REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 63 of 2004

BETWEEN

NEIL HERNANDEZ
(also called Redman)

Appellant

AND

THE STATE

Respondent

PANEL:

P. Weekes, J.A.
A. Yorke-Soo Hon, J.A
R. Narine, J.A.

APPEARANCES:

Mr. K. Scotland for the Appellant
Mrs. Honore-Paul for the Respondent

Date Delivered: 15th July, 2014

JUDGMENT

Delivered by R. Narine, J.A.

Summary of Facts

1. On 29th November 2004 the appellant was convicted of the murders of Christine Henry and her six year old son Phillip Henry.

2. The case for the prosecution was that the appellant killed both deceased on 2nd May, 2000 at Tompire Beach, Toco where they had gone to have a bath. He attacked them with a cutlass. The deceased received multiple fatal chop wounds about their bodies.

3. The prosecution relied principally on the evidence of Darren Lyons, Julien Des Vignes and a confession statement given by the appellant to the police on 4th May 2000. Lyons and Des Vignes both worked nearby on Peake's Estate which adjoined Tompire Beach. On the morning of the 2nd May 2000, Lyons was instructed by Everton Williams also called Breddo, who was the overseer at Peake's estate and husband of the deceased Christine Henry, to go to Williams' home approximately a quarter mile from the estate. When he arrived there he met Julien Des Vignes and they went to the beach. On the track leading to the beach Lyons stumbled upon the motionless body of Phillip Henry and on the beach he saw the body of Christine Henry covered in blood with several chop wounds to her body. On the way to the hospital, in response to Lyons, Christine told him that they had been attacked by the appellant. She also told him that she knew she was going to die and to take care of her children.

4. Des Vignes testified that at 5:00 a.m. that day the appellant left the accommodation that they shared saying he was going to cut coconuts on the beach. When the he left he had a cutlass in a case fastened around his waist.

5. Des Vignes also testified that around 10:00 a.m. he ran down to the beach. On the way he saw the body of Phillip Henry, and on the beach he saw Christine Henry lying on the ground. He asked Christine who had done that to her and she replied that it was the appellant who had attacked her. She also told him that she knew she was going to die and to take care of her children.

6. The appellant was arrested at his home on 2nd May, 2000. When told of the report against him he told the police officer that he only used his cutlass with a cause. He gave a written statement to the police on 4th May 2000. In the statement he said that he was on top of the hill husking coconuts when he observed Christine and her three children on Tompire Beach. He called out to them and went towards them with his cutlass in his hand. He said that Christine asked him if he was working and he told her he wasn't and that he was only making a hustle. She threatened to report him to her husband. An argument arose between them and Christine walked off saying she was going to tell her husband. He admitted that he then swung his blade at her, not intending to chop her, but in the process she was chopped.

7. The appellant further indicated in his statement that his intention was to "planass her" (to strike her with the flat side of the cutlass). He said that on hearing her tell Phillip to call Breddo he swung the blade with the intention of planassing Phillip but he too got chopped.

8. The appellant gave evidence and called witnesses. He raised the issue of alibi stating that on the day in question he had left home very early to go and husk coconuts along the beach. He returned home about 11:30 a.m., took a bath and had a rest. About 3:00 p.m. he was awakened by the police officers and taken into custody. He contended that he was tricked into signing a statement which he was not allowed to read. He agreed that the signatures were his.

9. No psychiatric evidence was adduced on behalf of the appellant and no psychiatric assessment was conducted.

10. On the 29th November 2004, the appellant was convicted on both counts of murder and sentenced to death. The Court of Appeal dismissed his appeal and affirmed his convictions and sentences on 21st June 2005.

11. On 12th February 2008, the Judicial Committee dismissed the petition against conviction and adjourned the petition against sentence pending the outcome of **Lester Pitman v. The State** (P.C.A. No. 89 of 2005).

12. By supplemental petition for special leave to appeal dated 30th January 2008 the appellant:

    a. sought leave to admit fresh evidence in the form of a neuropsychological report of Dr. Alistair Gray, a Clinical Psychologist; and
    b. set out one further ground of appeal against sentence arising out of the findings of Dr. Alistair Gray.

13. The further ground of appeal was whether the imposition of the death sentence on a mentally retarded defendant is cruel and unusual punishment contrary to section 5 of the Republican Constitution of Trinidad and Tobago.

14. Pursuant to the supplemental petition, the Judicial Committee having taken into consideration the judgment of the Board in **Lester Pitman v. The State** (P.C.A. No 89 of 2005), granted special leave to appeal against sentence and the matter was remitted to the Court of Appeal to consider the following issues:

    a. whether to admit the neuropsychological report of Dr. Alistair Gray dated 27th November 2007, as well as any further evidence filed by the appellant and/or the State and

b. to determine the supplemental ground of appeal against sentence as the Court of Appeal sees fit.

15. The time which had elapsed between conviction and the hearing and determination of the appellant's supplemental petition by the Privy Council was approximately three years and five months.

16. Subsequent to the Order of Remittal by the Judicial Committee of the Privy Council the matter came before us to consider whether to admit the neuropsychological report of Dr. Alistair Gray dated 27th November 2007 and the supplemental ground of appeal against sentence.

Grounds of appeal against sentence

17. The grounds of appeal against sentence are:

a. The imposition of the penalty of death on the appellant having regard to his mental retardation is cruel and unusual punishment contrary to section 5 of the Republican Constitution of Trinidad and Tobago and

b. The imposition of the penalty of death on the appellant is cruel and unusual punishment contrary to section 5 of the Republican Constitution of Trinidad and Tobago having regard to the lapse of time since his conviction.

Submissions:

18. The appellant submitted:

a. that it is necessary and expedient in the interest of justice that Dr. Alistair Gray's neuropsychological report be admitted as fresh evidence;

b. that the appellant's full scale IQ score as contained in the fresh evidence (the neuropsychological report of Dr. Alistair Gray) places him within the

World Health Organization's recognized criteria for mental retardation, and accordingly the imposition of the death penalty on the appellant is contrary to the prohibition on cruel and unusual punishment or treatment contained in section 5(2) of the Republican Constitution of Trinidad and Tobago;

c. that the psychological profiles of the appellant were not presented at trial because they did not fall directly within the M'Naghten standard or the standard of abnormality of mind under diminished responsibility and that persons with psychological profiles like the appellant should be recognized as a class of persons exempt from the death penalty;

d. that given the appellant's low IQ score of 57 as contained in the neuropsychological report, his characteristics (for example, his ability to anticipate and appreciate consequences) are similar to juvenile characteristics. Since the law recognizes that children are exempted from the death penalty, then by extension a mentally retarded person should not be executed since a mentally retarded offender is not an appropriate medium for making an example to others thereby being unable to satisfy the goals of sentencing which is retribution and deterrence;

e. that it is now unlawful to execute the appellant for the two convictions of murder since a delay of more than five years in carrying out the sentence of death is an abuse of process of the court, deprives the appellant of his right to due process of the law and constitutes cruel and unusual punishment;

f. that the court should consider the following factors when sentencing a person with a mental impairment which does not fall within the scope of insanity or diminished responsibility:

    a. the accused must be suffering from mental impairment at the time of sentencing and

b. the accused must be diagnosed by an appropriately qualified medical doctor who must certify that the degree of mental impairment has four effects on the accused, that is, (1) substantial effect, (2) adverse effect, (3) long term effect and (4) recurring effect.

19. The Respondent submitted:

a. that despite the findings contained in the fresh evidence, the Privy Council did not ask the Court of Appeal to look afresh at the conviction of the appellant because the appellant's impairment made no impact on the Court's assessment of the evidence against him or on the fairness of the trial.

b. that the fresh evidence of the appellant's mental disability is not such that an accused person can avail himself of a defence of diminished responsibility.

c. That an arrest of judgment would not apply in the instant case as it is principally available only for cases where there is an error on the face of the record.

Issues

20. Having regard to the submissions of counsel the following issues arise for determination:

a. Should the fresh evidence (the neuropsychological report of Dr. Alistair Gray) be admitted?

b. If the fresh evidence is admitted, would the imposition of the death penalty upon the appellant constitute cruel and unusual punishment contrary to section 5(2)(b) of the Constitution?

c. Would the lapse of time between sentence and execution of sentence, constitute cruel and unusual punishment contrary to section 5(2)(b) of the Constitution?

Issue No. 1:

Should the fresh evidence be admitted?

21. The fresh evidence that the appellant wishes to adduce is a Neuropsychology Report of Dr. Alistair Gray, a clinical psychologist, instructed by Simons Muirhead and Burton, a firm of British solicitors who acted for the appellant in his applications before the Privy Council. The appellant was interviewed by Dr. Gray on a single occasion at the Port of Spain Prison on 25th October, 2007.

22. Dr. Gray assessed the appellant's intellectual functioning using the Wechsler Abbreviated Scale of Intelligence (WASI). The appellant's verbal IQ score was 60, his performance IQ score was 62, and his full-scale IQ score was assessed at 57. These scores fall below the 1st percentile of the appellant's peer group.

23. Using the Wechsler Test of Adult Reading, the appellant obtained scores of 77 for predicted verbal IQ, 82 for predicted performance IQ, and a full IQ score of 77. These premorbid estimates of intellectual functioning are in line with the results of the Wechsler Abbreviated Scale of Intelligence.

24. Dr. Gray concluded from his assessment of the appellant that he presented two distinct psychological profiles, namely a depressive of long standing and a level of cognitive functioning that represents a learning disability. Interestingly, Dr. Gray noted that the assessment tools he used were developed in research settings in Europe and North America and validated for clinical use in those locations. There

are no appropriate locally validated assessment tools. The tests were carried out in the presence of a local attorney, who was expected to assist with "any linguistic differences present".

25. Section 47 of the Supreme Court of Judicature Act Chapter 4:01 of the Laws of Trinidad and Tobago confers upon the Court of Appeal hearing a criminal appeal the power to receive fresh evidence "if it thinks it necessary and expedient in the interest of justice". The Board in **Lester Pitman v. The State** PC Appeal No. 89 of 2005 approved the observations of de la Bastide CJ in **Solomon v. The State** (1999) 57 WIR 432 in which he made it clear that the generality of the power does not remove the long accepted requirements for admitting fresh evidence. These requirements are that the fresh evidence should appear to be capable of belief and a reasonable explanation should be furnished for the failure to adduce it at trial.

26. The principles that apply to the exercise of this discretion were summarised in **R v Parks [1961] 3 All ER 633** as follows:

    a. The evidence that it is sought to call must be evidence which was not available at the trial.
    b. It must be evidence relevant to the issues.
    c. It must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief.
    d. The court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial. [1]

27. In **Benedetto v. The Queen** 2003 UKPC 27, the Board explained that the Court of Appeal's discretionary power to receive fresh evidence represents a very

[1] R v Parks [1961] 3 All ER 633 at 634 (Parker CJ)

significant safeguard against the possibility of injustice. This discretionary power ought to be exercised if, after investigation of all the circumstances, the court thinks it is necessary or expedient in the interest of justice to do so. The Board further noted at paragraph 65 that:

> *"While it is always a relevant consideration that evidence which it is sought to adduce on appeal could have been called at trial, the appellate court may nonetheless conclude that it ought, in the interest of justice, to receive and take account of such evidence."*

28. In this case, applying the principles enunciated above, we find:

(i) that the fresh evidence is relevant;
(ii) it is capable of belief;
(iii) it was not available at trial, since neither the prosecution nor the defence considered that the mental condition of the appellant brought him within the Mc Naghten rules, or withing the statutory definition of diminished responsibility, hence no psychological assessment was carried out before or at the trial and
(iv) the evidence ought to be admitted in the interest of justice.

Accordingly, we exercise our discretion to admit the report of Dr. Gray.

Issue No. 2

Effect of the fresh evidence on the constitutionality of the sentence

29. Section 4 of the Offences Against the person Act Chapter 11:08 (OAPA) provides that *"every person convicted of murder **shall** suffer death".*

30. Section 4(a) of the Constitution recognises the right of the individual to life, liberty and security of the person and the right not to be deprived thereof except by due process of law.

31. Section 5(2)(b) prohibits the imposition of cruel and unusual treatment or punishment.

32. Sections 6(1) and 6(3) of the Constitution provide that nothing contained in sections 4 and 5 shall invalidate a law that existed as part of the law of Trinidad and Tobago immediately before the commencement of the Constitution.

33. In **Charles Matthew v. The State** [2005] 1 AC 433 the Privy Council held by a majority that nothing in section 4 of the Constitution which declares the right of an individual to life, or in section 5(2) (b) which provides that Parliament may not impose or authorise the imposition of cruel and unusual treatment or punishment, invalidates section 4 of the OAPA, as it was an existing law in consonance with Section 6(1) of the Constitution. The mandatory death sentence was therefore constitutional.

34. The laws of Trinidad and Tobago provide certain exceptions to the mandatory imposition of the death sentence. These are to be found in:

    (i) Section 79 of the **Children Act** Chap 46:01, which provides that the death sentence shall not be pronounced on a person who was under the age of 18 years at the time of the commission of the offence;
    (ii) Section 62(1) of the **Criminal Procedure Act** Chap 12:02, which provides for the imposition of a sentence of imprisonment for life on a pregnant woman and
    (iii) Section 66 of the **Criminal Procedure Act** which provides for a special verdict of guilty but insane the case of a person who was

insane at the time of commission of the offence, in which case the court makes an order for his detention at the court's pleasure.

35. Section 4 of the OAPA also provides for a defence of diminished responsibility, where at the time of the killing the accused was suffering from an abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes, or induced by disease or injury) as substantially impaired his mental responsibility for his acts.

36. It is clear that the appellant does not come within the exceptions set out in paragraph 34 above. Nor has the appellant at any time sought to put forward a defence of diminished responsibility. In fact the Privy Council has dismissed his petition against conviction and has remitted this appeal to determine the supplemental ground against sentence only. The central issue before this court is whether the mandatory imposition of the sentence of death on the appellant constitutes cruel and unusual punishment in view of the findings of Dr. Gray as contained in his report.

37. In support of this ground the appellant submits that the common law position is to be found in **Blackstone's Commentaries on the Laws of England (1765 – 1769) Book 4 Chapter 2:**

> *"In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment,*

> *judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed, in the bloody reign of Henry the eighth, a statute was made, which enacted, that if a person, being compos mentis [of sound mind], should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M.c.10. "For," as is observed by Sir Edward Coke, "the execution of an offender is for example, ut poena ad paucos, metus ad omnes perveniat: but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others."*

38. Based on the forgoing extract, the appellant submits that a person who is mentally retarded comes within the concept of an "idiot" and so ought not to be subjected to the sentence of death.

39. The appellant has also placed heavy reliance on the decision of the United States Supreme Court in the case of **Atkins v. Virginia** 536 US 304 (2002), in which the court considered the appropriateness of imposing the death sentence on an offender with a full-scale IQ score of 59. The court went on to hold that the execution of mentally retarded criminals was a cruel and unusual punishment prohibited by the Eight Amendment of the US Constitution.

40. **Atkins** was in fact a majority decision of the Supreme Court with six judges allowing the appeal and three judges dissenting. The majority opinion was delivered by Stevens J and was premised primarily on what the court perceived to

be a national consensus against enforcing the death penalty against mentally retarded persons. This consensus was evident from the fact that several states that retained the death penalty had enacted legislation expressly prohibiting the imposition of the death penalty on mentally retarded persons. These states included Georgia, Maryland, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri and North Carolina. This legislative trend reflected a much broader social and professional consensus as presented by professional organizations such as the American psychological Association, and representatives of various religious communities who had presented briefs as amici curiae.

41. Stevens J outlined the peculiar difficulties faced by mentally retarded offenders who come before the court:

> *"Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than other, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."*[2]

[2] Atkins v Virginia 536 U.S. 304 at 318 (Stevens J)

42. Having considered that a lesser degree of culpability attaches to a mentally retarded offender, the majority reasoned that such an offender should not attract the most extreme sanction available to the state. That sanction should be reserved for the most serious crimes. The majority concluded that, the retributive function of sentencing would not be advanced by imposing the death penalty on a mentally retarded person.

43. In addition, in the court's view, the deterrent function of sentencing is not served by execution, since capital punishment serves as a deterrent, only when murder is the result of premeditation and deliberation. It is unlikely that the mentally retarded potential offender can process the information of the possibility of execution as a penalty and as a result, control his conduct based on that information.

44. For these reasons, the court concluded that since the imposition of the death penalty on a mentally retarded offender will not "measurably contribute" to any retributive or deterrent purpose, the imposition of such a punishment is "a needless imposition of pain and suffering", and accordingly constitutes cruel and unusual punishment.[3]

45. Chief Justice Rehnquist (with whom Scalia J and Thomas J agreed) delivered a very strong dissenting judgment. The issue, as he saw it, was whether a so called national consensus deprived the state of Virginia of the constitutional power to impose the death penalty on offenders who were competent to stand trial, who were aware of the punishment they were about to suffer and why, and whose mental retardation was found to be "an insufficiently compelling reason to lessen their individual responsibility for the crime". In the view of Rehnquist CJ, legislation was the "clearest and most reliable objective evidence of contemporary values"[4]. The reason for this was that in a democratic society the legislatures, not the courts, "are constituted to respond to the will and consequently the moral values of

[3] Atkins v Virginia 536 U.S. 304 at 313 (Stevens J) quoting White J in Edmund v Florida 458 U.S. 782 at 798
[4] Atkins v. Virginia 536 U.S. 304 at 322 (Rhenquist CJ, dissenting) quoting Penry v. Lynaugh, 492 U.S. 302 at 331

the people".[5] In addition, the Chief Justice described the process by which the majority arrived at a national consensus as nothing more than a "post hoc rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency".[6] In addition the Chief Justice noted that while eighteen states recently passed laws limiting the imposition of the death penalty on mentally retarded persons, there were nineteen states, including Virginia that did not. Further, the analysis by the majority was flawed by their consideration of the view of other countries, the views of certain professional and certain religious organizations and opinion polls, which were subject to methodological and sampling errors.

46. In an equally trenchant dissent (with which Rehnquist CJ and Thomas J agreed) Scalia J dismantled the conclusions reached by the majority. The Judge observed: "Seldom has an opinion of this court rested so obviously upon nothing but the personal views of its members".[7]

47. Scalia J restated the facts in order to illustrate the weakness of the decision. After spending a day drinking alcohol and smoking marijuana, Atkins and another man abducted the victim and drove him to an automated teller machine, where he was forced to withdraw $200.00. They then drove him to a deserted area, where Atkins ordered him out of the car, and shot him eight times in his thorax, chest, abdomen, arms and legs, ignoring his pleas to leave him unharmed. The jury convicted Atkins of capital murder. At the sentencing hearing the jury heard the evidence of a psychologist who testified that Atkins was mildly mentally retarded with an IQ of 59, that he was a slow learner and he had an impaired capacity to appreciate the criminality of his conduct and to conform his conduct to the law. Another psychologist testified that there was absolutely no evidence other than the IQ score to indicate that Atkins was mentally retarded, and concluded that he was (at best) of average intelligence. The jury also heard about Atkins' criminal record

[5] Atkins v. Virginia 536 U.S. 304 at 322 (Rhenquist CJ, dissenting) quoting Gregg v. Georgia, 428 U.S. 153 at 175
[6] Atkins v. Virginia 536 U.S. 304 at 322 (Rhenquist CJ, dissenting)
[7] Atkins v. Virginia 536 U.S. 304 at 338 (Scalia J, dissenting)

which contained sixteen prior felony convictions for robbery, attempted robbery, abduction, use of a firearm and maiming. The victims provided details of those offences. In one case Atkins had slapped a victim across her face with a gun, clubbed her on the head with the gun knocking her to the ground, and helped her up, only to shoot her in the stomach.

48. Having considered the appellant's mental retardation which was a central issue in the case, the brutality of the murder and the appellant's demonstrated propensity for violence, the jury sentenced Atkins to death. By upsetting the jury's determination, the court appeared to be saying that no one who is even slightly mentally retarded can have sufficient moral responsibility to be subjected to capital punishment for his crime. In the view of Scalia J. this is "a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution".[8]

49. Scalia J further pointed out that it was only the severely or profoundly mentally retarded, commonly known as "idiots" that enjoyed any special status under the law. Like lunatics, they suffered "a deficiency of will", as Blackstone described them, rendering them unable to tell right from wrong. The term idiot was generally used to describe persons who had a total lack of reason or understanding, or an inability to distinguish between good and evil. They had an IQ of 25 or below, which placed them within the "profound" or "severe" range of mental retardation by modern standards.[9] Because of their incompetence, idiots were excused from prosecution or punishment for their lawful acts. However, mentally retarded offenders, who were not as severely impaired were subject to prosecution and punishment, including capital punishment.

50. The issue (which the majority decided in the affirmative) was whether the execution of the mildly retarded is inconsistent with evolving standards of decency in a modern society. This issue was to be decided on the basis of objective factors

[8] Atkins v. Virginia 536 U.S. 304 at 339 (Scalia J, dissenting)
[9] Penry 492 U.S. 331 at 333.

as far as possible, not merely by the subjective view of members of the court. The first of these objective factors was legislation passed by the elected representatives of the society, who are expected to reflect the views of their constituents. In the view of Scalia J, the fact that eighteen states, which represent 47% of the death penalty jurisdictions, have enacted legislation limiting the imposition of the death penalty on mentally retarded offenders, hardly amounted to a "national consensus".

51. Scalia J also took apart the majority's conclusion that the retributive and deterrent purposes of punishment are not advanced by executing mentally retarded offenders. In the first place, there was no scientific evidence to support the view that somehow a mentally retarded person, who knows the difference between right and wrong, cannot be morally culpable for the most heinous of crimes. Secondly, there was no evidence that all mentally retarded offenders are unable to process the possibility of execution and so control their actions based on that information. It is sufficient that some mentally retarded offenders may be able to process, the information and be deterred from their criminal conduct. In any event, the conclusion of the majority ignored a third social purpose of punishment, which is to incapacitate dangerous offenders in order to protect society from crimes they may commit in the future.

52. The decision in **Atkins** is of assistance to this court in crystallizing the issues raised in this appeal. However, in our view, it clearly is not applicable in this case for the following reasons:

    (i) In this jurisdiction the death penalty is mandatory for the offence of murder subject to the statutory exceptions which exist in the case of pregnant women and persons under the age of 18 years, (and more recently, since the decision in **Miguel v. The State** [2011] UKPC 14, the death penalty is no longer mandatory in cases that fall under the felony/murder rule).

(ii) In the United States, following conviction for murder there is a sentencing phase in which the jury hears evidence from both sides and decides whether the death penalty should be imposed. No such procedure exists in this jurisdiction for the simple reason that there is a single offence of murder which attracts a mandatory sentence of death.

(iii) The decision itself is based primarily on what the court perceived to be a national consensus on evolving standards of morality and decency in the modern day United States. It would be quite wrong to assume, in the absence of evidence, that there exists any kind of national consensus in this jurisdiction on this issue.

53. As Rehnquist CJ and Scalia J were at pains to point out, the clearest objective evidence of standards of morality or decency is to be found in the statutes passed by the legislature of the country, by those elected to represent the views and values of the citizenry. If the members of this society hold the view that it is repugnant to evolving standards of decency to impose the death sentence on mentally retarded persons, then those members are entitled to make their views felt and to lobby members of Parliament to introduce legislation which reflects those standards. It is not for the court to impose its subjective views of what ought to be modern standards of morality on the society.

54. There are, of course, varying degrees of mental retardation, varying from very severe to very mild. In our view, it would be a matter for the legislature to make a policy decision as to where the cut-off point should be for offenders to be considered legally unaccountable for their unlawful conduct.

55. In this case, the report of Dr. Gray concludes that the appellant presented with two distinct psychological profiles, namely a depressive illness of long standing, and a level of cognitive functioning that represents a learning disability and which is

consistent with low levels of education. There is nothing to suggest that he is unable to distinguish between right or wrong or that he was not fit to plead. In fact, the Privy Council, did not disturb the conviction, which was a deliberate departure from the ruling in **Pitman v. The State (Trinidad And Tobago) [2008] UKPC 16**.

56. In **Pitman** the appellant was diagnosed with a significant impairment to his intellectual functioning, and a high degree of suggestibility and compliance. These afflictions left him unable to effectively give evidence in court and understand the course of proceedings[10]. Pitman's mental impairment directly affected the admissibility of his confession which was central to the prosecution's case.

57. The departure from **Pitman** in this case suggests that the Privy Council were not of the view that there were issues affecting the safety of the conviction that should be re-opened. The sole issue is whether the imposition of the death penalty on the appellant would constitute cruel and unusual punishment contrary to section 5(2)(b) of the Constitution. For the reasons set out above, we find no basis for such a declaration. Accordingly this ground fails.

58. Before leaving this issue, we consider it useful to set out an observation expressed by Scalia J which we find applies with equal force in this jurisdiction:

> *"Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence. None of those requirements existed when the Eighth Amendment was adopted, and some of them were not even supported by current moral consensus."*[11]

(The judge then went on to give details of such judge made requirements.)

. . . . . .

[10] Pitman v. The State (Trinidad And Tobago) [2008] UKPC 16 (Carswell J) at [27]
[11] Atkins v. Virginia 536 U.S. 304 at 352 - 353 (Scalia J, dissenting)

"There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.

This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association on Mental Retardation and the American Psychiatric Association (set forth in the Court's opinion, ante, at 2245, n. 3) to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), ***Jones v. United States,*** 463 U.S. 354, 370, and n. 20, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), *the capital defendant who feigns mental retardation risks nothing at all. The mere pendency of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded."*[12]

59. We have noted in this jurisdiction a certain trend in judicial decisions which seeks to incrementally impose limitations on the imposition and execution of the death penalty. The latest development in this regard has been the retention of British psychologists and psychiatrists at the final level of the appellate process to raise issues of fitness to plead, that were not raised during the trial process of even at the Court of Appeal level. Of particular concern is the frequency with which appellants are now submitting fresh evidence of their psychological profiles as a substitute for substantive grounds of appeal. (See for example: **Lester Pitman v. The State** [2008] UKPC 16; **Deenish Benjamin and Deochan Ganga v. The State** [2012] UKPC 8; **Nigel Brown v. The State** [2012] UKPC 2, **Tabeel Lewis v.**

[12] Atkins v. Virginia 536 U.S. 304 at 353 - 354 (Scalia J, dissenting)

The State [2011] UKPC 15 and **Marcus Jason Daniel v. The State** [2014] UKPC 3). Applications of this kind have fallen on sympathetic ears at the level of the Privy Council, which have been remitting cases to this court to examine issues of fitness to plead and defences such as provocation and diminished responsibility that should have been raised at the trial.

60. While the court must be slow to prevent an appellant from exploring all avenues that may lead to the quashing of his conviction or to a lesser sentence, the court must be mindful of certain principles which must prevail over individual sympathies:

(i) The court must defer to the intention of the legislature, which expresses the collective will and standards of morality of the society in the written laws which it passes.

(ii) It is for the court to interpret the law, not to usurp the function of the legislature by attempting to whittle down or reshape the law in defiance of the clear intention of the legislature.

(iii) The court must not substitute its own subjective views for those of the populace, or allow the standards of morality of other societies to be imposed on our society.

(iv) There must be finality in these matters. The court must be slow to allow issues which ought to have been raised at an early stage to be raised at the appellate level unless exceptional circumstances are shown.

Issue No. 3

Whether the lapse of time between date of the death sentence and execution of sentence constitutes a breach of Section 5(2)(b) of the Constitution.

61. In this case, the appellant was convicted of murder and sentenced to death on 29th November, 2004. His appeal was dismissed on 21st June, 2005. On 12th February, 2008, the Privy Council dismissed his petition against conviction and adjourned the petition against sentence to await the outcome of **Lester Pitman v. The State** Privy Council Appeal No. 89 of 2005. On 6th May, 2008 the Privy Council remitted this matter to the Court of Appeal to determine the supplemental ground of appeal against sentence. The appeal was heard on 12th June, 2012, and adjourned for decision.

62. In **Pratt and Morgan v. The Attorney General for Jamaica** [1994] 2 AC 1, the Privy Council opined 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 treatment. The Board noted as well that "if the appellate procedure enables the prisoner to prolong the appellants' hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it". In the case of **Pratt and Morgan**, the Board concluded that a delay of 14 years in carrying out the sentence was unacceptable and commuted the death sentences of the appellants to life imprisonment.

63. In this case there has been a delay of nine years and seven months in carrying out the sentence of death on the appellant. In our view the delay brings this case within the **Pratt and Morgan** principle. Accordingly we uphold this ground of appeal.

Disposition

64. These appeals are allowed. The death sentences are vacated, and in each case a term of life imprisonment not to be released before thirty years is substituted. From this figure the time spent in custody awaiting trial must be deducted – a period of four years and seven months. That leaves a figure of twenty five years and five months. The appellant is sentenced in each case to a term of life

imprisonment not to be released before twenty five years and five months. The sentences will run concurrently and will start from the date of conviction.

Dated the 15th day of July, 2014.

P.Weekes
Justice of Appeal

A.Yorke-Soo Hon
Justice of Appeal

R. Narine
Justice of Appeal