

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. Cv. 1090 of 2003

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF THE GUARANTEES OF FUNDAMENTAL HUMAN RIGHTS
AND FREEDOMS PART 1 OF THE SAID CONSTITUTION

AND

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL HUMAN
RIGHTS AND FREEDOMS PURSUANT TO SECTION 14 OF THE CONSTITUTION
AND ORDER 55 OF THE RULES OF THE SUPREME COURT

BETWEEN

ANGELA RAMDEEN

Applicant

AND

THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO

Respondent

Before the Honourable Mr. Justice P. Jamadar

APPEARANCES

Dr. F. Ramsahoye Q.C., Mr. P. Carter Q.C. & Mr. A. Ramlogan for the Applicant.

Mr. I. Benjamin, Ms. A. Ferguson & Ms. K. Fournillier for the Respondent.

JUDGMENT

INTRODUCTION

The Applicant was arrested and charged with the murder of her two minor children on the 26th October, 1993. On the 14th January, 1997 she was convicted and sentenced to death pursuant to section 4 of the Offences Against the Persons Act, 1925. That sentence was treated and imposed as a mandatory death sentence by the trial judge.

In the instant motion (amended on the 2nd December, 2003) the Applicant seeks relief under two principal heads:

- i. The **Pratt principles**, as stated and clarified by the Privy Council in **Pratt v A.G. for Jamaica** (1993) 3 WLR 995, **Guerra v Baptiste** (1995) 3 WLR 891, **Henfield v A.G** (1996) 49 WIR 1 and **Thomas v Baptiste** (1999) 3 WLR 249; and
- ii. The **Roodal principles**, as stated recently in **Roodal v The State** P.C. Appeal No. 18 of 2003 (delivered on the 20th November, 2003) and **Khan v The State**, P. C. Appeal No. 28 of 2003 (also delivered on the 20th November, 2003).

Under both heads, the Applicant also seeks consequential relief for compensation in the event the Court determines that the claimed constitutional infringements have occurred.

ORDER OF THE COURT

On the 12th December, 2003 this Court gave its decision in the form of an order with explanatory recitals. That order was as follows:

IT IS CONSIDERED APPROPRIATE AND HEREBY:

[Under the Pratt principles]

- i. **DECLARED** that the execution of the sentence of death imposed on the Applicant on the 14th of January, 1997 for murder may no longer be lawfully carried out as to do so would constitute a breach of the Applicant's fundamental human rights protected by sections 4(a) and 5(2)(b) of the Constitution.
- ii. **ORDERED** that the said sentence of death imposed on the Applicant be and is hereby commuted to life imprisonment.
- iii. **DECLARED** that the continued detention of the Applicant on death row awaiting execution under sentence of death subsequent to the 14th of January, 2002 constituted a breach of her fundamental rights protected by sections 4(a) and 5 (2)(b) of the Constitution such as may be compensated in damages.
- iv. **ORDERED** that the assessment of monetary compensation such as may be found to be payable to the Applicant under paragraph iii of this aspect of the

order be referred to a Master sitting in Chambers on a date to be fixed by the Registrar.

[Under the Roodal principles]

- v. **DECLARED** that the mandatory sentence of death imposed on the Applicant on the 14th January, 1997 is unconstitutional and unlawful and in breach of her fundamental human rights as protected by sections 4(a) and 5(2)(b) of the Constitution.
- vi. **ORDERED** that the Applicant be taken before a judge of the High Court for resentencing on a date to be fixed by the Registrar at which hearing the maximum penalty to be considered shall be life imprisonment.
- vii. **ORDERED** that the Applicant be forthwith removed from death row and kept in an appropriate place for convicted murderers awaiting sentence.

[On the entire motion]

- viii. **ORDERED** that the Respondent pay the Applicant's costs of this motion certified fit for one senior and one junior advocate.

It is important to note that, in the context of this case where both the Pratt and Roodal principles apply, commutation under the Pratt principles is an entitlement which operates to remove the option of the death penalty from the resentencing process that is to occur under the Roodal principles.

STRUCTURE OF JUDGMENT

This judgment will be organized under the following sub-heads:

- i. Statement and analysis of the relevant facts.
- ii. Statement and analysis of the relevant law, dealt with under:
 - a. The Pratt principles, and
 - b. The Roodal principles.
- iii. Application of the relevant law to the facts and the rationale for the decisions made.
- iv. Compensation.
- v. Costs.

FACTS

The following are the relevant undisputed facts:

- i. On the 26th October, 1993 the Applicant was arrested and charged for murder.
- ii. On the 14th January, 1997 she was convicted and sentenced to death by Jones J. (now Jones J.A.).
- iii. On the 15th October, 1997 her appeal to the Court of Appeal against conviction was dismissed.
- iv. On the 17th December, 1997 notice of intention to apply for special leave to appeal to the Privy Council was given.
- v. On the 26th February, 1998 a copy of Dr. Hutchinson's report which was used as the basis for his evidence at the trial was supplied to the Applicant's attorneys.
- vi. On the 25th March, 1998 (five months after her appeal to the Court of Appeal was rejected) the Petitioner filed her application for special leave to appeal to the Privy Council.
- vii. *On the 14th January, 1999 the realistic two year target within which the entire domestic appeal process was to have been completed elapsed (Pratt at p. 1015).*
- viii. On the 1st December, 1999 the Board dismissed the Applicant's appeal to the Privy Council.
- ix. On the 20th December, 1999 a fresh petition was lodged with the Privy Council.
- x. On the 23rd March, 2000 the Privy Council adjourned this fresh petition "because of the importance of the issue which emerges ... to a full Board of the Judicial Committee;" and stated "that it would be of considerable benefit if, before this matter comes on again for hearing before the Board, a decision had been taken by the President (of Trinidad and Tobago) whether or not to refer the whole case to the Court of Appeal under section 64(2)(a)" of the Supreme Court of Judicature Act, Trinidad and Tobago.
- xi. On the 10th April, 2000 application was made to the President on behalf of the Applicant pursuant to section 64(2)(a) of the Supreme Court of Judicature Act.
- xii. *On the 14th June, 2000 the presumptive three and one-half year period (applicable where there are no applications to international human rights bodies such as the I.A.C.H.R. or the U.N.H.R.C.) elapsed, after which a presumption of*

inordinate delay in executing a sentence of death arises, with the consequence that subsequent execution could constitute cruel and unusual punishment. (Henfield at p. 11).

- xiii. On the 22nd October, 2000 final documents on behalf of the Applicant were sent to the President with respect to her section 64(2)(a) application.
- xiv. On the 15th October, 2001 the Minister of National Security sent his provisional advice [under section 64(2)(a)] to the Applicant's attorneys requesting a response within one month.
- xv. On the 5th November, 2001 and on the 8th, 16th, 19th and 22nd November, 2001 and again on the 26th March, 2002 the Applicant's attorneys requested a copy of a report of Dr. Hutchinson dated the 27th March, 2000, referred to in the Minister's provisional advice, which was agreed to be disclosed and forwarded, but which was not done until 3rd September, 2003 (a delay of twenty-two months from the initial request and after the commencement of these proceedings).
- xvi. *On the 14th January, 2002 the presumptive five year period applicable to every case in which the mandatory death sentence was imposed elapsed, after which, absent "delay due entirely to the fault of the accused ... or frivolous and time wasting resort to legal procedures which amount to an abuse of process" (Pratt at p. 1011), "there will be strong grounds for believing that the delay is such as to constitute" cruel and unusual punishment (Pratt at p. 1016).*
- xvii. On the 24th January, 2002 the Applicant's attorneys wrote to the President requesting that the sentence of death pronounced on the Applicant be commuted to life imprisonment in accordance with the Pratt principles.
- xviii. On the 17th June, 2003 the instant motion was filed, the Applicant having then been under sentence of death for six years and five months.
- xix. On the 12th December, 2003, the date of delivery of this decision, the Applicant would have been under sentence of death for six years and ten months.
- xx. In this case no application has been made to any international human rights body.
- xxi. It is impracticable to refer this matter to the trial judge who determined it as he is now a member of the Court of Appeal.

In addition to the above, the following conclusions have been arrived at by this Court in the circumstances of this case:

i. A realistic target within which the entire process on a section 64(2)(a) application can be completed is eighteen (18) months.

This because, having regard to:

- a. the ordinary domestic appellate process and the process of applications to international human rights organizations (such as the I.A.C.H.R. or the U.N.H.R.C.),
- b. the comparatively truncated and limited scope of a section 64(2)(a) application,
- c. the time lines established by the Pratt principles in relation to the processes at (a) above, and
- d. the general success in achieving the said time lines set for the entire domestic appellate process,

it is considered proportionately fair and realistic to expect a section 64(2)(a) application to be completed within eighteen months of its commencement.

In this case, the section 64(2)(a) application was initiated on the 10th April, 2000. It should therefore have been completed by the 10th October, 2001. In fact it is still very much in its preliminary stages, as the advice of the relevant Minister has not been sent to the President for his consideration.

Section 64(2)(a) states:

(2) The President on the advice of the Minister on the consideration of any petition for the exercise of the President's power of pardon having reference to the conviction of a person on indictment or to the sentence, other than sentence of death, passed on a person so convicted, may at any time – (a) refer the whole case to the Court of Appeal, and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted.

Two features of a section 64(2)(a) application are noteworthy where the basis for invoking the Presidential discretion is founded on the availability of compelling fresh evidence. These are:

- a. the time for commencement of the application is uncertain because it is conditional on the discovery of relevant compelling fresh evidence, and
- b. the process, though uncertain as to time of commencement, once it is initiated is under the control of the State.

Both of these features are relevant to the resolution of the issues raised in this case of (i) delay and (ii) the implications of a section 64 (2)(a) application for the Pratt principles.

ii. That any delay in pursuing the section 64(2)(a) application cannot reasonably be argued to be entirely or substantially due to the fault of the Applicant.

In my opinion, though the Applicant allowed some four months after the dismissal of her appeal against conviction to the Privy Council to elapse before commencing the section 64(2)(a) application and a further six months before submitting her final documents with respect to that application, this delay must be weighted against the delay of twenty-two months by the State in forwarding a report of Dr. Hutchinson [which was agreed to be done and without which the Applicant would not submit her comments to the Minister's provisional report and in turn without which the Minister could not submit his final advice to the President for his consideration and the exercise of his discretion].

I find that no acceptable explanation has been given by the State for its delay of twenty-two months in forwarding the report of Dr. Hutchinson. That report was dated the 26th March, 2000. It was quoted in the Minister's advice of October, 2001. A copy was first requested on the 5th November, 2001. The only explanation for the delay in forwarding it was given in these proceedings, when at paragraph 21 of the affidavit of B. Thomas, it is stated:

This report was commissioned by the State's legal representatives ... at a time when it was believed that the Privy Council might see fit to hear the

second petition in full sometime in or about April, 2000. The report was therefore transmitted to London and was not in the files of the Ministry of National Security hence the delay in providing it to the applicant's attorneys.

If this was indeed so, then how did the Minister of National Security have sight of the report and quote from it in or about October, 2001? And, given that the Applicant's solicitors were based in London also, why was no request made to the State's solicitors in London to simply forward a copy of the report? No explanations for these questions have been given.

In addition, I find that on the evidence the Applicant demonstrated an intention to pursue her section 64(2)(a) application with due diligence. Further, that the evidence does not show that the Applicant was engaged in a deliberate attempt to delay the section 64(2)(a) proceedings so as to benefit under the Pratt principles.

No less than five letters were written by the Applicant's attorneys to the State within November, 2001 requesting the report of Dr. Hutchinson. These letters were sent by fax and email. They all record a sense of urgency, captured in the following sentences of the letter of the 16th November:

As you know there is a short time frame in this matter in that we have been asked to provide our comments within a month of receipt of the provisional advice.

Given the short time frame in this matter I would be grateful if any correspondence could be sent by fax ... or e-mail where possible.

The final position agreed by the State, was to extend the time of one month for the Applicant's comments to the provisional advice of the Minister until after Dr. Hutchinson's report had been received by her solicitors in England. That report was only sent in September 2003. It is in these circumstances that the section 64(2)(a) application has reached the stage that it has.

iii. The State was at all material times fully aware that on the 14th January, 2002 the five year presumptive period under the Pratt principles had elapsed

This because, by letter of the 24th January, 2002 the Applicant's attorneys wrote to the President informing him of same. In any event, after Pratt, the State must be expected to track all person convicted of murder and under sentence of death with the Pratt principles in mind and be prepared to act in accordance with same.

Yet, despite the said letter of the 24th January, the State did nothing with respect to this Applicant to either expedite the section 64(2)(a) application or ameliorate the Applicant's circumstances in light of the Pratt principles. Further, but for this action the State has not demonstrated any intention to do so.

iv. That since the 29th March, 1976 (the commencement of the 1976 Constitution Act) and until the decision in Roodal, every person convicted of murder has had imposed on him/her a mandatory death sentence in the belief that the law of the land (section 4 of the Offences Against the Persons Act, 1925) demanded same. Further, that pursuant to the imposition of the said mandatory death sentence several persons have in fact been executed by the State.

LAW

i. The Pratt principles

From the cases of Pratt v A.G. for Jamaica, Guerra v Baptiste, Henfield v A.G., and Thomas v Baptiste, the following statements encompass the Pratt principles that are relevant to the instant matter.

- a. A state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. [Pratt at page 1014 A].
- b. It is part of the human condition that a condemned man will take every opportunity to save his life through the use of the appellate procedure. If the appellate procedure enables a prisoner to prolong the appellate hearings over a

period of years, the fault is to be attributed to the system that permits such delay and not to the prisoner who takes advantage of it. [Pratt at page 1014 B].

- c. If capital punishment is to be retained it must be carried out with all possible expedition. The aim should be to hear a capital appeal within 12 months of conviction. [Pratt at page 1015 E].
- d. An application to the Judicial Committee of the Privy Council must be made as soon as possible, in which case it should be possible to dispose of it within six months of the Court of Appeal hearing or within a further six months if there is to be a full hearing of the appeal. In this way it should be possible to complete the entire domestic appeal process within approximately two years. [Pratt at page 1015 F].
- e. The above guidelines are not a rigid timetable but indicate what appear to be realistic targets which, if achieved, could not be considered to involve inhuman or degrading punishment or other treatment. [Pratt at page 1015 G].
- f. With respect to complaints to the U.N.H.R.C. (or the I.A.C.H.R.) it should be possible for the committee to dispose of them with reasonable dispatch and at most within 18 months. [Pratt at 1016 E].
- g. These considerations lead to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute “inhuman or degrading punishment or other treatment.” Therefore, rather than waiting for all those prisoners who have been on death row under sentence of death for five years or more to commence proceedings pursuant to the Constitution, all such cases should be considered in accordance with the above guidelines and their death sentences commuted to life imprisonment. In this way, justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief. [Pratt at 1016 F].
- h. This five year period is to be treated as the overall period which, in ordinary circumstances, must have passed since sentence of death before it can be said that execution will constitute cruel or inhuman punishment. It is not, however, to be regarded as a fixed limit applicable in all cases, but rather as a norm which may

be departed from if the circumstances of the case so require. [Henfield at page 7 G].

- i. In the context of a legal system in which the target period for appeals is two years and where no time has to be allowed for petitions to Human Rights Committees, the lapse of an overall period of time of three and a half years following sentence of death is an inordinate time. [Henfield at page 11 H-J].
- j. The identification of an inordinate period of delay is not achieved by simply adding eighteen months to the target period for appeals. What has to be done is to identify an overall period which not only accommodates the target periods for the relevant appellate procedures, but is in itself so prolonged as to render subsequent execution inhuman punishment. [Henfield at page 11 D-E].
- k. If delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process the defendant cannot be allowed to take advantage of that delay, for to do so would be to permit the defendant to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime. [Pratt at page 1011 A].
- l. The fundamental reason why execution following the lapse of a prolonged period of time after sentence of death would constitute inhuman punishment is that the condemned man has suffered the agony of mind of facing the prospect of execution over that period. And, although part of that period will have been occupied with appellate procedures, it is the lapse of the whole period which is relevant to the question whether there has been an inordinate delay. This is because the agony of mind is the same, whatever the cause of the delay. [Henfield at page 10 G-J].
- m. Following conviction and sentence to death, the condemned man is placed on death row and has there to contemplate the prospect of execution even though, in some cases but not in others, he may have a real hope of a successful appeal. This fact alone is enough to justify the conclusion that the period before the appellate process has been finally exhausted must be taken into account in deciding whether

there has been such delay since the death sentence was imposed as to render execution thereafter cruel and unusual punishment. [Guerra at page 545 F].

- n. The mere fact that the appellant takes advantage of the appellate procedures open to him will not of itself debar him from claiming that the delay involved has contributed to the breach of his constitutional rights. But if the delay has occurred as a result of exploiting the available procedures in a manner which can be described as frivolous or an abuse of the court's process, the delay incurred cannot be attributed to the appellate process and is to be disregarded. [Guerra at page 542 F].
- o. No fixed time is specified for the period within which execution should take place after conviction and sentence. On the contrary, the period is to be ascertained by reference to the requirement that execution should follow *as swiftly as practicable* after sentence, allowing *a reasonable time* for appeal and consideration of reprieve. [Guerra at page 542 G and 544 A].
- p. If capital punishment is to be carried out it must be carried out "with all possible expedition." It is in this sense that a "reasonable time" for appeal is to be understood. In the assessment of such reasonable time, great importance must be attached to ensuring that, consonant with the tradition of the common law and the recognition of the inhumanity involved in prolonging the period awaiting execution in a condemned cell on death row, such delay will not occur and any delay which does occur will be curtailed. [Guerra at page 543 F].
- q. A basic approach to analysing cases such as this is as follows. One should start with ascertaining the time which had elapsed between sentence of death and completion of the hearing by the Court of Appeal. Then one should ascertain the time which elapsed between sentence and the completion of the entire domestic appellate process. These figures should be compared with the realistic targets set of approximately twelve months and two years respectively. One should then undertake an examination of the facts to ascertain the main reasons for any delay in execution and determine whether they are significantly attributable to the fault of the Applicant. [Guerra at page 544 D to G]. Finally, one should consider

whether any special circumstances exist which may operate to extend, vary or nullify the stated target periods or the Pratt principles.

ii. The Roodal principles

From the cases of Roodal and Khan, the following statements encompass the Roodal principles that are relevant to the instant matter:

- a. The mandatory sentence of death is a cruel and unusual punishment. [Roodal at paragraph 21].
- b. Section 4 of the Offences Against the Persons Act, 1925 should be interpreted as providing for a discretionary life sentence. This modification is to be effected as follows. Section 68 of the Interpretation Act should be read as providing not for a fixed penalty of death for murder but for a maximum penalty of death. In other words, the imposition of the death penalty for murder is discretionary. The obvious alternative to it is imprisonment. [Roodal at paragraphs 31 and 32].
- c. In cases like Roodal, the mandatory sentence of death imposed on the appellant is to be quashed and the case remitted for the trial judge to decide as a matter of discretion what is the appropriate sentence. [Roodal at paragraph 35].
- d. The rationale for the decision in Roodal was that section 4 of the Offences against the Person Act, 1925, in requiring a sentence of death to be passed on all defendants convicted of murder, without any consideration of the culpability and circumstances of the individual defendant, violated the prohibition in section 5(2)(b) of the Constitution on the imposition of cruel and unusual treatment or punishment. And, that section 4 was not saved by section 6 of the Constitution to the extent that it mandatorily required sentence of death to be passed. [Khan paragraphs 17 and 33].
- e. In cases like Khan, for the reasons given in *Roodal*, section 4 of the Offences against the Person Act, 1925 is to be understood as authorizing, but not requiring, sentence of death. Therefore, a mandatory sentence of death passed on a convicted person is to be quashed and the case remitted

to the High Court, for that court to impose an appropriate sentence. [Khan paragraphs 18, 19 and 44].

[Note, the cases of Reyes v The Queen (2002) 2 WLR 1034 at 1057 H; R v Hughes (2002) 2 WLR 1058 at 1076 B and F; and Fox v The Queen (2002) at WLR 1077 at 1086 A, provide that the alternative to the death penalty is any appropriate term of imprisonment].

APPLICATION OF LAW TO FACTS

i. Under the Pratt principles

a. The domestic appellate process

The domestic appellate process was completed on the 1st December, 1999, some eleven months outside of the two year target. This period is divided as follows, nine months for the completion of the Local appeal and almost twenty-six months for the completion of the Appeal to the Privy Council (a total of some thirty-five months).

The reasons given by the Applicant for the entire domestic appellate process exceeding the two year target and in particular with respect to the elapse of time between the decision of the Court of Appeal and the Privy Council, were:

- i. the non receipt of a copy of a report of Dr. Hutchinson used at the trial until the 26th February, 1998,
- ii. that it took about six months for the Record to be delivered by the State,
- iii. that it took a further three months to obtain an appointment to read the Record, and
- iv. that the initial full hearing before the Privy Council was adjourned at the request of the State and as a consequence not re-listed until four months later.

In my opinion, given that none of these reasons are challenged, it cannot be said that the reasons for exceeding the two year target for completing the entire domestic appellate process can be entirely or substantially attributed to the Applicant. It is significant that the Applicant filed her Notice of intention to seek special leave within two months of the

rejection of her appeal by the Court of Appeal and her actual petition for special leave was filed within one month of receipt of a copy of Dr. Hutchinson's said report.

b. The fresh petition

Following the Privy Council's dismissal (on the 1st December, 1999) of the Applicant's appeal to the Board, the Applicant filed a fresh petition on the 20th December, 1999. That is, within a month of the disposal of the first petition. Within two months, that is, by the 17th February, 2000, argument was heard on that fresh petition. And, about one month after argument, the Privy Council adjourned that fresh petition for hearing by the full Board because of the importance of the issues raised in it.

In my opinion, the above analysis demonstrates the timeliness with which the Applicant acted to pursue procedural processes that were legitimately open to her. Substantively, the legitimacy of the fresh Petition is evidenced by the decision of the Board to adjourn it for hearing before a full Board. Thus, in my opinion it also cannot reasonably be said that this fresh petition was or is an abuse of process.

c. The Applicant's section 64(2)(a) application

On the 10th April, 2000, within a month of the Board's decision to adjourn the hearing of the fresh petition to a full Board, the Applicant made her formal application to the President of Trinidad and Tobago, requesting a referral of her case to the Court of Appeal under his discretionary powers as provided for by section 64 of the Supreme Court of Judicature Act.

Final documents were sent with respect to this section 64(2)(a) application on the 27th October, 2000, some six months after initiating the process. The explanation given for this delay is that: "It has taken time to assemble the evidence for Ms. Ramdeen's case" (letter of the 27th October, 2000 from the Applicant's London solicitors to the President of Trinidad and Tobago). Before any position is taken on this six month delay, the entire section 64(2)(a) procedure, in the context of this case, needs to be evaluated.

As I have already indicated, a realistic target within which an entire section 64(2)(a) application can be completed in eighteen months. It is agreed that the procedure involves at least four basic steps. First, upon receipt of the application the President must seek the advice of the Minister of National Security. Second, the Minister must consider the application and the evidence in support and all other matters which are considered relevant and prepare a provisional advice to be sent to the Applicant for comment. Third, upon receipt of the Applicant's comments the Minister should consider same and then prepare his 'final' advice to the President and so advise the President. Fourth, the President must consider all the evidence before him and all material matters including the advice of the Minister (and one would also assume the comments of the Applicant and the provisional advice of the Minister) and come to a decision whether to refer the case to the Court of Appeal or not. [It is agreed that the President's decision is reviewable by the courts and that an appeal can lie from any decision of the Court of Appeal].

In this case the process is still at the second stage. That is, the provisional advice of the Minister has been sent to the Applicant, but no comments on it have been made. This state of affairs has been so from the 15th October, 2001 (when the Minister sent his provisional advice) to date. The question is why?

The main reason, as I have already pointed out, is because of the failure of the State (for over twenty-two months) to forward a copy of a March 2000 report of Dr. Hutchinson. In fact, this report was only forwarded in September, 2003, after this action was commenced and in the face of specific relief claimed with respect to same (see relief (d) and (e) in the amended statement, which was abandoned during the hearing of the matter because the subject report had been received).

In my opinion, the substantial cause for delay in the processing of the section 64(2)(a) application was the State's delay in sending the March 2000 report of Dr. Hutchinson. [The irony of this is that an earlier delay was also occasioned because of another report of Dr. Hutchinson]. I do not think that any delay that may be attributable because of this section 64(2)(a) application can be said to be entirely or substantially the fault of the

Applicant, or that the extant section 64(2)(a) application can be categorized as an abuse of process. On the contrary, this section 64(2)(a) application is a legitimate legal process which is open to any litigant and which in this case has not been demonstrated to have been frivolous or an abuse of process (see in this regard, **James v The State** Cr. App. 89 of 1996, unreported judgment of John J.A. delivered on the 12th March, 2003, at pp. 10-13 and **R. v Thornton** Cr. App. No. 95/3108/x2 U.K., unreported judgment of Lord Taylor, at pp. 12-14). The Privy Council certainly thought that this section 64(2)(a) application should be completed before the hearing of the fresh petition by the full Board.

Because the eighteen month period I have allowed for the completion of a section 64(2)(a) application elapsed on the 10th October, 2001, within the five (5) years presumptive period prescribed by the Pratt principles. And, because I have concluded that any delay that may have occurred cannot be reasonably attributed to the Applicant according to the Pratt principles. I therefore do not find it necessary to determine whether this eighteen months period should be added onto the two year period for the completion of the entire domestic appellate process as contemplated by Pratt, or whether it is a part of that process and to be completed within the two year target.

However, I do not believe that the Privy Council had in mind section 64(2)(a) applications when they set the two year period for the completion of the entire domestic appeal process or that they considered such an application as part of the domestic appellate process, when they stated the Pratt principles. What is clear, is that the section 64(2)(a) procedure can be legitimately invoked by an applicant, that the time of commencement is unpredictable, but once invoked its conduct falls under the control of the State and then (if referred) the Judiciary.

In my opinion, whatever the state of affairs of any section 64(2)(a) application, once such an application cannot be said to be frivolous or vexatious or an abuse of process in the context of the Pratt principles, then the time that runs under the Pratt principles and in particular the five year presumptive period, is not avoided by reason of the existence of a section 64(2)(a) application.

d. Conclusion

From the above stated analysis and based on the stated Pratt principles, it is clear that this Applicant has legitimately pursued and is pursuing the appellate and other procedures that the legal system permits. There has been no demonstrated or arguable abuse of process. No good reasons have been advanced to extend the five year presumptive period, which in my opinion, in the circumstances of this case, is a sufficient overall period which not only accommodates all realistic targets for the legal and appellate processes invoked, but is in itself so prolonged as to render subsequent execution cruel and unusual punishment.

For all of the above reasons and given the undisputed facts, I have concluded that there has been unjustifiable inordinate delay by the State in moving to execute the Applicant. To execute the Applicant now would constitute cruel and unusual punishment. The Applicant is therefore entitled to have her death sentence commuted to life imprisonment under the Pratt principles.

ii. Under the Roodal principles

a. Generally

The sentence of death pronounced on the Applicant on the 14th January, 1997 was imposed as a mandatory death sentence. It is now accepted that the imposition of a mandatory death sentence amounts to cruel and unusual punishment, contrary to sections 4(a) and 5(2)(b) of the Constitution. It is also agreed that the Privy Council has recently (in Roodal, 20th November, 2003) declared that as from the commencement of the 1976 Constitution Act (29th March, 1976), section 4 of the Offences Against the Person Act, 1925 ought properly to have been interpreted as imposing a discretionary death penalty upon conviction for murder. By this decision, the Privy Council has effectively overruled twenty-seven years of unquestioned judicial authority which accepted that section 4 of the Offences Against the Persons Act, 1925 provided for the imposition of a mandatory death penalty.

The declaratory theory of law postulates that a restatement of the correct law is deemed to have existed from the time of its inception (in the case of the common law, from time

immemorial). The logical consequence is that judicial overruling operates retrospectively. In any event, the Privy Council has now declared the law as it stood on the 29th March, 1976 in relation to section 4 of the Offences Against the Persons Act.

In my opinion, there can be no question that the Roodal principles implicate every mandatory sentence of death imposed since the 1976 Constitution Act as cruel and unusual punishment imposed contrary to the law of the land.

b. The constitutional issue

The vexing question is whether, as in this case, in matters in which the entire domestic appellate process has been completed and the sentence of death confirmed, the error of law that the Roodal principles now declare can give rise to a breach of any constitutional rights.

There is a long line of authority that states that errors of substantive law cannot ordinarily give rise to constitutional relief. This line of authority includes, Maharaj v A.G. of T & T (No. 2) (1978) 2 AER 670; Chokolingo v A.G. of T & T (1981) 1 AER 244; Boodram v A.G. of T & T (1996) 2 LRC 196 and Hinds v A.G. of T & T (2002) 4 LRC 287. All of these cases were reviewed in Forbes v A.G. of T & T (2003) 1 LRC 350.

Lord Diplock in Maharaj (No. 2) seemed to have stated the position quite unequivocally when he said (at page 679):

In the first place, no human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights

protected by section a(a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event.

However, Lord Millett in **Forbes** itself, having reviewed the said line of authorities, stated the position this way (at page 356):

Their Lordships do not think that it would be helpful or desirable to add their own observations to the foregoing citations. They establish that it is only in rare cases where there has been a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However the exceptional case is formulated it is clear that the constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error. This is the reason for the appellate process.

In my opinion, whereas Lord Diplock limited the rare cases giving rise to constitutional relief to errors in procedure, Lord Millett seems to have stated no such limitation in categorizing those rare cases when resort to constitutional redress is appropriate, where errors (presumably of either procedural or substantive law) have resulted in “a fundamental subversion of the rule of law” or “of the judicial process.”

If this analysis is correct, the first question becomes whether, in this case and in all others like it, what has occurred is an error of substantive law and/or of procedural law.

In my opinion the error is properly categorized as an error of substantive law (that is, an error in the interpretation of section 4 of the Offences Against the Persons Act, 1925 in light of section 5(1) of the 1976 Constitution Act and section 68 of the Interpretation Act, 1962), which consequentially also has implicit errors of procedural law (that is, for example, the consequential right to be heard on the issue of sentencing).

Having determined that the error is one of substantive law, the second question to be determined is whether the error is such as may be categorized as constituting ‘a fundamental subversion of the rule of law.’

In my opinion, the error of law that has occurred has amounted to and if left to follow its course will continue to amount to a fundamental subversion of the rule of law and of the judicial process.

This is because, firstly, what has occurred in Trinidad and Tobago in relation to this issue amounts to a systemic failure of the judicial process to declare, uphold and apply the law of the land, as is constitutionally demanded by the concept of the rule of law and protected by sections 4(a) and 5(2)(b) of the Constitution. The error itself may be classified, as submitted by the Applicant’s attorneys, as being ‘a constitutional error involving the disapplication of constitutional provisions.’ Certainly, in light of the law as now declared, it was a fundamental and pervasive error of law. Secondly, the obvious consequences of the imposition and carrying out of a death sentence are grave and irremediable (as have already occurred in several cases).

For these two reasons the error of law that has occurred in this case is held to be one of those rare and exceptional cases as contemplated by Lord Millett in **Forbes**, which has resulted in a subversion of the rule of law.

In any event, it is not untenable to hold that fundamental justice and fairness demand that where a systemic error of law is discovered, that those who are still the victims of that error be afforded an opportunity for reconsideration in the light of the declared law and in a manner appropriate to the nature of the case and the error. In my opinion, such a consideration is both a legitimate extension of the idea of due process and a consequence of the rule of law in cases where an abridgement of the fundamental rights guaranteed under section 4(a) is concerned, or at least in the more limited cases where the abridgement is to the right to life.

This contention may be tested this way. Would it now be fair and just to execute a person on whom the mandatory death sentence was imposed prior to **Roodal**? In my opinion it would not be. This because, the concept of the rule of law demands that each citizen be afforded the benefit and the protection of the law of the land. This follows from the principle of the supremacy of the law as an aspect of the rule of law (see, Dicey, *The Law of the Constitution*, Chap. iv; and Wade and Forsyth, *Administrative Law*, 8th ed Chap. 2, page. 20). Surely, the concept of due process is ultimately in service of this demand of the rule of law (see, **Thomas v Baptiste** at page 259).

c. Conclusion

Thus, in my opinion, the systemic misinterpretation and misapplication of section 4 of the Offences Against the Persons Act, 1925, is in effect and consequence so rare, exceptional and oppressive as to amount to a breach of the Applicant's right to due process including the benefit of the rule of law. To hold otherwise, would in my opinion amount to allowing a known injustice to be perpetuated under the shield of law and in the name of justice.

Finally, under the **Roodal** principles, it was agreed and seems clear that the discretion now to be exercised under section 4 of the Offences Against the Persons Act, 1925, allows for the imposition of the death penalty or any term of imprisonment from life to a lesser sentence. This interpretation is consistent with the judgments of the Board in **Roodal** and **Khan**, and also in **Reyes**, **Hughes** and **Fox** (cited above).

COMPENSATION

i. Under the Pratt principles

Section 14 of the Constitution permits a Court to make any order that 'it may consider appropriate for the purpose of enforcing, or securing the enforcement of' any of the enshrined fundamental rights.

Though thus far compensation has not been ordered in any matter in which a death sentence has been commuted to life imprisonment under the Pratt principles, I think that this case is one in which such an order is appropriate.

This is because, in this case there is no question that the State was aware that the Applicant had claimed to be entitled to the benefit of commutation under the Pratt principles. On the 24th January, 2002 the Applicant's attorneys wrote to the President requesting commutation. Yet, the State did nothing. No step was taken to explain why commutation was not being considered and no step was taken to ameliorate the Applicant's position as a person under sentence of death.

Clearly, after the five year threshold had elapsed the Applicant was to be presumed to have been thereafter subjected to cruel and unusual punishment if she remained under sentence of death. But for this action, indications are that the State did not intend to act in keeping with the Pratt principles. Yet, from the 14th January, 2002 by reason of the unjustifiable and inordinate delay in executing the Applicant, she has in law been presumed to be undergoing cruel and unusual punishment, a condition under which she has continued to be subjected by the State for over one year and five months, at the time of filing of this action.

In such circumstances, I am of the opinion that it is appropriate that the Applicant be entitled to be considered for monetary compensation for any suffering and distress that she may have undergone subsequent to the 14th January, 2002 by reason of her continued detention on death row under sentence of death (see Maharaj v A.G. of T & T (No. 2)).

ii. **Under the Roodal principles**

I am of the opinion that the appropriate relief is to order the Applicant removed from death row and placed in an appropriate place for convicted murderers awaiting sentence and to order that she be placed before a judge of the High Court who will determine what is the appropriate sentence to be imposed. However, given the Applicant's entitlement to commutation under the Pratt principles, the maximum sentence that is appropriate to be

considered by the resentencing judge is life imprisonment. In light of these orders, I do not consider it necessary that any further relief should be granted as a consequence of the stated breaches of the Applicant's constitutional rights (see **Guerra** at page 550 c).

In light of the above, I do not think that any monetary compensation should be awarded to the Applicant where reconsideration of sentence clearly meets the justice of the case. It is noteworthy, that at a resentencing hearing it is open to a judge to determine as the appropriate sentence the death penalty.

COSTS

In my opinion the issues raised in this case, though sufficiently important and complex to justify the attendance and appearance of one senior and one junior advocate, are not such as to justify the use of two senior advocates.

The issues raised, though based on the Pratt principles and the Roodal principles, required a consideration of, inter alia, the effect of a section 64(2)(a) application on the Pratt principles and whether the Roodal principles were retrospective or could give rise, in cases such as this, to a breach of a constitutional right. These aspects of this case are new, complex and of general public importance. In addition, the question of whether any monetary compensation should be paid to the Applicant has also arisen for determination. This is also a question of general public importance. In fact, on all of these issues the opinion of senior counsel was considered invaluable.

Dated this 31st day December, 2003.

P. Jamadar
Judge