and the

Court appointed the Second Applicant's present attorney at law as advocate[6]. The trial was fixed, on the next occasion, when the Second Applicant's advocate attorney was not ready. The matter was adjourned to the next day, the 5th and then again to the 7 April 2005.

34. On that occasion, the trial appears to have commenced, in one way or another. The First Applicant deposed that the matter began and continued for a period of 58 days when it was aborted, due prosecuting counsel's reference to evidence that the trial Judge had agreed to exclude from the jury, because the prejudicial effect of it could not be cured by a warning at the summing up stage. In oral submissions, Ms. Ramsundar conceded that, due to a misunderstanding on her part, she opened to the jury, in her opening address, certain matters to which the defence understood there to have been agreement with regard to editing, under the *Silcott*[7] principle, after a period of 2 months of preliminary, legal arguments.

HISTORY OF THE THREE INDICTMENTS

35. The history of these 3 indictments is set out in the affidavits of Janice Rigsby, the Indictment Officer, at the Office of the Director of Public Prosecutions.

36. This witness deposes to the receipt of the files and the filing of indictments in respect of the instant matter and those in respect of Chandranath Maharaj and Lambert Dookoo. The instant matter was received on the 26th April 1994, with the other two being received on the same date, namely, the 18 August 1995. The indictments were filed on the 10 April 1997, the 31 October 1996 and the 10th of July 1995 (*sic*), respectively. This witness deposes that, from her experience, it is not unusual for an indictment to take a year to be filed once committal proceedings have been received. Her department is said to be understaffed, and that, therefore, in those circumstances, it is inevitable that there would be delays in the filing of indictments which has been compounded by the fact that there has been an increase in the number of murders, over the course of the past 5 years.

37. It may be seen, therefore, that this indictment was filed within 3 years and that in respect of Chandranath Maharaj, approximately 14 months. One cannot ascertain the time within which that in respect of Lambert Dookoo was filed because, clearly, there is an error as to the date of filing, in her affidavit. In any event, she deposes that all 3 indictments were filed within the space of 4 years.

38. Ms Rigsby points out that, against this background of delay, it is noteworthy that both Defendants had been tried and convicted of the murder of Chandranath Maharaj, by the 9th November 1995.

39. Whilst there is always room for improvement, resources permitting, the Court is not unduly concerned at this aspect of the delay, standing in isolation, which may be considered just about average, in our jurisdiction, bearing in mind the resources available to the Magistracy, of which the Court takes judicial notice, and the difficulties faced within the Office of the Director Of Public Prosecutions, as described by Ms Rigsby. However, the Court takes judicial notice that, of late, quite a few matters, of a similar nature, have come on for trial, within a much shorter timeframe. It is accepted that the Courts "must have regard to the constraints imposed by harsh economic reality and local conditions", when considering such issues, see *Mungroo v. R.* [1991] 1 WLR 1351, 1355 and,

[6] During supplementary submissions, Mr Alleyne Forte indicated that there was a typographical error in the Second Applicant's affidavit at paragraph 34, in so far as he was appointed in 2005 and not 2000. The Court record supports his contention.
[7] [1987] Crim. L.R. 765

generally, de la Bastide CJ (as he then was), in *Sieuraj Sookermany v. DPP* (1996) 48 WIR 346, 357.

40. In both her written (para. 89) and oral submissions, Ms Ramsundar avers that it was "the Director of Public Prosecutions [who] sought to have [the instant] matter relisted by letter dated April 19, 2004." The relevant letter is exhibited by Ms Rigsby, and I shall return to this topic, later in this judgment. The Court is left with the distinct impression that the Director's Office was placing blame for delay, subsequent to the matter being adjourned generally, on the Criminal Registry, as the latter is said to be responsible for the listing of criminal matters.

COOLING OFF PERIOD

41. I accept the submission of Ms Ramsundar that a cooling off period had to be taken into account when considering bringing the two outstanding indictments to trial, once the Applicants had been convicted of the murder of Chandranath Maharaj, on the 9 November 1995, and that this should be borne in mind when assessing the period of delay from 1993 to 1997. State Counsel reminded the Court that in the case of *Boodram v. A.G*. (1996) 2 WLR 464, the defendant had sought a discontinuance or postponement of his trial for at least 18 months, after the publication of certain articles in the media. In my view, a cooling off period, of this nature, is even more important, when one considers that this matter was to be heard in San Fernando, and not Port of Spain although, for my part, I would have thought that somewhere in the region of 9 -12 months would have been appropriate, bearing in mind the regularity with which a large number of capital trials have been highlighted, in the media, over the last few years.

PRIORITISATION OF TRIALS

42. In my view, it was perfectly reasonable for the indictment in respect of the murder of Lambert Dookoo, to be given precedence over that in the instant matter, as the third defendant was, apparently, a minor. This, together with a further cooling off period that would, of necessity, be associated thereto, is a factor which I have borne in mind when considering the delay in this case.

THE RESPONSIBILITY OF THE ACCUSED FOR ASSERTING THEIR RIGHTS

43. In *Barker v. Wingo,* 407 US 514 (1972), Powell J. identified four factors which, in his view, the Court should assess in determining whether a particular defendant has been deprived of his right [under the US Constitution] to a *speedy* trial, namely: (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 v. DPP* (1985) 32 WIR 317, 326, their Lordships acknowledged the desirability of applying the same or similar criteria to any Constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must, however, vary from jurisdiction to jurisdiction and from case to case. Moreover, when considering *Bell, ibid* and three other Privy Council decisions, de la Bastide CJ (as he then was) stated, in *Sieuraj Sookermany*, *ibid,* at page 356,

> "It is possible to extract from these cases certain important guidelines which, in so far as they were laid down in cases in which the right to be tried within a reasonable time was expressly provided by a written law, would apply *a fortiori* to cases like ours in which a stay is sought on the basis of a less specific common-law right, albeit one that has been impliedly incorporated in the Constitution",

and went on to specify them. Whilst his Lordship did not expressly adopt the four factors, propounded by Powell J., *supra*, they were applied by Lucky J., at first instance, in *DPP v. Tokai*, *supra*, and his doing so was not criticised, on appeal, in the Court of Appeal or

the Privy Council, and I share his view that they are germane to applications such as this, at common-law.

44. Accordingly, it is important to consider what the First and Second Applicants did, if anything, to assert their rights.

First Applicant

45. In his affidavit, the First Applicant sets out the considerable number of steps he took to inquire as to the status of this matter, when he learned that it had been adjourned "indefinitely", of his then attorney at law, IG, and, on receiving, allegedly, no response, thereto, the steps that he took to have him replaced by the LAAA.

46. He states that he was "very concerned that [his] matter had no adjourned date" and made every effort to contact his attorney to inquire what the position was, including writing him numerous letters. One such letter, dated 19 May 2000 is exhibited. Therein, he makes reference to the 45 minute conference, at the cell block, on the 18 January 2000, together with an alleged promise, on the part of the attorney, to visit him in prison, prior to his next Court date, to receive the remaining instructions and hold discussions with him, in preparation for the trial, then set for the 20 *(sic)* March 2000 (the 3rd of March 2000 being the date upon which the matter was adjourned generally). He continued by stating that he had been informed that the case was adjourned indefinitely, but that on further inquiry had been told that that meant adjourned to the next Assize and, to quote, continued:

> "yet in light of this two months have passed and my case have (*sic*) not been relisted for trial, plus I have not received any visit from you to complete laying instructions and further discussions in preparation for my case. Having been appointed my legal representative for this case it becomes your duty to seek and/or act in my best interest [and went on to quote Article 21, Part A of the Code of Ethics]. In light of this fact and also bearing in mind that this charge has been pending against me for seven years and two months I am sure that you would agree that it would be in my best interest to have this matter heard as soon as possible in order to avoid the possible irreversible complications that would occur because of the delay. Therefore I implore you as my appointed legal representative to act in my best interest and investigate the reason, and/or reasons why my case has not been relisted for trial and take the necessary steps to have that problem rectified as soon as possible.
>
> In contribution to rectifying this problem I propose to write the Director of Public Prosecutions (DPP), the office of the Chief Justice and if it becomes necessary the Inter-American Commission on Human Rights for clearly such prolonged delay indeed amounts to a violation of my rights as a citizen of Trinidad and Tobago.
>
> I anticipate that in taking the steps listed above this issue should be rectified in the very near future thus having my case relisted for trial; and in light of this we must take all necessary steps to make sure we are prepared to proceed on the relisted date. Apart from wanting to complete my instructions to you and discuss my case in detail there are certain issues that I wish for you to investigate in preparation for my trial and obviously all this must be done before our case is called before the court again....."

47. The First Applicant deposed that his attorney, IG, never respond to any of his correspondence, nor visited him in prison. Accordingly, there then followed an exchange of correspondence between him and the then Director of the LAAA seeking to have his matter re-assigned, since he was anxious to obtain assistance outside of the prison to shed some light on the status of his matter.

48. By letter, to the LAAA, dated 12 January 2001 (exhibited) the First Applicant referred to earlier correspondence dated the 5 January 2001, wherein he had requested that his attorney, IG, "be revoked from [his] case" and be replaced by PE. He continued with a reference to the fact that he expected that his pending case would be listed for hearing in the upcoming month and trusted that the suggested appointment would be made soon in anticipation of the same.

49. The then Director replied, by letter of the 21 March 2001, to the effect that he had spoken to PE, who was unable to accept the brief, due to her very heavy workload and that the Judge's appointment of IG "remains intact" but that if he could get an attorney of his choice, on the legal aid panel, willing to accept the matter, he would make every effort to accede to his request. As it is of some significance, in what follows, it is appropriate to state, at this juncture, that the Court takes judicial notice of the fact that PE is an attorney at law, *in practice, in Port-of-Spain*.

50. The First Applicant deposed as to how, during the remainder of that year, he wrote several letters to attorneys in San Fernando and Princes Town, requesting their assistance in representing him, via LAAA, but received no response thereto.

51. The First Applicant deposed that his present, advocate attorney at law, Ms Margaret Rose agreed, sometime during 2001, to represent him, provided she was appointed by LAAA, pursuant to his written request of her, dated the 18 January 2001 (exhibited).

52. There then appears to have followed an exchange of correspondence between the First Applicant and the then Director of LAAA. In his letter to the LAAA, dated the 5 April 2002, he made it plain that, other than seeing him for 15 minutes in December 1999, he had neither seen nor heard from IG, that he had not received any replies to any of his correspondence to him, and that he had not visited him, to discuss his case, in preparation for his trial. He pointed out that it was obvious from those facts that IG was definitely not interested in representing him and implored the then Director to revoke his appointment and appoint Ms Rose. The letter confirmed Ms Rose's willingness to act, if so appointed. When he had received no response to his letter, the First Applicant wrote a follow-up, dated the 24 May 2002, re-requesting the revocation of IG's appointment and the appointment of Ms Rose.

53. The then Director replied to the latter, by letter dated the 15th of July 2002 (exhibited), indicating an unwillingness to appoint Ms Rose, a Port of Spain-based attorney to do a San Fernando matter. The Director indicated that if he were to indicate a San Fernando-based attorney, whom he believed could represent him, he would consider his request.

54. The First Applicant deposed that he continued to write to the LAAA indicating that he had written numerous letters to attorneys in the San Fernando and Princes Town area to which he had received no replies. Exhibited are 2 further letters dated the 11th and 18th October 2002, again, seeking the appointment of Ms Rose. It is clear, from this correspondence, that the First Applicant was unhappy with the Director's refusal to appoint Ms Rose and, in the former, he indicated that he had taken a decision to lodge a formal complaint to the Law Association and the Office of the Attorney General.

55. By way of letter dated 16 October 2002, the then Director indicated, *inter alia*, that the First Applicant was not entitled to a lawyer of his choice under the Legal Aid and Advisory Act, that it was a policy of LAAA to appoint San Fernando attorneys in San Fernando matters and that no lawyer, based in Port-of-Spain, had ever represented an accused at San Fernando, under the exegesis of LAAA, or vice versa, that if he wanted a change of assigned lawyer, he must obtain the written consent of two lawyers based in San Fernando who would be willing to act for him and that it was only then that he would consider changing the assignment and, finally, that he was to be advised that any further

correspondence requesting a Port of Spain-based attorney would be ignored and not replied to.

56. In response to his letter dated the 11th October, the then Director, wrote to the First Applicant, on the 24 October 2002, in terms, *inter alia*, that he could retain Ms Rose, privately, if he did not want the ""legal aid" lawyers assigned to represent [him]."

57. Non deterred, the First Applicant, deposed that he wrote to the then Director, again, on the 8th November 2002 in terms, *inter alia*, pointing out that "there are no "lawyers" appointed to represent [him]" and that, in his opinion, IG was a junior attorney at law, with little, or no experience in dealing with murder cases, that he had told him, on many occasions, of IG's apparent disregard towards his case, in that since his appointment, almost three years ago, he had only seen him once for about 15 minutes to discuss his case, that this was not in keeping with the Code of Ethics, hence his desire to have IG's appointment revoked, expressed an understanding as to the logic behind the practice of Port-of-Spain attorneys conducting cases in Port-of-Spain but asked, that, nonetheless, the Director consider that IG was definitely not interested in his case and the fact that Ms Rose had indicated a willingness to act, if appointed. This letter continued by making it plain that he had written to several San Fernando and Princes Town attorneys, inquiring as to whether they would be willing to accept his case under Legal Aid, but that those letters were not even answered.

58. The First Applicant deposed that, after December 2002, he received no further communication, either from the LAAA, or his attorney, IG, with regard to this matter, for several months. He deposed that, on or about November 2003, on being informed that the Director, with whom he had been corresponding, was no longer in post, he wrote, once again, repeating his request that the matter be reassigned. On this occasion he succeeded, as Ms Rose was appointed by way of Legal Aid assignment, dated 12 December 2003.

59. The First Applicant deposed that he did write several letters to the Director Of Public Prosecutions to have his matter relisted but that copies thereof were no longer in his possession. Ms. Rigsby conceded, in her affidavit, that the Office of the Director of Public Prosecutions received a letter, dated the 21 March 2004, exhibited and stamped as received, 5 days later, from Father Paul Bartle-Jenkins, in Bristol, UK. It was this letter which prompted the Director to write to the Registrar of the Supreme Court, on the 19th of April 2004, requesting the matter to be placed on the Cause List. It is noteworthy that the introductory paragraph of Father Bartle-Jenkins' letter is in terms of "my friend Darrin Thomas wrote to me recently *to explain his frustration with failed communications between him and your good self*." The letter continued by requesting the Director set a date for the First Applicant, by listing his last case for trial. Whilst not seeking to controvert the evidence of the First Applicant to the effect that he wrote *several letters* to the Director, Ms. Rigsby concedes that one was received, on the 2 December 2003. The Court notes that this was not exhibited by Ms Rigsby and draws an inference, therefrom, in favour of the First Applicant, that it would tend to support his case. Ms. Ramsundar conceded in her written submissions that: “we do not doubt that he would have written.”

Second Applicant

60. Whilst the Second Applicant has not particularised her efforts, to have this matter listed, with the same degree of documented precision, as her co-accused, she has deposed to having written to the Director Of Public Prosecutions, the Attorney General, the Ombudsman, the LAAA and the Registry, and there is no evidence before me, by way of affidavit gainsaying this assertion which, therefore, I accept.

OBLIGATIONS OF THE STATE WHEN IT BECAME AWARE OF THE SHORTCOMINGS OF APPOINTED COUNSEL

61. The then Director of LAAA was certainly aware, from the First Applicant's letter of the 5 April 2002, if not before, of his allegation of the total disinterest, in the matter, shown by appointed counsel IG. The First Applicant had written, on the 12 January 2001, to the then Director, referring to his previous letter of the 5 January 2001 which was said to have contained a request for the re-assignment of the case, and included reasons for the same. It is clear, in my judgement, that the First Applicant did everything that he could, bearing in mind that he was incarcerated, on Death Row, to draw the alleged shortcomings of assigned counsel, to that arm of the State, responsible for the provision of attorneys, under the Legal Aid and Advice Act, namely the LAAA, that he had sought, unsuccessfully, the assistance of attorneys in San Fernando and Princes Town and, moreover, had obtained the consent of an attorney at law, willing to act, provided she was appointed by LAAA, namely, Ms Margaret Rose.

62. The then Director steadfastly refused to appoint Ms Rose, on the grounds of "the policy of LAAA to appoint attorneys based in San Fernando to handle San Fernando matters" and, quite astonishingly in my judgement, had indicated that he would only consider changing his assigned attorneys, if the First Applicant obtained the written consent of two lawyers, based in San Fernando, willing to undertake the matter (see letter dated 16 October 2002). In my judgement, bearing in mind that the then Director was aware, by letter of the 8th of November 2002, if not before, that the First Applicant had sought the assistance of several attorneys in San Fernando and Princes Town, through correspondence, which had gone unanswered, and, bearing in mind that he was incarcerated on Death Row, this placed a burden on the First Applicant which was far too onerous. Whilst it is clear that no defendant is entitled to counsel of his choice, under the Legal Aid Scheme, this case illustrates, when one considers the history of representation of this Applicant, how difficult it would appear to have been for LAAA, at that time, particularly in South Trinidad, to obtain the services of attorneys of sufficient breadth of experience and expertise, who were willing, and had the time available, bearing in mind their other commitments, to take on a capital case, under the Legal Aid Scheme. Whilst there was, doubtless, a reason behind the then policy (I say then, as opposed to present policy as there would appear to have been a change, now, as Ms Rose *was* ultimately appointed, apparently, after a change in the Directorship of the LAAA), I find the refusal to appoint an attorney, simply because she hailed from Port-of-Spain, as quite irrational, bearing in mind the apparent difficulties, at that time, at any rate, in securing the services of attorneys, in South, prepared to see a case through to a conclusion. For my part, one would have thought that the Authority would have been thankful that an attorney, practising in Port-of-Spain, was prepared to assist and take on a matter, of several weeks duration, in San Fernando, with all the inconvenience that this entails. I note that when the First Applicant requested the services of PE, the then Director did not indicate that he could not appoint her *because she practised in Port-of-Spain*, as he had indicated with Ms Rose, but, indicated that he had spoken to her to be informed that she could not accept the brief because of her other commitments. Accordingly, there would appear, at the very least, to have been an inconsistent application of the policy as was said to exist at that time.

63. Whilst allegations against, and criticisms of, attorneys are easy to make and put forward, in my judgement, there is an obligation upon the LAAA, at the very least, to write to the attorney concerned, in an appropriate and wholly exceptional case such as this, perhaps providing him or her with a copy of any correspondence, to the Authority, from the assisted person, asking him/her for observations, thereby enquiring as to whether the appointee really has a genuine interest in conducting the case and has the time available

to adequately prepare it, bearing in mind his/her other commitments, or would prefer the matter to be re-assigned. There are doubtless many attorneys who are proactive and inform the Authority, immediately it becomes apparent to them, that their commitments are such that they are unable to take a matter on, or to continue to represent an appointee, but, there are, no doubt, others, few one hopes, who might simply let such matters slide, for one reason or another.

64. In my judgement, it is unacceptable for the Authority, as it did in this case, under the then Director, who, after all *had* been notified of the alleged shortcomings of counsel, simply to have placed the burden upon the First Applicant to find other counsel, himself, from his condemned cell - in fact two such counsel, who would be prepared to indicate, in writing, their willingness to act for him. In the interim, after the hearing on the 18th of January 2000, up until Ms Rose's assignment on the 12 December 2003, the First Applicant was, on his account, entirely without *de facto* legal representation although, from the court record, it appears, somewhat surprisingly, that Ms. Rose never entered an appearance, until, via a colleague who held for her, on the 4 November 2004, which, in itself, causes the Court a degree of concern. It is abundantly plain that the First Applicant was anxious to have his matter relisted and, in my judgement, it is likely that this would have been achieved, that much earlier, if he had had the benefit of *effective, de facto* legal representation as opposed to what would appear, on his account, to be a disinterested, *de jure*, legal aid appointee. In my judgement, the LAAA has a duty to investigate and re-assign matters, if necessary, if and when it becomes aware of assigned counsel's total ineffectiveness, such as has been alleged in this case, or, at the very least, to cause him to fulfill his obligations.

65. I arrive at these conclusions having had the benefit of reading the judgment in *Artico v. Italy* - 6694/74 [1980] ECHR 4 (13 May 1980). Whilst this aspect of that case was decided under Article 6 paragraph 3 (c) of the Convention for the Protection of Human Rights and Fundamental Freedoms, in my judgement, I can find no rational basis for excluding similar principles in our jurisprudence, bearing in mind national law, namely the Legal Aid and Advice Act, Chap. 7:07, and the obligations of the Republic of Trinidad and Tobago, under Article 14 (3) of the International Covenant on Civil and Political Rights which provides: "In the determination of any criminal charge against him, every one shall be entitled to the following minimum guarantees in full equality: (a)…(b)…(c)…(d)…… to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

66. Paragraphs 31-33 of the *Artico* judgment are instructive:

> "31. The applicant alleged a violation of Article 6 par. 3 (c) (art. 6-3-c) of the Convention, which reads:
>
> "Everyone charged with a criminal offence has the following minimum rights:
> ...
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;..."
>
> This contention was unanimously accepted in substance by the Commission but disputed by the Government.
>
> 32. Paragraph 3 of Article 6 (art. 6-3) contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article (art. 6-1). The various rights of which a non-exhaustive list appears in paragraph 3 reflect certain of the aspects of the notion of a fair trial in criminal proceedings...When

> compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots.
>
> 33. As the Commission observed…sub-paragraph (c) (art. 6-3-c) guarantees the right to an adequate defence either in person or through a lawyer, this right being reinforced by an obligation on the part of the State to provide free legal assistance in certain cases. Mr. Artico claimed to be the victim of a breach of this obligation. The Government, on the other hand, regarded the obligation as satisfied *by the nomination of a lawyer for legal aid purposes, contending that what occurred thereafter was in no way the concern of the Italian Republic*[8]. According to them, although Mr. Della Rocca declined to undertake the task entrusted to him on 8 August 1972 by the President of the Second Criminal Section of the Court of Cassation, he continued to the very end and "for all purposes" to be the applicant's lawyer. In the Government's view, Mr. Artico was, in short, complaining of the *failure to appoint a substitute* but this amounted to claiming a right which was not guaranteed. *The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (see the *Airey* judgment of 9 October 1979, Series A no. 32, pp. 12-13, par. 24, and paragraph 32 above). As the Commission's Delegates correctly emphasised, Article 6 par. 3 (c) (art. 6-3-c) speaks of "assistance" and not of "nomination". *Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.* Adoption of the Government's restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) (art. 6-3-c) and the structure of Article 6 (art. 6) taken as a whole; *in many instances free legal assistance might prove to be worthless.* In the present case, Mr. Artico did not have the benefit of Mr. Della Rocca's services at any point of time. From the very outset, the lawyer stated that he was unable to act. He invoked firstly the existence of other commitments and subsequently his state of health (see paragraph 14 above). The Court is not called upon to enquire into the relevance of these explanations. It finds, as did the Commission (see paragraph 98 of the report), that the applicant did not receive effective assistance before the Court of Cassation; as far as he was concerned, the above-mentioned decision of 8 August 1972 remained a dead letter."

67. In my judgement, on the materials before me, in particular what is contained within the Court flysheets, the First Applicant appears to have had little, if any, *effective* representation from the first date of hearing, the 20th of September 1997, until the appointment of Ms Rose, by the LAAA on the 12th of December 2003. The court record is clearly marked that both had requested legal representation, via Legal Aid, at the first hearing at which they were present, namely, the 30th September 1997. Whilst initially, attorneys were assigned by the State and gave up the brief, for one reason or another, the Authority was well aware of the alleged shortcomings of Ms Rose's immediate predecessor and did little about that, other than to place the burden of securing alternate representation upon the Applicant. In my judgement, the State, through the agency of the LAAA, was in breach of its obligations to the First Applicant to provide him with effective legal assistance on what is, after all, a capital charge, until Ms Rose was ultimately appointed. It appears to me that this the defalcation contributed, significantly, to the delay in this case, in particular between the 9th March 2000 and the 12 December 2003.

EVIDENCE IN THE CASE OF REUBEN PAUL JASKARAN

68. Whilst in the case of the First Applicant, there is evidence of an "oral", a fingerprint found

[8] Emphasis mine, throughout

in a vehicle used as a taxi and some inconclusive evidence based upon a recovered "equaliser", Ms Ramsundar conceded, during her supplementary submissions, that the State's case against both Applicants rested entirely on the written statements they were said to have given to the Police.

EFFECT OF THE DELAY ON MEMORY

Background

69. It is important, to note, that following their initial arrests, both Applicants were intervi ewed in respect of the murders of Chandranath Maharaj, Lambert Dookoo and Reuben Paul Jaskaran (the instant matter). These interviews took place over a relatively short timeframe and it is axiomatic that both on any *voir dire*, and on any trial of the general issue before a jury, the Applicants will need to be able to give a good account of events in their lives at the material times, as to what happened at the Police Station before, during and immediately after interview and as to the steps that the Police took to authenticate any statements said to have been given by them. They will also need to be able to compartmentalise in their minds and extricate the events concerning the statements in this case from the events concerning the interrogations into all 3 murders, where it is said 3 statements have been given, by each of them.

70. The Table, below, summarises the dates/times at which the Applicants were interviewed, by the Police, in respect of each of the three murders, following their arrests, as revealed by the depositions, to which the Court has referred[9]:-

[9] It should be noted that the statements in respect of the Maharaj and Dookoo matters were not amongst the papers before me.

TABLE

Date	Time	Defendant	Event	Case
10/3/93			Second arrested	
11/3/93		Second	Statement. Percival Morancie signed after allegedly read to Second Applicant.	Dookoo
11/3/93		3rd Defendant	Percival Morancie present at interview of 3rd defendant, a minor.	Dookoo
12/3/93			First arrested	
12/3/93		Second	Police, Percival Morancie, Second Applicant, to JP Persad for verification that given and as to voluntariness	Dookoo
12/3/93	3:10pm	3rd Defendant	Statement authenticated by JP Persad	Dookoo
12/3/93	10:45-11:55pm	First	Statement	Dookoo
13/3/93	6-7pm	First	Statement	Maharaj
13/3/93	8:50pm	First	Statement authenticated at Princes Town by JP Francis	Maharaj
13/3/93		Second	Statement	Maharaj
13/3/93	7:30pm	Second	Statement	Jaskaran
13/3/93	7:15pm	First	Statement	Jaskaran
15/3/93	11:45am	Second	Police and Second Applicant to JP Persad for statement authentication	Maharaj

It will be observed that both the First, and Second Applicant, were interviewed twice on the 13 March 1993: in respect of the deaths of Maharaj and Jaskaran.

Presumptive prejudice

71. At common law, the relevant period when considering delay, is that from the date of the commission of the alleged offence to the date of the application for a stay: *Sieuraj Sookermany v. DPP* (1996) WIR 346, 358. Accordingly, the period in this case is one of 13 years, 2 months. I hold that this period is presumptively prejudicial, and in doing so I note that my brother Moosai J. held a period of almost 11 years to be "by any stretch of the imagination presumptively prejudicial" in the case of *Balram Supersad v. the State,*

HCA No. CR 69/02 and so too, a period of 9 years in the *State v. Hilton Barnett*, HCA No. CR114/2002.

Evidence as to memory failure

First Applicant

72. The First Applicant has deposed that having regard to the length of time that has elapsed and to the fact that over the years there were three different murder charges pending against him, he has difficulty in remembering exactly what occurred on the adjourned dates of each of the matters and that he had put together, from his recollection and documents in his possession, and attempted to highlight in his affidavit, the course of the proceedings.

73. In relation to the events themselves, he deposed, further, that he is constrained to say that, with the effluxion of time, he has increased difficulty remembering details about his arrest and detention, interaction with particular officers and a number of other relevant and possibly crucial details in this matter, a difficulty which has been painfully evident in his attempts to instruct his current attorneys, impairing his defence of this matter.

74. In her supplementary, oral submissions, Ms Rose indicated that, during the proceedings of the last aborted trial of this matter, she had placed on record several shortcomings as to memory difficulty. At paragraph 49, of his affidavit filed the 13 February 2006, the First Applicant deposed that on the last occasion, during April-May 2005, his attorney repeatedly placed on the record his inability to recall the events and finally intimated to the trial Judge that a full recollection seemed impossible but that they would try to mount a defence on what they could gather from the various depositions.

75. It was agreed, by Counsel on both sides, that I could, and indeed should, have recourse to those proceedings, when assessing, so far as I am able, the effect of the delay on memory.

76. Whilst reading those transcripts, I bore in mind the words of Mme Justice Paula Mae Weekes (as she then was), in the case of the *State v. Donaldson Mortley,* HCA, No. 186/79:

> "while the Court is of the opinion that in its direction to the jury it can effectively deal with the issue of the absent alibi witness to ensure a fair trial the position is less certain in respect of the proposed evidence of the accused as it is affected by the passage of time. While the prosecution witnesses will also be affected by the passage of time they will not have undergone the particular emotional strain of having been in custody with a capital charge pending and they would have the assistance of their deposition to refresh their memory. *The accused would be expected to testify on a voir dire and, if necessary, at the substantive trial and while there is no burden on him he would have to give evidence sufficiently cogent to raise the necessary issues and this would necessarily call for a degree of detail*…. The Court is of the opinion that notwithstanding a direction on the effect of the passage of time on the memory of the accused (that essentially being a question of fact for the jury) there remains the very real likelihood that a jury will attribute repeated lapses of memory on the part of the accused to an attempt to obscure the truth."

77. Whilst, of course, it cannot be apparent from a reading of the transcript of an examination in chief whether a particular witness has come up to proof or not, I was unable to discern, from a reading of the evidence in chief of the First Applicant, on the *voir dire*, any points at which he appeared to be faltering based upon his poor recollection of events, save for the transcript for the 1st June 2005 at Page 38, line 34, when questioned about what

happened, after the JP left the police station on the 13th of March 1993. His answer was: "to the best of my recollection, I cannot even remember being at the police station on that time that they saying that I was there, and that I tell them about equaliser. I can't even remember being there."

78. During cross-examination, by Ms Ramsundar, on the same date, when pressed for times, (see transcript, *ibid*, pages 42 to 44), his memory was plainly faltering. At one juncture, Ms Rose objected to the further questioning on this issue, because the trial Judge had indicated that he would help protect the Defence in relation to the delay that they had experienced and the effect on memory and that he would take precautions so to do [the application for a stay based upon delay having failed] (see transcript, *ibid*, page 43, line 31).

79. Later on, that day, Ms Ramsundar cross-examined the First Applicant on what he had said at the trial of the murder of Lambert Dookoo, of which he had been acquitted (see transcript, *ibid*, page 56, line 1). He was unable to recall the evidence that he had given, at trial, on this point (see transcript, *ibid*, page 56, lines and 34-39).

80. On the 2 June 2005, he was cross-examined on the time at which he left "the Mess Room", and he was unable to say (see transcript, 2 June 2005, page 4, lines and 33-38).

81. Later on, during the course of that day, he was cross-examined as to the fact that it was on the night of the 13th that he spent the night in Marbella (transcript, *ibid*, page 10, line 47). The First Applicant was unable to remember which date it was that he went there (transcript, *ibid*, page 11, line 5). The next "question" put by State Counsel was: "you would agree with me that your memory is very convenient to you, there are things you remember and then there are things you say you can't remember, is it convenient?" (transcript, *ibid*, page 11, line 9).

82. His answer, to that was, in my judgement, most telling, which, perhaps, confirmed what Ms Rose had indicated, to me, in her supplementary, oral submissions: "no ma'am, I have been saying this from the beginning. When this case start, I told my attorney that I could not remember everything that was happen" (transcript, *ibid*, page 11, line 14).

83. Later that day, he was cross-examined as to whether he had seen or had any interaction, before, with Winston Dave O'Nardex (transcript, *ibid*, page 13 -15) and was pressed over and over, by Counsel for the State, leading Ms Rose to rise, on at least two occasions, to indicate that her client had answered that he could not recall.

84. I am satisfied, on a balance of probabilities, that the First Applicant would be seriously prejudiced, at trial on the *voir dire,* or the general issue, by the effect, on his memory, of the passage of slightly in excess of 13 years, bearing in mind the relevant evidence contained within his affidavit and upon considering the evidence that he gave, on the *voir dire*, at the previously aborted trial of this matter, and that he would be unable to give evidence sufficiently cogent to raise the necessary issues *with the necessary degree of detail.*

85. It is clear, from my reading the transcript of Prosecuting Counsel's opening address to the jury, in the previously aborted trial of this matter, together with her concessions made, to me, in her supplementary, oral submissions, that the fact that that trial was aborted was entirely down to an error/misunderstanding on her part. In the same way that the First Applicant was cross-examined on the trial transcript of the Dookoo matter he would, of course, now, potentially, be liable to be cross-examined, both on any subsequent *voir dire* and before a jury, on the entirety of the evidence that he gave on the *voir dire* of the previously aborted trial, which would, in my judgement, add to the difficulties he would face in recollecting past events, with any degree of clarity and accuracy.

Second Applicant

86. The Second Applicant did not give evidence, on the *voir dire*, at the previously aborted trial. Accordingly, the only evidence before me, is that within her affidavit, wherein she deposes that, due to the delay, her recollection is severely impaired and as such, she is unable to properly assist the attorneys in her defence. She has been trying to recall all the necessary details of this matter but it is said to be rather difficult to remember a great majority of the history.

STATE'S ATTITUDE TO ALLEGED MEMORY SHORTCOMINGS

87. In her supplementary, oral submissions, Ms Ramsundar made much weight of the fact that the Police Officers had their diaries, notebooks and station diaries and that the defence had had full disclosure thereof, and, that, therefore, there would be no prejudice, as the State's witnesses would be refreshing their memories, 13 years later, from documents made contemporaneously, or shortly after the events recorded. This, of course, is no answer to the difficulties faced by the Applicants, with regard to *their* recollection of events, as I took pains to point out.

88. Moreover, in her skeleton arguments, Ms Ramsundar suggests that "it is apparent there is a very good quality of memory in relation to the ability to recall and aver", as demonstrated by the contents of their respective affidavits.

89. As I have indicated, already, a significant part of the First Applicant's affidavit deals with a reconstruction of the course of the proceedings, by reference to Notices of Indictment, Legal Aid Assignment Notices, letters to attorneys and the Director of LAAA and to correspondence received from the then Director of LAAA. I have indicated, already, how, on at least two occasions, his affidavit does not accord, in a variety of ways, with the notes on the court flysheet which would have been recorded, contemporaneously, by the Judicial Support Officer, sitting in Court, on the day in question, which, therefore, I accept as the more reliable. I am satisfied, on a balance of probabilities, that the First Applicant was being truthful when he deposed that he was doing as best as he could to put together the course of the proceedings, from his recollection and documents in his possession. The remainder of his affidavit, paragraph 50 *et seq.*, merely deals, somewhat briefly, with his conviction, appeals and the reading of a Death Warrant in respect of the conviction for the murder of Chandranath Maharaj, his acquittal of the murder of Lambert Dookoo, a generalised account of trauma and prejudice suffered and the oppressive and inhumane conditions of his incarceration, a bald allegation of prosecutorial manipulation and misuse of the process of the court and the death of his alibi witness and that of the Justice of the Peace, alleged to have authenticated his confessional statement. In any event, the affidavit, perhaps for obvious reasons, does not deal with the details of the incidents about which the First Applicant would be required to give evidence on the *voir dire* and on the general issue, if this matter were to proceed to trial a second time. Accordingly, I reject Ms Ramsundar's argument to the effect that the affidavit demonstrates a good quality of memory in relation to the ability to recall and aver; if anything, in my view, it demonstrates entirely the opposite, when one looks at the detail.

90. The Second Applicant's affidavit differs from that of the First, in so far as it *does* deal with issues that one would expect to be raised on the trial of the *voir dire*, or the general issue, including:

a) where she slept, at CID, for five days;
b) whether she was given a change of clothing or allowed to shower;
c) whether she was given anything to eat whilst in custody;

d) how she felt;
e) a description of the layout of the room at CID in which she was lodged;
f) that she heard her father's voice, at the police station, on the 13th of March 1993;
g) that her requests to officers for a change of clothing, to see her father, or an attorney at law were denied;
h) her age, condition of pregnancy, and her need for support and guidance;
i) her signing a document on the 13th of March 1993, which she realised, later, purported to be a voluntary statement made by her;
j) her father's presence at the JP's office, on the 15 March 1993, but refusing to sign a document, as he was not present, on the 13th;
k) that she was unrepresented, throughout the PI, and that the Magistrate offered her no assistance in the proceedings;
l) that the Magistrate did not direct her attention to the services of the LAAA, nor advise her how she was able to access such services, notwithstanding her many requests that an attorney appear on her behalf;
m) her limited forays into cross-examination;
n) how she felt, during many of the days of the PI, the pregnancy and the effect, thereof, on her comprehension of the proceedings;
o) occasions, at the PI, when she was not brought up, before and after the birth of her daughter;
p) that the Magistrate did not inform her that she had the right to call witnesses on her behalf;
q) that her father would have been in a position to testify that, although being at CID, on the 13 March 1993, at about 7:30 p.m., he was not allowed to see or speak to her and that she is now prejudiced as a result of his death;
r) the circumstances in which the previous trial was aborted;
s) had she had the benefit of legal advice, or been assisted by the Magistrate, in accordance with the law, her father's deposition would now, at least, have been available to her.

91. Accordingly, Ms Ramsundar's argument that the affidavit demonstrates a good quality of memory in relation to her ability to recall and aver is, perhaps, more well founded than in the case of the First Applicant. The Second Applicant did not give evidence on the *voir dire* and, therefore, I am not assisted, in that regard, in coming to any conclusion as to whether she has suffered any prejudice, on account of failing memory, over the period of the delay of 13 years. I simply have her bald assertion, in her affidavit, together with the presumed prejudice over such a long period of time. The part of her affidavit, dealing with the salient features of what happened, whilst in police custody, as summarised above, is, essentially, only a skeletal outline of what she could say about those incidents. At trial, she would be expected to flesh out these bare bones with considerable detail, particularly in cross-examination. I remind myself, again, of the words of Madame Justice Paula Mae Weekes (as she then was) in the *State v. Donaldson Mortley, supra*. 13 years is, after all, a considerable period of time over which to try to recall details of an incident concerning the giving of a voluntary statement, in particular, when, at 18 years of age, she had been interrogated with regard to three murders over the course of as many days. I am satisfied, on a balance of probabilities, that the Second Applicant would not be able to give evidence sufficiently cogent to raise the necessary issues which would necessarily call for a degree of detail and that she has suffered serious prejudice, in that regard, by virtue of the delay in excess of 13 years.

ABSENT WITNESSES

First Applicant – alibi witness

92. The First Applicant deposed that he had spent the entire evening of the 28th December 1992 with one Mr. Lee Young, who was fully aware of his innocence and who had been willing to come and attest to this at the trial.

93. Barbara Whitier deposed, in her later affidavit, that between March and December 1993, she met with Mr. Lee Young. He is said to have agreed that he would come to give evidence in the matter to the effect that the First Applicant was with him for the entirety of the evening of the 28th December 1992 and requested that he be informed when he was required to attend court. A Death Certificate in the name of Barry Lee Young is exhibited by the First Applicant, showing a date of death of 28th June 1998.

94. In her skeleton arguments, Ms Ramsundar questions why no statement or proof appears to have been taken, during the period 1993 to 1998. She also states that there is nothing to suggest that the witness did exist, that he was a potential alibi witness or that he could have assisted the case for the First Applicant.

95. The history of the First Applicant's somewhat chequered, legal representation has already been outlined. Notwithstanding the legislation requiring an alibi warning to be given at the PI, which was not complied with here, and providing for a period within which such details may be given to the Director, in the Court's experience of such matters, the proofing of alibi witnesses and the service of an alibi notice on the Director, if given at all, are matters which are left, invariably, to be dealt with by the attorneys at law by whom it is clear, by a certain time, the case is to be conducted. In the Court's experience these are not matters which, from a practical point of view, are dealt with by what is often a multiplicity of attorneys who come in and go out of a case, between the first hearing and the trial, until definitive trial representation has crystallised. It seems to me that this did not occur, in this case, until the 12 December 2003, with the appointment of Ms Rose, by which time the alibi witness had died.

96. In my judgement, there is no merit, whatsoever, in Ms Ramsundar's second point which is put to rest on the affidavit evidence of the First Applicant and Barbara Whitier.

97. I bear in mind the sentiments of my brother Moosai J. in *Balram Supersad v. the State, supra:*

> "I should however make the point that in cases such as these, the Court will more readily draw the inference that an accused has suffered prejudice where statements have been recorded from the alibi witnesses..... when one looks at the case for the accused, the accused, as a result of the death of his two alibi witnesses, would at trial have only his testimony to rely on. A jury might well convict the accused in the absence of his alibi witnesses, notwithstanding the strongest directions by the trial judge." (This appears to be a case where no proofs had been taken from the proposed, deceased alibi witnesses).

98. In his dissenting judgement in *DPP v. Jaikaran Tokai, supra,* p.411, Hamel-Smith, J. A., whose opinion was upheld, on appeal to the Privy Council, stated:

> " It is evident that the appellants' attempt to claim actual prejudice was rejected outright by the trial judge, and rightly so. The lack of any relevant particulars as to the name and address of the witness, the efforts (if any) to locate him (or her) and whether or not he ever indicated to them a willingness to testify on their behalf had telling effects on the claim. To determine whether the testimony of the alleged witness was supportive of the appellants' defence required more than

> the assertion that he was an 'independent witness'. Left in its nakedness either inference was possible, a leaning to the prosecution's story or to the appellants', and required no cross-examination to dispose of same."

99. At no stage did Hamel Smith, J. A., elevate the existence of a witness statement or proof of a deceased witness to a condition precedent to establishing prejudice. His Lordship seemed to be of the view that it would be sufficient to be in a position to indicate the name and address of a witness, the efforts to locate him and whether or not he had ever indicated to be willing to testify on behalf of the Applicant. In my judgement, this accords with good common sense. After all, whilst totally unacceptable and to be deprecated in the strongest of terms, the Court takes notice that it is not entirely unknown for defence attorneys not to have written proofs of evidence from their clients, on trial in the High Court, never mind witnesses to be called on their behalf.

First Applicant – Justice of the Peace

100. I have been provided, at my request, by the State, subsequent to the last hearing of this matter, with the Death Certificate of one Laurence Adolphus Francis, the JP who is said to have authenticated the First Applicant's voluntary statement, showing a date of death of the 3 October 1998.

101. The State's case is that the voluntary statement of the First Applicant was taken to JP Francis, at Princes Town, for *ex post facto* authentication. Whilst not a strict requirement of the Judges' Rules, the Court takes notice of the fact that, invariably, in capital matters, a JP will be called to interview a prisoner to ascertain whether s/he has been properly treated and wishes to give a statement voluntarily and, additionally, to sit in and witness the taking of the statement, certifying, as appropriate, thereon, at the conclusion thereof. Such a witness, in the Court's experience, would, usually, be called, to testify, at the PI.

102. In this case, whilst Francis did not testify at the PI, although alive at the time, police officers testified to taking the First Applicant to see him, at Princes Town, for *ex post facto* certification. During supplementary, oral submissions, Ms Ramsundar indicated that, in circumstances where he had died, so as to minimise prejudice, it was proposed that the JP's certificate be expunged from the voluntary statement to be admitted into evidence but that, nonetheless, the police officers would give evidence as to the *ex post facto* certification. The Court, in any event, is somewhat troubled by the concept whereby police officers can give evidence, uncorroborated by an independent third-party, of steps they took to have their own procedures and the voluntariness of a statement, said to have been taken by them, investigated and certified, by the said third-party, since deceased.

103. Even if the JP had still been alive, the Court has been troubled by the fact that he was not called at the PI. In the supplementary, oral submissions, Ms Ramsundar indicated that that was the practice at that time and that the calling of JP's, to testify at a PI, is a relatively modern concept, resorted to, since it became fashionable to challenge written confessional statements. At that time, she maintained, JP's were only called, *in the High Court*, on the *voir dire*, *if there was a challenge to the admissibility of the statement*.

104. In *Constance, Wilson & Lee v. the State,* (1999) 57 WIR 490, 498, it was stated that:

> "In Trinidad and Tobago their lordships were informed that for at least the last twenty years a practice has developed whereby a justice of the peace is called by the State to prove that any confession relied upon by the prosecution was

> obtained in accordance with the Judges' Rules and common-law principles. Such a witness has no interest of his own to serve, is entirely independent and of course is of impeccable character and reputation. All this is acknowledged by the State."

105. The above would appear to clash with the statement made, to the Court, by Ms Ramsundar. In any capital case, wholly reliant upon an alleged voluntary statement, some form of challenge to the statement is to be expected and, therefore, one would expect the State to call any witness capable of demonstrating compliance with the Judges' Rules, at the PI. This was not done and, accordingly, there is no deposition from the JP and the opportunity for cross-examination has been lost forever. In my judgement, the mechanism, said to have been agreed upon, at the previously aborted trial, and proposed again in this, is insufficient to deal with the obvious prejudice, occasioned, to the First Applicant, by the demise of the JP, in the interim. One cannot simply assume that there cannot be any prejudice, by his absence, which must assist the defence, as, if called, it is axiomatic that he would have supported the Police Officers and so assisted the State. The Court is only too well aware of the destructive power of the tool of cross-examination, wielded in the hands of a competent and skillful advocate, particularly when deployed against an array of supposedly corroborative witnesses. Whilst if the State had agreed to expunge *all* evidence of the alleged, *ex post facto* authentication, which was not suggested, by Ms Ramsundar, or, if I had ruled that the same be excluded, this would have met the concern that I have raised at para. 102, *supra*, there is still the question of prejudice by the JP's demise. The making of serious inroads, into the credibility of the Police Officers, on whose testimony the case totally depended, may very well have been possible, by a skilful cross-examination of the JP.

106. On the *voir dire*, at the previously aborted trial, the First Applicant denied any incident of *ex post facto* authentication (see transcript, 1st June 2005, page 35), and he has so deposed in his affidavit.

107. I am satisfied, on a balance of probabilities, that, in all the circumstances of this case, the First Applicant is seriously prejudiced, in his defence, by the demise of the Justice of the Peace who, clearly, the Defence would have wished to call to be cross-examined, or, at the very least, to have interviewed with regard to the possibility of his being a defence witness, if not called by the State.

Second Applicant - Father

108. In my partial summary of the Second Applicant's affidavit, *supra*, it will be seen that she is alleging that her father, Percival Morancie, was at the Police Station, on the 13th March 1993 and that she was denied access to him. One must not overlook the fact that he was present, at the Police Station, on the 11th of March 1993, was present at the interview of the third defendant, a minor, in the investigation into the death of Lambert Dookoo and, ultimately, was a State Witness, against his daughter, at that trial, in respect of the authentication of the relevant statement.

109. During the evidence on the *voir dire*, on the previously aborted trial, the Police conceded that Morancie was present at the Police Station, on the 11 March, and that he spoke to the Second Applicant and was with her, between 7 and 8:30 p.m., on the 12th of March 1993, but it was denied that he was in the building on the 13th., and that she had asked to see him, upon hearing his voice.

110. Since the last hearing, the State provided the Court, at my request, with a Death Certificate in respect of Percival Morancie, showing a date of death of the 26 June 2004.

111. Ms Ramsundar argues that, if he could have been of assistance, he would have been a State Witness, as he was in the Dookoo matter, and she took pains to point out

that the Defence had been provided with his witness statement, in that matter, by way of unused material. It is interesting to note that Morancie falls out of the picture, after the statement in respect of the death of Dookoo had been taken and authenticated, see para. 70, *supra*. Commonsense would seem to dictate that there are issues which any competent, defence counsel would have wished to investigate with him.

112. The Court flysheets show that attorney at law MC seemed to have appeared for the Second Applicant, from very early on in the matter, but neither the Court records, nor the Second Applicant's affidavit, indicates the basis upon which he appeared. She deposed, that in or about June 2004, she was appointed, for the first time, as far as she was aware, two attorneys, Mr. PR and Mr. SJ to represent her. Of course, it was around that time, that the father died. MC would appear to have fallen out of the picture, after the matter was adjourned, generally, on the 9 March 2000. Thereafter, the Court records confirm that Mr. J. appears to have been appointed, by LAAA, instructing Mr. R. who had to return the brief, to a colleague, who found himself in a similar predicament. The Second Applicant's present, advocate attorney at law was appointed, by the Court, on the 10th February 2005. Accordingly, the father was clearly still alive, when the case was adjourned, generally, for approximately a further four years but, was dead, at the time when trial representation crystallised, thereafter.

113. On a balance of probabilities, in the absence of any evidence, before me, to the contrary, I accept the evidence of the Second Applicant that her father, Percival Morancie would have been in a position to testify that, although he was in the precincts of the CID, San Fernando, on the 13th day of March, 1993 at about 7:30 in the evening, he was not allowed to see nor speak to her, and I find that she has been seriously prejudiced, by his death, during the period of delay in this case.

EVIDENCE OF OTHER PREJUDICE

114. The First Applicant has deposed that the 12 (now 13) year delay in the prosecution of this matter has caused him great trauma and that he has suffered great prejudice having regard to certain unique and specific factors in his case. Bearing in mind that he was sentenced to death, for the murder of Chandranath Maharaj, on the 9th November 1995, and, presumably, has been on Death Row ever since, I attach no significance, whatsoever, to his allegation that he has been "permitted to languish in prison" without any explanation as to why his indictment was not served on him until four years after he was committed and as to why the matter was adjourned generally for approximately four years from 2000 to 2004. In the same way, I disregard his complaint that prison conditions have been very oppressive and inhumane and that he has been kept in a cell by himself. The Court takes notice of the fact that condemned prisoners are housed in single occupancy cells, on Death Row. It appears to me, that the majority of the trauma that the First Applicant must have suffered since November 1995 was that, since then, he has been under sentence of death and that, on the 25 June 1998, the State sought to execute him. Ms Rose's suggestion, contained within her written submissions, that the State should not have read a Death Warrant to, and sought to hang her client, bearing in mind that he had two similar, allegations of murder, pending, before the local Courts, is, in my view, totally devoid of any merit whatsoever.

115. The Second Applicant's affidavit raises no other issue of prejudice, over and above what I have considered, hitherto.

OPPRESSIVE OR UNCONSCIONABLE CONDUCT

116. In her written submissions, Ms Rose argued that the first time that either this, or the other, remaining indictment, of the original three, was set for trial in the High Court, was January of 2001, noticeably just after the expiration of the timeline laid down in *Pratt*

and Morgan v. AG of Jamaica, (1993) 43 WIR 340. On that basis, she submitted that the actions of the State in the continued prosecution of this matter amounted to a manipulation of the process intended to deprive the applicant herein of his life, rather than propelled by the desire to protect the public and reform him. In other words, because the State could not execute him for the murder of Chandranath Maharaj, five years having elapsed since his conviction, under the rule in *Pratt and Morgan,* it decided to prosecute him, for a further capital charge, in the hope of being able to execute him, for that, if convicted. Ms Rose relied upon several authorities, namely, *Bennett v. Horseferry Road Magistrates Court*, [1993] 3 All ER 138, *Sookermany v. the State*, *supra*, the *State v. Michael Paul and others*, HCA No. 333 of 1998, *the State v. Donaldson Mortley, supra, Balkissoon Roodal v. the State*, Privy Council Appeal No. 18 of 2003 and *Charles Matthew v. the State,* Privy Council Appeal No. 12 of 2004.

117. The facts of *Donaldson Mortley* were, briefly, that in February 1979, the defendant was charged with a murder of SK. The PI was completed in March of that year. In July, 1980, the matter was called at the Assizes and was adjourned to the November Assize of that year. On that occasion he was not brought to court and the matter was adjourned generally. During 1980 to 1983 he was tried, on three occasions, in relation to the murder of one DW. The appeal in respect of his third trial was allowed and no retrial was ordered. The accused had protested the delay, that he was facing, in respect of the SK matter and had taken all steps within his power to bring this to the attention of the authorities including letters of complaint and a hunger strike. The Court found that, even before the issue of prejudice, the conduct of the State in not listing the matter until the accused was unburdened of another like criminal charge, 15 years later, to be unconscionable and oppressive, applying the common-law principle referred to in *Sookermany v. the State, supra.*

118. However, during supplementary, oral submissions, Ms Rose was forced to withdraw her argument that the State was manipulating the process, by only setting this case down for trial, once the rule in *Pratt and Morgan* became applicable to the Chandranath Maharaj conviction, when the Court pointed out, to her, that that conviction was recorded on the 9 November 1995, *Pratt and Morgan*, thereby, applied on the 10th November 2000 and that the Court flysheets record that this matter was fixed for trial on the 20 October 1997 (for the 20 November 1997), the 24 July 1998 (for the 6 October 1998), the 30 November 1999 (for the 12 January 2000), and the 18 January 2000 (for the 9th March 2000).

119. Ms Rose points out, in her written arguments, that the ruling in *Balkissoon Roodal, supra,* meant that had the First Applicant been tried and convicted for this offence, within a reasonable time, he would have had the opportunity of seeking to persuade a Judge to impose a sentence other than one of death. The speeches in *Balkissoon Roodal* were handed down on the 20 November 2003 and the decision was overruled by *Charles Matthew*, *supra*, on the 7 July 2004. Whilst Ms Rose indicates that their Lordships insisted that all persons on Death Row, at the time of the judgment, were not to be executed, as they had a legitimate expectation in light of the prior decision of *Roodal, supra,* she did not develop the point any further.

120. If the Applicants had been tried and convicted for this matter, within a reasonable time and prior to the 7th of July 2004, the date upon which the speeches in *Charles Matthew, supra*, were delivered, they could not be executed for the offence, now[10], and would be entitled to a commutation of the death sentence to one of life imprisonment (see paragraph 33 of the speech of Lord Hoffmann, in *Charles Matthew, supra*). In my judgement, by analogy with *Donaldson Mortley, supra* and applying the principle to be

[10] Presuming, of course, that they had not exhausted all appeals and been executed, within the *Pratt & Morgan* time frame.

found in *Sookermany v. the State, supra,* it is unconscionable and oppressive for the State to seek to try these Applicants, now, 13 years after the incident, and after the ruling in *Charles Matthew, supra*, as, if convicted, they would receive a mandatory death sentence (see, paragraph 33 of the speech of Lord Hoffmann, *ibid*).

CONCLUSION

121. I hold that this period of 13 years 2 months, is inordinate, unjustifiable and presumptively prejudicial.

122. Whilst there is always room for improvement, I am not too perturbed by the period of 4 years which it is said to have taken to file all 3 indictments in this series, bearing in mind, that in that period, the Applicants had been tried, convicted and sentenced to death on one indictment.

123. From the first, effective Cause List hearing, on the 30th of September 1997, until the matter was adjourned, generally, on the 9 March 2000, the reasons why this matter had not come on, for trial, according to the Court flysheets, appear to be based upon the fact that: the First Applicant was represented by a variety of Counsel each of whom, for a variety of reasons came off the record or, in the case of one of them, allegedly took no real interest in the matter; the Court was, on more than one occasion, engaged on the trial of other matters and, on other occasions, one or more of the attorneys on record for the Defendants, either failed to appear or indicated that he was engaged, in the conduct of a matter, elsewhere. It will be apparent that to commence a trial, such as this, several factors have to crystallise, in a favorable manner, synchronously, viz., the Court has to be available, both the prosecution and defence witnesses must be available, State Counsel must be fully prepared, Counsel for each Defendant, in a multi-handed matter, must have no competing commitments and be available for trial and, moreover, be in a state of readiness for trial. It is hardly surprising, that, in our jurisdiction, it is frequently the case that the above factors do not crystallise in the way that I have indicated, with the result being that cases are adjourned, over and over again. The limited number of Criminal Assize Courts and, Judges; the dramatic increase in serious crime over the past few years; the relatively small size of the Criminal Bar, in particular in San Fernando; together with the tradition, in our jurisdiction, that attorneys, with other commitments, often send a colleague to hold, to seek an adjournment, doubtless due to the uncertainty of whether a trial will commence or not, and not wishing to shed remunerative work in those circumstances, as opposed to returning the brief, in time for a substitute to be fully prepared and ready for trial, as occurs elsewhere, are all factors that contribute towards delay and, in my view, militate against any change, in this regard, in the immediately foreseeable future, unless inroads, can be made, in certain areas, or changes in various areas of the current, working practices of the Criminal Bar can be encouraged and brought about.

124. I have taken account of the fact that cooling off periods were a necessity, after each of the first 2 trials of this trilogy, when considering the delay.

125. The delay occasioned between the 9 March 2000 and immediately prior to the 12 December 2003 would appear to have been contributed to, significantly, by the State, through its agency the LAAA, under the Directorship of the then Director, who had been made aware of the alleged shortcomings of the First Applicant's trial counsel, either in January of 2001 or, at the latest, by April of 2002, did not replace him, or cause him to fulfill his obligations, and refused to reassign the matter to Ms Rose, when made aware that she was able and willing to act, on the grounds of policy not to appoint a Port-of-Spain attorney in a San Fernando matter. Of course, she was, ultimately appointed, upon a change of the Directorship of the LAAA. I am satisfied, from the assiduous manner in which Ms Rose has conducted the defence of the First Applicant, before me, in

particular with regard to her comprehensive, written submissions, that she would have taken such steps as were necessary, if she had been appointed at an earlier stage of these proceedings, which, in my judgement, would in all likelihood, have reduced this period of the delay.

126. The delay occasioned between the 9 March 2000 and the 27 May 2004, is said, by the Office of the Director of Public Prosecutions, to the attributable to the Criminal Registry of the Supreme Court of Trinidad and Tobago, which bears responsibility for the listing of criminal matters. The State having taken a decision, for understandable reasons, to try the matter concerning Lambert Dookoo, prior to this indictment, and seeking, or agreeing, to the latter being adjourned, generally, in my judgement, on the 5th February 2001, upon the acquittal of the First, and the conviction of the Second Applicant, for the manslaughter of Dookoo, or within a reasonable time thereafter, had a responsibility to decide whether or not to proceed with this third indictment and to cause the matter to be relisted, once such a decision had been taken, either for the matter to be proceeded with, for no evidence to be offered, or, perhaps, for an order that it lie on the file, on the usual terms. In my judgement, the Office of the Director of Public Prosecutions can hardly take the credit for causing the matter to be relisted, when this was only as a result of the request, via Father Paul Bartle-Jenkins, in his letter, to the Director, pointing to the First Applicant's frustration with failed communications between himself and the Director.

127. Accordingly, it is clear, in my judgement, that the period of delay from the 9 March 2000 to the 27 May 2004 was caused, permitted, or contributed to wholly by the State, through one or more of its agencies. Whilst the total period, in excess of 13 years, may, be broken down into various periods, (arrest-PI-filing indictment-Cause List-Trial List etc.,) this is the single period of delay that has caused me the greatest degree of concern as steps could have been taken, by one or more of the agencies of the State, to deal with it.

128. Once the matter had been relisted and came on again, in a Cause List, on the 27 May 2004, there followed a period of some 10 months during which the Director of Public Prosecutions decided that the matter should proceed, notwithstanding the verdicts in the other two matters, legal representation had to be regularised for the Second Applicant, as MC had dropped out of the picture, the State had to get itself into a state of preparedness and, moreover, both sides had to be in a state of readiness, at a time when a Court was available. In my judgement, blame can be ascribed to no one for the delay occasioned during this period which, however, did, of course, add to the delay which had gone before.

129. Other than the fact that the delay was added to, I am not unduly concerned by the delay occasioned by the previously aborted trial, the time taken for defence counsel to receive the written judgements of the Court and for the matter to be relisted, before a Judge, on a retrial.

130. Ms. Ramsundar would appear to have overlooked what emerges from my analysis of the history of these proceedings, together with the matters upon which I pass observation at paragraph 123 hereof, when she submits, in her written submissions [paras. 63-5]: "1997-2001 – From the date the matter was placed on the cause list well into 2000, the defence was never ready…..[the 2 accused contributed to the delay]…..From 1995-2001…there was…a level of delinquency on the part of the defence in committing to a trial date……2001-2005…the question of delay should be viewed against the defence and his representation", thereby seeking to throw responsibility for the delay entirely onto the shoulders of the Applicant(s), which I reject, unreservedly.

131. I have considered such other explanation that has been put forward for the delay,

by the Prosecution: the limited resources at the Office of the Director of Public Prosecutions and the upsurge in the volume of work received; cooling off periods; that one indictment was tried by 1995 and another by 2001 and that the Court is said to be partially to blame.

132. In my judgement, both Applicants, but more so the First, did all that they could to assert their rights.

133. I have found, on a balance of probabilities, the burden on them being onerous, that both Applicants would suffer serious prejudice through the effect upon their memories and their ability to record detail, due to the passage of this period of delay.

134. I have found, on a balance of probabilities, the burden on them being onerous, that both Applicants would suffer serious prejudice through the unavailability of witnesses, 3 in total, who have died in the intervening period. I accept that Barry Lee Young died on the 28 June 1998 and that Laurence Adolphus Francis died on the 3 October 1998, during the period when the Court was seeking to try the matter, which did not take place, for the reasons given, *supra*. The position with Percival Morancie is somewhat different as he died on the 26 June 2004 and therefore, clearly, was available, subject to his ability and willingness to assist, had the matter being tried, within a reasonable time.

135. I am satisfied that the two species of serious prejudice referred to above are incapable of remedy by any direction which I could give to a jury, and that, because of their nature, these two Applicants are unable to have a fair trial.

136. I have considered and taken into account that the right of an accused to be tried, within a reasonable time, must, in every case, be balanced against the interest of the public in having him tried. In performing this balancing exercise, the Court is entitled to take into account the prevailing system of legal administration and the prevailing economic, social and cultural conditions that are found in Trinidad and Tobago.

137. I hold that the State seeking to prosecute these Applicants, for a capital offence, after a delay of 13 years 2 months, *post* the decision in *Charles Matthew, supra,* when the death sentence, on conviction, is, once again, mandatory, is oppressive and unconscionable, *per se*, without proof of actual prejudice, when if convicted, within a reasonable time, and before the 7 July 2004, they would have been entitled to a commutation, to life imprisonment, of any death sentence imposed upon them.

138. I shall exercise my discretion and stay this indictment.

139. I am mindful that such a stay is likely to heighten the perceived threat to the personal safety and property of the already embattled law-abiding section of the population. It is regrettable that it will produce, also, a good deal of quite understandable consternation and distress for the indirect victims of this crime, namely the family, relatives and friends of the deceased, Ruben Paul Jaskaran, who, on the evening in question, was, apparently, doing little more than seeking to earn an honest living, by driving his taxi about South Trinidad. After all, it is not only the Applicants who have waited in excess of 13 years, it is also the family of Reuben Paul Jaskaran who have waited, similarly, for those alleged to be responsible for his brutal death to be brought to justice. The delay in this case, together with its ramifications, in their various guises, as I have attempted to describe, means that they have waited, for justice, in vain; waited, patiently, for what is often termed, these days, "closure", and I am profoundly aware and conscious of the fact that they may feel that they have been let down by the criminal justice system of our country, notwithstanding my detailed reasons seeking to explain the reasons for my decision. I hope that, in some way, my focusing, in this judgment, by way

of constructive criticism, on certain areas where there may be a need for change or is, perhaps, room for improvement, may contribute, in some meaningful way, to the enhancement of our system, in the future.

140. In the circumstances of the Order which I am about to make, there is no need, to dispose of this matter, for me to decide the other points raised by Counsel for both Applicants, including the assertion of a right to a fair trial, within a reasonable time, in accordance with the Constitution, together with the arguments, under section 18 of the Indictable Offences (Preliminary Inquiry) Act, Chapter 12:01 and section 23 of the Interpretation Act, Chap. 3:01, etc., raised by the Second Applicant.

141. Although, in coming to my conclusions, I have had the benefit of the transcripts of the evidence on the *voir dire*, on the previously aborted trial, including that of the First Applicant, I hasten to add that I would have come to the same conclusion to stay the Indictment, as I come to now, if I had heard these Motions in April/May of 2005. It follows that I disagree, respectfully, with the relevant ruling of my brother, Rampersad J. (Ag.).

142. I emphasise that this is a wholly exceptional case and my ruling is not to be taken to apply to everyone awaiting trial, on a capital charge, at the time when the ruling in *Charles Matthew, supra*, was delivered, on the 7th July 2004.

RULING

143. In the circumstances, the Court orders that these proceedings be stayed and not to be relisted without the leave of this Court or the Court of Appeal.

Brook J. (Ag.)

3rd March 2006