

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**H.C.A No. 1412 of 2005**

IN THE MATTER OF SECTION 4 AND 5 OF THE CONSTITUTION OF THE  
REPUBLIC OF TRINIDAD AND TOBAGO ACT NO. 4 OF 1976

*AND*

IN THE MATTER OF THE AN APPLICATION BY **ANDREW DOTTIN, MARK TEELUCK, RAMSINGH JAIRAM, KELVIN DIAL** (ON THEIR OWN BEHALF AND ON BEHALF OR FOR THE BENEFIT OF ALL PERSONS ON DEATH ROW WHO WERE SENTENCED TO DEATH BEFORE THE PRIVY COUNCIL DELIVERED ITS JUDGMENT IN MATTHEWS V THE STATE ON JULY 7<sup>TH</sup>, 2004), PERSONS ALLEGING THAT THEIR RIGHTS (AND THOSE OF WHOM THEY REPRESENT) GUARANTEED BY SECTIONS 4 (A), (B) AND (D) AND 5 (2) (A), (B), (E) AND (H) OF THE CONSTITUTION HAVE BEEN, ARE BEING OR ARE LIKELY TO BE CONTRAVENED IN RELATION TO THEM (AND IN RELATION TO THOSE WHOM THEY REPRESENT) FOR REDRESS IN ACCORDANCE WITH SECTION 14 OF THE CONSITUTION

*AND*

IN THE MATTER OF THE AN APPLICATION BY **ANDREW DOTTIN, MARK TEELUCK, RAMSINGH JAIRAM, KELVIN DIAL** (ON THEIR OWN BEHALF AND ON BEHALF OR FOR THE BENEFIT OF ALL PERSONS ON DEATH ROW WHO WERE SENTENCED TO DEATH BEFORE THE PRIVY COUNCIL DELIVERED ITS JUDGMENT IN MATTHEWS V THE STATE ON JULY 7<sup>TH</sup>, 2004), FOR AN INTERIM

STAY OF EXECUTION OF THE SENTENCE OF DEATH ON HIM (AND THOSE FOR WHOM HE REPRESENTS) OR ALTERNATIVELY A CONSERVATORY ORDER

*BETWEEN*

IN THE MATTER OF THE AN APPLICATION BY **ANDREW DOTTIN, MARK TEELUCK, RAMSINGH JAIRAM, KELVIN DIAL** (ON THEIR OWN BEHALF AND ON BEHALF OR FOR THE BENEFIT OF ALL PERSONS ON DEATH ROW WHO WERE SENTENCED TO DEATH BEFORE THE PRIVY COUNCIL DELIVERED ITS JUDGMENT IN MATTHEWS V THE STATE ON JULY 7<sup>TH</sup>, 2004)

*Applicant*

*AND*

**JOHN ROUGIER**

(COMMISSIONER OF PRISONS)

**EVELYN PETERSON**

(REGISTRAR OF THE SUPREME COURT)

**THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO**

*Respondents*

\*\*\*\*\*

**BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR**

**APPEARANCES:**

Mr. Mark Seepersad, Mr. Gerald Ramdeen for the applicants.

Ms. Cherry Ann Rajkumar for applicants.

Mr. Gilbert Petersen S.C., Ms. Josefina Baptiste-Mohammed, Ms. Mary Davis, instructed by

Ms. Sharon Sharma for the Attorney General.

Mr. Ricki Harnanan for the Registrar of the Supreme Court.

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## Judgment

### BACKGROUND

The applicants were all detained on death row for a period in excess of 3 ½ or alternatively, 5 years after conviction, and/or, were persons on death row awaiting execution at July 7th 2004, (the date of the decision of the Privy Council in **Matthew v The State** (Matthew) Privy Council Appeal No. 12 of 2004 -delivered the 7th July 2004.

### 1. CHRONOLOGY

(a) This action had its genesis on Monday 6<sup>th</sup> June 2005 when a statement was made in Parliament by the Attorney General which as reported in the daily newspapers was, inter alia, in the following terms (underlining added)

*“Mr. Speaker, the Government intends that every person on death row will be hanged if the opportunity is available to the State.*

*If the courts intervene, the State will, cognizant with the rule of law, do everything within its power to pursue the sentence of death in relation to every person on death row.*

*Mr. Speaker, the State intends to insist that the courts, going through to the Privy Council, revisit the decision in Pratt and Morgan v R.*

*We do not agree with it, although for the time being it binds us.*

*We do not agree either with the statement of the Privy Council in Matthews by which the Privy Council attempted, in our view, in defiance of the Constitution, to commute the sentences of persons on death row whose appeals were not even before them.*

*We shall resist these decisions with every resource of the state.*

*I say no more on this matter at this time.”*

(b) On 10<sup>th</sup> day of June 2005 a letter was issued by the secretary to the Mercy Committee on the Power of Pardon in the following terms:

*“Dear Sir,*

*I write to inform you that the Mercy Committee will convene a meeting on Monday 13<sup>th</sup> June 2005 at 4.00 p.m to consider your case. You are advised to make any representation before the Committee on this day.”*

(c) By motion dated 13<sup>th</sup> June 2005 Applicants instituted these proceedings and obtained a conservatory order in the following terms before the Honourable Justice Benjamin -

*“It is ordered that the first, second and third respondents are directed by way of a conservatory order to undertake that the execution of the sentence of death against the applicants and all persons on death row who were sentenced to death before the Privy Council's decision in Matthews v State on*

*the 7<sup>th</sup> July 2004 will not be carried out pending the hearing and determination of the Applicants' motion dated and filed herein on the 13<sup>th</sup> June 2005 or until further order”*

and sought further relief as set out later in this judgment.

On 15th day of August 2008 the following order was made by the Honourable Justice Beraux (as he then was) -

*“IT IS HEREBY ORDERED as follows:*

- 1. That the terms of this order shall apply to (a) the named Applicants ANDREW DOTTIN, RAMSINGH JAIRAM, KELVIN DIAL and MARK TEELUCK, and (b) those other inmates under sentence of death whom the Applicants claim to represent and whose names appear on the List of Inmates annexed to this order as a Schedule and marked “A”,*
- 2. Subject to paragraph 4 herein the respective sentences of death imposed on the named Applicants and on the said inmates be and are hereby commuted to sentences of life imprisonment.*
- 3. That the said named Applicants and the said inmates be removed from Death Row forthwith.*

4. *That the rights of the Applicants and those whom they represent and the Respondents to argue any other issues that arise in this matter are expressly reserved.*
5. *Costs of this Motion be reserved.”*

On the **10<sup>th</sup> of July 2009** the said order was clarified before this court when it was recorded from all persons in attendance representing the Respondent and all the Applicants that “*the understanding of the order of the Honourable Berezuk J dated 19/8/08 as amended is that it is to be treated (as though) in paragraph 4 the word “other” is redundant*” so as to make clear that the applicants reserved the right to present arguments on resentencing, and that their commutation of sentence to life imprisonment was an interim order.

### **The statement in Parliament**

The statement made in Parliament gave the clear impression

- (i) That the State
  - (a) intended to hang "every person on death row" if "the opportunity is available to the State",
  - (b) intended to pursue the sentence of death in relation to every person on death row, and
  - (c) intended to resist the decisions in **Pratt and Morgan** and in **Matthew**, though recognizing that **Pratt** was binding on it for the time being.

## **The letter**

The letter from the Secretary to the Mercy Committee (delivered on a Friday afternoon) required representation to be made on the following Monday morning.

The time period therefore initially afforded for representations on the applicants' behalf was wholly inadequate for meaningful representations to be made.

The truncated deadline unfortunately gave the impression that a real opportunity to be heard was not intended. The time for representations was subsequently extended by the Minister of National Security by letter dated June 13 2005 in reply of to that of the applicant's attorney.

This sequence of events and the timing thereof was quite capable of giving the extremely unfortunate impression that the statement in Parliament by one member of the Executive, and the haste to convene a meeting of the Mercy Committee, which tenders advice to the Minister of National Security, another member of the Executive, were linked and that the outcome was preordained in accordance with the stated intention of the government.

The applicant Jairam swore to effect on him of that sequence of events and the timing thereof as follows:-

**Paragraphs 10 and 11 of Jairam's affidavit**

*On Tuesday 7<sup>th</sup> June 2005 I read both the Trinidad Guardian and the Trinidad Express newspaper and I listened to several radio broadcasts. By those media I became aware that the Attorney General had made the following statements:-*

- a. That hangings were to resume.*
- b. That if the Courts intervene to stop it, the State will, cognizant with the rule of law, do everything within its power to pursue the sentence of death in relation to every person on death row.*
- c. That the State does not agree with some of the decisions of the Privy Council to commute the sentences of Death Row inmates whose appeals were not even before them,*
- d. That the State shall resist these decisions with every resource it possesses.*

*In the period of time I have been on death Row I have ascertained that there are on Death Row several other persons sentenced to death and who are similarly circumstanced to myself. I bring this Motion on my own behalf and on their behalf and for their benefit, they being persons who were sentenced to death before the Privy Council delivered its judgement in Mathew v The State on July 4<sup>th</sup> 2004, being persons alleging, like myself that in the premises earlier stated herein, I and they are persons whose rights guaranteed by sections 4(a), (b) and (d) and 5(2) (A), (B), (E) and (H) of the Constitution, have been are being or are likely to be contravened by the State, for redress in accordance with section 14 of the Constitution.*

### **The Third Named Respondent's Position**

It was contended that the words of the Attorney General

(i) demonstrated an intention to observe the law, that he recognized that the decision of the Privy Council in **Pratt** remained binding though he disagreed with it, and

(ii) that the letter from the Mercy Committee was merely the first stage in a process, (aborted by the institution of these proceedings), of an examination of the circumstances of each prisoner to consider and apply **Pratt and Morgan** and **Matthew** to each if it could be so applied.

The Respondents' attorney further contended that while the announcement in Parliament may have caused disquiet among prisoners on Death Row, in fact such was misplaced, for the following reasons:

(1) In the case of Dial and Dottin they had the assurance of the undertaking/representation given by counsel for State at the Privy Council that **Earl Pratt and Ivan Morgan v Attorney General of Jamaica Privy Council Appeal No. 10 of 1993 Delivered the 2nd November 1993 (Pratt and Morgan)** applied to them.

In fact Mr. Knox for the State in a letter exhibited in these proceedings [Exhibit ACJ 4] indicated that it was a practice for the Privy Council to inquire whether the State accepted that **Pratt and Morgan** would apply when the issue came before them of convictions and sentence of persons convicted of murder. In accordance with such a practice Jairam also had the benefit and assurance of such an undertaking and it is likely that persons other than him also did.

- (2) In the case of Jairam and all other prisoners they were entitled to a hearing before the Mercy Committee (subsequent to the decision of the Privy Council in **Lewis v A.G.** *Privy Council Appeals Nos. 60 of 1999, 65 of 1999, 69 of 1999 and 10 of 2000*) in which considerations of inter alia, **Pratt** delay could be raised. They were in no danger therefore of being subject to execution if **Pratt** delay did apply.
- (3) That the State at all times recognized the decisions in **Pratt** and **Matthew** even if it did not agree with these.
- (4) For those reasons the instant application was premature in that it aborted a process which was progressing along the only route prescribed by the Constitution which permitted the possibility of alteration of the sentence of death.

## **The Conservatory Order**

I consider the chronology of events unfortunate and one which justified the immediate application to the court for a conservatory order. Even the slightest risk of a premature or unjustified execution would have justified the application.

For this reason the applicants or such of them that remain parties to this motion would be entitled to their costs up to the stage of the grant of the conservatory order. I note that attorneys at law then on record who initiated that application and obtained that result, are not the same as attorneys at law now on record.

## **The Present Motion**

The following further relief was sought in the motion:

- 1. A declaration that the rights of the Applicants (and those whom they represent) to life, liberty and the security of the person and right not to be deprived thereof except by due process of law guaranteed to them by sections 4(a) and 5(2) (a), (b), (e) and (h) of the constitution of the Republic of Trinidad and Tobago have been and are being contravened by the failure of the State to commute the sentence of death imposed upon them (and those whom they represent) in compliance with the decision of the Privy Council in *Matthews v The State*.*

2. *A declaration that the rights of the applicants (and those whom they represent) to equality before the law and the protection of the law and to equal treatment by a public authority in the exercise of its functions, guaranteed to them (and those whom they represent) by section 4(b) and (d) and 5 (2)(a), (b), (e) and (h) of the Constitution of Trinidad and Tobago, have been and are being contravened in relation to them (and those whom they represent) by the failure of the State to commute the sentence of death imposed upon them (and those whom they represent) in compliance with the decision of the Privy Council in *Matthews v The State*.*
  
3. *A declaration that the Applicant's rights (and rights of those whom they represent) not to be subjected to cruel and unusual treatment or punishment have been, are being and are likely to be violated.*
  
4. *A declaration that the execution of the sentence of death on the Applicants (and those whom they represent), as threatened by the third named Respondent, will contravene their right (and the rights of those whom they represent) not to be deprived of life, liberty and the security of the person except by due process of law guaranteed to them (and those whom they represent) by Sections 4(a) and 5(2) (a), (b), (e) and (h) of the Constitution of the Republic of Trinidad and Tobago.*

5. *A declaration that the execution of the sentence of death on the Applicants (and those whom they represent), as threatened by the third named Respondent, will contravene their right (and the rights of those whom they represent) to equality before the law and the protection of the law and to equal treatment by a public authority in the exercise of their functions, guaranteed to them by Sections 4(b) and (d) and 5(2)(a), (b), (e) and (h) of the Constitution of Trinidad and Tobago.*
  
6. *An order commuting the sentence of death imposed on the Applicants (and those whom they represent) to a sentence of life imprisonment.*
  
7. *An interim order staying the execution of the sentence of death on the Applicants (and on those whom they represent) pending the hearing and determination of this motion or further order or alternatively, a conservatory order directing the Respondents to undertake that the execution of the sentence of death on the Applicants (and on those whom they represent) will not be carried out pending the hearing and determination of this Motion or further order.*
  
8. *Damages under section 14 of the Constitution, including aggravated and exemplary damages.*

## **Reliefs now sought**

After the grant of the conservatory order the motion mutated into its present form, where the main relief now being sought is resentencing.

When the matter came on for trial, leave was granted to the initial attorneys on record at the time of the conservatory order to withdraw and take no further part in these proceedings. Attorneys at law representing the applicants, who came on record subsequent to the conservatory order being granted, indicated abandonment of all but 3 reliefs in the initial motion – leaving the issue of costs, relief number 3 above, and, under the heading of further or other relief –

*A declaration that the continued detention of the Applicants and those whom they represent on death row under the sentence of death from 3 ½ years following their convictions in accordance with Pratt and Morgan v AG of Jamaica and Matthew v The State was in breach of their fundamental rights under s.4 (a), (b) and 5(2) (b) and (h).*

It was also made clear that the applicants were not pursuing relief number 6 [commutation of their sentence to life imprisonment] but were all seeking individual resentencing by the High Court.

The issue of damages, though not abandoned was not pursued as Applicants' counsel candidly recognized it was one which would pose difficulties on the evidence

in a representation action , though an award of nominal damages or a reference to individual assessment were options, if the court reached that stage.

The contention of the applicants at trial therefore is that a further breach of Constitutional rights arises in respect of post **Pratt** or post **Matthew** detention on death row, that the mere fact of such detention constitutes cruel and unusual treatment or punishment, and that the remedy for such unconstitutional breach must be resentencing, which the court has the jurisdiction to order under of s.14 of the Constitution.

## **2. ISSUES**

At issue now is whether by reason of their detention on death row after July 7th 2004, or after 3 1/2 years, (or 5 years), had elapsed from the date of their conviction for murder the Applicants are entitled to:

- (a) An order for resentencing and/or,
- (b) A declaration that the Applicant's rights (and rights of those whom they represent) not to be subjected to cruel and unusual treatment or punishment have been, are being and are likely to be violated,
- (c) Costs.

Also in issue if the relief of resentencing is available for breach of any such right, is whether such resentencing should be carried out by the application of a mandatory life sentence to all persons entitled to the benefit of **Matthew v The State**

Privy Council Appeal No. 12 of 2004 Delivered the 7th July 2004 or **Pratt and Morgan v A.G. of Jamaica** [1994] 2 A.C., [1993] 3 W.L.R. 995, by the High Court exercising its jurisdiction to grant such further or other relief under the Constitution, or by a referral by this court to the Criminal Division of the High Court for individual resentencing after individual resentencing hearings.

### 3. DISPOSITION

I find:

- (a) The decisions in **Pratt and Morgan** and **Matthew**, were consistently recognized and applied by the courts, and recognized and observed by the State through its undertakings via counsel and in correspondence. Consequently no person who had the benefit of those decisions was at real risk of having the sentence of death implemented in relation to him.
- (b) The issue of commutation of sentence in accordance with **Pratt and Morgan** and **Matthew**, not having been carried out by the Executive, can be dealt with:
  - (i) by referring the individual matters to the Mercy Committee,
  - (ii) by the High Court in the exercise of its constitutional jurisdiction,

- (iii) by this court referring the individual matters to the Criminal Division of the High Court as was done by the Court of Appeal in **Angela Ramdeen**.

The process commenced by the Mercy Committee was tainted by the announcement in Parliament and the truncated timelines initially stipulated, which suggested that the outcome of the process was preordained.

There is no resentencing jurisdiction or discretion in the High Court in relation to these applicants, either in its Constitutional or Criminal jurisdiction. All the High Court can do at this stage is to commute the sentences of death in accordance with **Matthew** - [as in **Ramdeen**] to imprisonment for life. That being so there would be no purpose in referring these matters to the Criminal Division for imposition of the mandatory sentences of imprisonment for life. This court can do so in the exercise of its Constitutional jurisdiction. [See **Ramdeen, Gairy, Matthew and Pratt and Morgan.**]

- (c) After **Lewis** the applicants all had the opportunity to bring to the attention of the Mercy Committee and, if necessary, to the courts, inter alia, the applicability of **Matthew**, and **Pratt and Morgan**. These opportunities provided safeguards against any execution of the death

sentence in respect of persons entitled to the benefit of the binding decisions in **Pratt and Morgan** and **Matthew**.

- (d) Detention on death row by itself it is not supportive of a breach of the constitutional right not to be subjected to cruel and unusual punishment in the absence of any real threat of execution. I find there was no threat of execution save for the period between June 6th and June 13th 2005.
  
- (e) I find there is no evidence that conditions on Death Row after the time frames set out in **Pratt and Morgan** have elapsed are significantly worse than conditions off Death Row, and further, the conditions on Death Row complained of by the applicants are not such as to qualify as cruel and unusual treatment in the light of the Privy Council decision in **Thomas v Baptiste** Privy Council Appeal No. 60 of 1998. I find therefore that detention on Death Row after the delivery of the decision of the Privy Council in **Matthew**, and/or after 3 ½ years after conviction and sentence of death, is not rendered cruel and unusual punishment or treatment by reason of either of the conditions on death row or any real continued threat of execution.
  
- (f) Even if such detention did amount to cruel and unusual treatment or punishment, this would amount at highest to a separate breach of

constitutional right remediable in damages [**Thomas v Baptiste** *Privy Council Appeal No. 60 of 1998*] and would not constitute grounds for alteration of sentence. There is no basis on the present state of the authorities for the remedy for any such constitutional breach to be individual resentencing.

## **Orders**

In accordance with the decision of the Privy Council in **Matthew**

- (i) It is declared that all persons who were sentenced to death and awaiting execution as at July 7th 2004 who were the subject of the order of the Honourable Justice Benjamin who remain parties to this motion as set out in the appendix A annexed hereto are entitled to have their sentences of death commuted to imprisonment for life.**
- (ii) It is further declared that the sentences of death imposed on those applicants who remain parties to this motion as set out in the appendix A annexed hereto who were the subjects of the order of the Honourable Justice Bereaux are commuted to imprisonment for life.**
- (iii) It is ordered that each party is to bear his own costs.**
- (iv) It is further ordered that parties be at liberty to apply.**

This would eliminate any possibility of non commutation of the sentences of death in respect of those persons remaining parties to this motion set out in the schedule.

It is possible that consideration of clemency was intended under the process that was initiated and then preempted by the institution of these proceedings. Nothing prevents those persons remaining parties to this motion as set out in the schedule hereto, from further approaching the Mercy Committee on the Power of Pardon.

It is noted that some persons as listed in the schedule hereto have clearly indicated that they had no knowledge of these proceedings or the fact that they are being represented in these proceedings and their wish to no longer participate in this motion. This order does not apply to those persons listed as such in that schedule.

#### **4. ANALYSIS AND REASONING**

##### **PRINCIPLES OF CONSTITUTIONAL INTERPRETATION**

I repeat and adopt the principles of constitutional interpretation as set out by this court in its decision in **Allan Henry** delivered 1st December 2009. It is not necessary to repeat them save to emphasise that a purposive interpretation of the constitution is required, and is here adopted.

(i) **Pratt and Morgan** and **Matthew** revisited.

The issue arises because of the decisions in **Pratt and Morgan v The Attorney General for Jamaica and Matthew v AG** (1993) 43 WIR 340.

In **Pratt and Morgan v The Attorney General of Jamaica and Ors** it was held that [from headnote]

(i) *....that execution should follow as swiftly as practicable after sentence of death, subject to allowance of a reasonable time for appeal and consideration of a reprieve...*

*Per curiam. (i) The aim should be to hear a capital appeal in Jamaica within 12 months of conviction, and the entire domestic appeal process completed within two years. Although it is reasonable to allow some period of delay for appeals to the I.A.C.H.R. and U.N.H.R.C. it should not be prolonged*  
*(ii) 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".*

**Pratt and Another v Attorney General and Another (1993) 43 WIR 340**

*P 341*

*Held (2) That the execution of the death sentence after unconscionable delay would constitute a contravention of section 17(1), except where the delay had been the result of some fault of the accused, e.g. an escape from custody or the frivolous or time*

*wasting resort to legal procedures such as would amount to an abuse of process; but delay attributable to the accused exploring legitimate avenues of appeal did not fall within such exception.*

Pratt pg 340

*In this way it should be possible to complete the entire domestic appeal process within approximately two years. Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets which, if achieved, would entail very much shorter delay than has occurred in recent cases and could not be considered to involve inhuman or degrading punishment or other treatment.*

*p361*

*It therefore appears to their Lordships that provided there is in future no unacceptable delay in the domestic proceedings complaints to the UNHRC from Jamaica should be infrequent and when they do occur it should be possible for the Committee to dispose of them with reasonable dispatch and at most within eighteen months.*

*These considerations lead their Lordships 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”. If, therefore, rather than waiting for all*

*those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the Constitution, the Governor-General now refers all such cases to the JPC who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to section 17(1).*

*Their Lordships will accordingly humbly advise Her Majesty that this appeal ought to be allowed, and the sentences of the appellants **be commuted to life imprisonment.***

At p 359 certain observations were made therein by the Privy Council which are relevant to the status of prisoners who were on Death row.

*Section 25(2) of the Constitution provides that:-*

*“The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled.”*

*The width of the language of this subsection enables the court to substitute for the sentence of death such order as it considers appropriate. The appropriate order in the present case is that the sentence of death of each appellant should be commuted to life imprisonment."*

It is arguable that that period of 5 years may be further lessened if appeals to international bodies have been discontinued. See *Henfield Dwight v Attorney General Farrington v Minister of Public Safety and Immigration and Others* (1996) 49 WIR 1 ( emphasis added )

*There is no doubt that in Pratt the Board, when formulating the 5 year period, did indeed make an allowance of 18 months in respect of petitions to the U.N. Committee. But simply on this account to reduce the 5 year period applicable in Jamaica to a 3½ year period for The Bahamas would, in their Lordships' opinion, be too simplistic a reaction. Their Lordships start with the fundamental principle that the 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 (see Pratt at page 29G-H). Moreover, 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 (see Pratt at pages 30-33). It was on this basis that the death row phenomenon in the United States was rejected.*

*It is against this background that the formulation of the 5 year period in Pratt is to be understood. It is true that, in formulating that period, the Board made allowances both for domestic appeals (2 years) and for petitions to the U.N. Committee (18 months), the basic function of doing so being to ensure that the period so chosen accommodated target periods for both of these. But it is the whole period of 5 years, not just the balance of 18 months, which constitutes the inordinate delay; and the choice of 5 years indicates that that period was chosen as being long enough, in the Jamaican context, to accommodate the relevant appellate procedures, but also as being (special cases apart) long enough, in that context, to constitute inordinate delay.*

*It is against this background that a simple mathematical deduction of 18 months for The Bahamas appears simplistic. Let it be supposed that consideration is being given to the appropriate period for a country which has only one appellate court. On the mathematical approach, the period selected would be 2½ years (1 year for appeals to the Court of Appeal plus 18 months). It is not, in their Lordships' opinion, self-evident that, even in these circumstances, such a period would be sufficiently long to constitute inordinate delay for present purposes. It follows that the identification of an inordinate period of delay is not achieved by simply adding 18 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.*

*It follows that the question in the present case is whether the 5 year period applicable in Jamaica as being sufficiently prolonged for that purpose should be applicable in The Bahamas, where no time has to be allowed for petitions to the U.N. Committee. If it was so applied, however, it would have the effect that only after a delay of 3 years beyond the target periods for appeals (2 years) would an inordinate period have elapsed. In their Lordships' opinion, such a period of delay would be disproportionately long. On the other hand, as the example just given in respect of a country which has only one appellate court demonstrates, simply to add a period of 1½ years to the target periods for the relevant appeals may not be apt to produce an appropriate overall period for inordinate delay; and where the relevant target periods are relatively short, a longer period may have to be added for that purpose. Their Lordships have considered whether the appropriate period for The Bahamas should be a period of 4 years, in place of the 5 year period applicable in Jamaica. However, taking all the relevant considerations into account, they are satisfied that, in the context of a legal system in which the target period for appeals is 2 years, the lapse of an overall period of time of 3½ years following sentence of death is indeed an inordinate time*

In the instant cases both the period of 3 ½ years and the period of 5 years from sentence of death have been exceeded. (For the sake of convenience these will be referred to as the **Pratt** periods).

An additional complication was introduced when the Privy Council held in the case of **Balkissoon Roodal v A.G. Privy Council Appeal No. 18 of 2003 ( Roodal)**

that the mandatory penalty of death prescribed for the offence of murder in this jurisdiction was unconstitutional, and that there had to be afforded to persons subjected to that penalty an opportunity to be resentenced at a resentencing hearing.

In the subsequent case of **Matthew v The State** (2004) 64 WIR 412 (C), Privy Council Appeal No. 12 of 2004 (**Matthew**) the Privy Council revisited that decision and held that the mandatory death penalty in Trinidad and Tobago was saved from invalidity by the savings law clause in the Constitution.

At paragraph 1 it was stated:

*“The issue in these appeals is the constitutionality of the mandatory death penalty in Trinidad and Tobago. The relevant provisions of the constitution are sections 2, 4 and 5, and 6(1). Section 2 says that the constitution shall be the supreme law of Trinidad and Tobago and that any other law shall be “void to the extent of the inconsistency”. Section 4 declares the “right of the individual to life” and section 5(2)(b) says that Parliament “may not impose or authorise the imposition of cruel and unusual treatment or punishment”. But section 6(1) provides that “nothing in sections 4 and 5 shall invalidate ... an existing law”. The law decreeing the mandatory death penalty was an existing law at the time when the constitution came into force and therefore, whether or not it is an infringement of the right to life or a cruel and unusual punishment, it cannot be invalidated for inconsistency with sections 4 and 5. It follows that despite section 2, it remains valid”*

*“The result is that although the existence of the mandatory death penalty will not be consistent with a current interpretation of sections 4 and 5, it is prevented by section 6(1) from being unconstitutional.”*

It further took notice however of the fact that all persons who were on death row and awaiting execution would, after *Roodal v State of Trinidad and Tobago [2004] 2 WLR 65 (Roodal)* had been decided, have had the legitimate expectation that they were entitled to a resentencing hearing. Therefore fairness required that although the death penalty was once again recognized as mandatory, such persons, who were led to believe that they would have had the opportunity at a resentencing hearing to contend that it should not be applied to them, would have their sentence of death commuted to life imprisonment. It was recognized that some persons would have benefitted from this as there was no guarantee that at a resentencing hearing they may not have had their sentence of death confirmed.

*At paragraph 7 it was stated*

*“The effect of today’s decision is to overrule the recent case of **Roodal v State of Trinidad and Tobago [2004] 2 WLR 652**. Henceforth the death sentence for murder will continue to be mandatory. But for reasons which their Lordships will explain, they do not think it would be fair to deprive anyone presently under sentence of death of the benefit of the Roodal decision. They*

*will accordingly allow the appeal against sentence and substitute a sentence of imprisonment for life.*

*Paragraph 30-33 Matthews*

*That nevertheless leaves a serious problem. The appellant in this appeal, Mr Matthew, was given to understand in consequence of **Roodal** that the question of whether he should be sentenced to death would now be considered by a judge. Mr Roodal himself is no doubt awaiting a similar hearing and there may be others in the same position. But the effect of their Lordships' decision today is that a judge would have no discretion to change a death sentence which has already been imposed according to law. Such a resentencing cannot therefore take place.*

*On the other hand, simply to leave the sentence to be carried out, subject to the decision of the President, appears to their Lordships unfair to Mr Matthew. He has been given the expectation of a review of his sentence, additional to the possibility of presidential commutation, of which he is now deprived. Their Lordships think that it would be a cruel punishment for him to be executed when that possibility has been officially communicated to him and then been taken away. There is an analogy with *Pratt and Morgan v Attorney-General for Jamaica* [1994] 2 AC 1. In that case the Board said (at p. 33) that while the death penalty itself was not inhuman punishment, "to execute these men now after holding them in an agony of suspense after so many years" would be. The same is true of executing them after informing them (at the*

*time correctly) that the law would give them the opportunity to persuade a judge to impose a lesser sentence and then denying them that opportunity.*

*In **Pratt and Morgan** their Lordships exercised the power vested in the Supreme Court of Jamaica by the constitution to make “such orders ... as it may consider appropriate for the purpose of enforcing ... any of the provisions [relating to human rights and fundamental freedoms]” by allowing the appeal and commuting the death sentence to life imprisonment. There is a similar power in section 14(2) of the Constitution of Trinidad and Tobago. Pursuant to this power, their Lordships will allow the appeal, set aside the sentence of death and impose a sentence of life imprisonment.*

*In their Lordships’ opinion, the same considerations apply to anyone else sentenced to death and awaiting execution at the date of this judgment. Such persons may be fortunate because **Roodal** left open the possibility that the judge could still as a matter of discretion sentence them to death. However, in the absence of a judicial discretion as to sentence, their Lordships see no alternative course which it would be fair to take. On the other hand, the same considerations do not apply to persons convicted and sentenced to death after the date of this judgment, even though they may have been awaiting trial at the time of the **Roodal** decision. There is again an analogy with the *Pratt and Morgan* principle as applied by the Board in *Fisher v Minister of Public Safety and Immigration* [1998] AC 673. In that case it was held that pre-trial delay did not count as part of the period after which an execution would*

*be presumed to be cruel and inhuman. Lord Goff of Chieveley said that the state of mind of the accused before trial is not “the agony of mind of a man facing execution” but the somewhat different anxieties of a person who faces the possibility of conviction and sentence. There is obviously some common element but their Lordships do not think it is sufficient to justify treating the case as the same as that of a person actually sentenced to death.*

It may be noted that the Privy Council applied both terms of imprisonment for life and life imprisonment and clearly did not consider there to be any distinction between these terms.

In the case of **Clifford Beckles v The State Cr. App No. 52 of 2002 at page 20 and 21** *"The applicant was under sentence of death at the date of the judgment in Matthew (supra). We, therefore, grant leave to appeal against sentence and treat this application as the hearing of the appeal against sentence. The sentence of death is set aside and we substitute, therefore, a sentence of life imprisonment. We further order that the appellant be not released before the expiration of twenty-five years."*

**Arnold Huggins, Leslie Huggins and Junior Phillip v The State Privy Council**

Appeals No. 39, 25 and 55 of 2006 at paragraph 38. *"It was not in dispute that the effect of the Board's decision in Matthews v State of Trinidad and Tobago [2004] UKPC 33, [2005] 1 AC 433 is that it would be unfair in the circumstances for the sentences of death now to be carried out. Their Lordships will therefore allow the*

*appeals against sentence, set aside the sentences of death and substitute sentences of imprisonment for life.*

**Marlon Daniel and Ors v The State** Privy Council Appeal No. 123 and 124 of 2005 at paragraph 46 and 47.

*"The appellants' appeals against conviction will accordingly be dismissed.*

*It was not in dispute between the parties that the mandatory sentence of death should be set aside, on the grounds set out in Matthew v State of Trinidad and Tobago [2005] 1 AC 433. Following this decision, their Lordships will substitute in each case a sentence of life imprisonment."*

In addition the State had indicated via its legal representatives Charles Russell by letter dated **16th August 2004** as follows:-

*"Dear Sirs*

*Re: Reshi Bissoon v The State*

*We thank you for your letter of the 3rd August 2004.*

***Our client has every intention of complying with the state of the law as adjudicated in the Privy Council's decision of Matthews.***

*However, our client will not act upon the commutation of a sentence based on Pratt and Morgan until the individual has exhausted his judicial process. As you are aware*

*Mr. Bissoon has pending an intended application before the Privy Council relating to conviction and sentence.*

*It would be wrong for our client to act and commute your client's sentence to one of life based on Pratt and Morgan until such time as he has exhausted his appeal rights.*

***Our client will act on the basis of Matthews and Pratt and Morgan in such cases where the individual has exhausted his appeal rights.***

*We are sending a copy of this letter to Messrs Simons Muirhead & Burton. Ref:*

*SL/NG*

*Yours faithfully*

*Charles Russell."*

Further in letter dated **13 June 2005** (exhibit ACJ 3) Messrs. Charles Russell wrote as follows:-

*Dear Sirs,*

***Dial and Dottin v The State***

*Further to your communication we write to inform you that we have brought to the attention of the Attorney General the **written submissions** made in the case on behalf of the State in relation to your client's appeal to the Privy Council on the 29<sup>th</sup> November 2004. In addition, we have also informed the Attorney General that*

**Counsel in oral submissions informed their Lordships that, in any event, the Appellants' were protected by the principles of Pratt and Morgan.**

*Yours faithfully*

*Charles Russell*

In letter dated **13 June 2005** (Exhibit *ACJ 4*) Counsel for the State confirmed as follows:-

*Jeannie Mackie*

*Doughty Street Chambers*

*10 Doughty Street*

*London WC2*

*Fax 0207 404 2283*

*Dear Jeannie,*

*Ramsingh Jairam v The State*

*I understand from my telephone conversation with Lord Thomas yesterday afternoon, and from my telephone conversations with you this morning ( Monday 13 June 2005),*

*that the question whether or not to commute the sentence of death passed on Ramsingh Jairam is due to be considered today in Trinidad and Tobago by the Advisory Committee, and that, unless they recommend the commutation of his sentence, a death warrant issued against him last week will be carried out tomorrow morning ( Tuesday 14 June 2005).*

*As you know, I appeared for the state both on Jairam's petition for leave to appeal to the Privy Council on 19 December 2002, and on his appeal, which was heard on 14 and 15 February 2005.*

*At the appeal hearing on 15 February 2005, I believe I was asked by the Board (I think by Lord Rodger of Earlsferry) what the position on sentence was for Jairam, and I replied that his case would be covered by **Pratt v Morgan**. Although I cannot recall precisely what I said, it is likely that I would have added that therefore there would be no question of Jairam being executed, because the sentence of death had been passed on him at his retrial well over five years ago. In any event, this would have been implicit in my confirmation that **Pratt v Morgan** applied. I can say from my own experience that **in capital appeals the Privy Council frequently asks for such confirmation**, and when it is given it is understood without the need for elaboration.*

*I have spoken to John Almeida of Charles Russell, who was at the hearing and who took notes of the appeal. His note of the relevant exchange says "Pratt v Morgan confirmed". This corroborates my recollection of the exchange.*

*In our telephone conversation this morning, you mentioned that your note of the hearing of the petition back in December 2002 suggests that on that occasion as well I was asked the same question and gave the same answer. Your note also suggests that I added that when a sentence of death is commuted to life imprisonment, that generally means 70 to 75 years. I do not have any specific recollection of that particular exchange, but I have no reason to doubt that it took place along the lines of your note, because as I have said, **the Privy Council frequently asks for such confirmation in capital cases.***

*Yours Sincerely*

*Peter Knox*

The effect of these cases is as follows:-

1. There would have been some persons who already, by virtue of the **Pratt and Morgan** decision, could not have been subject to execution at the date of delivery of **Matthew**, as the relevant time limits would have elapsed.
2. There would have been some persons awaiting execution who as at the date of delivery of **Matthew**, though the relevant time limits under **Pratt and Morgan** had not elapsed, would have been entitled to the benefit of having their sentence of death commuted to life imprisonment.

After **Pratt** and **Matthew** it was clear:

- (i) that persons on death row after 5 years had elapsed could in most cases not have been executed,
- (ii) that that period may have been abbreviated to 3 1/2 years if appeals to international human rights tribunals were not available,
- (iii) that persons under sentence of death on death row as at July 7th 2004 awaiting execution could not have been executed,
- (iv) that persons who had not exhausted their appeals to the Privy Council could not have been executed pending hearing of their appeal,
- (v) that after the order of the Honourable Justice Breaux persons who have had their sentences of death commuted to life imprisonment and who have been removed from death row could not be subject to execution thereafter for the same reasons given in **Matthew** namely - once an expectation is held out to a prisoner and officially communicated to him that he would not be executed, this cannot be resiled from,

- (vi) that the State had represented before the Judicial Committee of the Privy Council, in the cases of Dial, Dottin, Jairam and probably others, that it recognized and would be bound by **Pratt** and
  
- (vii) that the State, via its attorneys Charles Russel had written on January 12 2005, and possibly on a number of occasions previously, to solicitors Simons, Muirhead, and Burton, (representing persons convicted of murder), that the Government of Trinidad and Tobago had accepted their Lordships' decision in the case of **Matthew** – including paragraph 33 thereof. - (See Exhibit KD 1 to Dial's affidavit filed on June 13 2005).
  
- (viii) that the courts, including the Privy Council, recognized and subsequently gave effect to **Pratt** and **Matthew**.

## **(II) DETENTION ON DEATH ROW - POST PRATT, AND MATTHEW - WHETHER CRUEL AND UNUSUAL TREATMENT**

1. The issue arises as to whether detention on death row

- (a) After **Pratt and Morgan** took effect,

(b) After the ruling in **Matthew** took effect gives rise to a further breach of a constitutional right not to be subject to cruel and unusual punishment\reatment.

2. (a) If so is the relief of resentencing available for breach of such right.

(b) If it is, whether such resentencing can be carried out by the High court exercising its jurisdiction to grant such further or other relief under the Constitution.

### **Post Pratt detention - Whether cruel and unusual**

If such detention on Death Row gives rise to a breach of the constitutional right not to be subjected to cruel and unusual treatment this could logically arise in two ways

- (i) from the continuing threat of execution and agony of mind so produced.
- (ii) from prison conditions.

### **(A) THE THREAT OF EXECUTION**

The applicants' motion is premised upon their contention set out in their grounds that they remained liable to the reading of a warrant at any time and to subsequent execution, and further that on June 6th 2005 the third Respondent announced and declared in the House of Representatives that the State intended to execute all persons on death row, and that it was government policy not to accept the decision of the Privy Council in **Matthew**.

One element as to whether such detention can constitute unconstitutional cruel and unusual treatment is whether the applicants remained subject to execution.

**In Dial's affidavit sworn to on 11<sup>th</sup> June 2005 Dial stated as follows:**

**Paragraph 10**

*I also read and heard reports of a speech made by the Attorney General on Monday 6<sup>th</sup> June 2005. On Tuesday 7<sup>th</sup> June 2005 I listened to several radio broadcasts. By those media I became aware that the Attorney General had made the following statements:-*

- a. That hangings were to resume.*
- b. That if the Courts intervene to stop it, the State will, cognizant with the rule of law, do everything within its power to pursue the sentence of death in relation to every person on death row.*
- c. That the State does not agree with some of the decisions of the Privy Council to commute the sentences of Death Row inmates whose appeals were not even before them,*
- d. That the State shall resist these decisions with every resource it possesses.*

**Paragraph 12**

*On the 10<sup>th</sup> day of June 2005 I was informed by my Attorney that Lawyers from the State in London had since the 12<sup>th</sup> Day of January 2005 agreed to abide by the Matthews decision...*

**Further Paragraphs 3 and 6 of Dial's Affidavit dated 14<sup>th</sup> January 2009 are instructive.**

*I recall that shortly before this I had heard press reports that the then Attorney General had announced that the State was going to resume hangings. Further, I recall that the State had read the death warrant to Lester Pitman, another death row inmate. I told Mr. Brook and I did not know what he was talking about. He told me that there was a rumour that there were 4 "death warrants" ready "to come into the jail". I asked him if my name was on one of them. He told me that he could not disclose that information. I then told him that as far as I was concerned the State could not hang me since I had been on death row over 8 years and in any case I was not signing anything until I spoke to my lawyer in England...*

Paragraph 6.

*...By this time I understood that the letter from the Ministry was the first step to attempts to hang me and that the State was proceeding notwithstanding the fact that I had been on death row for some 8 years and **what I had been informed had occurred at the hearing of my second appeal before the Privy Council...***

It is clear that while the State did not actively take steps to remove the applicants from death row, it did indicate to some of them via their counsel that **Pratt and Morgan** applied, meaning that they could not be executed.

Jairam and other applicants, to whom **Pratt and Morgan** and/or **Matthew** applied, viewed objectively, therefore had no basis for apprehending execution until the statement in Parliament. One week later, days after the letter from the Mercy Committee, the High court's intervention was sought and the conservatory order granted.

Therefore any threat of execution which existed for any period of detention subsequent to the time frames set out in **Pratt and Morgan** would have been very limited in duration- no more than one week - as such threatened infringement was stopped in its tracks by the conservatory order.

Further the effect of **Lewis** - (which the Mercy Committee was seeking to give effect to by affording the opportunity to the applicants to make representations) was that **Pratt and Matthew** considerations, which bound the State, would have prevented unlawful executions, after a bona fide consideration by the Mercy Committee.

The case of **The Attorney General of Trinidad and Tobago v Angela Ramdeen**, Cv.A No. 6 of 2004, Paragraphs 17 to 21 (**Angela Ramdeen**) was relied upon for the proposition that specific evidence of suffering on death row was not required - it would be presumed ,and this case requires examination to determine what it actually decided.

In **Angela Ramdeen** it was expressly found by the Honourable Justice Jamadar (as he then was) and upheld by the Court of Appeal, that the applicant was detained on death row awaiting execution under sentence of death and declaratory relief and damages were awarded under the **Pratt** principles.

As stated by the Court of Appeal therein -

18. *In granting relief under Pratt, the Judge referred to the target period of 5 years after which, absent delay due to the fault of the accused, there will be strong grounds for believing that the delay is such as to constitute cruel and unusual punishment. He found that there had been unjustifiable delay by the State in moving to execute the Respondent.*

19. *The Judge found on the evidence that the presumptive target period of two years for the completion of domestic appeals had been exceeded and that factor could not be entirely or substantially attributed to the Respondent.*

21 *....The Judge therefore concluded that to move now to execute the Respondent would constitute cruel and unusual punishment and an abuse of process. He consequently commuted the sentence to life imprisonment. In granting the declaration and making the order complained of in this Appeal the Judge stated:*

*“Clearly, after the five year threshold had elapsed the Applicant was 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 14<sup>th</sup> 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 the filing of this action.”*

*...Implied in that passage from Pratt is **that someone facing the death penalty is likely to be in agony or as has been said to alternate between periods of hope and despair.** The passage expressly states that to keep someone over a prolonged period **in that state** is inhuman or in our context cruel and unusual treatment. That was taken as **the likely effect** of the prolonged imprisonment **while awaiting execution.** **The likely effect is all that is necessary. ... It was not necessary to ascertain the effect of the delay on the individual person sentenced to suffer death.** It was no doubt inappropriate to distinguish between persons of different make up and enquire how a sentence of death may affect them. ...*

38 *In my Judgment therefore, **there is no requirement for the Respondent to have produced evidence of the actual effect of delay after the imposition of the death sentence and while awaiting execution.** What is regarded as the **likely effect** of the **death penalty and prolonged delay awaiting execution** is **sufficient.** The likely*

*effect of someone under sentence of death is that he would go through periods of agony alternating with periods of hope. To keep someone in that state over a prolonged period is to inflict upon him cruel and unusual punishment. In cases therefore where the applicant is entitled to commutation under the principles in Pratt, the Court is entitled to find, where appropriate relief is sought, that the applicant was subjected to cruel and unusual treatment by virtue of his continued detention on death row beyond the date that his sentence ought to have been commuted and order that compensation be paid. The extent of the applicant's actual physical or emotional suffering is relevant to the quantum of damages and not whether the relief ought to have been granted.*

*Paragraph 39*

*"There is one further submission of Mr. Harnanan which I have not yet mentioned and to which I now turn. He submitted that the Pratt principle is now well known and gives rise to certainty. The result therefore is that anyone sentenced to death would now know that he would not be executed after the five-year period since his conviction and sentence has expired. I do not however think that this submission takes the case any further. Under Pratt the condemned prisoner is entitled to commutation but not if the delay is his fault. In those circumstances the failure to give effect to Pratt and grant the commutation of sentence when it may thought to be due may further aggravate the mental anguish on the part of the condemned man. In any event, on the facts of this case that submission cannot be advanced with any real hope of success. In this case the Respondent's sentence was not commuted despite the*

requests of her solicitors to do so. By the time the constitutional motion was filed the Respondent had been under sentence of death for six years and five months. She however continued on death row without any communication that her sentence would be commuted and that she would not be executed. Not only was no such communication given, but the Appellant resisted the constitutional motion. The Appellant argued that the delay was attributable to the Respondent and that the time before Pratt “kicks in” should therefore be extended. On this appeal, as mentioned earlier in this judgment, the Appellant challenged the setting aside of the death penalty. It was not known until the Appellant’s skeleton arguments were filed 2 days before the hearing of the appeal that that ground was not being pursued. As far as the Respondent was concerned therefore, the State, up to two days before the hearing of the appeal was still intending to execute her, if this Court could be persuaded that the Judge was wrong to set aside the death penalty. If any signal was sent to the Respondent it was not that she could rest in the belief that she would not be executed.”

A simple letter may have sufficed to eliminate any doubt about eventual commutation.

It was argued that the process which would have resulted in such a letter was commenced by the letter from the Mercy Committee. It is exceedingly unfortunate that that process was legitimately capable of being subject to the opposite interpretation in the context of the statements made in Parliament which immediately

preceded it. Here however there is evidence that supports the submission of Mr. Harnanan in the **Ramdeen** case.

Unlike in **Ramdeen**

(a) there was no suggestion that **Pratt** doesn't apply. I find that there is no indication that the State did not intend to observe **Pratt and Morgan** In fact despite the unfortunate tone of the reported statement in Parliament of the Attorney General it confirmed that the State expressly recognized that it was bound by **Pratt**.

(b) there was no suggestion that a representation to that effect was not given to Privy Council. In fact it is undisputed that such a representation was given – on more than one occasion.

(c) there was no suggestion that State is seeking to argue that the **Pratt** period should be extended.

(d) Further it appears by the letter from the Advisory Committee that the State recognized the decision in Lewis, and was seeking to afford a right to make representations in accordance therewith.

I have found however that there was not in the case of these applicants any threat of execution after the **Pratt and Morgan** time frames elapsed, save for a period of approximately one week. I also find that the applicants knew of **Pratt** and in some cases had been told via their attorneys that it applied to them.

Accordingly I find there could be no threat of execution because:

- (i) At their Privy Council Appeal an undertaking was given by Counsel for the State that Pratt applies.
- (ii) Once **Pratt** applies the applicants would not be subject to threat of execution

The State, viewed objectively did nothing and in fact could do nothing in furtherance of its stated agenda to hang all persons on death row if the opportunity arose once it recognized, as it did, that **Pratt** bound it.

It offered a hearing via the Mercy Committee to the applicants in accordance with **Lewis**. The effect of that is that once **Pratt** applied the applicants could not be hanged. The process of hearing before the Mercy Committee did not proceed and so it cannot be determined whether a real opportunity was being afforded to the applicants. Consideration by the Mercy Committee was also necessary as a prelude to the recommendation of the exercise of the prerogative of mercy and commutation of the death penalty and was as equally consistent therewith, as it was with a recommendation to carry out the sentence of death.

While it may be presumed that a bona fide opportunity was in fact being so provided the applicants were entitled to view with skepticism and alarm the opportunity extended to them to make representations to the Mercy Committee .The truncated time frames provided conveyed the impression ,rightly or wrongly, that no

real opportunity was being afforded, and that it was in fact a prelude to the Minister of National Security giving advice to the President in accordance with the agenda already announced by the Executive of which the Minister was a part.

That threat of execution, though objectively unlikely to have been carried out in light of the cases of **Pratt** and **Matthew** and in light of the hearing being offered to the applicants in accordance with **Lewis**, would have been, subjectively, quite real, to persons on death row after the statement was made in Parliament.

However that threat was short lived .The applicability of **Pratt** and **Matthew**, were matters that could have been brought to the attention of the Mercy Committee. Further the courts were always available to ensure compliance with the rule of law and enforce Pratt, as in fact occurred when the conservatory order was sought and obtained, before the High court,

**Pratt** made it clear that after a presumptive period of 5 years, and arguably 3 and 1/2, a mandatory sentence of death, though lawful, in many cases becomes unenforceable. The "alternating periods of hope and despair", and the "agony of mind while awaiting execution, are what render the delay in enforcing the sentence of death unconstitutionally cruel and unusual.

These should cease to apply once a five year period has elapsed in a State which is bound by the rule of law and which recognises Pratt as a decision of its

highest court. The evidence suggests this is the case here - and there is no objective evidence to the contrary.

Further there is ample evidence that this state of affairs was communicated to the applicants and known to them. Post Pratt detention on death row cannot, at least by virtue of any implicit continuing threat of execution rise to a separate constitutional breach in such circumstances.

The contention in this case that a sentence of death remained hanging over the applicants once not officially withdrawn by some executive act and the applicants removed from death row, is based on artificiality. I find there could be no threat of execution because:-

- (1) Save for a period of less than a week after the statement was made in Parliament the applicants would not have been facing any impending sentence of death or agony of mind. The applicants were well aware of the applicability of Pratt and Matthew and on their own evidence had no fear of the execution of that sentence.
- (2) The process was aborted. by which executive action could have formally given effect to **Pratt** or **Matthew** (via the Mercy Committee tendering advice to the Minister who advises the President ).
- (3) At the Privy Council Appeal of some applicants an undertaking was given by Counsel for the State that Pratt applies.

- (4) Once Pratt applies the applicants would not be subject to threat of execution

I therefore find that, unlike the situation and circumstances of Angela Ramdeen, there is no basis to **presume** any similar prolonged suffering or agony of mind on death row on the part of these applicants while awaiting execution.

### **Detention on Death Row - Conditions**

It needs to be considered whether, when a prisoner is no longer under sentence of death and/or under threat of execution, detention on Death Row could be separately rendered cruel and unusual by reason of prison conditions, so as to amount to a breach of his constitutional right not to be exposed to cruel and unusual treatment, the constitutional remedy for which is resentencing.

In **Lewis** the Privy Council indicated that allegations of prison conditions should be investigated and findings of fact made therein. In the instant case the issue of prison conditions was not the primary focus of the applicants on the motion. Rather it was the fact of the continued detention on death row after they had the benefit of the rulings in **Pratt** and/or **Matthew**.

The case of **Angela Ramdeen** was primarily relied upon in which it was decided that specific evidence of suffering on death row while awaiting execution

was not required - it would be presumed. I have found however that there is no basis to presume any similar suffering on death row in the case of these applicants.

In **Thomas v Baptiste and others** Privy Council Appeal No. 60 of 1998, 1998 54W.I.R. 387 the Privy Council indicated commutation of sentence, even a sentence of death, is not the remedy for complaints concerning prison conditions, even if such conditions amounted to cruel and unusual treatment.

Further in **Anthony Briggs v. Cipriani Baptiste (Commissioner of Prisons) & Ors** Privy Council Appeal No. 31 of 1999 @ pg. 6 Lord Millette in the Privy Council indicated that compensation was the only remedy which was available and appropriate in such circumstances where (a party) had been sentenced to death or life imprisonment.

In the case of **Thomas v Baptiste and others** De la Bastide C.J. in his judgment in the Court of Appeal, and after expressing his opinion on the extent of the Supreme court's constitutional jurisdiction (@page 396 ), described and analysed those complaints @pg. 397 :-

*396 - I do not rule out the possibility that the court might, in truly exceptional circumstances and in exercise of the very wide power it enjoys under section 14 of the Constitution to make orders for the purpose of enforcing the constitutionally protected rights, prohibit the state from carrying out a sentence of death if because of intransience [ ?] of the relevant authorities that appeared to be the only effective way of inducing them to respect the right of prisoners not to be subjected to cruel and*

*unusual treatment or punishment while in prison. Suffice it to say that there is nothing to suggest that such a situation exists at present, whatever view one takes of Thomas's complaints.*

at **Page 397**

*I do not think that it was justified to treat the conditions under which Thomas was kept to be tantamount to solitary confinement. Apart from the occasions when he was allowed to leave his cell in the mornings for his ablutions and his meals, the unchallenged evidence was that the prisoners could talk among themselves at will. There was a radio played in the cell block which they could hear. They had access to books and newspapers. In addition, they could receive visits from their family and friends twice per week and from their legal advisers at any time between 8.00 am and 4.00 pm, Monday to Friday.*

He found those conditions within prison, especially when compared to conditions endured by some sectors of society outside prison, to fall far short of what could be properly described as cruel and unusual treatment or punishment.

On appeal, the Privy Council considered those conditions and the effect of such conditions on a claim for constitutional relief.

*At Page 54 WIR 387@ 426 to 427 [per Lord Millette] it was stated:-*

*"In their Lordships view, the question for consideration is whether the conditions in which the appellants were kept involved so much pain and suffering or such deprivation of the elementary necessities of life that they*

*amounted to treatment which went beyond the harsh and could properly be described as cruel and unusual. Prison conditions in third world countries often fall lamentably short of the minimum which would be acceptable in more affluent countries. It would not serve the cause of human rights to set such demanding standards that breaches were commonplace. Whether or not the conditions in which the appellants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions both in and outside prison. Their Lordships do not wish to seem to minimise the appalling conditions which the appellants endured. As the Court of Appeal emphasised, they were and are completely unacceptable in a civilised society. But their Lordships would be slow to depart from the careful assessment of the Court of Appeal that they did not amount to cruel and unusual treatment.*

*Even if the prison conditions in themselves amounted to cruel and unusual treatment, however, and so constituted an independent breach of the appellants' constitutional rights, commutation of the sentence would not be the appropriate remedy. Pratt did not establish the principle that prolonged detention prior to execution constitutes cruel and unusual treatment. It is the carrying out of the death sentence after such detention which constitutes cruel and unusual punishment. This is because of the additional cruelty, over and above that inherent in the death penalty itself, involved in carrying it out after having exposed the condemned man to a long period of alternating hope and*

despair. It is the circumstances in which it is proposed to carry out the sentence, not the fact that it has been preceded by a long period of imprisonment, which renders it cruel and unusual. The fact that the conditions in which the condemned man has been kept prior to execution infringe his constitutional rights does not make a lawful sentence unconstitutional.

It would be otherwise if the condemned man were kept in solitary confinement or shackled or flogged or tortured. One would then say: "enough is enough". A state which imposes such punishments forfeits its right to carry out the death sentence in addition. But the present cases fall a long way short of this.

Their Lordships are unwilling to adopt the approach of the IACHR, which they understand holds that any breach of a condemned man's constitutional rights makes it unlawful to carry out a sentence of death. In their Lordships' view this fails to give sufficient recognition to the public interest in having a lawful sentence of the court carried out. They would also be slow to accept the proposition that a breach of a man's constitutional rights must attract some remedy, and that if the only remedy which is available is commutation of the sentence then it must be adopted even if it is inappropriate and disproportionate. The proposition would have little to commend it even in the absence of section 14(2) of the Constitution, but it is clearly precluded by that section."

What was said by the Privy Council in **Thomas v Baptiste** was repeated in **Briggs** @ pg 48 sitting as the final Court of Appeal of Trinidad and Tobago.

In **Anthony Briggs v Cipriani Baptiste and Others** [2000] 2 W.L.R. 574

*...They do not wish to minimize the seriousness of the breach of the appellant's right to personal liberty while awaiting trial, but they observe that the normal remedy for false imprisonment is compensation. Where the defendant is sentenced to a term of imprisonment, the national Court may instead provide a sufficient remedy by directing that the period of pre-trial custody should be taken into account. This is obviously not possible where the defendant is sentenced to death or life imprisonment. In such a case, compensation is the only remedy which is both available and appropriate. They repeat what they said in *Thomas v Baptiste* [2000] 2AC @ 28:–*

*"Their Lordships are unwilling to adopt the approach of [the Commission], which they understand holds that any breach of a condemned man's constitutional rights makes it unlawful to carry out a sentence of death. In their Lordships' view this fails to give sufficient recognition to the public interest in having a lawful sentence of the court carried out. They would also be slow to accept the proposition that a breach of a man's constitutional rights must attract some remedy, and that if the only remedy which is available is commutation of the sentence then it must be adopted even if it is inappropriate and disproportionate."*

The issue remaining therefore is whether there is evidence that conditions on death row are sufficiently worse than those off Death Row, that to expose a prisoner to them unnecessarily amounts to cruel and unusual punishment or treatment. It may be helpful to analyze in relation to each applicant who remains a party to this motion what are the conditions that are complained of.

In the case of Gangadeen Tahaloo for example he complained that while on Death Row he complained of the following:

- (i) Poor Ventilation
- (ii) Poor quality of food
- (iii) Poor lighting
- (iv) Exhaust fumes from vehicles, generator
- (v) Overflowing sewer and poor ventilation in block CI
- (vi) Inadequate exercise - none on weekends and public holidays
- (vii) Airing twice weekly - [airing of prisoners on death row was the subject of a decision of this court of **Alladin Mohammed** H.C.2044/2005 delivered 20th March 2008.
- (viii) Exercise with handcuffs - [this was considered in the case of **Guerra v Baptiste**.
- (ix) Searches on Death Row including first search after 9 pm interrupting sleep.

- (x) Expectation of commutation to life sentence after **Pratt**.
- (xi) Psychological stress from time of arrest and aggravation in 1999 when execution took place the vicinity of the division where he was kept – (this would have been prior to the time when the **Pratt** time frames applied and before **Matthew** was decided)
- (xii) Developed arthritis from sleeping on the floor
- (xiii) He learned to read and write and spent time reading and writing and exercising
- (xiv) On Death Row when taken out he was handcuffed but could talk to others.

With respect to Amir Mohammed his complaints were as follows as set out at paragraph 6 Amir Mohammed's affidavit:-

*The treatment and accommodation on death row as compared to remand where I was before the trial are very different. I was provided with a single cell, a bed and a table and a bench to make my reading and writing more comfortable. There is even a radio to listen to the news, and a little music to cool the mind, but the same articles that are to bring comfort have been used to intimidate and to torment for though it is for us, the authorities put on channels at a very loud pitch on talk show programmes. At that moment I would be in a quiet time or studying, and the noise is very distracting. Even when I ask them to change the channel or to lower the volume, my request is never heard. I feel frustrated and stressed out, and feelings of despair cover me.*

He was provided with a single cell, a bed and a table, and a bench to make reading and writing more comfortable. There is a radio to listen to the news and a little music, though the volume is set too high.

He does art and craft. He read books, papers and literature. He witnessed punishment of other inmates which affected him emotionally.

With respect to Curtis Sirju he describes conditions on Death row at paragraph 26 of his affidavit filed on 21st November 2008.

*The conditions on Death Row are inhumane. No proper lighting system, no proper ventilation, slop pail at times so the bare cell is used in its place. I cannot recall when I properly could wash my mouth and face. Officers search and wilfully make a mess as they kick down everything including the pail water, which leaves my things wet.*

The affidavits filed on behalf of the 16 applicants represented by Ms. Rajkumar set out at great length their individual circumstances and the impact of prison conditions on them. In some cases they portray applicants as victims of circumstance, and even of conspiracy. I consider it unnecessary to set out in detail the complaints of each applicant save to make the following observations.

Different applicants had different experiences, though some common elements existed. In the case of women prisoners they complained of invasive and demeaning searches which were remedied after complaint.

In other cases inmates complained of lighting, ventilation, victimisation and assault by prison officers on other prisoners and the impact therein upon them. Some had better experiences than others.

A distinction is not always made in the affidavits between conditions on death row and off death row. In fact they deal with conditions prior to conviction as well as subsequent thereto.

However examination and analysis of the applicants' affidavits, even untested by cross examination as they were, reveal that there is little evidential basis for their contention that their continued detention of death row was in conditions which breached their constitutional rights not to be subject to cruel and unusual treatment or punishments. I take into account that the allegations therein are uncontradicted. I also take into account that they are in some cases contradictory.

Even accepting the conditions were as alleged in the affidavits of the applicants I find that, especially when compared and contrasted with the conditions considered in **Thomas v Baptiste**, they do not establish matters amounting to cruel and unusual treatment. Harsh conditions, and I note that some of the applicants have

detailed conditions which cannot be so described, do not necessarily amount to cruel and unusual treatment.

Even if such detention was in such conditions, or any of them which amounted to cruel and unusual treatment, (though I expressly find otherwise) it is inconsistent with determinations of the Privy Council previously in **Thomas v Baptiste** and **Briggs** to contend that the appropriate relief would be an entitlement to a resentencing hearing. Such would be inappropriate and disproportionate in the circumstances.

I note the decision of **Fisher v Attorney General and others** Privy Council Appeal No.35 of 1988 dated 5th October 1998 where the issue of prison conditions in the Bahamas and the continued deprivation of the applicants there of the opportunity to exercise was considered.

I consider the circumstances there distinguishable. Unlike in the Bahamas, prisoners on Death Row in Trinidad do appear to have access to attorneys, and legal representation to pursue such remedies for breaches of the Prison Rules. The case of **Alladin Mohammed HCA 2044 of 2005 Del. 2008** is one example of this. The evidence of Jairam himself as to his ability to confer with his lawyers - in fact with several lawyers, both locally and abroad is also illustrative.

Furthermore, the case of **Thomas v Baptiste** dealt with the specific conditions on Death Row in prison in Trinidad.

I have noted the dissent of Lord Steyn in **Thomas v Baptiste**, but consider that the allegations in the instant matter regarding prison conditions do not equate, for less surpass in harshness those specifically dealt with in **Thomas v Baptiste**. It was clearly recognized by this court in **Aladdin Mohammed** that there are minimum standards, including those set out in the Prison Rules, below which prison conditions will not be tolerated. It goes without saying that courts must be prepared to uphold and enforce these via the wide range of remedies available to them in a manner proportionate to any breach.

I find nothing has been demonstrated to establish that prison conditions on Death Row are substantially worse than those considered by the Court of Appeal in **Thomas v Baptiste**. In fact some applicants appear to describe improvements. I am unable to find the conditions described in the numerous and lengthy affidavits cruel and unusual - though they are distressing and have been in some instances, and for some periods, appalling.

### **(III) JURISDICTION RE RESENTENCING**

Having found that unconstitutional cruel and unusual punishment or treatment does not arise, neither does the issue of resentencing. However, given that

this was the primary focus of this motion I will deal with the issue of resentencing for the sake of completeness.

It was contended that the High court has sufficiently wide powers under the Constitution to resentence the applicants or to order their resentencing.

In **Jennifer Gairy v The Attorney General of Grenada**, PC No.29 of 2000 at paragraph 23 it was stated as follows :-

*But for reasons already given the appellant is not constrained by the principles governing applications for judicial review. Having proved a breach of a right protected by the constitution, having obtained a money judgment and having failed to obtain full payment, the appellant now seeks an effective, not merely a nominal, remedy. **The court has power to grant such a remedy. And if it is necessary to fashion a new remedy to give effective relief, the court may do so within the broad limits of section 16.** Whereas, in granting a person constitutional relief not related to Chapter 1, the court may under section 101(3) “grant to that person such remedy as it considers appropriate, being a remedy available generally under the law of Grenada in proceedings in the High Court”, the court’s powers under section 16(2) are not so limited. **The court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right.***

I accept this proposition.

It was suggested that it is the further breach of constitutional rights of the applicants by their continued incarceration on Death Row that afforded this court in the exercise of its wide powers under S.14 of the constitution to craft a new remedy and order an individual resentencing of each applicant.

I have found there has been no breach thereby of the right not to be subjected to cruel and unusual treatment or punishment.

It was submitted that examples of the exercise of such power were to be found in **Angela Ramdeen** and **Bernard Coard** Privy Council Appeal No. 10 of 2006.

I consider these to be distinguishable. In **Ramdeen** - resentencing was directed by the Court of Appeal in **accordance with Matthew**.

While in the case of **Coard** [loc. cit] the Privy Council ordered in the circumstances of that case that the applicants were entitled to a judicial resentencing, in **Coard** the original death sentence and therefore its subsequent commutation to life imprisonment were invalid. Resentencing therefore took place in the manner originally contemplated by **Roodal**.

In **Coard**, like the instant ones, the applicants were sentenced to death. Those sentences were purportedly commuted by the Governor General. Unlike in the instant

cases however, the mandatory death sentence in Grenada in 1986 was unconstitutional.

Accordingly it was held that any purported commutation of the initial invalid sentence was itself invalid. The Privy Council was asked to hold that notwithstanding their unconstitutionality, the sentences were res judicata, and that they, (together with the commutations thereof to life imprisonment), should stand, as the applicants were by this time several years later, out of the judicial system, leaving them to their remedy to petition for the exercise of executive clemency.

The Privy Council indicated that in the ordinary way there would be both logic and practical sense in this argument. However there were in the special circumstances of that case several reasons why the court should intervene and order a judicial resentencing hearing.

The first was that the legality of the death sentence imposed on those applicants had never been the subject of judicial decision. If it had been raised before the Court of Appeal in 1991 because of the principle that judicial decisions on the meaning of the Constitution have retrospective effect, the correct answer would have been that it was unlawful. But in practice it was unrealistic to expect that the argument would have succeeded in the court of appeal.

In the instant case there can be no doubt since *Matthew v AG* that the death sentences passed on the applicants, as confirmed on appeal up to the Privy Council, were lawful.

Secondly, the applicants there remained in detention without lawful authority as their initial sentences of death were invalid (unlike the instant cases), and therefore the commutations of those sentences were equally invalid.

Thirdly, there had never been any judicial contribution to determining the sentences the applicants should serve. In the instant case, while there was no sentencing discretion in the trial judge that was not unconstitutional under the law of Trinidad and Tobago.

Fourthly, there appeared to be no adequate mechanism for providing the applicants with the judicial sentencing procedure to which they were entitled. Here they are not so entitled since **Matthew**.

Fifthly, the politically charged atmosphere which still surrounded the applicants' fate in **Coard** is not a feature in the instant application.

None of those reasons applies to the instant situation.

Further the contention that the Applicants should be resentenced individually seeks in substance to give effect indirectly to a discretion that is not available in respect of initial sentence for murder [**Matthew**], nor conferred by events subsequent to sentence such as breaches of constitutional rights resulting from unacceptable prison conditions. (**Baptiste**)

There is little reason in principle for any further discretion in sentence to be triggered by post Pratt or post Matthew detention on Death Row, when it has already been decisively determined by the Privy Council that life imprisonment and not the death penalty now applies as the lawful sentence..

The case of **Attin v Attorney General** is distinguishable for obvious reasons - "At the court's pleasure" is an indeterminate sentence requiring periodic reviews by a court.

It was further contended that if the court determined that a mandatory life sentence was applicable then it would be compounding the unconstitutionality of any unconstitutional detention on death row and that any across the board sentence is unconstitutional. But the Privy Council itself did this in **Pratt, Matthew and Lewis**.

I consider that a remedy of resentencing, even if it arises from the breaches complained of, (and I expressly find that it does not) would be inappropriate and disproportionate. It cannot be contended that the initial sentence of death was not

lawful. The detention of persons on death row is the result of conviction at the Assizes, and confirmation of sentence throughout the appeal process up to and including the Privy Council, and then the effective application of either **Pratt** or **Matthew**.

In cases where **Pratt** or **Matthew** applies the Privy Council itself determined the applicable sentence to be life imprisonment or imprisonment for life and made no distinction between these. This court in **Allan Henry** has also found there is in fact no such distinction.

In **Pratt** itself the Privy Council declined to order individual resentencing. In **Matthew** the Privy Council expressly held there was no sentencing discretion. Further it again had the opportunity to order or indicate that all persons on death row awaiting execution should be resentenced in accordance with their expectation under **Roodal**. It did not do so.

In the cases set out previously where the Privy Council has had the opportunity to apply **Matthew** it has ordered life imprisonment. In no criminal appeal which reached the Privy Council where **Matthew** was applicable to the appellant did the Privy Council order or suggest individual resentencing. **Matthew** made it clear that once **Roodal** was overturned, there was no discretion to apply individual sentences.

No reason has been demonstrated for this court to exercise for the first time, a jurisdiction to grant the remedy of resentencing - in a representation action in respect of applicants who claim as the basis for such remedy, continued detention on Death Row.

I hold that it is not open to this court to entertain a remedy of individual resentencing, were it to have been found, which it has not, that there was a breach of any constitutional right of the applicants.

The law is settled and individual resentencing has been precluded by the highest authority binding on this court.

### **WHETHER THE PRINCIPLE OF SEPARATION OF POWERS PRECLUDES COMMUTATION BY THE HIGH COURT**

Section 87 of the constitution provides the normal route for commutation of sentence. In the instant case the Advisory Committee on the Power of Pardon (Mercy Committee) did commence a process of inviting representations by the applicants, and it has been suggested by the third named respondent's attorneys that the court has no power to intervene in sentence, that being the exclusive domain of the Executive.

It was further contended that any individual resentencing would be a breach of the separation of powers and that the constitution itself provides by S.87 the only

route by which a prisoner convicted of murder who has exhausted all his appeals can claim to have his individual sentence reviewed.

However this is not so.

(a) Situations can be envisaged for example in which it may be possible or even necessary for the courts in exceptional circumstances of breach of the constitution to intervene in the administration of sentence. (See **Baptiste**) In fact that is what the Privy Council has done with a broad brush in **Pratt and Matthew**. However this constitutional jurisdiction of the High Court to intervene and take the administration of sentence out of the hands of the executive when there has been abuse in the administration of a lawfully imposed sentence- e.g. by torture - is a distinct matter - See **Baptiste**) which I find is inapplicable in the present circumstances.)

(b) Where the Executive has exercised its powers under s.87 of the Constitution to commute a lawful sentence the court will not intervene, as it has at that stage no further sentencing function. See **Allan Henry** – a decision of this court - delivered 1st December 2009.

(c) But where the executive has not exercised those powers it clear that the High Court in the exercise of its constitutional jurisdiction can, in the exceptional circumstances where either **Pratt** or **Matthew** or both apply, can, acting in accordance with the law set out by the highest court of this country, give effect to

**Pratt** or **Matthew** and commute the sentence of death to life imprisonment or imprisonment for life.

This jurisdiction to commute a sentence of death based upon **Pratt** was exercised by the Court of Appeal in **Angela Ramdeen**, where the Executive had refused to commute her sentence of death and seemed to be pursuing enforcement of the sentence of death, even up to and in the constitutional motion.

In such a situation, as exists in the instant case, the High court can itself give effect to the Privy Council guidance by commuting to life imprisonment. This is not a sentencing function. .If this court were to commute the death sentences of the applicants it could only be to life imprisonment or imprisonment for life – The Privy Council in **Matthew** has made it clear they are the same . There is no longer any further sentencing discretion available at this stage to the High court in respect of the applicants. (**Matthew**)

The High Court can in the alternative refer the matter to the Advisory Committee to continue the process which it commenced. That process permits a hearing, and in fact allows for the exercise of the power of mercy by the Executive, a discretion and jurisdiction that does not exist in the High Court at this stage. It is a process that is capable of producing a wider range of options than is available to this court.

However the process before the Advisory Committee with its truncated timelines, and its unfortunate timing commenced under a cloud of suspicion and is tainted.

In the circumstances the court will confirm the orders for commutation of the death sentences made in the first instance before the Honourable Justice Breaux .

This will remove once and for all any residual impact from the initial sentences of death, which save for the interim order of the Honourable Justice Breaux remained uncommuted.

It is possible that consideration of clemency was intended under the process that was initiated and then preempted by the institution of these proceedings. Nothing prevents those persons remaining parties to this motion as set out in the schedule hereto, from further approaching the Advisory Committee on the Power of Pardon.

In the event they choose to do so the court's guidance (derived from **Lewis**) in the case of **Allan Henry** (loc cit.), though applicable there to reviews under the Prison Rules is similarly applicable in relation to the content of the hearing before the Advisory Committee when the issue of clemency is being considered. This is hereinafter set out.

It is noted that some persons as listed in the schedule hereto have clearly indicated that they had no knowledge of these proceedings or the fact that they are being represented in these proceedings and their wish to no longer participate in this motion. This order does not apply to those persons listed as such in that schedule.

### **Review under Prison Rules**

*Rule 282 of the Prison Rules provides –*

*“the case of every prisoner serving for a term of imprisonment exceeding (4) years shall be reviewed by the President at intervals of four(4) years or at shorter periods if desirable”*

Even if no such review occurred on Death Row certainly once off Death Row inmates are entitled to such review.

It was not the contention on behalf of the applicants that such breach of the Prison Rules amounted to cruel and unusual punishment. Even if it were so contended however based on the reasoning of Lord Millette in **Thomas and Hillaire v Baptiste Privy Council Appeal No. 60 of 1998** to the opposite effect, the remedy would not be commutation of sentence.

Further, a breach of Prison Rules is remediable by judicial review - See H.C.A 2044/05 **Alladin Mohammed v Commissioner of Prisons** delivered March 20th 2008 per Rajkumar J where this court applied the case of **Hague v Deputy Governor**

**of Parkhurst Prison and Others** [1991] 3 All England Reports 733 House of Lords  
where at page 752(h), (ibid) Lord Jauncey found that:

*“He, (the prisoner), may also challenge any administrative decision of the Secretary of State or the Governor which he considers to contravene the provisions of the Act or the Rules by judicial review proceedings. In the case of a continuing wrong done to him, a prisoner could expect that a hearing in judicial review proceedings could be obtained with little delay. These public law remedies are additional to any private law remedies which would be available to him such as damages for misfeasance in public office, assault or negligence.”*

The Hague case supra, therefore, recognizes inter alia the possibility of public law remedies.

Judicial review is in principle available in a suitable case at the suit of a prisoner who claims there has been a continuing wrong done to him by a breach of the Prisons Rules.

If judicial review had been sought the procedural bar of delay would probably have been invoked as the alleged breach was not pursued on a timely basis

This Court gave guidance in relation to such reviews in **Allan Henry** in respect of reviews under the Prisons Rules ( and the same will apply in relation to applications to the Mercy Committee) which is summarized as follows: -

- (i) The prisoner should know that a review is being conducted in relation to him.
- (ii) He should know and be provided with the material that is being considered
- (iii) He should have the opportunity to put forward representations by himself or his advisors in response.
- (iv) He should have sufficient time available to do so.
- (v) The opportunity to be heard need not be in writing, and
- (vi) The specific procedures for review can be determined by the reviewer.

## **5. REPRESENTATION**

It was clear at the inception of the hearing that while there were at least some applicants who wished to pursue the motion there were several who did not wish to identify with or be bound by it.

I note that after the clarification of the order of the Honourable Breaux J that it was indicated to the court that it was no longer intended to pursue the respective applications of those persons to withdraw from the motion. Nevertheless their

affidavits remain on file and cannot be ignored unless I were to expressly find that they are not true. There would be no basis for considering them to be anything other than the truth.

It was recognized by the applicants that the issue of determining damages, if available at all, would not be practicable in a representation action such as this. I agree. I consider that the reliefs granted would be an effective means of vindicating the applicant's rights.

### **Costs**

The applicants would be entitled to costs up to the date of the order of the Honourable Justice Breaux save that no applicant in the schedule hereto who indicated that he did not have knowledge of the motion and did not wish to participate in or be bound by it could be entitled to costs.

The Third Respondent' would be entitled to costs at least from the date of that order up to and including the hearing of the motion .The primary issue remaining on the motion was resentencing on which the applicants have not succeeded. The relief on which they have succeeded was already obtained before the Honourable Justices Benjamin and Breaux (as they each then were).

Costs up to trial after the order of the Honourable Justice Breaux , ( ignoring for the time being the possibility that the third respondent may be entitled to costs

incurred after the conservatory order of the Honourable Justice Benjamin ) would be at least equal and would probably exceed those incurred prior to the order of Bereaux J. If such costs after that order exceed those incurred before the date of that order it is unlikely they can ever be recovered against the applicants.

Costs to which the applicants would be entitled would in all likelihood be exceeded by the costs to which the third respondent is entitled.

In the circumstances I consider it appropriate to set off the costs payable by the applicants on the substantive motion against the costs payable to the applicants in respect of their application for a conservatory order.

## CONCLUSION

I find:

- (a) The process commenced by the Advisory Committee was tainted by the announcement in Parliament and the truncated timelines initially stipulated, which suggested that the outcome of the process was preordained. The issue of commutation of sentence in accordance with **Pratt and Morgan** and **Matthew**, not having been carried out by the Executive, can be dealt with by the High Court in the exercise of its constitutional jurisdiction.

- (b) The decisions in **Pratt and Morgan** and **Matthew**, were consistently recognized and applied by the courts, and recognized and observed by the State through its undertakings via counsel and in correspondence. Consequently no person who had the benefit of those decisions was at real risk of having the sentence of death implemented in relation to him.
- (c) After **Lewis** the applicants all had the opportunity to bring to the attention of the Mercy Committee and, if necessary, to the courts, inter alia, the applicability of **Matthew**, and **Pratt and Morgan**. These opportunities provided safeguards against any execution of the death sentence in respect of persons entitled to the benefit of the binding decisions in **Pratt and Morgan** and **Matthew**.
- (d) Detention on death row by itself it is not supportive of a breach of the constitutional right not to be subjected to cruel and unusual punishment in the absence of any real threat of execution. I find there was no threat of execution save for the period between June 6th and June 13th 2005.
- (e) I find there is no evidence that conditions on Death Row after the time frames set out in **Pratt and Morgan** have elapsed are significantly worse than conditions off Death Row, and further, the conditions on

Death Row complained of by the applicants are not such as to qualify as cruel and unusual treatment in the light of the Privy Council decision in **Thomas v Baptiste** Privy Council Appeal No. 60 of 1998. I find therefore that detention on Death Row after the delivery of the decision of the Privy Council in **Matthew** , and/or after 3 ½ years after conviction and sentence of death , is not rendered cruel and unusual punishment or treatment by reason of either of the conditions on death row or any real continued threat of execution.

- (f) Even if such detention did amount to cruel and unusual treatment or punishment, this would amount at highest to a separate breach of constitutional right remediable in damages [**Thomas v Baptiste** Privy Council Appeal No. 60 of 1998] and would not constitute grounds for alteration of sentence. There is no basis on the present state of the authorities for the remedy for any such constitutional breach to be individual resentencing.

## **Orders**

- (i) **It is declared that all persons who were sentenced to death and awaiting execution as at July 7th 2004 who were the subject of the order of the Honourable Justice Benjamin who remain parties to this motion as set out in the appendix A**

**annexed hereto are entitled to have their sentences of death commuted to imprisonment for life.**

- (ii) It is further declared that the sentences of death imposed on those applicants who remain parties to this motion as set out in the appendix A annexed hereto who were the subjects of the order of the Honourable Justice Bereaux are commuted to imprisonment for life.**
- (iii) It is ordered that each party is to bear his own costs.**
- (iv) It is further ordered that parties be at liberty to apply.**

Finally I wish to express the court's appreciation for the assistance rendered by attorneys for the parties for the comprehensive and carefully researched submissions and analysis provided to the court.

Dated this 5th day of January 2010

Peter A Rajkumar

## Appendix A

<b>Persons who were subject to the initial conservatory order</b>	<b>Persons who wished to take no part in the motion</b>	<b>Person who wish to be bound</b>
1. Baptiste, Denny	1. Brown, Ian	1. Baptiste, Denny
2. Benjamin, Peter	2. Benjamin, Peter	2. Bissoon, Rashi
3. Bissoon, Rashi	3. Boodram, Naresh	3. Charles, Clarence
4. Boodram, Naresh	4. Boiselle, Marvin	4. Constantine, George
5. Boiselle, Marvin	5. Chotalal, Phillip	5. Dial, Kevin
6. Brown, Ian	6. Davis, Rodney	6. Dottin, Andrew
7. Charles, Clarence	7. Frederick, Alfred	7. Edmund, Mervyn
8. Chotalal, Phillip	8. Garcia, Anthony Allan	8. Edo, Fareyad
9. Constantine, George	9. Ghany, Rawle	9. Herrera, Bruce
10. Davis, Rodney	10. Mansingh, Francis	10. Hernandez, Neil
11. Dial, Kevin	11. Mowlah, Amir	11. Hillaire, Haniff
12. Dottin, Andrew	12. Mungroo, Vijay	12. Isaac, Evit
13. Edmund, Mervyn	13. Phillip, Allan	13. Jairam, Ramsingh
14. Edo, Fareyad	14. Ramcharan, Tackoor	14. John, Dennis

15.	Frederick, Alfred	15. Ramlogan, Arnold	15. London, Kenrick
16.	Garcia, Anthony Allan	16. Ramnarace, Beemal	16. Mark, Nigel
17.	Ghany, Rawle	17. Reid, Martin	17. Mohammed, Amir
18.	Herrera, Bruce	18. Roach, Sheldon	18. Mungroo, Steve
19.	Hernandez, Neil	19. Taylor, Robert	19. Parris, Mervyn
20.	Hillaire, Haniff	20. Teeluck, Mark	20. Prince Wilson
21.	Isaac, Evit	21. Thomas, Kieron	21. Seepersad, Noel
22.	Jairam, Ramsingh	22. Winchester, Samuel.	22. Serrette, Foster
23.	John, Dennis	23. Alladin Mohammed	23. Sirju, Curtis
24.	London, Kenrick		24. Sooklal, Narine
25.	Mansingh, Francis		25. Tahaloo, Gangadeen
26.	Mark, Nigel		26. Thomas, Darren
27.	Mohammed, Alladin		27. Parbatee, Dass
28.	Mohammed, Amir		28. Natasha De Leon
29.	Mowlah, Amir		29. Chandroutie, London
30.	Mungroo, Steve		
31.	Mungroo, Vijay		
32.	Parris, Mervyn		
33.	Phillip, Allan		

34.	Prince, Wilson	
35.	Ramcharan, Tackoor	
36.	Ramlogan, Arnold	
37.	Ramnarace, Beemal	
38.	Reid, Martin	
39.	Roach, Sheldon	
40.	Seepersad, Noel	
41.	Serrette, Foster	
42.	Sirju, Curtis	
43.	Sooklal, Narine	
44.	Tahaloo, Gangadeen	
45.	Taylor, Robert	
46.	Teeluck, Mark	
47.	Thomas, Darren	
48.	Thomas, Kieron	
49.	Winchester, Samuel	
50.	Parbatee, Dass	
51.	Natasha De Leon	
52.	Chandroutie, London.	