

Chrono ✓

TRINIDAD AND TOBAGO.

CIV

IN THE COURT OF APPEAL

Civil Appeal
No. 13 of 1974.

In the Matter of the Constitution of
Trinidad and Tobago, being the Second
Schedule to the Trinidad and Tobago
(Constitution) Order in Council, 1962

AND

In the Matter of the Application of
Michael de Freitas also called Michael
Abdul Malik (A person alleging that
certain Provisions of Sections 1, 2, 3,
4, 5 and 7 of the said Constitution
have been, are being or likely to be
contravened in relation to him) for
Redress in Accordance with Section 6
of the said Constitution.

BETWEEN

Michael de Freitas also called Michael
Abdul Malik
Appellant

AND

George R. Benny, Registrar of the
Supreme Court
The Attorney General
Tom Iles, Commissioner of Prisons
Respondents

Coram: Sir Isaac Hyatali, C.J.
C.E. Phillips, J.A.
M.A. Corbin, J.A.

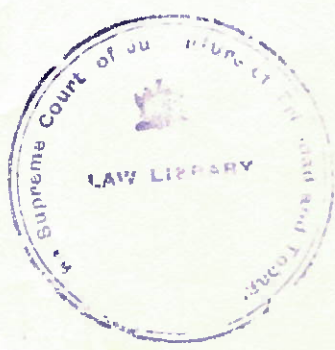
April 30, 1974

L. Blom-Cooper, Q.C. and Allan Alexander, for the Appellant.
Alcalde Warner, Q.C., Solicitor General, and C. Brooks, State Counsel,
for the Registrar, Supreme Court and the Attorney General.
C. Bernard, Deputy Solicitor General, for the Commissioner of Prisons.

J U D G M E N T

Delivered by Sir Isaac Hyatali, C.J.:

The appellant Michael de Freitas also called Michael
Abdul Malik was tried before Rees, J. and a jury at the Port-of-
Spain Assizes for the murder of Joseph Skerritt sometime between
7 February and 22 February 1972. He was found guilty on 21 August
1972 and in compliance with section 4(1) of the Offences Against
/the Person ...



CIV. App 13/74 DE FREITAS, MICHAEL V BENNY, GEORGE, + OTHERS

the Person Ordinance (hereinafter called the first Ordinance) he was sentenced to suffer death as a felon. He lodged an appeal thereafter against his conviction but it was dismissed by this Court on 17 April 1973. He then petitioned for special leave to appeal to the Judicial Committee of the Privy Council but on 26 November 1973 his petition was refused. He next filed a notice of motion in the High Court on 20 December 1973 in which he applied for declarations that -

1. "the passing of the judgment against [him] on the 21st day of August, 1972, that he be hanged by the neck until he be dead constitutes an imposition of and/or authority to impose cruel and unusual treatment and/or punishment of [him] and a contravention in relation to him of his right not to be so treated or punished guaranteed and protected by the Constitution";
2. "the execution of the judgment against [him] on the 21st day of August, 1972, that he be hanged by the neck until he be dead will constitute an imposition of and/or authority to impose cruel and unusual treatment and/or punishment of [him] and a contravention in relation to him of his right not to be so treated or punished and protected by the Constitution";
3. "the execution of the judgment against [him] on the 21st August 1972, that he be hanged by the neck until he be dead, would amount to a deprivation of his life other than by due process of law in contravention of the Constitution";
4. "the said judgment is wrong in law in that it contravenes the common law principle that a person convicted on the evidence of an accomplice ought to be recommended to mercy";
5. "the said judgment is wrong in law in that it authorises the infliction of cruel and unusual punishment contrary to the Statute 1 W & M commonly known as the Bill of Rights";

and prayed for orders -

- (a) setting aside the judgment referred to in paragraph 1 above;
- (b) directing that no warrant for [his] execution . . . or for his delivery for such execution do issue;
- (c) restraining the respondents their servants and/or agents and each of them from taking delivery of and/or [delivering him] unto his or their custody for the purpose of executing the said judgment;

/(d)

- (d) restraining the respondents their servants and/or agents from carrying into execution any warrant for [his] execution;
- (e) that a less severe form of punishment be substituted. AND that such order as to the costs of and incidental to this application may be made as the Court shall think fit."

The appellant's application was made under section 6 of the Constitution which conferred on him the right to seek redress in the High Court if he alleged that any of the provisions of sections 1 to 5 inclusive and section 7 thereof "[had] been [was] being or [was] likely to be contravened in relation to him." The sections of the Constitution relevant for present purposes however are these:

Section 1. "It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.
- (b) the right of the individual to equality before the law and the protection of the law
-
- (d) the right of the individual to equality of treatment from any public authority in the exercise of any public functions."

Section 2. "Subject to the provisions of sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared and in particular no Act of Parliament shall

-
- (b) impose or authorise the imposition of cruel and unusual treatment or punishment;
-
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."

/Section 3(1).

Section 3(1). "Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution."

Section 70(1). "The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -

- (a) grant to any person convicted of any offence against the law of Trinidad and Tobago a pardon, either free or subject to lawful conditions;
 - (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
 - (c) substitute a less severe form of punishment for that imposed by any sentence for such an offence; or
 - (d) remit the whole or any part of any sentence passed for such an offence or any penalty or forfeiture otherwise due to Her Majesty on account of such an offence.
- (2) The powers of the Governor-General under sub-section (1) of this section shall be exercised by him in accordance with the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister."

Section 71. "There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of -

- (a) the Minister referred to in subsection (2) of section 70 of this Constitution, who shall be Chairman;
- (b) the Attorney-General; and
- (c) not more than four other members appointed by the Governor-General, acting in accordance with the advice of the Prime Minister."

Section 72(1). "Where an offender has been sentenced to death by any court for an offence against the law of Trinidad and Tobago, the Minister shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Minister may require, to be taken into consideration at a meeting of the Advisory Committee.

- (2) The Minister may consult with the Advisory Committee before tendering any advice to the Governor-General under subsection (2) of section 70 of this Constitution in any case not falling within subsection (1) of this section.
- (3) The Minister shall not be obliged in any case to act in accordance with the advice of the Advisory Committee.

- (4) The Advisory Committee may regulate its own procedure.
- (5) In this section 'the Minister' means the Minister referred to in subsection (2) of section 70 of this Constitution."

Braithwaite, J. heard the motion on 8 February 1974. He dismissed it on the same date on the ground that he had no jurisdiction to grant any of the several reliefs claimed therein. His reasons for so holding were set out in a written judgment delivered on 15 February 1974. They were, inter alia, as follows:

- (1) the first Ordinance and the Criminal Procedure Ordinance Ch. 4 No.3 (hereinafter called the second Ordinance) under which the death penalty and the execution thereof were respectively prescribed were laws in force at the commencement of the Constitution and were consequently outside the purview of sections 1(a) and 2(b) of the Constitution on which the appellant's application for redress was founded;
- (2) the Court could not interfere with a penalty for a crime if that penalty was fixed by a subsisting law which was properly enacted by the legislature;
- (3) the "due process of law" referred to in section 1 of the Constitution was completed when the Courts of Law had finished their respective tasks; and save for any wrong done to anyone incarcerated in the prisons or for the infringement of any constitutional right in relation to him the Court could not take cognisance of the operations of the prisons, their executioners or their staff or be burdened with the day to day problems or administration of a prison;
- (4) the prerogative of mercy or pardon fell within "the time honoured and well established preserve of the Executive arm of Government" and the Court would be guilty of a "serious trespass" if it interfered with its exercise;
- (5) Section 72 of the Constitution "by the clearest possible implication recognised the existence, validity and constitutionality" of the death sentence;
- (6) the decisions of the American Courts on "cruel and unusual treatment or punishment" as contemplated by the Constitution of the United States, and on which decisions counsel for the appellant relied, had no application to the execution of penalties provided for by laws which came into force in this country before the commencement of the Constitution.

Counsel for the appellant in the course of an attractive and interesting address to this Court attacked the conclusions of the learned judge on several grounds but in the final analysis he

/rested his ...

rested his case on the following propositions:

1. While section 3(1) of the Constitution prevents the first Ordinance and the second Ordinance from being impugned as unconstitutional, administrative actions which subjected the appellant to cruel and unusual treatment or punishment under the purported authority of the said Ordinances fell to be struck down as inconsistent with and contrary to the provisions of sections 1 and 2 of the Constitution.
2. The procedure prescribed by section 59 of the second Ordinance for carrying out the sentence of death was saved by section 3(1) of the Constitution but inordinate delays in executing that sentence fell outside the purview of that section and constituted the imposition on the appellant of cruel and unusual punishment contrary to sections 1 and 2 of the Constitution.
3. Death by hanging was per se cruel and unusual punishment and so was the treatment of condemned prisoners in the country. On the assumption that these contentions were accepted, the Bill of Rights 1689 which was preserved by section 3(1) as part of the common law in force at the commencement of the Constitution must be held to have rendered nugatory the provisions of section 4(1) of the first Ordinance which prescribed the penalty of death for murder and section 59 of the second Ordinance which authorised the due execution of that penalty. This was so, it was submitted, because of the stipulation in the Bill of Rights that -

"excessive bail ought not to be required,
nor excessive fines imposed, nor cruel
and unusual punishments inflicted."

4. The reprieve procedure under the Constitution operated in an arbitrary and discriminatory fashion. It accordingly infringed the prescriptions in the Constitution against the deprivation of life except by due process of law - section 1(a), the guarantee of equality before the law - section 1(b), and the guarantee of equality of treatment from any public authority in the exercise of any functions - section 1(d). Consequently, the appellant was entitled to relief from the operation of such a procedure. (The particular relief sought was an order by the Court substituting a sentence of life imprisonment for the sentence of death passed on the appellant.)
5. The procedure of the Advisory Committee on the Prerogative of Mercy under the chairmanship of the Minister concerned infringed the rules of natural justice, contravened the "due process" provision in section 1 of the Constitution and operated in such a manner as to deprive the appellant of a fair hearing before the said Committee in accordance with the principles of fundamental justice. The Minister's failure to comply with the rule of natural justice in respect of the
/appellant ...

appellant justified an order by the Court for an indefinite stay of execution of the death penalty.

6. The appellant has the right not to be deprived of his life if he is in fact insane. Consequently, if his submissions were rejected an order for an inquiry into the appellant's present mental condition should be made and a stay of execution granted in the meantime.

Before us, the claim made for the declaration that the passing of the sentence of death on the appellant constituted cruel and unusual treatment or punishment, contrary to the provisions of the Constitution was not pursued. Nor was the claim for a declaration that the judgment sentencing him to death contravened the common law principle that a person convicted on the evidence of an accomplice ought to be recommended to mercy. They seemed to me to be rather astonishing claims. However, as they were abandoned, it is unnecessary to say anything further about them.

I must at the outset confess, that I experienced much difficulty in grasping the precise ground of complaint that counsel for the appellant sought to advance under his first and second propositions. He conceded, and quite rightly in my view, that under section 3(1) of the Constitution, sections 1 and 2 thereof had no application to the first Ordinance nor to the second Ordinance, since they were in force "at the commencement of the Constitution". (This expression is, for convenience, referred to hereafter as "the relevant date".) Having done so, he could not maintain that the death penalty prescribed under the first Ordinance and the mandate given under the second Ordinance for executing it, contravened any of the provisions of sections 1 and 2 of the Constitution even if it could be argued that these two Ordinances were either inconsistent with or repugnant to sections 1 and 2 aforesaid. His first argument therefore was that while the death penalty provided for in the first Ordinance was not cruel and unusual punishment, the action of officials in carrying it out constituted punishment of that nature.

It was abundantly clear however that the action of officials in so doing is expressly authorised by two warrants issued under section 59 of the second Ordinance which when construed /and adapted ...

and adapted as provided for in section 4 of the Trinidad and Tobago (Constitution) Order in Council 1962 and the Existing Laws Amendment Order 1962 and the Existing Laws Amendment Order 1963 would read as follows:

"59. Every warrant for the execution of any prisoner under sentence of death shall be under the Public Seal of Trinidad and Tobago and the hand of the Governor General and shall be directed to the Marshal, and shall be carried into execution by such Marshal or his assistant at such time and place as shall be mentioned in such warrant; and such warrant shall be in the form A in the Third Schedule hereto, and there shall issue in every such case a warrant for the delivery of such prisoner by the Keeper of the Royal Gaol to the said Marshal for the purpose of such execution, and such last mentioned warrant shall be under the Public Seal of Trinidad and Tobago and the hand of the Governor General and shall be in the form B in the Third Schedule:

Provided that it shall be lawful for the Governor General by warrant under his hand and the Public Seal of Trinidad and Tobago directed to the Marshal, to respite any such execution, and, by the same or any subsequent warrant, so sealed and signed, to order such execution to be carried into effect at such time and place as shall be appointed and specified in such warrant, in which case the execution shall be done at such time and place as shall be so appointed."

The material portions of the warrants addressed by the Governor-General to the Marshal and the Keeper of the Royal Gaol respectively are in these terms:

"To the Marshal.
GREETING:

Whereas (A.B.), late of has been indicted for felony and murder by him done and committed, and the said (A.B.) having been thereupon arraigned before the Supreme Court of Trinidad and Tobago at its Session held on the day of in the year of our Lord one thousand nine hundred and ; and having upon such arraignment pleaded NOT GUILTY or GUILTY, as the case may be, the said (A.B.) has before the said Court in its aforesaid Session been tried and in due form of law convicted thereof: And whereas judgment has been given by the said Court, that the said (A.B.) be hanged by the neck until he be dead, the execution of which judgment yet remains to be done, I, Governor General of Trinidad and Tobago, do by these presents require and strictly command you that upon the day of in the year of our Lord one thousand nine hundred and between the hours of six in the forenoon and twelve at noon of the same day, him the said (A.B.) at the Royal Gaol in Trinidad and Tobago to you to be delivered, as by another writ to the Keeper of the said Royal Gaol is commanded, into your custody,

/you then ...

you then and there receive, and him in your custody so being you forthwith convey to the usual place of execution and that you do then and there cause execution to be done upon the said (A.B.) in your custody so being in all things according to the said judgment: And this you are by no means to omit at your peril."

"To the Keeper of the Royal Gaol.
GREETING:

Whereas (A.B.), late of _____ in Trinidad and Tobago has been indicted for felony and murder by him done and committed; and the said (A.B.) having been thereupon arraigned before the Supreme Court of Trinidad and Tobago at its Session held on the _____ day of _____ in the year of our Lord one thousand nine hundred and _____ and having upon such arraignment pleaded NOT GUILTY or GUILTY, as the case may be, the said (A.B.) has before the said Court in its aforesaid Session been tried, and in due form of law convicted thereof: And whereas judgment has been given by the said Court that the said (A.B.) be hanged by the neck until he be dead, the execution of which judgment yet remains to be done, I, Governor General of Trinidad and Tobago, do therefore by these presents require and strictly command you that upon the _____ day of _____ in the year of our Lord one thousand nine hundred and _____ between the hours of six and eleven in the forenoon of the same day him the said (A.B.) at the Royal Gaol aforesaid to the Marshal of Trinidad and Tobago you then deliver, which said Marshal, by another writ to him directed, is commanded then and there to receive the said (A.B.) that execution of the aforesaid judgment may be done in manner and form as to the said Marshal is by the said other writ commanded: And this you are by no means to omit at your peril."

It is of importance to note that the warrant to the Keeper requires and strictly commands him to deliver the prisoner to the Marshal for executing the sentence of the Court, that the warrant to the Marshal requires and strictly commands him to receive the prisoner and cause execution to be done upon him in accordance with the sentence of the Court; and that both Keeper and Marshal are in effect warned in the clearest language that if they fail to obey the respective commands addressed to them, they do so at their peril. Deriving their origin as they do from the express provisions of section 59 of the second Ordinance it is beyond question that these two warrants have not only the same force and authority as the statute itself but imbue the acts performed by these two officials, in compliance with the commands addressed to them, with a like force and authority. With this obstacle exposed in the way of his
/submission ...

submission counsel for the appellant shifted his position to argue that his complaint was not that the execution of the death penalty per se by officials was cruel and unusual punishment but that the inordinate delays which occurred in the execution of the penalty by officials constituted such punishment. This was so, it was submitted, because administrative actions to execute the penalty after inordinate delays fell outside the purview of the first Ordinance and the second Ordinance and as such, they offended against the provisions of section 1(a) and section 2(b) of the Constitution.

When asked to give his interpretation of "inordinate delay" counsel for the appellant defined it as "more than five months". He conceded however that an execution carried out by officials within five months did not constitute cruel and unusual punishment. The submissions therefore came to this: Administrative acts performed to carry out the sentence of death within five months of its imposition did not constitute cruel and unusual punishment. Consequently they were to be regarded as falling within the authority of the first Ordinance and the second Ordinance and to be beyond impeachment as contraventions of sections 1 and 2 of the Constitution. The very same administrative acts however, performed after five months, fell outside the purview of the first Ordinance and the second Ordinance. Accordingly, they constituted cruel and unusual punishment and ^{were} ~~was~~ impeachable as contraventions of sections 1 and 2 of the Constitution. It made no difference, it was said, that the delay was caused by the pursuit of efforts by the appellant to exhaust his right of appeal against his conviction, or that section 51 of the Supreme Court of Judicature Act 1962, (a law in existence at the relevant date) prohibited, inter alia, the execution of the death sentence while an appeal was pending.

These submissions struck me as being both contradictory and fallacious for the fact is, that irrespective of whether the death sentence is executed before or after five months of its imposition, it is executed in both instances under the authority of warrants issued by the Governor General under section 59 of the second Ordinance to the Keeper and the Marshal. Unless it can be

/demonstrated ...

demonstrated therefore that there is no authority after the passage of five months to issue these warrants under section 59 aforesaid or if they are issued thereunder after this period, they have no validity, it cannot be maintained that the execution carried out in obedience thereto is an administrative act that is beyond the pale of their authority. As this was not and indeed could not be so demonstrated I reject the arguments as untenable.

But then it was also argued that the framers of the Constitution of this country did not intend to preserve from impugnement as unconstitutional, administrative actions performed at any time after the relevant date in purported pursuance of legislation subsisting at such date. Support for that proposition, it was contended, was to be found in the omission to insert in the Constitution a clause to the following effect:

"Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of /the sections guaranteeing fundamental rights/ to the extent that the law in question is in force at the commencement of the Constitution."

Such a clause, it was pointed out, was inserted in the Constitutions of Southern Rhodesia and Guyana for the purpose and with the intention of preserving the validity of administrative acts done after the relevant date in pursuance of a law in force at such date. If this is a valid contention then it is inconsistent with the concession made by counsel for the appellant that administrative acts performed to carry out within five months of its imposition the sentence of death authorised under the legislation preserved by section 3(1) did not contravene sections 1 and 2 of the Constitution.

But however that may be it was apparent from the outset that the whole object of the argument was to establish that administrative acts performed in pursuance of legislation in force at the relevant date were in fact not performed thereunder but had a wholly independent existence; and further that they fell to be struck down as unconstitutional if they contravened any of the provisions of sections 1 and 2 of the Constitution.

/The case of ...

The case of Oliver v. Buttigieg (1967) 1 A.C. 115 and a passage in Professor S.A. de Smith's monograph entitled The New Commonwealth and its Constitutions (1964) at p. 191 were quoted to support the proposition that administrative acts and orders were cognisable by the Courts if they infringed fundamental rights and freedoms guaranteed in Constitutions such as this country's. As a general proposition I have no doubt that it is unassailable but it is significant that no authority was quoted to support the proposition that administrative acts performed after the relevant date under a law which was similar to section 59 of the second Ordinance were to be regarded as not performed thereunder, but were to be examined on the footing that they had a wholly independent existence. What was relied on to support that submission was the omission to insert in the Constitution the saving clause that is to be found in the Constitutions of Southern Rhodesia and Guyana. It seems to me however that such a clause was inserted in these Constitutions ex abundanti cautela since its presence therein is not really necessary to give validity to acts performed after the relevant date in pursuance of and within the authority of legislation subsisting at the relevant date. By necessary implication such acts are perfectly valid. To hold otherwise would have the effect of either repealing the legislation that was intended to be preserved or at any rate of depriving it of efficacy. To adopt such a construction would defeat the clear intention of section 3(1). This, in my opinion, would be indefensible.

I therefore reject the contention that administrative acts performed after the relevant date in pursuance of the first Ordinance and the second Ordinance and within their authority are not preserved by section 3(1) of the Constitution. On the contrary I hold that they are. This is not to say however, that the conduct of officials outside the authority of the law is not cognisable by the Courts. Such conduct is undoubtedly so cognisable but on its manifestation it would raise, in my view,

/a question ...

a question that is far removed and completely different from the question whether the death penalty and its execution under authority of laws preserved by the Constitution are in fact constitutional.

Another barrier which had to be surmounted to ensure the success of this contention was presented by the learned Solicitor General. It arose from this submission: If the administrative acts in question were not performed under the first Ordinance and the second Ordinance as was contended, then in order to succeed in establishing an infringement of section 2(b) of the Constitution it was essential to show that those acts were performed under a law or Act of Parliament which imposed or authorised the imposition of cruel and unusual treatment or punishment; and further that it was a law or Act passed after the relevant date as section 2 of the Constitution clearly contemplates. See in this connexion Director of Public Prosecutions v. Nasralla (1967) 10 W.I.R. 299, per Lord Devlin at p.303. It was of course impossible for counsel for the appellant to show this and in the result the barrier referred to prevailed against him.

The third proposition of counsel for the appellant was founded on the Bill of Rights 1689, and the prescription therein against cruel and unusual punishments. I do not propose to discuss in this judgment, because it is not relevant to do so for reasons that will appear presently, either the morality or the justification, of the death penalty for crimes of murder in our society. I have read the learned judgments on this question in the case of Furman v. Georgia delivered by the distinguished judges of the Supreme Court of the U.S.A. on 29 June 1972 with much interest and admiration but I would merely content myself by saying at this stage that much can be said on both sides of this question.

The contention of counsel for the appellant however was that the Bill of Rights had rendered nugatory section 4(1) of the first Ordinance which prescribes the death penalty for murder and section 59 of the second Ordinance which authorises the execution of that penalty in the manner prescribed therein. The contention was based on the provisions of section 12 of the Supreme Court of

/Judicature Act ...

Judicature Act 1962, which repeats in somewhat, but for present purposes immaterially different language, the provisions of section 19 of the Judicature Ordinance Ch. 3 No. 1 which that Act repealed. It provides that:

"12. Subject to the provisions of any enactment in operation on the 1st of March, 1848, and to any enactment passed after that date, the Common Law, Doctrines of Equity, and Statutes of general application of the Imperial Parliament that were in force in England on that date shall be deemed to have been enacted and to have been in force in Trinidad as from that date and in Tobago as from the 1st of January, 1889."

It was submitted that the Bill of Rights enacted on 16 December 1689 was part of the Common Law on 1 March 1848 but I would prefer to regard it as a statute of general application of the Imperial Parliament within the meaning of section 12 and that it was in force at the commencement of the Constitution; but even so the argument of counsel for the appellant in my judgment is not maintainable. Both the first Ordinance and the second Ordinance were enactments passed after 1st March 1848 and consequently they must in accordance with the plain language of section 12 aforesaid be taken and read as having repealed or rendered nugatory any provision of the Bill of Rights which was inconsistent with or repugnant to them or conversely the Bill of Rights must be read subject to any provisions to the contrary in the first Ordinance and the second Ordinance. While therefore the argument as formulated by counsel for the appellant cannot be supported the converse of it is perfectly sound. From this, it follows that if the death penalty and its execution constituted cruel and unusual punishment under the Bill of Rights - a proposition to which I do not subscribe, then it ceased to be so after the enactment of the first Ordinance on 3 April 1925 and a fortiori after the enactment of the second Ordinance on 2 June 1925. For these reasons and those to be given by Phillips, J.A. in the judgment he is about to deliver, which I have had the advantage of reading and which I endorse and support, I am unable to accept the submission of counsel for the appellant.

I turn next to the attack made on the reprieve procedure. The argument on this question was founded on the allegation that
/this procedure ...

this procedure operated in an arbitrary and discriminatory fashion, and fell within the mischief which Mr. Justice Douglas condemned and Mr. Justice Stewart supported in Furman v. Georgia (supra).

At p. 17 of his judgment Mr. Justice Douglas stated:

"these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination, and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments. Any law which is nondiscriminating on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. Yick Wo v. Hopkins 118 U.S. 356. Such conceivably might be the fate of a mandatory death penalty where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach."

And at p. 5 of his judgment Mr. Justice Stewart said:

"These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. See McLaughlin v. Florida, 379 U.S. 184. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

There are two points to be noticed here. Firstly, the death penalty considered in Furman v. Georgia (supra) was not one fixed by law for murder as it is in this country under a law that is expressly preserved by its Constitution. And secondly, the question which the U.S. Supreme Court dealt with in that case was quite different from the one under examination in this case. In the U.S. the death penalty was imposed by judges or juries in their discretion for the offences of murder and rape. The question which arose in those circumstances was whether the imposition of the death penalty under /this discretionary ...

this discretionary system was offensive and contrary to the Eighth and Fourteenth Amendment of the American Constitution. As put by Mr. Justice Douglas at p. 14 of his judgment the U.S. Supreme Court was dealing there -

"with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die dependent on the whim of one man or of 12."

Furman v. Georgia is not binding on this Court but even if it were or even if I were willing to yield to the persuasive impact of the erudite opinions of the majority of the learned judges in that historic case, I would hold it to be wholly inapplicable to the instant case on account of the two fundamental points of difference to which I have drawn attention. The reprieve procedure in this country is essentially a procedure for the exercise of mercy or extending pardons to convicted criminals already sentenced and it cannot in my judgment be successfully attacked as a system of law and justice which invests those concerned in operating it with a discretion to impose the sentence of death on persons convicted for the crime of murder. I am satisfied that the charges made against the reprieve procedure are unfounded and further that it derives no support from the case of Furman v. Georgia (supra) on which counsel for the appellant heavily relied. I think it would be appropriate to observe here before passing on, that if the proposition advanced on this point were accepted then this Court would have been called upon to substitute a term of life imprisonment for the death penalty imposed by law on the appellant. For the Court to accede to that call however, it would have had to arrogate unto itself the power to amend or repeal a subsisting law - a function that belongs exclusively under the Constitution to Parliament. This manifestly, it could not possibly have attempted to do. In this connection the judgment of Lord Morris of Borth-y-Gest in Runyowa v. Reg. (1966) 1 All E.R. 633 on the respective roles of the Court and the legislature are worth repeating. Speaking for the Privy Council he said at p. 643 *ibid*:

/"A legislature ...

"A legislature may have to consider questions of policy in regard to punishment for crime. For a particular offence a legislature may merely decree the maximum punishment and may invest the courts with a complete discretion as to what sentence to impose - subject only to the fixed maximum. There may be cases however where a legislature deems it necessary to decree that for a particular offence a fixed sentence is to follow. As an example a legislature might decide that on conviction for murder a sentence of death is to be imposed. A legislature might decide that on conviction of some other offence some other fixed sentence is to follow. A legislature must assess the situations which have arisen or which may arise, and must form a judgment as to what laws are necessary and desirable for the purposes of maintaining peace, order and good government. It can hardly be for the courts, unless clearly so empowered or directed, to rule as to the necessity or propriety of particular legislation. Nor can it be for the courts, without possessing the evidence on which a decision of the legislature has been based, to overrule and nullify the decision. As QUENET, A.C.J., said /in Gundu v. A.G. of Southern Rhodesia (1965) unreported/ if once laws are validly enacted it is not for the courts to adjudicate on their wisdom, their appropriateness or the necessity for their existence."

The next contention of counsel for the appellant was for an order granting an indefinite stay of execution of the death penalty on him on the ground that the proceedings of the Advisory Committee on the Prerogative of Mercy established under section 71 of the Constitution infringe the right of the appellant not to be deprived of his life except by due process of law. His complaint here was not directed against any infringement of the due process of law in relation to his trial or his conviction or the sentence imposed on him or the dismissal of his appeal against conviction. It was focused in another direction. His objections were firstly, that the presence of the Minister and the Attorney General on the Committee as two of its members tainted its proceedings with an appearance of bias; and secondly, that contrary to one of the fundamental rules of natural justice the appellant was given no opportunity of being heard before the Committee.

These contentions were founded on the supposition that the proceedings of the Committee were either judicial or quasi-judicial or that the Committee sat as a statutory body to exercise a discretion. If this supposition were correct then it would be open

/to the Court ...

to the Court to review the decision of this Committee if it were shown that it acted in bad faith, acted unfairly, acted contrary to the rules of natural justice, or even though it acted in good faith it was influenced by extraneous considerations which it ought not to have taken into account. See Padfield v. Minister of Agriculture, Fisheries and Food (1968) 1 All E.R. 694 which was described by Ld Denning, M.R. in Breen v Amalgamated Engineering Union (1971) 1 All E.R. 1148 at p. 1154 as a landmark in modern administration law. But the supposition made was erroneous in every respect. The Committee does no more than advise. It has no power to deprive any person of his life. It exercises no prerogative. Section 70 of the Constitution makes it clear that the Prerogative of Mercy resides exclusively in Her Majesty and that its exercise is an act of Her Majesty in whom the executive authority of Trinidad and Tobago is vested by section 56 of the Constitution.

The exercise of mercy is consequently an absolute executive act which is not subject to review or control by the courts. And it makes no difference to this proposition, in my judgment, that the Constitution expressly refers to this prerogative and permits the Governor General to exercise it in accordance with the advice of Her Majesty's Minister. The fact is that both this prerogative and the procedure for its exercise always existed prior to the relevant date and that the Governor General, like his predecessors, exercised it in the name and on behalf of Her Majesty. See in this connexion sections 74 and 75 of the second Ordinance. Section 1(a) of the Constitution relating to "due process" does not therefore apply to the proceedings of the Committee nor do the rules of natural justice. The contention of counsel for the appellant to the contrary accordingly fails.

The last proposition advanced on behalf of the appellant was that the Court should, if his application for the several reliefs claimed is denied, issue an order to have him medically examined to determine whether he is sane since he has a right not to be hanged if he is insane. The Australian case of Re Taitt (1963) V.R. 550 was quoted in support of that proposition. It seemed to me however

/that in the ...

that in the circumstances of this case this proposition was not one of law but fell to be taken as a plea of desperation for some respite. I found it impossible to take it seriously notwithstanding the assurance of counsel from the Bar table that he was not proposing it lightly, whatever that meant. There is absolutely no evidence before the Court to show that the appellant is insane or has manifested any signs indicating that he is or might be afflicted with a disease of the mind. The plea is founded on the refusal of a request made to the prison authorities after the motion herein was filed to have a psychiatrist from abroad and possibly of the appellant's choice examine him. The prison authorities however have given the assurance in a written document exhibited in these proceedings that the prison medical records show that the appellant is in good mental and physical health. Nothing was said or appears in the record to controvert that statement. On the contrary, this satisfactory state of his mental and physical health derives support from his own affidavit sworn on 31 January 1974 and filed in these proceedings. It reveals, in my view, the keen observations and apprehensions of a sane, coherent and intelligent man in surroundings which evidently give him good cause to be gravely concerned about his future. This however is no ground for entertaining his request. I would therefore reject it.

For these reasons I would dismiss the appeal but because of the nature of the application and the issues raised thereby I would make no order as to costs.

Isaac E. Hyatali
Chief Justice