



"PUBLIC LAW (HABEAS CORPUS, CONSTITUTIONAL MATTER)"

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 114 of 1992  
Consolidated Action No. 1337 of 1990

IN THE MATTER OF APPLICATIONS FOR WRITS OF  
HABEAS CORPUS AD SUBJICIENDUM

AND

IN THE MATTER OF LENNOX PHILLIP A/C  
YASIN ABU BAKR AND 113 ORS.

BETWEEN

THE COMMISSIONER OF PRISONS

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENTS/APELLANTS

AND

LENNOX PHILLIP A/C YASIN ABU BAKR AND 113 ORS.

APPLICANTS/RESPONDENTS

NO. 1311 of 1990

IN THE MATTER OF THE CONSTITUTION  
OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF AN APPLICATION OF LENNOX PHILLIP A/C  
YASIN ABU BAKR AND 113 ORS.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENTS/APELLANTS

AND

LENNOX PHILLIP A/C YASIN ABU BAKR AND 113 ORS.

APPLICANTS/RESPONDENTS

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*Civ. App. 114/92 Prisons Commissioner + Attorney General v Lennox Phillip Abu Bakr + others*

CORAM: S. Sharma, J.A.  
M. Ibrahim, J.A.  
R. Hamel-Smith, J.A.

Dated: 28th day of October, 1993.

Appearances:

Mr. G. Newman, Q.C., Ms. A. Carrington, Mr. N. Bereaux  
and Ms. D. Backett for The Attorney General  
of Trinidad and Tobago.

Mr. E. Thorne, Q.C. and Mr. I. Benjamin for the  
Director of Public Prosecutions.

Mr. G. Robertson, Q.C., Mr. R. Maharaj, N.King and  
Mr. R. Rajcoomar for the Respondents.

J U D G M E N T

The proceedings which give rise to the present appeal, are the sequel to events, the origin and circumstances of which have already been explored in outline by Lord Ackner in Lennox Phillip v. Attorney General (1992) 2 A.C. 545. However, because of the issues raised in this appeal it will be necessary to set out more elaborately the historical background which give rise to them.

The appeal itself turns partly upon whether the power conferred upon the President by Section 87(1) of the Constitution of Trinidad and Tobago (the Constitution) to grant a pardon to any person before or after he is charged and before he is convicted was validly exercised and partly on the construction of the said section.

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The section reads as follows:-

"87(1) The President may grant to any person a pardon, either free or subject to lawful conditions respecting any offences that he may have committed. The power of the President under this subsection may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof."

Historical Background:  
Friday July 27th 1990:

On Friday July 27th at approximately 6.45 p.m. forty two of the Respondents, members of a religious sect known as the Jamaat al Muslimeen stormed the Red House, the home of the Trinidad and Tobago Parliament and burst into the Parliamentary Chamber while Parliament was in session. This assault, in the course of which five civilians were killed, was led by one Richard Bradshaw also called Bilaal Abdullah. Almost simultaneously another group led by Lennox Phillip also called Abu Bakr the leader of the sect, stormed the Trinidad and Tobago Television (TTT) transmitting station at Maraval Road, Port of Spain, while one or two members detonated a car bomb at Police Headquarters immediately opposite the Red House, but not before shooting and killing the Police Sentry on duty at the time. Police Headquarters was razed to the ground.

At the Red House, the Prime Minister, Ministers of Government, Members of Parliament and a Permanent Secretary were held captive, bound hand and foot and forced to lie on the floor on their stomachs at gunpoint. The Prime Minister and Minister of Justice and National Security were taunted, kicked and beaten about the face and body. Minister Richardson was accused of sending the police and army to occupy the lands of the Muslimeen at

Mucurapo Road, Port of Spain. Civilian hostages were also taken at TTT house at Maraval Road, Port of Spain.

Some time after Television House was taken two vehicles, a van and a Mazda motor car were booby trapped and strategically placed outside Television House. The van was not disarmed until Wednesday August 1, 1990.

At about 6.05 p.m. Yasin Abu Bakr, leader of the sect appeared on Television and alleged that the Government of Trinidad and Tobago had been overthrown, and that the Prime Minister and his Cabinet were under arrest.

Between 6.00 p.m. and 9.00 p.m. Senior Army Officers, Senior Police Officers and Ministers Pantin and Myers who were not at the Red House were located and brought to Camp Ogden.

Acting President Carter (President Carter) was brought to Camp Ogden at about 9.30 p.m. The Trinidad and Tobago Defence Force was mobilized and the army units sent to both the Red House and TTT. By 9.00 to 9.30 p.m. the army had effectively contained the action and it was confirmed that the action was localized to TTT and the Red House only.

There was looting in Port of Spain and parts of the East-West Corridor, but the rest of Trinidad and Tobago was calm. The security forces were satisfied that the action taken was confined to the two locations at Port of Spain.

At about 10.00 p.m. one of the transmitting channels of TTT was knocked out. (The other was knocked out several hours later). Threats were made by Abu Bakr to kill the hostages if

if transmission was not restored. One of the hostages at TTT Mr. Jones P. Medeira a television journalist was used to relay this message.

At about 10.15 p.m. Minister Myers, Colonel Ralph Brown and Minister Pantin, made a Television Broadcast to the nation through the Cumberland Hill transmitter assuring the nation that the Government had not fallen. President Carter made a broadcast to the nation at about 2.00 p.m. giving similar assurances.

The accommodation at Camp Ogden was cramped and basic. Lawyers, army and police officers, Parliamentarians and other civilians were housed in a small area. There was concern for the lives of the hostages both at TTT and the Red House. The options on how best to resolve the circumstances were considered. Lawyers were engaged in the process of drafting the Proclamation of a State of Emergency.

At the Red House, Members of Parliament were painfully bound hand and foot and made to lie prone on the floor at gunpoint. Bilaal Abdullah, the group at the Red House told the Prime Minister to withdraw troops. He refused to co-operate and was shot. Minister Richardson was also shot. Minister Dookeran then begged "why don't we talk." Discussions ensued between Bilaal, Dookeran and Minister Toney. Bilaal Abdullah demanded the resignation of the Government, and that they should not be prosecuted for their actions. The demand for absolution of their crimes first fell from the lips of Bilaal Abdullah. It is clear from the evidence that the demand for an amnesty first came from the Muslimeen. The suggestion from Richardson, of a pardon under

section 89(3) of the Constitution (as he put it in his letter to the President) was concerned about the mechanics of effecting the demand. It is equally clear that Richardson's suggestion flowed from the demand for amnesty and was later contained in his letter written after Canon Clarke had returned to the Red House at about midday on Saturday 28th. The discussions took place with Dookeran, Toney and later Humphrey lying stretched out on the floor of the Parliamentary Chamber with hands and feet bound.

Exchange of gun fire between security forces and the Muslimeen extremists continued. Threats were made to place the Parliamentarians at the windows to receive the bullets.

Canon Knolly Clarke was chosen at the insistence of Bilaal to be mediator because he knew him. Both Canon Clarke and the Muslimeen belonged to the Summit of Peoples Organisation. No objection was raised to Canon Clarke because "there was no point in arguing with a man with a gun."

Under threat of being "blown away" if he said anything to the contrary, Minister Dookeran contacted outside authorities to have Canon Clarke brought to the Chamber. The result of the discussions was that a document headed "Major Points of Agreement" was drawn up. The Prime Minister shot, beaten and bleeding from his wounds was consulted. He agreed to resign and to support Minister Dookeran as Prime Minister after being advised by Dookeran "that we had no choice in the matter." Minister Toney who wrote out the document agreed "to whatever they wanted" because "I did not consider that I was in any position to

disagree." Minister Richardson took no part in the discussions at this time and was lying motionless next to the Prime Minister. The sixth point of agreement was subsequently added on the suggestion of Bilaal Abdullah "as though it were an ultimatum".

Saturday 28th July, 1990:

Canon Clarke arrived at Camp Ogden shortly after midnight and radio contact was established with Red House.

Canon Clarke left for the Red House sometime between 6.00 a.m. and 7.00 a.m. on Saturday. He subsequently returned from the Red House some time between 8.00 a.m. and 9.00 a.m. with Minister Dookeran and the three documents -

- (1) The Major Points of Agreement;
- (2) The letter of resignation of the Prime Minister;
- (3) The letter of support for Minister Dookeran as interim Prime Minister.

Between 9.00 a.m. and 10.00 a.m. a state of emergency was proclaimed by President Carter at TTT transmitter Cumberland Hill.

Minister Dookeran delivered the documents to a team of Ministers in the presence of Canon Clarke. No lawyers were present at that briefing. He described the shooting of Prime Minister Robinson and Minister Richardson. Canon Clarke also gave information on the condition of the hostages and the general state of affairs in the Parliamentary Chamber. He described the situation in the Red House as "volatile" and that there were young men with big guns who were very jumpy.

At some point between midday and 3.00 p.m. Canon Clarke returned to the Red House with medical supplies. He was accosted by Bilaal Abdullah who accused him of "setting up" the Muslimeen. He also told Clarke that Dookeran had appealed for foreign intervention. Clarke assured them that that was not so. Clarke then returned to Camp Ogden with two more documents from the Red House -

- (i) A letter from Selwyn Richardson recommending a pardon under section 89(3) of the Constitution;
- (ii) A letter from the Parliamentarians advising against foreign intervention.

During the course of Saturday, President Carter was involved in the preparation of a floor plan of the Red House if it became necessary for the soldiers to enter the building. Lawyers set out drafting a document for the consideration of the terrorists which would appear to be an amnesty but have no legal effect.

At about 4.00 p.m. the President was shown the draft by Martin Daly and was advised that the draft which had been prepared did not involve the exercise of any powers under section 87 of the Constitution and was prepared only with reference to the Major Points of Agreement. President Carter was unwilling to sign any document. Canon Clarke expressed great fear for his life and those of the hostages if he returned empty handed or "without some concrete response to the document". He was in a state of great agitation. In view of the pleadings of Canon Clarke, President Carter signed the original and initialled a carbon copy "in order to keep discussions going and to preserve lives."

At the Red House both captors and captives waited with increasing impatience and anxiety for the return of Canon Clarke. There were continued exchanges of gun fire between the extremists and the security forces. Bilaal Abdullah expecting an assault on the Red House by the security forces ordered the members of the Government to be placed in a line to be shot first in event of the assault on the Red House. The hostage takers were prepared to take the ultimate course to enforce their objectives.

Canon Clarke arrived at the Red House after dark with the carbon copy shouting "I have got an amnesty". Shortly before the departure he had been advised by Colonel Brown to "let those people know that there is no way out for them other than to surrender" and by Colonel Theodore to tell the Muslimeen that they must lay down their arms. This was not conveyed to the Muslimeen by Clarke. The arrival of Canon Clarke abated the crisis somewhat but the hostages remained in a "lined up" position with guns trained at them for the greater part of Saturday night. The hostages remained bound and their bonds were not released until Monday afternoon.

Events after the Grant of the Amnesty:

The hostages were not released immediately upon the grant of the pardon. It was not until 1st August, 1990 that successful machinery for release was constructed and the evacuation process completed. Prime Minister Robinson, however, was released on Tuesday 31st July.

The most accurate evidence of what took place during this period is derived from the affidavits of Canon Clarke, John

Humphrey and Kelvin Ramnath made only two and a half months after the insurrection and from the transcripts of telephone conversation which were held between among others Colonel Theodore for the State authorities and the hostage takers and hostages, together with some transcripts of conversations with a number of radio stations.

The transcripts clarify the following matters:

Although there were references to requests for political demands after the grant of the amnesty, the making of these requests did not hinder the process of negotiating the construction of machinery for the safe release of the hostages. They were not backed by further threats or by suggestions that the "hostages" would be killed. Nothing in these discussions indicated that the Muslimeen did not accept and were not trying to implement the condition of the amnesty. On Tuesday 31st July, for example, Bilaal Abdullah asked Abu Bakr about future elections and Abu Bakr responded "those things are not our business we are not politicians."

The discussions concerning the political demands were encouraged by the State authorities for tactical reasons. At no point did the State authorities say to the Muslimeen - "You have an amnesty, that is

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all you will get from us." On the contrary they engaged in these discussions in a manner that would reasonably have led the Muslimeen to believe that they were open to negotiation. They did this not because they were open to negotiating but as part of their strategy, informed by consultations with an expert on hostage negotiations Dr. Schlossberg, to "wear the Muslimeen down and try to maintain the initiative".

It may be that some of the Muslimeen mistakenly believed that the amnesty was connected with Minister Dookeran being appointed as Prime Minister and hence some of the references to this prospect.

This explains the sense of the urgency among the Muslimeen as relayed by Canon Clarke their ultimate resort to the International News Services on Monday 30th July after they were unable to contact the State authorities.

The transcripts reveal that it would not have been safe whatever Colonel Theodore may have said, to release the hostages before Wednesday 1st August.

The main causes of the delays in evacuating the hostages were the following:

The violence did not cease immediately upon the grant of the amnesty.

Throughout the night of Saturday 28th July a great deal of gunfire was directed at the Red House from the security forces. It seems that the police did not approve of the grant of the amnesty, to the extent that they, over the radio threatened the Prime Minister and other Parliamentarians. The gunfire continued on Sunday morning and ensued again on Sunday night. (This was the reason why Canon Clarke was unable to return from the Red House on the evening of the 28th July).

Even as late as Tuesday night a group of soldiers shot at the air conditioning ducts.

Possibly there was also some shooting by a group of Muslimen who may not have been in contact with the main group in the Red House. However, any such action would clearly have been in perceived self defence. In any event there is no suggestion that any members of the security forces were injured as a result.

The transcripts reveal that it was not until Tuesday 31st July that the State authorities considered it safe to

supervise the release of Prime Minister Robinson. When on Monday 30th, Bilaal Abdullah made it clear that he could leave at any time, Colonel Theodore, demonstrated a reluctance to evacuate him immediately.

NEGOTIATION OF MACHINERY TO ENSURE THE SAFETY OF THE MUSLIMEEN AND THEIR FAMILIES UPON THEIR RETURN TO MUCURAPO:

On the night of Saturday 28th July Minister Richardson expressed concern to Bilaal Abdullah about the safety of the Muslimeen and their families upon their return to Mucurapo Road. He suggested that 15 to 20 members be precepted. His concern related to possible reprisal attacks by disaffected third parties and dissident members of the police and the Muslimeen shared this concern in relation to the safety of their families and their homes and places of worship. There was also concern for the safety of the hostages.

Colonel Theodore also considered and took seriously this danger. Although he did not agree that the Muslimeen should be permitted to carry arms, or that this was covered by the amnesty package, he nonetheless recognized that the Muslimeen had understandably assumed that they would be permitted to retain some arms, because Canon Clarke had failed to make clear that they were to emerge unarmed. The pardon, of course, had imposed no condition about the surrender of their arms or indeed about the timing of the evacuation.

On Tuesday 31st July, the Muslimeen's fears about reprisal attacks gave rise to concrete negotiations between Colonel

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Theodore and Bilaal Abdullah. The possibility of preception was discussed at length, together with the idea of issuing a number of firearm permits. Both these options would take time to implement. Accordingly a means of ensuring the safety of their families, their followers, their homes and themselves in the meantime also had to be found.

On Wednesday a temporary solution was found: it was agreed that the Muslimeen would be taken to a camp at Chaguaramas where they would be protected by the Defence Forces pending preception.

BREAKDOWN IN COMMUNICATIONS AND DELIBERATE  
STALLING FOR STRATEGY REASONS BY THE  
STATE AUTHORITIES:

There were numerous occasions when communications broke down between the insurgents and the State authorities. The causes appeared to be a mixture of genuine problems with the telephone lines occasioned by the widespread disorder and a psychological strategy adopted by the authorities to stall the negotiations in the hope that it would make the Muslimeen more compliant. The breakdown on Monday was particularly acute leading the Muslimeen to contact a number of international news services as already mentioned. It is also clear that from 29th July onwards the army leaders (Browne and Theodore) were using delaying tactics as part of their overall strategy. At no point did these tactics involve calling into question the validity of the Amnesty.

Subsequent to the release of the members of Parliament and the civilians (who were held as hostages at TTT) and the physical

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surrender of the respondents, the respondents were arrested and detained in custody of the State, and charged with treason, murder, assault and other offences which the State alleged were committed while the Respondents were jointly involved in acts of insurrection from the 27th July, 1990 to 1st August, 1990.

For the purpose of the committal proceedings the Respondents were divided in five 'batches' to be proceeded against separately at the preliminary enquiries which were to be conducted at the specially constructed Magistrate's Court at Chaguaramas.

On the 8th October, 1990, all the Respondents filed a Constitutional Motion (Constitutional Motion) in which they alleged that their detention and prosecution for offences in relation to the insurrection had contravened their constitutional rights:

- (a) to liberty and/or security of the person and the right not to be deprived thereof except by due process of law, and
- (b) to the protection of the law.

These are rights guaranteed by Section 4(a) and (b) of the Constitution.

The basis of the Respondents contention was they they being the beneficiaries of a valid pardon, granted to them by the Acting President, could not be lawfully arrested, charged or prosecuted by the State for offences encompassed by the pardon.

On the 9th of October, 1990 eight of the Respondents made an

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application in the High Court for leave to issue a Writ of Habeas Corpus directing the Commissioner of the State Prisons to show cause why the Respondents should not be released immediately. The basis upon which the Respondents contended that their detention was illegal was that a pardon had been granted to them by the President under section 87(1) of the Constitution.

The Constitutional Motion was heard by Gopeesingh, J. (as he then was). The Respondents filed affidavits of evidence in support of their motion, but not in sufficient time to comply with the rules. Accordingly when the matter came on before the Judge on the 14th October, 1990 the Respondents were entitled to have the motion adjourned to enable them to consider evidence in answer.

However, counsel for the State applied to the Court for leave to take a preliminary objection, to the effect that the Court had no jurisdiction to entertain the motion, and should be struck out as being an abuse of process of the Court.

The basis of the objection was that the grounds of the motion and the evidence in support of it did not disclose any infringement of the Constitution and accordingly the Respondents were not entitled to any redress. The Court after hearing this objection, by a ruling on the 14th October upheld the objection and dismissed the motion with costs.

The Respondents appealed (the Constitutional appeal) and on the 18th March, 1991 the Court of Appeal unanimously dismissed the appeal. The Respondents then appealed to the Privy Council.

In the mean time the habeas corpus application had come up before Blackman J. and although made ex parte, notice was given to the Commissioner of Prisons and the Attorney General who were represented by Counsel.

The point they took was similar to that taken in the Constitutional Motion namely, the habeas corpus proceedings could not be brought on the basis of the pardon, since a pardon must be the subject of a special plea and this could only be done on the arraignment. This submission impressed the learned judge and he dismissed the application.

The Respondents appealed - and the Court of Appeal unanimously dismissed the appeal (the habeas corpus appeal). They then appealed to the Privy Council.

The Constitutional appeal and habeas corpus appeal, were consolidated and both these appeals raised closely related issues, which arose as was obvious on the same facts.

On the 10th December, 1991, the Privy Council allowed both appeals and made the following orders:

1. The judgments of the Court of Appeal of Trinidad and Tobago of 18th March and 8th July 1991, and of the High Court of 14th November and 4th December, 1990, to be set aside.
2. The proceedings in High Court Actions Nos. 1311 and 1337 of 1990 to be consolidated and hereafter dealt with and tried together.

3. The appellants in Privy Council Appeal No. 23 of 1991, not already parties to action 1337 of 1990, to be treated from the date hereof as parties to action No. 1337 of 1990.
4. All the appellants to have leave to issue a writ of habeas corpus, and the Registrar of the Supreme Court of Trinidad and Tobago to do all such things as may be required for the hearing of the consolidated proceedings.
5. The respondents to pay the appellants' costs of these proceedings in the High Court, Court of Appeal and before their Lordships' Board.

The matters came before Brooks J. on the 9th March, 1992 and after a hearing which lasted several days, the learned judge reserved his decision.

On the 30th June, 1992 Justice Brooks delivered judgment and made the following orders in the Habeas Corpus Proceedings and in the Constitutional Motion proceedings:

- (1) a declaration is hereby granted that the detention and prosecution of the Applicants for offences in relation to the insurrection contravened their right:-
  - (a) to liberty and/or security of the person and the right not to be deprived thereof except by due process of law; and

- (b) to the protection of the law;
- (2) an order that the Applicants be released from detention forthwith;
- (3) an order for damages for infringement of the aforesaid rights of the Applicants to be assessed by a Judge in Chambers and paid to them by the State - from the date of their detention;
- (4) an order for costs to be taxed and paid by the Respondents to the Applicants in respect of the Habeas Corpus Application and the Constitutional Motion - certified fit for three Advocate Attorneys."

THE APPEAL

JURISDICTION - ABUSE OF PROCESS:

The Attorney General and the D.P.P. appealed against the decision of Justice Brooks on the Constitutional Motion.

The point of this court's jurisdiction was raised in the most unusual circumstances. There was no hint of it in the skeleton argument nor was any notice given of any preliminary point to be taken.

On the first day of the hearing however, Mr. Robertson in his desire to allay the fears of his clients enquired of Mr. Newman, whether the purpose of this appeal was to re-arrest the Respondents. Mr. Newman replied that he could not say but

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that was entirely a matter for the Director of Public Prosecutions and the Attorney General. He added that the outcome of the appeal was likely to be a factor to consider, when the Director of Public Prosecutions and/or the Attorney General came to exercise his discretion, and in any event it was premature to raise the point.

The following day the question arose again, and once more arguments were raised by Mr. Robertson and Mr. Newman in a piecemeal way. It was at this point the Court invited both Counsel to put their arguments in skeleton form, so that the point could be fully agitated.

Mr. Robertson submitted that the issue of the validity of the pardon was raised originally both as a constitutional motion and as an application for habeas corpus. The Privy Council invited submissions on the habeas corpus appeal first, and "this was accepted as a convenient course by Mr. Newman for the Respondents who conceded that his success or failure on the latter appeal would depend on how their Lordships determined the habeas corpus appeal" Lennox Phillips v. A.G. (1992) A.C. 558 D.

After this significant concession as to the identity of the issue in both sets of proceedings, the Privy Council ordered them "to be consolidated and hereafter dealt with and tried together" (1992) A.C. 561 F).

Brooks J. decided, "on a consideration of all the facts and circumstances of these two actions" that the pardon was valid, and hence that the "great writ" of habeas corpus should issue

to release the Muslimeen. He exercised his discretion to grant additionally a declaration that their constitutional rights had been infringed, and an order was made for damages to be assessed by a judge in chambers.

In Trinidad and Tobago, Mr. Robertson submitted the Habeas Corpus Act of 1841 applies the English law of habeas corpus notably the 1679 Habeas Corpus Act, and the English case-law on the subject prior to legislation in 1960, (which English legislation does not apply in Trinidad and Tobago).

The result he said was that in Trinidad and Tobago there can be no appeal from a decision to release applicants in habeas corpus cases. This rule was decided by the House of Lords in Cox v. Hakes (1890 15 A.C. 506. The head note reads: "Where a person has been discharged from custody by an order of the High Court under a habeas corpus the Court of Appeal has no jurisdiction to entertain an appeal".

The speeches of Lord Halsbury and other Law Lords justify this rule as to the finality of a determination in habeas corpus matters on the grounds that the issue of the writ is to decide, once and for all, and for all purposes the legality or illegality of the detention.

This rule Mr. Robertson submitted was confirmed and extended by the House of Lords in Secretary of State v. O'Brien (1923) A.C. 603. This case made it abundantly clear that the issue of a writ of habeas corpus determined the illegality of the applicant's

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detention for all time, it included the following dicta:

"if upon the return to the writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody, and if discharge followed, the legality of such discharge could never again be brought in question." (Earl of Birkenhead, p.610).

"The cardinal principle of English law (is) that a person once found entitled to liberty should not be liable to have that determination again called into question" (Lord Dunedin, p.622).

"I think the law of England to be long settled to the following effect, i.e., that when once a legally constituted court has determined that a subject of the Crown, who is an applicant for the issue of a writ of habeas corpus is entitled to his liberty, such a judgment cannot be overruled either by any other court or by any court of review or appeal.....to sustain jurisdiction would be to claim a right to circumvent or destroy that finality of liberation which has long been affirmed as a matter of right in one of His Majesty's subjects" (Lord Shaw of Dunfermline, p.643,645).

A decision to issue a writ of habeas corpus is a decision in rem and consequently binding on the world in general, as an unimpeachable determination of status. The rule is stated thus in the leading textbook on res judicata:

"A decision, on the return to a writ of habeas corpus, that there is no legal ground or justification for the arrest or detention of the applicant, and an order that he be discharged from custody, is a determination of the applicant's right to his liberty and of the legality of his discharge, which is conclusive upon all subject<sup>s</sup> of the Queen, both at common law and under the provisions of the Habeas Corpus Act 1579" (Spencer-Bower and Turner, "Res Judicata", para. 253).

In the present appeal, he added, the Attorney General and the D.P.P. were seeking to litigate, on the conjoined constitutional motion, the very issue which the Court had finally decided, for all time and between these same parties, on the unchallengeable habeas corpus decision. As the purpose of the constitutional appeal is to impeach the unimpeachable decision of Brooks J., it contravened the rule in Cox v. Hakes. It followed that the Appeal Court had no jurisdiction to entertain it, or alternatively that the appeal from a motion consolidated with a successful habeas corpus application was an abuse of process. This follows from Lord Hershell in Cox v. Hakes at 534: "The judgment of the higher court cannot in any wise effect the discharge or restore to custody the person liberated. It is incompetent to give effect to its judgment and cannot undo that which it holds to have been wrongly done by the order appealed from.....I cannot think that it was even contemplated that an appeal should be entertained from any class of orders when that which was affected by them could never be effectually interfered with".

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It was clear Mr. Robertson submitted from the dicta cited above in O'Brien that no higher court can question or challenge the basis of issuing habeas corpus. That was precisely what the State was seeking to do by appealing the decision on the constitutional motion, which was the very same decision, as that delivered on the habeas corpus application with which it had been consolidated. The object of the appeal, in his view, was to question the habeas corpus decision, and this court lacked jurisdiction to hear it. If the ulterior purpose of the appeal is to put the State in a position where it may re-prosecute the Muslimeen, then this is an unlawful purpose and the appeal is an abuse of process.

The problems faced by the State in pursuing this appeal went further. If it had, as a possible object, or result, the subsequent detention and prosecution of the Muslimcon, then it offends S.5 of the 1679 Act. This Section provides that no attempt shall be made to vex a liberated detainee by seeking his re-commitment: All those who have aided or assisted such process shall be obliged to pay £500.00 to each of the Muslimeen. It followed that the State can on no account re-prosecute these men.

It followed he concluded from the above that the only proper way for the Court to proceed is to decline jurisdiction to hear this appeal and to return these proceedings to the judge in Chambers to consider the arguments for the quantum of damages which should be paid to the Muslimeen by way of compensation.

Mr. Newman submitted that Mr. Robertson's arguments had three strands.

Firstly, that the State had lost its right to appeal the orders made by Brooks J. in the constitutional action. Secondly, that in Trinidad and Tobago there is no right of appeal in habeas corpus proceedings where the habeas corpus proceedings involve an issue as to the interpretation of the Constitution. Thirdly, that the appeal constituted a representation of an intention to re-arrest and prosecute the Respondents, and no right to re-arrest existed. (This third point subsequently became the basis of an improper threat of prosecution of the Director of Public Prosecutions and Counsel).

Right of Appeal:

Mr. Newman submitted that the Respondents commenced two actions; the constitutional and the habeas corpus proceedings. An order for consolidation was made so that both could be heard together could not possibly lead to the loss of the State's right to appeal the constitutional proceedings. The proceedings were consolidated for there was an issue common to both, namely the validity of the pardon document.

Section 108(a) of the Constitution (of which the Respondents make no mention) makes it plain that in "constitutional matters" there is a right of appeal whenever an issue of interpretation arises in "any civil or criminal proceedings". It follows that the constitutional issue as to the interpretation of section 37(1) could have been raised on appeal in the habeas corpus proceedings alone.

Power to re-arrest:

Cox v. Belsas and Secretary of State v. O'Brien have nothing to

do with the general power to re-arrest after a writ of habeas corpus has been issued and an order for discharge has been made.

Section 5 of Habeas Corpus Act, 1679:

This section has never been construed as absolutely preventing re-arrest. See Attorney General for Hong Kong v. Kwok-a-Sing (1873) L.R. 5 P.C. 197 and Ex p. Stallman (1912) 3 K.B. 424.

See the true position: "The Law of Habeas Corpus" (2nd Ed.) by R.J. Sharpe pg.214 and note 71.

This point he submitted had now evaporated in any event for it appeared to be conceded that the section could have no effect until re-arrest occurred (which is plain from the section), and that the pursuit of the appeal cannot constitute a representation of an intention to prosecute.

I think both of Mr. Robertson's points were misconceived.

First of all, it is clear that although both proceedings were consolidated, they still remained separate and distinct and have lives of their own, and although the issue was the same in both, the reliefs sought were completely different.

While it is true to say that Mr. Newman had conceded in the Privy Council that his success or failure in the Constitutional Motion depended on the outcome of the habeas corpus proceedings. I cannot see that his point is thereby affected -- what this clearly means is once the issue i.e. the validity of the parton was decided in one proceeding it would be pointless and futile in seeking to litigate the other. That however does not mean,

if there is no right to appeal in the habeas corpus proceedings, that it necessarily followed that the appellants had no right of appeal in the Constitutional Motion. The fetter which is placed on habeas corpus proceedings cannot be allowed to infect the Constitutional proceedings.

ABUSE OF PROCESS:

Whether or not Mr. Robertson has not pursued his point on the abuse of process (as there appears to be some doubt) it was clear that his submission that the purpose of the appeal was solely for the purpose of re-arresting the Respondents is untenable. It simply does not make sense. All Mr. Nowman has said is if or when the situation does arise, the Attorney General and/or D.P.P. may wish to consider the outcome of this appeal before it so decides. Mr. Robertson's submission is clearly based on Section 5 of the Habeas Corpus Act, and I think it would readily be seen that this Section can have no effect until re-arrest actually occurs -- and this in fact may very well account for the failure of Mr. Robertson to press this submission with any vigour.

JURISDICTION:

As to Mr. Robertson's second submission; that the court had no jurisdiction to entertain the State's appeal against the orders for redress under the Constitution, as the issues were the same in both proceedings had me flabbergasted. By what principle of law or logic can it be said that by some form of legal consequence the State who would otherwise have had an undeniable right to appeal

the relief granted to the Respondents in their claim for constitutional redress would have by some legal magic lost it. The fact that the proceedings were consolidated, was nothing to the point.

Further it was clear, that a person detained under a writ of habeas corpus had no redress to damages thereafter, so that the only way the Respondents can claim damages is under the Constitution. The result of Mr. Robertson's submission, if he is correct must be, that once the issue was determined in the habeas corpus which is unappealable - that also makes the Constitutional Motion unappealable. This I cannot accept.

Mr. Maharaj of junior counsel for the Respondents pressed in his reply on the jurisdiction point that the Constitutional appeal was being used as a device for impeaching the Habeas Corpus proceedings. First of all it is well to remember that there is no appeal in the habeas corpus proceedings; and whether there can be an appeal by virtue of Section 108(a) of the Constitution is therefore of an academic nature - because as I have said there is no appeal against it.

But surely the appellants are entitled to challenge the Constitutional proceedings in order to determine whether they are liable to pay compensation.

Accordingly I reject all the submissions of the Respondents,- I find that the appeal is properly before us, as the appellants have the undoubted right to do so in accordance with section 108(b) of the Constitution.

DURESS - COERCION:

Mr. Newman submitted, that the action taken by the President initialling the pardon document, resulted from a course of conduct pursued by the Respondents. It moved in stages he said and led to a written series of demands being delivered to the President, (contained in the "Major Points of Agreement") by the hand of Mr. Dookeran in the company of Canon Clarke. The delivery he added was at the insistence of the Respondents backed by their violence and threats.

Mr. Newman submitted the Major Points of Agreement having been delivered at Camp Ogden were considered by the Parliamentarians along with other documents. Further after consideration by the President of the facts, which were disclosed to him about the State's position in the Red House and in particular after the specific representation was made by Canon Clarke, that he be allowed to return with something concrete in his hands.

Mr. Newman made a number of other submissions which were really a repetition of what was argued before Brooks J.-and because they are lucidly and pithily summarised in his judgment, I respectfully wish to adopt them as part of this judgment.

They are as follows:

- (1) That the Applicants by their own conduct of making a demand backed by unlawful and terrifying threats made a free and voluntary act impossible. It is an argument against their having the benefit of an act done by the President when he

was subjected to unlawful and extreme pressure by them designed to secure a pardon. A Head of State may be faced with an insurrection, and that will constitute pressure on him from those events, but what he has got to be free to do is to decide, in the exercise of his own discretion, free from pressure other than those generated by public events, whether in the public interest those in a state of insurrection should have the benefit of a pardon;

- (2) Those in a state of insurrection on this occasion employed unlawful threats directed at the President with a view to securing a pardon. Threats were made against others which were directed not only at those others but were directed at the President specifically in order to force him, to influence him, to co-erce him, to compel him to exercise a power of pardon which under section 87(1) of the Constitution he was entitled to exercise, free from such specific pressure designed for the very purpose of obtaining a pardon. It does not lie in the respondents mouth to claim an untarnished pardon when they have engaged in unlawful and extreme conduct to achieve it. They have rendered imperfect that which to be valid and binding has to be perfect. In the exercise of the power of pardon, there must be no interference, no imposition, no pressure designed or directed to obtain a pardon; no co-ercion upon the President to obtain a pardon - no

bargain, no deals, no negotiation. The grant must be freely bestowed.- The bargaining power under the Constitution is conferred so that it can be freely exercised without dictat from anyone, without prior agreement, without fetter of any agreed course of policy, save by law. There should be no embarrassment or imposition on the exercise of the discretion;

- (3) That as regards the document intituled "Major Points of Agreement", it is apparent from the fact of the document that the President's discretion had been exercised by reference to something which he had stated on the document required him to grant a pardon. So looking at the document, it is manifest that the President did not exercise his discretion because he had stated upon the document that something else has required him to exercise his discretion in that way. It is a document which by its terms discloses that it had been drawn up in response to the compulsion of unlawful captivity being maintained by those who wanted the pardon.
- (4) That there were two options available to President Carter - either to talk with the terrorists or immediately launch an assault on both Television House and the Red House. As a result of discussions, Acting President Carter was at that state entirely against the use of military force as a solution because there was no

guarantee that the lives of all or any of the hostages would be saved;

- (5) That a lawful exercise of power under section 87(1) of the Constitution requires the President (a) to exercise his discretion (b) the discretion to be exercised for the purpose for which the power was conferred (c) the power to be exercised in the absence of unlawful compulsion or unlawful pressure designed to secure a pardon (d) the power to be exercised within the four corners of the subsection. The words "as required of me by the document headed Major Points of Agreement" disclose the cause of the force operating upon him. The document intituled "Major Points of Agreement" disclosed an offer to release persons unlawfully held captive in return for various demands, including an amnesty. The alternative to that was a bloodbath. The interference with which this Court is concerned is criminal conduct and threats of injury to innocent civilians employed to bring pressure to bear to secure a pardon. The President considered the points raised in the document headed "Major Points of Agreement". He heard, or was informed of the pleas made by Canon Clarke and Mr. Dookeran that they should return to the Red House, with a concrete response, and he knew that as Chief Executive it was incumbent on him to take some form of action. The section 87(1) power cannot be exercised for a collateral purpose - to achieve some benefit wholly unconnected to a benefit to the grantee.

The pardon document does not have on it a condition that the grantee ceases to commit a crime, and this constitutes a purported grant in respect of offences not yet committed and is therefore ultra vires and unlawful. The document expressly contemplates an unspecified period of time in which offences may be committed after the grant because the only condition is the safe return of the captives and no time limit is set for the return. It is therefore ultra vires and void as being outside the four corners of section 87(1) of the Constitution;

PUBLIC POLICY

- (6) Public Policy requires that no effect be given to any grant achieved through compulsion outlawed by International Law and the accepted treaty obligations of the State. The law of the State should be interpreted consistently with its international obligations. Justice requires that if a State is subjected to threats in order to compel it to act, it should not be bound by its actions. There is no difference between obtaining a pardon by fraud and obtaining a pardon by making unlawful threats. They are both unlawful conduct - just a different variety;
- (7) Duress as a concept still exists and is alive and well and is protected by the rule of law, referring to the Universal Tankship of Monrovia case (1933) AC 366, at 384, letters "A" to "C" - a case of economic

duress. The whole concept of economic duress, namely forcing somebody to sign a contract or to do ~~something~~ involves considerations of pressure which have been applied and which have nothing to do with physical threats. Duress is "duress", the rationale is that the party's apparent consent to enter the contract was induced by pressure exercised upon him by that other party which the law does not regard as legitimate with the consequence that the consent is treated in law as revocable unless approved either expressly or by implication after the illegitimate pressure has caused to operate on his mind. This is exactly what this case is all about - whether the type of pressure which was brought to bear upon President Carter was pressure exercised upon him which the law would regard as legitimate. The reason why duress has for so long been stated not to be available as a defence to a murder charge is that the law regards the sanctity of human life and the protection thereof as of paramount importance. The threats do not have to be made physically to the person induced to act. Duress against the State is recognised by International law. Duress against the State will always be exercised to force someone to act who has the power to act for the State. It was duress against the State directed at the Parliamentarians with the intention of forcing the only man in the State who had the power to act to give them what they wanted;

UNLAWFUL CONDITIONS - IMPLIED TERMS

(8) That the power to grant a pardon under section 87(1) can only be exercised in respect of offences which "may have been committed". A conditional pardon can only be granted in respect of offences which have been or might have been committed. Since a pardon could only be granted in respect of acts of insurrection which may have been committed at the time of the grant, and by its terms only extended to acts of insurrection commencing Friday, 27th July 1990 and ending upon the safe return of all the Members of Parliament held captive, the obligation safely to return them arose immediately upon delivery of the pardon to the Applicants or somebody on their behalf.

The terms required them forthwith to cease acts of insurrection, and to safely return the captives. A pardon under section 87(1) granted in respect of acts of insurrection which may have been committed necessarily implies that after the grant the acts of insurrection cease. The Applicants continued to be in armed insurrection against the State and engaged the armed forces in combat. They continued to hold Members of Parliament and other civilians captive. They made fresh unlawful and unconstitutional demands for change in government additional to the demands made prior to the grant of the pardon. They took two new hostages after the grant of the pardon. They refused to lay down their arms and give up possession of same.

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THE LAW:

In his submissions on the law of duress, -or coercion, Mr. Newman gave a scholarly and erudite synopsis on the law of duress - I mean no disrespect, however, by seeking to summarise what he submitted.

The civil law he contended relating to coercion or duress has its application where one person has acted so as to confer a benefit upon another.

In Criminal law it applies where one person has acted so as to commit a criminal offence at the behest of another.

He further submitted that on the cases the concept of coercion or duress involves consideration of will and choice.

A comprehensive examination of the concept in both the Criminal and Civil Law was undertaken by the several Law Lords in the case of the D.P.P. v. Lynch (1975) A.G. p.653, he submitted, and referred us to several passages of the various members of the House.

I shall refer to some of them presently but firstly I wish to set out briefly the facts in Lynch.

This was a case involving terrorists from the IRA. The defendant drove a car containing a group of IRA terrorists on an expedition in which they shot and killed a police officer.

In his trial for aiding and abetting the murder, there was evidence that he was not a member of the IRA and that he had

acted unwillingly under the orders of the leader of the group being convinced that if he disobeyed he would be shot.

The trial judge held that the defence of duress was not available to him, and he was found guilty by the jury.

On appeal in Northern Ireland the court upheld the conviction.

On appeal to the House of Lords it was held Lords Simon and Kilbrandon dissenting that on a charge of murder the defence was open to a person accused as a principal in the second degree, namely an aider and abettor and accordingly a new trial would be ordered.

Lynch was overruled by R. v. Howe and others (1987) A.C. 417, but it is nevertheless authoritatively regarded for the scholarship and learning on the law of duress.

Lord Simon in a prescient and seminal judgment held that in Criminal law duress should not give rise to a defence to a principle in the second degree, and took the view that it should go to mitigation of sentence. This of course is now in accord with Howe (supra) and see R. v. Gitts (1992) 1 A.E.R. 832 H.L.

Now, although this was a case in Criminal Law, Mr. Newman used it only to show us how the courts also looked at the law of duress in the Civil cases. Starting with Lord Simon at p.695 when he said:

"So contemporarily aware a writer on the criminal law as Professor Glanville Williams, Criminal Law, 2nd ed. (1961), p.751 quotes the

phrase 'coactus volui' as descriptive of the mental state of an actor under duress according to our criminal law. I hope, indeed, to have demonstrated that duress is not inconsistent with act and will, the will being deflected not destroyed; so that the intention conflicts with the wish. The actor under duress has performed an act which is capable of full legal effect: if he is to have relief it should be discretionary. Translated into terms of the criminal law, he is guilty of the crime, but he may at discretion be relieved against its potential penal consequences when it comes to sentencing.

Similarly with duress in the English law of contract. Duress again deflects, without destroying, the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms; but there is coactus volui on his side. The contrast is with non est factum. The contract procured by duress is therefore not void: it is voidable-at the discretion of the party subject to duress."

And at page 680 Lord Wilberforce said:

"'Coactus volui' sums up the combination: the victim completes the act and knows that he is doing so; but the addition of the element of duress prevents the law from treating what he has done as a crime. One may note-and the comparison is satisfactory-that an analogous result is achieved in a civil law context: duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law: see the Privy Council

case of Barton v Armstrong (No.15 of 1972) (unreported), December 5, 1973, and the judgments in the Supreme Court of New South Wales.

If, then, it is correct that duress is an additional element which comes into play, and excuses, after act and intention have been manifested, it follows that analysis of 'intention' in the criminal law will not of itself assist in determining the scope of the defence of duress."

Mr. Newman also cited passages from Barton v. Armstrong (1976) A.C. 104 - a case which involved the formation of unconscionable agreements between two private individuals.

He submitted compulsion of duress: "...involves the consideration of what the law regards as voluntary, or its opposite; for in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be of a kind which the law does not regard as legitimate". (See Lords Wilberforce and Simon in Barton v. Armstrong (1976) A.C. 104, 121 D-E.

See also Lord Cross at pg. 118 D-F:-

"The scope of common law duress was very limited and at a comparatively early date equity began to grant relief in cases where the disposition in question had been procured by the exercise of pressure which the Chancellor considered to

be illegitimate although it did not amount to common law duress. There was a parallel development in the field of dispositions induced by fraud ..... There is an obvious analogy between setting aside a disposition for duress or undue influence and setting it aside for fraud".

He also referred us to what Lord Diplock said in Universal Tankships Incorporated Monrovia v. ITWF (1983) A.C. 366 at 384 B-C (a case which dealt with economic duress):

"The rationale is that the apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind. It is a rationale similar to that which underlies the avoidability of contracts entered into and the recovery of money exacted under colour of office, or under undue influence, or in consequence of threats or physical duress".

Mr. Newman also referred us to Hall v. Hall (1868) p.481 an undue influence case in relation to a testamentary disposition in which someone made a grant of property under a threat.

William v. Baylor (1866) English and Ir. Rep. 200, Kaufman v. Gerson (1904) 1 KB 591. These two cases cited to the same effect as Universal Tankships.

Mr. Newman went on further to list several sets of circumstances, most of which were covered in the law of contract and one in criminal law, where it was clearly demonstrated that the courts would never countenance duress. He posed the following question; what was the jurisprudential concept which underlies the operation of law in the several situations? and sought to answer it by saying that the jurisprudential concept which underlay all these circumstances was that the law wished to uphold the rule of law and to prevent those who go beyond the rule of law and sought to obtain benefits for themselves by operating outside the rule of law, to be denied the benefit they have obtained.

Mr. Robertson's submissions:

Mr. Robertson submitted that section 87(1) of the Constitution empowers the President in his sole and unfettered discretion to grant a pardon before arrest to persons who have committed or are committing offences of any kind, including treason, murder and hostage taking.

In further amplification of this submission, he added that so long as the President was capable of exercising his discretion and was performing the functions of his office, then the pardon was valid even though a request or demand for that pardon had been backed by unlawful pressure, criminal acts or whatever. The only general fetter or the one overriding principle was that when he exercised his power under this section it must be in the public interest. Hostage taking he concluded was the prime purpose for which section 87(1) was given. The power to forgive criminal offences was similar to that conferred on the President in the United States Constitution.

See Lennox Phillip & ors. v. A.G. & ors. (1992) 1 A.C.545.

Horgan v. Saxbe (1974) 378F supp. 1121 26 1227.

Schick v. Reed (1974) 42 L ed. 2nd 430.

Secondly Mr. Robertson submitted that if a pardon was conditional it came into operation once the condition was performed, if it were unconditional it came into force when the pardon was delivered.

Mr. Robertson contended that section 38(1) of the Constitution which reads as follows ".....the President shall not be answerable to any court for the performance of the functions of his office or for any act done in the performance of those functions" confined any court room investigation to (a) whether the grant was that of the act of the President, in other words whether he exercised his discretion deliberately and (b) whether the act was done in the performance of the functions of his office as President; in other words whether he was acting in the public interest in the performance of his duties. He pointed out that the evidence was overwhelming that it was the deliberate act of the President. He hated doing it. He was reluctant to do it. He even changed his mind and he did it. He was not incapacitated by being held captive with a gun at his head. There was a paucity of alternatives none of them very attractive but in the end he chose to grant a pardon which in his judgment was clearly in the public interest at the time.

He added that the limits set out above on the scope of the court's inquiry into an executive discretionary act meant that

the court must not permit any party to call into question the intention or motive of the President in performing the executive act, or place any reliance on the intention or motive of his advisers.

Section 38(1) of the Trinidad and Tobago Constitution.

De Freitas v. Benny (1976) 1 A.C. 239.

The G.C.H.O. Case (1985) 1 A.C. 374.

Jamison v. Planner (1924) 35 A.L.R. 973 (p.977).

Horwitz v. O'Connor 6 C.L.R. 38.

Bathbun v. Baumel (1922) 30 A.L.R. 216 (at 219).

And in Basu's Commentary on the Constitution of India (1981)  
Vol.4 (253 to 261).

"A Court has no right to inquire on what basis or information the executive has exercised the pardoning power in any case".

The scope of the pardoning power and accordingly, the limits of the Court's power of inquiry, may only be altered by a change in the Constitution itself.

Knapp v. Thomas (1883) Ohio State 377.

Fourthly, Mr. Robertson submitted that section 87(1) did not exist until 1976. It was not in the 1962 Constitution but was added in 1976, and invited us to adopt a purposive interpretation. The Court he said must look at the legislative history including the debates in Parliament. He initially drew our attention to Pepper v. Hart (1993) A.E.R. 1 - but when it was pointed out by Mr. Newman that this case was clearly inapplicable as section 87(1) was absolutely clear, and therefore there was no need to refer to

the debates in Parliament in order to determine its purpose as this was only to be resorted to in cases of obscurity and ambiguity. Mr. Robertson withdrew the submission. He ultimately relied on the principle that in all constitutional matters a purposive approach was the way to go.

He contended that (a) the power under this section fell to be exercised on the same principle of the pardoning power in the American Constitution as exemplified by the Nixon Pardon which was referred to in the debates as explained in Murphy v. Ford (1975) 390 F Supp. (b) the purpose of the American pardoning power therefore was the same as that of the purpose of the pardoning power of the Constitution; that purpose classically and definitively described by Alexander Hamilton, which he said was endorsed as the purpose of section 87(1) by the Privy Council in Phillips (supra).

This in my view would be an appropriate place to state what Lord Ackner said at pp.550-551:

"The power given to the President to grant a pardon before a person is charged with any offence and before he is convicted is a new power (cf. section 70 of the Trinidad and Tobago (Constitution) Order in Council 1962 (S.I. 1962 No. 1875) modelled on the Constitution to the President of the United States. It is interesting to observe that in the American case Murphy v. Ford (1975) 390 F. Supp. 1372 decided in the United States District Court of Michigan, in which the validity of a pardon granted by President

Ford to former President Nixon was challenged, there is quoted, at p.1373, the following observation of Alexander Hamilton in "The Federalist No. 74" in 1788 explaining why the Founding Fathers gave the President a discretionary power of pardon:

'The principal argument for reposing the power of pardoning...(in) the Chief Magistrate, "Hamilton wrote, is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.'"

Mr. Robertson then submitted that the founding fathers of the Trinidad and Tobago Constitution in the debate on whether section 87(1) should be a new part of the Constitution expressly recognised that it would be available to the President in conditions of rebellion and hostage taking, which would undoubtedly imperil the State.

Mr. Robertson, then invited us to conclude that in the light of all his submissions made, that the exercise of the power on the 28th July, 1990 and the coming into operation of the pardon on the 1st August was intra vires the constitution.

There was nothing he argued in section 87(1) which precluded the President from granting a pardon requested or demanded by a group of persons who were holding others as hostages even at the price of liberating those hostages.

THE WORDING OF THE PARDON:

"as required of me"

Before dealing with Mr. Robertson's submissions on the wording of the pardon, I think it would be helpful if I set out the wording of the actual pardon:

"I, Joseph Emmanuel Carter, as required of me by the document headed Major Points of Agreement hereby grant an amnesty to all those involved in the acts of insurrection commencing approximately 5.30 p.m. on Friday 27th July and ending upon the safe return of all members of Parliament held captive on 27th July, 1990. This amnesty is granted for the purpose of avoiding physical injury to the members of Parliament referred to above and is therefore subject to the complete fulfilment of the obligation safely to return them."

Now, it would be recalled the facts and circumstances under which the document headed Major Points of Agreement had come into being, the terms of which read as follows:

MAJOR POINTS OF AGREEMENT

- (1) Mr. Robinson writes letter of resignation to the President and makes appropriate statement.
- (2) All Parliamentarians including Mr. Robinson sign a letter supporting Mr. Dockeran for Prime Minister.
- (3) General Elections to be declared in 90 days.
- (4) Mr. Dockeran will leave Chamber with letters and go to President with Canon Clarke. Lee Des Vignes to be released simultaneously for treatment.

- (5) Mr. Dookeran upon his appointment secures an amnesty for all those involved in insurrection between 5.30 p.m. Friday 27th July, 1990 and resolution of matter.

Amnesty document to be prepared by President.

- (6) Mr. Dookeran and Canon Clarke return with amnesty papers all to be freed.

Now, what Mr. Robertson has submitted is that the wording of the pardon, and in particular the words "as required by me" was another way of putting the main argument of duress advanced by Mr. Newman.

He amplified this submission by contending that Mr. Newman had said the specific words imported duress into the pardon. Mr. Robertson reminded us that Mr. Newman had submitted that the document was based on invalid documents produced under unlawful pressure, but this he pointed out was not a separate argument. It was clear from the evidence of Canon Clarke and Dookeran that the President did not sign the pardon document on the basis of what was in the Major Point of Agreement. In elaborating he submitted that while it was true documents had been brought back from the Red House it was equally true that also brought back were graphic descriptions of all that was happening at the Red House from Canon Clarke. It was clear then, that the President was very much apprised of all that was going on, and his own evidence on affidavit had established conclusively that the President had NOT signed the pardon document - nor placed any reliance upon the Major Points of Agreement.

"Discussions took place about what Canon Clarke should take to the Red House. I indicated I was not willing to sign any amnesty or pardon nor was I willing to sign any copy of the draft document. So I didn't consider that Canon Clarke should take an unsigned copy."

Accordingly Mr. Robertson submitted until quite late in the afternoon he was determined not to sign anything, but Canon Clarke pleaded with him to be allowed to take back "something concrete" and in the end after hearing all the reports of the seriousness of the situation and the pleading of Canon Clarke he changed his mind -

"But for the pleas of Canon Clarke for the safety of his own life and those of the hostages I would not have initialled the carbon copy."

"Indeed as I stated I was too reluctant."

Where was the evidence, that the President had signed the pardon document pursuant to the heads of agreement? he asked. The answer he concluded was as clear as the proverbial pikestaff.

He was very critical of the approach taken by Mr. Newman, of how the pardon document was to be construed, and accused him of nit picking and treating the document as if it were a contract or a deed.

The pardon he advised was to be construed in a generous and in a way most beneficial to the beneficiaries and referred us to the case of Ex Parte Parquette (27A 2D 129).

With a sweep of the hand Mr. Robertson dismissed all the cases referred to by Mr. Newman, and based on coercion in private law, as being light years away from the Solemn Act of the President granting a pardon. They simply had no place or part to play when it came to the interpretation of the Constitution. He lamented the fact that Mr. Newman was not able to produce at least one case from any jurisdiction where there was a similar power to pardon, and accused him of having ransacked obscure areas of private law in order to buttress his argument.

He on the other hand had been able to find a case from Malaysia Mustapha and Mohammed and others (1987) L.R.C. (Const) 16. The facts in this case he said were enormously complicated and dealt with the Head of State's decision to appoint a politician rather than another as leader in the early hours of the morning.

He invited our attention to p.94 where Tan J. dealt with how duress should be treated in public law and advised us to follow this approach. It is true he said that it was a first instance judgment but interesting nevertheless.

At P. 94 of the judgment Tan J. said:

"If the duress pleaded in the defence should not, in the circumstances, be considered in the criminal law sense or in the sense as recognised by the law of contract, or in the "reviewability" sense referred to above, as is my view, then in what sense, should it be understood? In this regard, I am not aware of any judicial authority on the point. In considering the matter, I am guided by the dictionary definition of the word "duress",

and common law principles. I see no reason, in the circumstances, as at present advised, for not applying them. The relevant meaning given to the word "duress" in the Oxford English Dictionary is as follows: '4. Constraint, compulsion; spec. in Law, Constraint illegally exercised to force a person to perform some act.' Some compulsion may be by actual imprisonment, by threat of imprisonment or of loss of life or limb, or by physical violence. A deed or contract made under duress is voidable on a plea of duress at a subsequent trial...Blackstone Commentaries 1.1. 131. The constraint a man is under in these circumstances is called in law duress, from the Latin durities, of which there are two sorts; duress of imprisonment, where a man actually loses his liberty...and duress per minas, where the hardship is only threatened and impending. The relevant part of the definition of "duress" in Jowitt's Dictionary of English Law, Vol. 1 2nd Edition is as follows: "...imprisonment compulsion. Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in the strict sense), or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress per minas)..." I do not derive assistance from judicial authorities on the concept of duress, as applied to the law of contract, including those bearing on the matter of economic duress (see for instance, Universe Tankship Incorporated of Monrovia v. I.T.F. (1983) AC 366); nor from prominent legal publications such as Goff and Jones's Law of Restitution, as they deal with the question of duress, in

relation to other matters. The test of duress to avoid a contract of marriage in matrimonial law would appear to be less stringent; see *Hussein v. Hussein* (1938 P.159).

Applying, as I do, the principles contained in the definitions set out by me earlier, I find that the evidence is not sufficient to constitute unlawful constraint, or compulsion by imprisonment ~~or~~ threat of imprisonment, or of loss of life or limb, or of physical violence, as in the Oxford English Dictionary definition, committed or held out by the plaintiff or his agents against the first defendant, or that what was done by the plaintiff or his agents falls within any of the definitions of "duress" contained in Jowitt's Dictionary of English Law. Accordingly, I find on the evidence that the defendants have not succeeded in proving the defence of duress, as pleaded against the plaintiff."

Now, it is true to say when his submission was made on this case Mr. Robertson did use the expression act of State. It is clear to me however, in this he was mistaken for it was clearly not, and what he really meant in my opinion was an act of the State. I make this observation here, because of the alacrity with which both Mr. Newman and Mr. Thorne (who appeared for the D.P.P. in this appeal) pounced upon this clear and obvious mistake, and sought to show by the learning on the subject dealing with an act of State that this was NOT an act of State, and therefore the submission of Mr. Robertson was misconceived. I merely wish to point out that the error made by Mr. Robertson was clearly an understandable one, and has not in any way detracted from the force of his submission.

PUBLIC POLICY POINT:

Mr. Robertson submitted that the public policy point raised by Mr. Newman in which he relied upon Article 1 of the Resolutions and Decisions adopted by the General Assembly during its thirty fourth Session 18th September, 1979 to January 1980, to which Trinidad and Tobago is a signatory was without merit.

Article 1 reads as follows:

"1. Any person who seizes or detains and threatens to kill, or injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention."

What Mr. Robertson countered was that Article 13, and 3(1) of the resolutions were a complete answer to Mr. Newman's point.

Article 13 reads as follows:

"This convention shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State."

/53...

Article 3(1) reads:

"1. The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure."

The treaty he said was not incorporated in the domestic law, and referred us to Brind v. The Home Secretary (1991) 1 A.E.R. 720 to illustrate how the courts dealt with such a situation.

Now it is clear that these submissions of Mr. Robertson persuaded the trial judge, wrongly in my view, and caused him to miss completely the pith of Mr. Newman's submission.

This is absolutely clear from his judgment at p.53 where he said:

"As I have indicated earlier, economic duress, in my opinion, does not apply to the circumstances of the present case, and Articles 51 and 52 of the Vienna Convention of the Law of Treaties, and the International Convention against the Taking of Hostages are irrelevant and provide no assistance whatsoever to the Respondent's case, as this Court is not concerned with or dealing with a question of a treaty or hostage-taking by one State against another. The issue which falls for determination in these Actions is one which is purely internal - whether the pardon allegedly granted by the Acting President in circumstances amounting to an insurrection is valid or not."

I think it is worth repeating at this stage why Mr. Newman suggested it might be helpful to look at the convention.

It was he submitted, a well established principle of law that where the Court is not otherwise prevented from doing so it will administer the law consistent with the treaty obligations into which the State has entered and secondly, it provides a legitimate source of information to which the Court is entitled to access, when it is seeking to determine what the public policy considerations are in respect to the issue before the Court.

It was therefore unfortunate to suggest, and for the trial judge to hold that the article did not apply because the insurrection was a purely internal situation. That as I said was a clear misunderstanding and misreading of Mr. Newman's submission.

Review of Discretionary Powers:

Mr. Robertson in dealing with the review of discretionary powers referred us to several passages De Smiths - Judicial Review of Administrative Action 4th Ed. at pp.278-279.

The underlying principle to be extracted from this learning was clear and tersely emphasised by Lord Wilberforce in Secretary of State for Education and Science v. Thameside M.B.C. (1977) A.C. 1014 where he said "But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at."

I wish to adopt this statement most respectfully but because we are dealing with the construction of a constitutional provision I would like to add a few words of my own.

The cases in constitutional law have repeatedly established that a Constitution must be purposively and generously construed - see for instance Minister of Home Affairs v. Fisher (1979) 3 A.E.R. at p. 36 letters A-C and A.G. of Gambia v. Job (1985) L.R.C. (Constitution) 56 at 569.

When dealing with domestic legislation, the courts take a fundamentally different approach from a Constitutional provision, as one of the aims of the latter is to construe the provision in such a way as to establish and preserve the Constitution as the Supreme Law.

Thus in my view, for instance a privative or ouster clause in domestic legislation would not generally be construed as liberally and generously as a privative clause in a Constitution. Nor would for instance the approach to the exercise of a discretion given to a Minister in peace time, be put on the same footing as a discretion given by a constitutional provision to the Supreme Commander of the Security Forces whose sole duty in times of war or civil strife would be to act in the interest and security of the State.

This would no doubt encompass a broad spectrum of circumstances from the most trivial to the most horrendous and by the inherent nature of the circumstances, of a country at war, or in civil strife the Supreme Commander is perforce, restricted, in his actions and options. No longer is he a free agent of the State to decide as he would when the country is at peace.

And so it was not surprising that Mr. Robertson should submit that the cases referred to by Mr. Newman which dealt with restaurant licences, planning commissions and circulars were

light years away from the solemn exercise of the prerogative of mercy by head of State.

Mr. Robertson advised against using these cases, and submitted that the new power of the President under 87(1) was a plenary power, unfettered in any way, and unchallengeable, because it was a pure exercise of a discretion, similar to that of the exercise to the prerogative of mercy in Michael de Freitas also called Michael Abdul Malick v. George Ramoutar Benny & ors. (1976) A.C. 239.

In developing this submission he pointed out that sections 70-72 of the 1962 Constitution (the old Constitution) were repeated in sections 87(2) and 87(3) 88 and 89. In other words the only changes which were made apart from the renumbering were to insert section 87(1) and Governor General was substituted to read the President (as by then Trinidad and Tobago had become a Republic).

In De Freitas case (supra) the discretion that was exercised under the old constitution under what is now 87(2) and (3) was by the Governor General on the advice of the appropriate Minister. This was a pure discretion and unchallengeable because the prerogative of mercy is the classic example of a pure discretion which is not challengeable as other kinds of discretion.

He reasoned that since this was so in respect of 87(2) and (3) it must follow the new power in 87(1) was equally unchallengeable, because it was the exercise of a pure discretion. He referred to Council of Civil Service Unions v. The Minister of the Civil Service (1985) 1 A.C. at p.374, to support his argument and drew our attention to what Lord Roskill said at p.418

about which of the Royal Prerogatives were susceptible to judicial review and those which were not amenable to the Courts. Of course, he did emphasise that all the courts were required to ascertain whether it was the act of the President, and whether he was acting or performing his functions in the public interest. Once the Court was satisfied about the answers to these questions it did not matter whether there was coercion. This was the only way a challenge was permitted under English Law.

Mr. Newman of course has rejected that proposition and has maintained he was entitled to challenge whether the discretion was being exercised in accordance with law, namely a challenge to the legality of the exercise of power NOT the challenge as to whether or not a pardon should have been granted. The question remained and always was whether as a matter of law the power was exercised lawfully.

Before dealing with the submissions on this issue, I think it would be helpful to make some general observations, which would perhaps shed some light on the issues, and help in the resolution of them.

HEAD OF STATE:

A head of State, enjoys a unique and privileged position in society - and this must be so for many reasons. In most if not all countries, which have written constitutions (and even those that have unwritten ones) there are well established constitutional provisions or conventions to ensure the office of the head of State, whether titular, or executive is well insulated from attacks that are likely to bring the office into disrepute. There would be

provisions, which grant him certain immunities, or there may be exclusions of the Court's jurisdiction, the aim of which is not to question the motives, policy, and the basis upon which a President arrived at a decision.

Indeed in our own Constitution, we have section 38(1) (which is concerned with immunities of the President) the full import of which was much canvassed by all sides in this case. Again we have section 80(2), which uses words of classic exclusion of jurisdiction, which perhaps does make the exercise of the power by the President not justiciable in the Courts.

What all this boils down to is that very little is challengeable - and perhaps the only attack that can be launched against an exercise of power by the President is the legality of it i.e. whether it was his act or not, and this brings me to the question of duress - which I now propose to address.

DURESS:

This is not the place, nor is it necessary in this case to give a dissertation on the law of duress, I do think however, some basic principles should be pointed out.

Duress contrary to what is generally believed is a well settled principle in law. The only area in which there has been some difficulty is in its application in Criminal Law and only with respect to the offence of murder (which has now been settled). This apart, the law is quite settled in Private Law, although its meaning in Criminal Law differs greatly from its meaning in the law of contract, torts and equity.

Direct duress, by which I mean acts which consist of threat of injury, beating or unlawful imprisonment or the threat of being killed. In other words duress only operate to render invalid and act if it threatens the life or limb of the person performing the act.

Now in the context of the present appeal, both Mr. Newman, and Mr. Robertson have canvassed fundamentally different views.

It would be recalled that Mr. Robertson with a wave of the hand dismissed, and rejected out of hand that coercion as we know it in private law was wholly inappropriate to Constitutional law, and added that this was light years away from the solemn act of a Presidential Pardon. He advanced nothing further to justify this approach.

Mr. Newman on the other hand, it would be recalled referred to a number of cases in Private Law and appeared to suggest that there was no reason why coercion as we know and recognise it should not be applicable in matters which affect the exercise of a Presidential power under the Constitution. Both however, agreed that direct duress was clearly applicable, but this did not arise on the facts of this case.

The question which therefore has to be answered is how far should coercion go in this case? Indeed, in any case of a similar nature.

Quite frankly I can see no good reason why coercion, or for that matter undue influence should be inapplicable to the act of

the President or any head of State. After all, the Constitution is really a combination of the Common Law, and equity and it would be ludicrous to exclude coercion, on the ground that it is light years away from the solemn act of the President, or on the basis, that it would open other grounds to challenge the act of the President.

The rationale that underlies coercion, as developed by the law of equity is that the person who has performed an act, knows what he is doing; but has been forced or coerced into doing so.

I pause here to pose this question. Is the President's will less susceptible to force or coercion than that of the ordinary man? Despite our attempts through the Constitution to make the President special we must remember that he too is human, and has the same vulnerability as other mortals.

Really one of the reasons (there are others later discussed) I initially entertained for excluding coercion and undue influence as grounds for challenge, was that I feared that the efforts and provisions that had been made by the Constitution to insulate the President, might otherwise be circumvented, by a challenge on such grounds. In other words, motives, policy, reasons and other factors, that were not amenable to an enquiry by the Court would so become, if the President's act could be impugned on grounds of coercion or undue influence, I am not however impressed by this way of thinking, and in any event I would be hard pressed to justify any juridical distinction between direct duress, and force or coercion since in the former case it would NOT be the act of the President and in the latter because of the force or coercion the court will not countenance it.

I therefore see no reason, why and act of the President cannot be attacked on the grounds of force or coercion or undue influence, although such cases I should imagine would be extremely rare indeed.

In view of Mr. Newman's submission on the unlawful conduct of the Respondents I propose to set out the relevant principles of law quite fully in order to show how the Courts treat such behaviour.

UNLAWFUL CONDUCT - ILLEGALITY

CRIMINAL LAW:

Any unlawful conduct by an individual against the State whether he obtained a benefit or not constitutes a criminal offence against the State and is punishable by it.

In Civil Law:

The Courts would not generally allow a party to benefit from his illegal or unlawful conduct.

A very helpful, and erudite summary of the position in civil law was set out by Kerr L.J. in Eurodian Ltd. v. Bathurst (1990) 1 to B 1 at pp. 34-36 as follows:

"The Law: illegality -

The relevant principles and authorities are reviewed in detail in the judgment under the heading "Tainted with illegality:" ante, pp.15c-

25B. A similar discussion is to be found in Chitty on Contracts, 25th ed. (1983), vol.1 para.1158, p.626 et seq., under the heading "The maxim ex turpi causa non oritur actio and related rules.:" I do not think that it is necessary to repeat the judge's helpful analysis of the cases.

Subsequently to his decision in the present case this court had to deal with a somewhat similar problem in *Saunders v. Edwards* (1987) 1 W.L.R. 1116. In the same way as in that case, I propose to refer to the submissions raised on behalf of the defendant in this case compendiously as the "ex turpi causa defence." In my view the relevant principles can then be summarised as follows:

(1) The ex turpi causa defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts; see (2)(iii) below.

The problem is not only to apply this principle, but also to respect its limits, in relation to the facts of particular cases in the light of the authorities.

(2) The authorities show that in a number of situations the ex turpi ~~causa~~ defence will prima facie succeed. The main ones are:  
(1) where the plaintiff seeks to, or is forced to, found his claim on an illegal contract or to plead its illegality in order to support his claim: see e.g. *Bowmakers Ltd. v. Barnet Instruments Ltd.* (1945) K.B. 65,71. For that purpose it makes no difference whether the illegality is raised in the plaintiff's claim or by way of reply to a ground of defence: *Taylor v. Chester* (1869) L.R. 4 Q.B. 309, as there

cites. Other illustrations are *Gascoigne v. Gascoigne* (1918) 1 K.B. 223 and *in re Emery's Investments Trusts* (1959) Ch. 410, approved by the Court of Appeal in *Tinker v. Tinker* (1970) p. 136.

(ii) Where the grant of relief to the plaintiff would enable him to benefit from his criminal conduct see e.g. *Cleaver v. Mutual Reserve Fund Life Association* (1892) 1 Q.B. 147, 156, per Fry L.J. In the *Estate of Crippen* (1911) P. 108; *Beresford v. Royal Insurance Co.Ltd.* (1938) A.C. 586 and *Geismar v. Sun Alliance and London Insurance Ltd.* (1978) Q.B. 383, to which I refer again later on.

(iii) Where, even though neither (i) nor (ii) is applicable to the plaintiff's claim, the situation is nevertheless residually covered by the general principle summaries in (1) above. This is most recently illustrated by the judgment of Hutchison J. in *Tackwell v. Barclays Bank Plc.* (1986) 1 All E.R. 676, in particular at pp.687, 689, as approved by this Court in *Saunders v. Edwards* (1987) 1 W.L.R. 1116, 1127 and 1134, and in particular per Nicholls L.J., at p.1132.

(3) However, the *ex turpi causa* defence must be approached pragmatically and with caution, depending on the circumstances: see e.g. per Bingham L.J. in *Saunders v. Edwards*, at p. 1134. This applies in particular to cases which at first sight appear to fall within (2)(i) or (ii) above. Thus: (a) situations covered by (2)(i) above must be distinguished from others where the plaintiff's claim is not founded on any illegal act, but where some reprehensible conduct on his part is

disclosed in the course of the proceedings, whether by the plaintiff himself or otherwise: see e.g. *Pye Ltd. v. B.G. Transport Service Ltd.* (1966) 2 Lloyd's Rep.300 (to which I refer again later); *St. John Shipping Corporation v. Joseph Rank Ltd.* (1957) 1 Q.B. 267; *Belvoir Finance Co.Ltd. v. Stapleton* (1971) 1 Q.B. 210 and *Saunders v. Edwards* (1987) 1 W.L.R.1116. In such cases the *ex turpi causa* defence will not succeed. Nor will it succeed where the defendant's conduct in participating in an illegal contract on which the plaintiff sues is so reprehensible in comparison with that of the plaintiff that it would be wrong to allow the defendant to rely on it: see e.g. *Shelly v. Paddock* (1979) Q.B. 120. But where both parties are equally privy to the illegality the plaintiff's claim will fail, whether raised in contract or tort, *for potior est condicio defendentis*. *Ashmore, Benson, Pease & Co.Ltd. v A.G. Dawson Ltd.* (1973) 1 W.L.R. 828 is an illustration of such a situation. And an action on a contract whose terms are falsely recorded in documents intended to conceal the true agreement between the parties may be defeated by the *ex turpi causa* defence: see *E.G. Alexander v. Rayson* (1936) 1 K.B. 169.

(b) In situations covered by (2)(i) and (ii) above the *ex turpi causa* defence will also fail if the plaintiff's claim is for the delivery up of his goods, for damages for their wrongful conversion, and if he is able to assert a proprietary or possessory title to them even if this is derived from an illegal contract: see e.g. *Downmakers Ltd. v. Barnet Instruments Ltd.* (1945) K.B. 65, *Belvoir Finance Co.Ltd. v. Stapleton* (1971) 1 Q.B. 210 and *Singh v. Ali* (1960) A.C. 167.

Having addressed these principles I now wish to deal next with pardons, and the power to grant them.

PARDONS:

The power to grant pardons is an indispensable adjunct to any system of justice. Provisions for pardons date back to the earliest legal codes, and today play a vital role particularly when there have been miscarriages of justice in our courts.

The purpose in providing for a power of pardon is obvious - it is to confer a power to forgive. ".....the very essence of a pardon is forgiveness or remission of penalty...." See Murphy v. Ford 390 Fed. S.pg.1372 at pg.1375 where extract Page v. Weston 140 Fla 536 is cited. See also Coke's Institutes - Third Part CAP.CV.OF PARDONS.

"A pardon is a work of mercy, whereby the king either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right title debt or duty....."

Without attempting to be definitive about the possible circumstances in which a pre-charge or pre-trial pardon might be appropriate, the following situations come to mind.

- (a) In any situation where the litigation of the issues connected with the conduct or charge could have prejudicial consequences to society which would outweigh the interest in pursuing a charge or trial. Nixon's case (although likened to an insurrection) was simply an example of such a situation.

It may be forcefully argued that its use in Murphy v. Ford was stretched and dubious, but the underlying rationale was

correct; namely there may be circumstances where the public interest will be better served by pardon being granted.

- (b) The prospect of a trial is capable of giving rise to great anxiety to an accused. Situations can arise where risk or injury to health, and extreme mental pressure can outweigh the interest in pursuing such a person to trial. This could be particularly where the individual concerned may have had a distinguished career and contributed much to public life, and little is to be served by an attempt at conviction. In such circumstances a nolle prosequi could be considered insufficient and a pardon the appropriate method to grant relief.
- (c) The prospect of a charge or trial of an ambassador could give rise to such embarrassing diplomatic consequences that the question of a trial should be unequivocally avoided, and the need for a claim of immunity be avoided.
- (d) A prospective holder of a public office may have committed an offence many years ago (as a young man) but it had not come to light before and he had never been charged. Balancing of the respective interests could well lead to the grant of a pardon.

True, there is nothing classic or definitive about its use in times of insurrection. It may or may not be appropriate to use it but once used it would overwhelmingly

indicate that its purpose was to put an end to the insurrection.

I think I have set out enough of the relevant principles of law, so that I can now turn comfortably to wrestle with submissions on this appeal.

Now to return to Mr. Newman's main submission and at this stage I propose to paraphrase it and hope that in so doing I do not in any way detract from the force and intellectual zeal with which it was pressed. Mr. Newman it would be recalled had submitted that the Respondents had by their conduct of making demands backed by unlawful and terrifying threats had made a free and voluntary act impossible. The threats were in fact directed at the President with a view to securing a pardon: therefore he was compelled or coerced in exercising a power of pardon under section 87(1). In other words it was NOT his action.

The first observation I wish to make is that section 87(1) of the Constitution, covers all offences known to the Criminal Law in respect of which the President can grant a pardon.

The second comment I wish to make is that the section does not set out any conditions or give any set of circumstances (except that if the pardon is to be conditional the conditions must be lawful) in which the President can exercise the power.

Now, Mr. Newman's main submission is erected on two pillars:

- (a) That the law does not countenance or sanction illegal or immoral conduct of any person who has received a benefit thereby, and

- (b) that the demands made by the Respondents were backed by unlawful conduct (my emphasis). Again and again Mr. Newman stressed this unlawful conduct point throughout this appeal.

There is no dispute that when the Respondents sought to overthrow the duly elected Government, it was for political reasons, misguided as they were. Whether it turned out to be a hostage situation or not to my mind is immaterial.

I must confess that I have had great difficulty in following the logic of Mr. Newman's submissions.

In insurrection, or hostage taking situations there is NO lawful conduct. From the very inception of the insurrection and all conduct thereafter by the insurrectionists or hostage takers can ONLY be unlawful.

Does Mr. Newman mean therefore that the pardon from the President has to be unsolicited? And that if the initiative or demand comes from the insurrectionists or hostage takers it becomes tainted and therefore cannot be a proper exercise of the President's discretion? Does it mean further that if from these negotiations the President decides to grant a pardon, which would put down the insurrection, save lives and restore peace to the State, that this would be an improper exercise of the President's discretion under section 87(1)?

Why should this limit be put on the President's power?

If Mr. Newman is correct, then it would clearly mean that in any insurrection or hostage taking situation, there will be no

scope or room for the exercise of the President's discretion under section 87(1) once, the initiative came from the insurrectionists or hostage takers, and culminated in a pardon, it would be invalid, as it would have been unlawfully backed.

This in my view is untenable, and I accordingly reject Mr. Newman's submissions.

In my opinion there can be a proper exercise of a Presidential pardon even though the demands are backed by unlawful or illegal conduct which may or may not result in coercion.

In each case, the court will have to determine this - in the same way it is now charged in this appeal to discover whether there was coercion.

The other pillar on which his main submission stands is the law will not condone unlawful, illegal or immoral action of any person, especially if he has received a benefit thereby.

In my respectful view, there is a serious flaw in this submission as well, and this comes in the shape and form of section 87(1), namely the power of the President to grant a pardon in his own discretion.

It seems to me that the power granted by the law and the Supreme Law at that, does precisely that. Whether we like it or not, -and to put it bluntly the President does have the right to grant pardons to any person who has committed crimes (trivial or heinous) in whatever circumstances and whether the criminal has benefitted or not..

Now, the instant case provides, a good example of how difficult a task the Court has, in determining whether the President was acting under coercion, or under extreme pressure,--in which his real motive and purpose was to put down the insurrection, save the lives of a generation of politicians and hostages and restore peace and tranquillity to the island. What criteria should the Court apply to distinguish one from the other? The answer in my view is not simple.

One would have to look at all the circumstances of ~~the~~ case. No one factor is conclusive.

I think it would be a mistake, however, for the Courts to approach this matter of a pardon in a pedantic way, and in the narrow circumstances established by cases in private law like Barton v. Arastrong (supra). It may very well be, that the kind of illegitimate pressure discountenanced by the Court in private law, may well have to be looked at differently when it comes to consider the propriety of the exercise of a constitutional power such as section 87(1) of the Constitution. Involved here are wider issues, which transcend far beyond the boundaries of two citizens involved in some private transaction. Here the interest of the State and the lives of its citizens are involved and this is of paramount importance to the President when he comes to consider how he is to act.

The Court must NOT impose any fetter or gratuitously foist restrictions on the plenitude of powers, conferred upon the President by section 87(1). In plain and simple language this section really makes the President a law unto himself and gives him a free hand to act as he sees fit, and whatever the circumstances.

Now before dealing with the evidence in order to determine whether there was coercion or not, I just wish to refer briefly to the other important submission of Mr. Newman which was to the effect the words "as required of me" as they appeared in the pardon document, showed and clearly demonstrated that the discretion the President was purporting to exercise was in pursuance of the agreement reached by the respondents and the members of Parliament, which were clearly void as it was obtained by duress, while they were bound hand and feet.

I agree with Mr. Robertson, that this is really not a new argument, but really the same as the duress-coercion in another form, and it must therefore suffer the same fate as that argument. I mean the reason why he signed the document, is very clearly set out in his affidavit.

I now wish to go into the evidence, particularly that of the President but before doing so there are just three observations I wish to make.

The evidence in this case was by way of sworn affidavits. None of the deponents were cross-examined, as a result of which the trial judge would have been under some disability in determining the credibility of the parties and the witnesses. This being so, the trial judge was entitled to draw his own inferences, and find primary facts. This however does not preclude this court from making its own findings since, the conclusions of the trial judge were based on the printed evidence, and this court is in just as good a position of the trial judge to conduct this exercise.

The second observation I wish to make is that, there is the presumption of regularity. That is, that the act of the President was properly and regularly exercised. The onus would therefore be on the appellants to show that this was not so, and further since

they have alleged coercion the onus was on them to prove this on a balance of probabilities, of course the more serious the allegations, the higher the degree of evidence, the Court will require to satisfy itself on the balance of probabilities.

The final observation, is that the trial judge himself conducted no detailed analysis of the evidence, but it is clear from his judgment, that he inferentially held there was no evidence of coercion, and further that the pressure experienced by the President was such as that which was to be expected in a case of this kind. Of course, the findings and the conclusions of the trial judge are entitled to the utmost respect, and we would hesitate long before we depart from any of his findings as I have already said. There have been instances, however, where he made findings for which there was no basis, but these in my view do not impinge on any of the material issues in this appeal.

The affidavit of the President, is very crucial to this appeal and I therefore resist all temptation to paraphrase it.

Indeed what I intend to do is after making some preliminary observations, is to set out bodily those paragraphs of his affidavit that are relevant, as they so graphically and movingly tell the story of the events as they unfolded, after the respondents had failed miserably to overthrow the Government.

The President, is neither a military nor a legal man and thus depended and relied on the advice of the military and the lawyers who were present at the time. He was also advised by members of Parliament, including Cabinet Ministers.

It was clear, that no sooner had the Respondents sought to overthrow the Government when it was realised that they had failed.

Upon realising this the Respondents sought by negotiations through Canon Knolly Clarke to obtain certain political changes including an amnesty for themselves and intended to hold as hostages the members of parliament to secure these objectives.

The story is picked up at paragraph 7 of the President's affidavit.

"7. The accommodation we occupied at Camp Ogden (which had become Headquarters) was cramped and basic. By midnight the people there, apart from myself and families, included the police, the army, parliamentarians, lawyers and other civilians who provided support services. The accommodation did not facilitate segregation into groups but in general various persons performed separate functions. There were frequent discussions, sometimes in what could loosely be called meetings, (generally in the mess room) but there were frequent "comings and goings", reports, the filtering of rumours through the camp and exchanges. The atmosphere was suffused with the tension and shock generated by a crisis unprecedented in the country. We were all deeply concerned over a situation in which the Prime Minister, Cabinet Ministers, Parliamentarians, and other civilians were being held hostage by armed terrorists. Further, despite the assessment which had been made, there inevitably remained an air of uncertainty and grave anxiety for the lives of all the hostages both at the Red House and the Trinidad and Tobago Television Building. Sometimes the sound of bullets rang out in the vicinity of the Camp. People would dive for the ground. I later learned that the discharges heard were those of the soldiers

testing weapons before proceeding on operations but they served to heighten the atmosphere of threat and uncertainty.

8. I met with Colonel Brown, Ministers Pantin and Myers (as well as certain senior members of the Defence Force) shortly after their return from making their broadcast. As I have stated, I had already heard of the request for Canon Clarke to act as negotiator or intermediary.

9. It was agreed that there were two options available, either to talk with the terrorists, or immediately launch an assault on both Television House and the Red House. As a result of the discussions, I was (at that stage) entirely against the use of military force as a solution because there was no guarantee that the lives of all or any of the hostages could be saved. I was advised by Colonel Ralph Brown that few, if any of the hostages would survive such military action, I made it clear that in the circumstances I could not support or condone any military solution at this stage because the safety of the hostages at the Red House and Trinidad and Tobago Television could not be guaranteed. It was in my view best to see what talking would yield. The terrorists could go no where. I do not recollect any view to the contrary being expressed. Canon Clarke had (by this time) been contacted and he was being brought to Camp Ogden.

10. I was advised that Canon Knolly Clarke arrived at Camp Ogden shortly after midnight. I did not speak with him immediately upon his arrival. I spoke with him sometime before he left to go to the Red House to meet with the terrorists on the

morning of Saturday 28th July, 1990. I cannot be sure but I believe Ministers Pantin and Myers were present. Also present was Minister Herbert Atwell who had come up to Camp Ogden sometime during the night of Friday 27th July, 1990. The conversation took place in the officers' mess. I had already been advised that Canon Clarke had been in communication with the terrorists at the Red House, prior to our discussion. He indicated, as I recollect, that the then Prime Minister, A.N.R. Robinson, Minister Selwyn Richardson and Parliamentary Secretary, Lec des Vignes had been shot and the captors were making certain demands. He outlined the demands which included the resignation of the Prime Minister, the appointment of Mr. Dookeran (then a hostage) as Prime Minister and the granting of an amnesty. He also stated that the captors had requested a light stretcher for Mr. des Vignes who needed medical treatment.

11. After some discussion, Canon Clarke was requested to go to the Red House and speak with the terrorists in order to obtain more details of the demands being made, including the demand for an amnesty. I was also relying upon him to bring me an eye witness account of the situation in the Red House.

Our military experts had advised from Friday night that they had contained the situation and that it was confined to Port of Spain. It was necessary to find out what the terrorists wanted so that responses could be worked out. I know that later Colonel Brown made contact with an international expert on hostage situations. However, Colonel Brown had, I believe, himself being tutored in such situations. The fact that this was a situation

in which persons had been taken hostage dictated our approach, and our responses to the terrorists throughout the crisis. Canon Clarke left for the Red House between 6 a.m. or 7.00 a.m. on Saturday 28th July, 1990. He subsequently returned to Camp Ogden sometime between 8.00 a.m. and 9.00 a.m. the same day. I saw him before I left for Cumberland Hill at about 9.00 a.m. to declare a State of Emergency.

Canon Clarke gave us the first full eye-witness account of the situation inside the Red House. I did not see Minister Dookeran who I was advised had been released and was brought to the Camp with Canon Clarke. Canon Clarke stated that Mr. des Vignes had been released and had been taken to the Port of Spain General Hospital, and that he had obtained the release of other persons who were being held in the Chamber and were not Parliamentarians.

Canon Clarke and Minister Dookeran had brought with them three documents:-

- (1) A letter signed by the Prime Minister purporting to be a letter of resignation. I recognised the signature of the Prime Minister but did not recognise the writing in the body of the letter.
- (2) A document signed by members of Parliament who were being held as hostages in the Red House purporting to give their support to Mr. Dookeran's appointment as Prime Minister.
- (3) A document headed - "Major Points of Agreement".

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They were all hand-written originals. There are now produced and shown to me hereto annexed in a bundle and marked "JEC 2", true copies of the said documents. From the account given by Canon Clarke we were able to ascertain that there were sixteen (16) parliamentarians in the Red House. From Canon Clarke's account and from our own knowledge we were able to identify these persons.

13. Canon Clarke described the situation at the Red House as "volatile". He spoke of threats being made to commit further acts of violence to the hostages. He described the captors as young boys with big guns who were "jumpy". The Prime Minister had been shot and wounded and was bound and tied. All the hostages were bound and were being made to lie face down on the floor covered with fragments of broken glass. The Prime Minister said Kelvin Ramnath needed medication. The details portrayed a very horrifying picture and Canon Clarke was visibly shaken and frightened by what he had seen and heard. The documents, it was said, constituted an "agreement" which the hostages and their captors had concluded. Further violence to the hostages was threatened if these points were not met by that evening. I draw particular attention to the terms of the document headed "Major Points of Agreement", and Point 5 in particular.

14. With respect to the letter signed by the 16 Members of Parliament purporting to support the appointment of Mr. Dookeran as Prime Minister, I observed that the 16 Members of Parliament did not constitute the majority required for the appointment of a Prime Minister in accordance with the provisions of the Constitution. On that ground alone I could not appoint Mr. Dookeran as Prime Minister as required under the "Major Points of Agreement".

I was also very concerned about the circumstances in which these documents had been signed. I was certainly not prepared to accept the resignation letter of the Prime Minister as a valid document (bearing in mind that he had been shot, bound and tied) unless I was advised in writing by the Attorney General that I could do so. I remember that what did strike me at the time of the report from Canon Clarke and in particular in relation to the request for Mr. Dookeran to be appointed Prime Minister, was that whereas the Muslimoon had originally claimed to have overthrown the government, they were now in effect admitting they had failed to do so. They were now attempting to achieve their aims by demanding changes in the government as well as attempting to save themselves, by making threats against the hostages. There was no doubt that they were intending to put pressure on all of us in charge at Camp Ogden. The pressure on me was, I can say, intense, but I knew some sort of response to them was required. As will appear later, consideration of the nature and form of response was undertaken by the Parliamentarians and lawyers. I relied upon the lawyers present to advise me as to the effect of any action I was to take. I was made to understand from the military command that in this sort of situation as long as communication was maintained and negotiations continued, the chance of injury to the hostages was reduced, and the more likely there would be an end of the hostage crisis without further injury. This strategy was fundamental to every action taken throughout the crisis.

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16. I was advised that Canon Clarke returned to the Red House at about midday, taking with him medication for the Prime Minister and Kelvin Ramnath, Member of Parliament. At sometime in the course of Saturday (after Canon Clarke returned from the Red House with the documents at JEC 2) I received a letter addressed to me written by the then Minister of Justice and National Security, Selwyn Richardson, and a letter signed by Parliamentarians requesting that there be no foreign intervention. There is now produced and shown to me hereto annexed and marked JEC 4 true copies of the said letters. As far as I was aware, there were no plans for foreign intervention then or later.

In the course of the afternoon I was engaged with an army officer in drawing up a floor plan of the interior of the Red House. Although I had not been prepared to agree to a military solution on the Friday night and Saturday morning, I accepted that the security forces had to prepare themselves to make an assault if it became necessary. Canon Clarke had been able to give an account of the positions taken up in the Red House and of the numbers involved. I had spent much of my working life in the Red House and knew its layout intimately. There was still uncertainty, regarding the situation. Many rumours were flying about, for example, I heard that Minister Joseph Toney was said to be dead.

17. I did not know during the course of the day what the lawyers and Parliamentarians had decided to do about the demands contained in the "Major Points of Agreement". Sometime after 4 p.m. I was shown a typed draft of a document by Senior Counsel Martin Daly. I had not requested

any one to prepare such a document, but I was informed that the Parliamentarians had agreed that this should be done during their discussions on the "Major Points of Agreement" when I was engaged on other urgent business. Martin Daly and I were alone. I read the draft. He referred me to a passage to the effect that "this amnesty is granted for the purpose of avoiding physical injury....." He stated that the draft had been prepared so that it could be sent in for consideration by the terrorists. I showed him the letter which I had received from Minister Selwyn Richardson advising that an unconditional pardon under section 87 of the Constitution should be granted. He read it. He advised me to ignore the letter. He emphasised that the draft which had been prepared did not involve me acting under section 87 of the Constitution. He stated that the draft should go in as drafted without any reference to any section of the Constitution, and the terrorists could then consider what changes they wanted to make. He advised me that the document was not a pardon and had been prepared only with reference to the "Major Points of Agreement". He assured me that the document in itself could not be construed as a final document and that it was not the grant of a pardon under section 87.

18. Point 5 of the "Major Points of Agreement" was very much in my mind. So long as Mr. Dookeran had not been appointed Prime Minister Point 5 could not be complied with since it contemplated a request of me by Mr. Dookeran in his capacity as Prime Minister. I considered that no use should be made of the document until Mr. Dookeran, if he were appointed Prime Minister, requested it. I knew that I was not prepared to sign any instrument appointing Mr. Dookeran Prime Minister unless I

had received the written advice of the Attorney General that I could accept the letter purporting to be the resignation of the Prime Minister.

19. Shortly after these exchanges with Martin Daly, discussions took place about what Canon Clarke should take with him to the Red House. I indicated that I was not willing to sign any amnesty or pardon, nor was I willing to sign a copy of the draft document shown to me by Mr. Daly for Canon Clarke to take to the Red House. I did not consider that Canon Clarke should take an unsigned copy. I was reluctant to allow any document to be taken. Canon Clarke then pleaded to be allowed to take something. He expressed grave fear for his life and the lives of the hostages if he had to return "empty handed". There was great concern because he was returning alone and of course the terrorists expected Mr. Dookeran to return with him, having been appointed Prime Minister. He pleaded to be able to return with a carbon copy of the draft which I had been shown by Martin Daly, and I agreed that he could show it to the terrorists for consideration by them. A carbon copy was made available to Canon Clarke. I remember not so much what he said but his gesticulation at this time. He was in a state of great agitation. He had already reported to us about the tension and state of threat within the Red House and I am sure his fears for his own life and that of the hostages were genuine. He was the principal first hand witness of the situation at the Red House. I had to rely upon his assessment of the danger. His report was that the situation in the Red House was volatile and there were a number of young men with big guns who were jumpy and becoming impatient and had threatened the lives of the hostages and that he feared gravely

for his life and the lives of the hostages. Someone exclaimed "before they choke put something on it". It was in these circumstances it was agreed that I should initial the carbon copy of the document. I remember specifically saying to Canon Clarke that I would sign the original and I did and showed it to him. I said to him that I was not releasing the original. But for the pleas of Canon Clarke for the safety of his own life and those of the hostages, I would not have initialled the carbon copy which he took with him to the Red House or signed the original. Indeed, as I have stated, although I was advised that the document could have no legal effect I was still reluctant to permit any document to be taken to the Red House. However, the important considerations were to keep open communications which would gain time and the fact that without the initialled document Canon Clarke had convinced me there would be a real and imminent risk to his life and those of the hostages. There is now produced and shown to me marked exhibit JEC 5, copies of the initialled document and the signed original.

20. I made it abundantly clear to Canon Clarke that I was holding the original of the document which bore my full signature and was not releasing it. I had no intention of releasing it unless and until Mr. Dockeran was appointed Prime Minister and requested me in writing to release it. This was I considered fully in accordance with Point 5 of the "Major Points of Agreement" and with what the terrorists had demanded. I did not contemplate that the document would be construed by the terrorists as the grant of the "amnesty" demanded by them. Mr. Dockeran had not been appointed

Prime Minister. For reasons which will become apparent later from this affidavit, I do not believe they were convinced that I had granted the "amnesty" they had requested or any "amnesty" or pardon. I have been informed that the document had been prepared as a draft for their consideration. My signature to the original could be taken as an indication of my firm intention to consider their demands, but my declared retention of it, in my own mind, confirmed the draft character of the document, rather similar to a document held in escrow. I have already stated that I had seen and signed many instruments of pardon. If the time had come to grant or the decision had arisen for a grant of a pardon or pardons I had it clearly in my mind that individual instruments would have been prepared and would necessarily have had to be prepared for my signature, but I had no intention of signing any pardon unless requested to do so by Mr. Dookeran acting in his capacity as Prime Minister. Those pardons, bearing the identities of individuals to whom they would be granted and the specific offences to be covered would depend upon the final form of the document which was then being put forward for consideration, and upon a report made of me to grant pardons by Mr. Dookeran in his capacity as Prime Minister. As to the demand for Mr. Dookeran to be appointed Prime Minister, I considered it was for the Parliamentarians at Camp Ogden to decide how they wished to respond. For my part I made it plain to them that I would not sign an instrument appointing Mr. Dookeran Prime Minister unless I had the written advice of the Attorney General that I could act upon the "resignation" letter of the Prime Minister as a valid document notwithstanding the circumstances in which it had been

signed. Against the event that Mr. Dookeran might be appointed Prime Minister, a probable outcome if only because it had been sought and I might as a result find that I would at some time be required to make it, I instructed Mrs. Phillips, Secretary to the President to prepare for my signature an instrument of appointment of Mr. Dookeran as Prime Minister. I was always mindful of the urgency in handling matters throughout the hostage crisis and I acted so as to be in a state of preparedness. I showed that unsigned instrument to Ministers Atwell, Dookeran and Smart and advised them that I would only sign it if the Attorney General advised me in writing (as stated above) that I could act upon the purported letter of resignation from the Prime Minister. I was never advised in writing and therefore I never signed it.

For the avoidance of doubt I should emphasise that at no time did I act in accordance with or upon the advice tendered to me in the letter from Mr. Selwyn Richardson. Because of the circumstances I knew to be prevailing at the Red House I was not prepared to accept it or the letter of resignation of the Prime Minister as valid. I initialled the carbon copy to keep discussions going and to preserve lives."

Now, this is the affidavit upon which the State relied to establish coercion.

Coercion may be established expressly or impliedly - that is to say directly or inferentially or circumstantially.

Now, if the evidence of coercion was so overwhelming and cogent, as was generally perceived then there is no reason really, why the affidavit which purported to establish it was so tentative and ambivalent on this specific issue.

I wish here to refer to the case of Barton v. Armstrong (supra) but only for the limited purpose of showing how this might have been done especially in circumstances, which were universally thought to be abnormally clear. This is what Lord Wilberforce had to say at p.112 "Assuming therefore that what has to be decided is whether the illegitimate means used was a reason why the complainant acted as he did, it follows that his reason for acting must (unless the case is one of automatism which this is not) be a conscious reason so that the complainant can give evidence of it: 'I acted because I was forced.' If his evidence is honest and accepted, that will normally conclude the issue. If, moreover, he gives evidence, it is necessary for the court to evaluate his evidence by testing it against his credibility and his actions."

Now for whatever reason, this kind of direct evidence was not forthcoming. We are now required to carry out a forensic exercise in order to determine whether coercion was inferentially established.

The very first point which is worth noting is that at all times throughout the insurrection, the President was kept abreast and apprised of all the circumstances. The military filled him in about the strategy of the security forces, and Canon Clarke had given him a graphic account of the tense and horrendous situation at the Red House. Indeed, he was well informed at all times on all important matters.

It is also clear that, the President was reluctant and unwilling to sign any pardon and was only prepared to do so in certain circumstances.

In the end, however, he changed his mind and initialled the document prepared by Mr. Daly. The reasons for so doing, are set out in his affidavit where he swore "But for the pleas of Canon Clarke for the safety of his own life and those of the hostages, I would not have initialled the carbon copy which he took with him to the Red House or signed the original. Indeed, as I have stated, although I was advised that the document had no legal effect, I was still reluctant to permit any document to be taken to the Red House. However, the important considerations were to keep open communications which would gain time, and the fact that without the initialled document Canon Clarke had convinced me there would be a real and imminent risk to his life and those of the hostages."

What is interesting in all this however, is that from the affidavit of the President it is clear that he thought that he was in fact signing a document to open discussions with the respondents and not a pardon,-and he was of this impression throughout the whole insurrection. This was the state of his mind. He was further told, that it would not amount to a valid pardon because of the insertion of the words "as required of me", and also because there was nothing to indicate it was done pursuant to section 87(1) of the Constitution and in any event it was not intended to be a final document.

Indeed this is amplified and confirmed in paragraph 9 of the affidavit of Lincoln Myers where he said:

"The lawyers said they could put together a document which might satisfy the Muslimeen but would not be an amnesty. No amnesty was to be

granted. A document was to be drafted with a form of words which the Muslims could consider and discuss among themselves. The document would not be a final document but a discussion document. It was stated by the lawyers that by reason of duress no document could have any validity in any event. Such a document would enable us to buy time and might secure the release of the hostages both from the Red House and Television House. I was in agreement with such a course of conduct because it might save lives and there was an urgent pressing need for us to respond in some way."

What is also abnormally clear is that when the President signed the document although he was advised it was an invalid document, he thought at least it would save the lives of the hostages - and that was important to him. Indeed, as events turned out it did.

The fact that he was mistaken, and it turned out to be a valid pardon, is immaterial. There is no scope or room for mistaken intention, belief or mens-rea in this area of the law. As Mr. Newman himself conceded, if this was what the President thought and it turned out to be a valid and good pardon, that was just too bad. It stood, -with all the force of the law behind it.

If then, this was so, where is there evidence of the deflection of the will of the President by coercion?

The situation speaks for itself, and in my judgment there is not a tittle of evidence to show that coactus volui applied.

I mean one only has to read the President's affidavit to see there was no deflection of the will.

But in my respectful opinion as a matter of law there could be no illegitimate pressure or deflection of the will, as formulated and propounded by Mr. Newman in his submission. I am

of this view, because the deflection of the will only comes into play when both parties are so to speak ad idem i.e. of the same mind, or on the same wave length (as it were) with respect to the same transaction but because of the illegitimate pressure the will is deflected.

In the instant case, the parties were at cross purposes. Their focus and attention were on different transactions. Their objectives were fundamentally different. The Respondents were of the view that they were receiving a proper and valid pardon. The President (whose state of mind at the time is critical to this issue) believed that the document he had initialled was certainly not a valid pardon - and was so advised.

It is because of this he went along "freely" (I use this word advisedly) with the documents.

I have no doubt that the President had his strategy and an agenda of his own. His main objective was to save the lives of the hostages, quell the insurrection, and restore peace.

I wish to highlight a few instances from the President's affidavit to show how he went about this. He was always resilient, and acting very much in accordance with changing circumstances.

For example in paragraph 9 he says "As a result of the discussions I was (at that stage) entirely against the use of military force as a solution because there was no guarantee that the lives of all or any of the hostages could be saved."

And again "I made it clear that in the circumstances, I could not support or condone any military solution at this stage.... It was in my view best to see what talking would yield."

And in paragraph 16 "Although I had not been prepared to agree to military solution on the Friday night and Saturday morning I accepted that the security forces had to prepare themselves to make an assault if it became necessary."

In dealing with the state of his mind at the time he swore "They were now attempting to achieve their aims by demanding changes in the government as well as attempting to save themselves, by making threats against the hostages. There was no doubt that they were intending to put pressure on all of us in charge at Camp Ogden. The pressure on me was, I can say, was intense, but I knew some sort of response to them was required."

Now here was the Supreme Commander of the security forces clearly in charge and on top of the situation in making considered and well reasoned decisions. True enough the pressure was intense as he said - but acting coolly under fire nevertheless as one would expect an elder statesman, at least so it appears from his affidavit.

The strategy adopted to save the lives of the hostages was decisive and clear - sign the document and induce the Respondents to believe that it was a pardon and at the same time keep discussions going.

As it turned out the strategy worked - for it saved the lives of all hostages. A blood-bath was avoided. Unfortunately, however, the pardon was not void as he was advised. It was valid and proper. That part of the strategy had calamitously miscarried.

In my judgment then, in these circumstances it would be very difficult and the appellants would certainly be hard pressed to submit, that the act and discretion of the President was not his because the strategy -one in which albeit he reluctantly participated had failed. In my opinion this would be contrary to legal as well as non legal principles. In other words the State cannot now disavow this act, after having received advice upon which the President relied, and acted and upon which the other parties acted as well. This approach would lead to absurd and unjust results in law. Documents ostensibly, sacredly and honourably signed would be jettisoned at the whim and fancy of the signatory on the flimsiest grounds. I mean just think if after a head of state had signed an international treaty or a declaration of peace now sought to disavow it on this basis and claimed either he was mistakenly or erroneously advised and therefore his act and deed was void. This would clearly be outrageous.

It is not to the point in my opinion that the President acted thus, because he was put in that invidious and unenviable position by reason of the insurrection, or the conduct of the insurrectionists, otherwise, it would mean he would never be able to act under section 87(1) of the Constitution in circumstances like these. Of course, this is a proposition which I reject entirely. I venture at this point to suggest that even in a situation, where there is evidence of attempts to coerce the President that it might still be juridically possible for him to exercise properly and legitimately his constitutional power, if in his opinion or considered judgment the granting of a pardon will quell an insurrection and restore peace and tranquillity to the

indeed some may forcefully argue that this was precisely the position in this case. It is the state of his mind which is important and crucial to the proper exercise of this power, and this in my view emphasises the importance of the mental state of the President at the time the power is exercised. This in my view is confirmed by the approach suggested by Lord Wilberforce in Barton v. Armstrong (supra) in the short passage to which I earlier referred, and if at all would only be in the rarest and most exceptional circumstances in which it might be possible to establish force or coercion inferentially.

Moreover, this mode of proof in my opinion is inherently fraught with great danger given the fact, that the circumstances under which the President can constitutionally act under section 87(1) are undefined and limitless, and which would in my opinion undoubtedly include a case like the instant one. The fact, however, that it may be juridically difficult to impugn a decision of the President under section 87(1) of the Constitution on this ground coercion is no reason to exclude it jurisprudentially as a basis for challenge. Indeed perhaps the only way force or coercion may juridically be established under section 87(1) may be by direct evidence.

What has created a great deal of skepticism in my mind is, if as it is submitted in this appeal the pardon was obtained by force or coercion, why was it necessary for the State to seek to establish it inferentially, given the fact that the President was conscious and knew his state of mind at the time the pardon was granted and was certainly in a position to say so at th time his affidavit was sworn.

In my opinion this omission is critical or crucial to this issue because as I have repeatedly said throughout this appeal that there is nothing to show on the President's affidavit, that what he did was necessarily inconsistent with a proper exercise of power under section 87(1) of the Constitution.

I mean, what is there in the affidavit which tells the Court, in a way which is satisfactory enough to dislodge the presumption of regularity or to reject the prima facie evidence of the validity of the pardon.

Certainly not the fact, that the President was "under pressure" or that the hostages were being threatened with annihilation, if a pardon was not granted. Once more I say there is nothing in such a situation to prevent a President from acting properly or constitutionally, especially, if in his opinion that act would also terminate the insurrection, avoid further blood shed and restore peace and security "to the Commonwealth".

I find therefore that in his affidavit there was ample evidence, to show, that the President, though acting under extreme pressure was sensible and mature in his appreciation and consideration of the facts. At all times, he was quite selective and discriminating, weighing the advice that had been tendered and making independent decisions after due deliberations.

The affidavit, though undoubtedly drafted with great care and detail, unfortunately was obscure and reticent in dealing with aspects that were crucial to establishing coercion. In other words the evidence disclosed is quite consistent with a proper exercise

of the President's power under section 87(1) of the Constitution, and I am accordingly of the view that the State has failed to discharge the heavy onus cast on it.

Parenthetically I might add that I am fully aware that with coercion, the person who is being coerced is aware of all the circumstances. He knows what he is doing, but the law does not countenance it because of the illegitimate pressure.

Neither am I unappreciative of Mr. Newman's submission, that the coercion need not be the sole reason for entering into an agreement and that once it can be shown it was one of the reasons the court will set aside the agreement as being invalid, however, even on this narrow basis which incidentally I rejected and of which I earlier spoke about showed that the evidence disclosed in the affidavit fell woefully short of establishing coercion or a deflected will. In any event I have held as a matter of law it could not apply because the principles of law are wholly inapplicable in view of the particular facts of this case.

Having addressed all of the State's submissions on coercion I believe the time has now come for me to examine in a more critical way, the logic of its submission, that the pardon was obtained by coercion and thus ~~void~~ void.

In so doing I am afraid, that it would once more be necessary to revive and continue the debate whether coercion should be excluded as a ground for challenge in the context and circumstances of this case.

I shall therefore assume first of all that there is an insurrection but no hostages are held.

If then in these circumstances the insurrectionists demanded a pardon, would this not logically mean that what they are saying is that "if you the President do not grant us a pardon, we shall be free to continue our insurrection,--and thus kill (not hostages) but innocent people who are at large."

What then is the essential difference between the two situations, one in which hostages are held, and the other in which they are at large?

Now, in my opinion it is not to the point who initiates the discussions which culminates in a pardon in these circumstances.

If there is logic in the State's argument,--then the demands made of the President in the situation where there are no hostages are no less coercive than those where there are hostages.

Why then is the former unassailable while in the latter it is argued that the pardon was obtained by coercion?

In my view, this approach clearly constitutes a miscarriage in logical thought.

Now I know that I have come perilously close to advocating the elimination of coercion jurisprudentially as a ground for attacking the President's decision to grant a pardon under section 87(1) however, I still think that it is juridically possible as I have earlier sought to show that it can be established in very exceptional cases by direct and other evidence which is capable of satisfying a court.

Now I can perhaps see another argument, a contrary one, being spawned from what I have just said, and it is this, that once it can be shown that a pardon was obtained in unlawful circumstances the evidential burden ~~should~~ shift to those who allege its propriety. However, this would mean at once, that all pardons given in war or civil insurrection etc., would prima facie be illegal, by that fact alone, and therefore the evidential burden must shift ab initio to those insurrectionists.

This is an argument I must again repeat because of what I have said ad nauseam in this judgment, -that there is nothing inherently wrong with a President granting a pardon in the circumstances of this case. If this is accepted then, why should the evidential burden be shifted to those who allege its propriety?

If this were to be the proper and accepted approach it would lead to mischievous results. One which readily springs to mind, is that no insurrection will ever be put down, because those who rely on the pardon, would say it was worthless.

I must confess, that in the light of these excogitative arguments I feel uneasy in still maintaining that coercion should remain a ground for challenge in the context and circumstances of this case. I am painfully aware that it seems contrary to what I have said before, as to why coercion should remain a ground of attack.

There is no doubt that it can be persuasively and forcefully argued that it should be eliminated altogether as a ground as it is never likely to succeed in a case like the instant one. This presents me with a great dilemma, for obvious reasons.

It goes against the grain of any system of justice, that the Courts will seem to be countenancing barbarous and violent conduct, but then isn't that what a pardon is all about?

I hope I have put the two views fairly and objectively. I am sure they will generate lively discussion and esoteric arguments. For my part I shall still hold on to my original view.

Perhaps, in doing so, I have been guided more out of a strong feeling for law and order rather than logic. In any event it seems the civilised thing to do.

Further, I submit that by this approach the Court will be seen to show that it repudiates and condemns violence and terrorism as a means for resolving problems, -in preference to the rule of law.

For the sake of completeness I wish to point out that history is replete with instances where a timely pardon, by the executive was able to quell an insurrection or some uprising, which not only saved lives but brought peace and tranquillity to the State. Pardons given in these circumstances are justified on the basis that they are for the public welfare. It has often been said however, the most frequently granted undeserved pardons are those granted only because it is in the public interest. There is food for thought here - and I am sure compelling arguments can be raised on both sides about the pardon in this case. That however, is NOT the courts concern.

I should just like to refer to two cases the reference to the first of which was unobtainable. It was from Argentina.

Recent events in Argentina provided a severe test of the retributivist insistence that pardons "for the public good" cannot be justified on that ground alone. Military officers who had run the country for years had committed dreadful human rights violations. The new government determined to bring them to trial, faced a revolt of the armed forces who demanded that the officers be pardoned. To save itself, the government passed legislation to pardon most of the officers on the grounds that most of the soldiers facing charges for murder, torture or other human rights violation acted "under orders during a state of emergency". See Pardons by Kathleen Deen Moore published by Oxford University Press New York 1989 at p.202.

As I have already said I was not able to get the full report or the case, but from the little that was obtainable it seems to go against the grain of Mr. Newman's submission that the demand was backed by unlawful conduct. Undoubtedly in this case, the armed forces which had demanded the pardon had unlawfully backed it with threats of revolt. If Mr. Newman is correct, then it would mean that the only difference between the Argentinian case and the facts of the instant one, is that the legislature was granting the pardon, in Argentina, while in the latter the President was performing a corresponding act pursuant to the Constitution.

Now this would mean, according to Mr. Newman's logic, that the Courts in Argentina can later strike down the legislation granting the pardon by the Argentinian Parliament on the ground that it was procured by coercion. This reasoning I do not accept.

The other case is from the State of Pennsylvania and the events I am about to narrate put the doctrine of Hamilton's ideas to a practical test. In other words could a well timed pardon restore tranquillity?

In home made stills, Pennsylvania farmers distilled their grain into whiskey a profitable product far easier to cart to market than corn on the cob. In 1794 several hundreds of them violently objected to the federal revenueurs coming around and collecting a tax on their livelihood. They burned down the house of one revenueur and tarred and feathered others. With President George Washington at its head, an army marched across the mountains. The Whiskey Rebellion ended as the rebels ran off the field. Washington pardoned them all.

Washington said:

"For though I shall always think it is a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet it appears to me no less consistent with the public good that it is with my own feelings to mingle in the operation of Government every degree of moderation and tenderness which the national justice and safety may permit.  
Quoted in U.S. Presidential Clemency Board  
(1975) 356.

The President had put his finger right on two of the central problems on the theory of pardon. The Constitution charged him with carrying out the law of the land and the same Constitution gave him the right to permit some who broke the law to do so with impunity. Merciful treatment of offenders is good in itself, and yet it is often unjust and unsafe.

In my judgment the timing and signing of the document by the President was impeccable. His judgment sound.

The insurrection was quelled. Lives were saved and a blood bath avoided. Peace was restored to the "Commonwealth". Hamilton's dictum and practical advice was once more vindicated.

In view of the conclusion to which I have come on the duress point, the public policy point must inevitably fail.

UNLAWFUL CONDITIONS - SECOND ISSUE  
IMPLIED TERMS:

Mr. Newman submitted, that the language of section 87(1) was absolutely clear. The President has power to grant a pardon either unconditionally or subject to lawful conditions, -further such a power could only be exercised in respect of offences that "may have been committed". Grammatically speaking - the tense was clear.

Further, if there were to be a conditional pardon, the conditions had to be lawful. There was no power in the President to grant a licence to anybody to commit criminal offences. In other words the President had no power under section 87(1) to pardon someone in respect of offences which he had not yet committed.

Mr. Newman suggested that the pardon could be looked at in several ways. Firstly, either the pardon purported by its terms to pardon the Respondents for their conduct between the 28th July and whenever they stopped, in this case it was the 1st of August. If it was so construed then it was an unlawful pardon - for the reasons he had already advanced, namely it purported to pardon offences not yet committed.

Another way of looking at the pardon was to say, it was a valid pardon in respect of offences up to 28th July but invalid for anything done thereafter.

There was a third way he submitted in which it could be viewed and that was one in which the pardon, in order to be saved from being an invalid one, could be saved by an implication of law namely that upon its delivery the Respondents cease forthwith to commit criminal offences.

Mr. Thorne who appeared for the D.P.P. in this court, joined Mr. Newman on this submission. He too contended that the President purported to pardon future offences - and it followed as a matter of law that the pardon was void ab inito. It was immaterial whether further offences were committed or not. The President certainly had no power to do so.

Mr. Robertson's submission:

Mr. Robertson in attacking the submissions of Mr. Newman contended that they were unsustainable, because they were premised on a basic mistake of law.

Mr. Newman's submissions "that a pardon came into force, one when it was granted by the act of the President and two when it was delivered to the beneficiary": "It came into force, when the exercise of the power takes place".

That, Mr. Robertson said was quite correct when one was dealing with an unconditional pardon, but manifestly wrong when one was dealing with a conditional pardon.

What then was the position in respect of the conditional pardon? He submitted, the answer to this question was that the power was exercised when the pardon was granted on the condition, and in this particular case when the document was signed. The

words "hereby grant" indicating the exercise of the power under 87(1).

The act of oblivion, the wiping out of the slate took place only when the condition was fulfilled.

In expanding and developing this argument he submitted that the pardon delivered was a solemn promise to forgive the acts committed in the course of the insurrection, at a future point in time if and when and only if the members of Parliament (not those at TTT) were released.

And so his argument ran the promise of forgiveness was made and put into suspense and came into operation at a future time if it came into operation at all.

The condition to return the members was a serious one, and in order to fulfil it to obtain mercy, if a "drop of blood" was spilt, they would not be entitled to the pardon.

The condition to save lives was a lawful one, and it was highly immaterial whether in doing so they laid down arms or not. Indeed, if the President wanted to make this a condition, or for that matter that the members had to be handed over forthwith, that could easily have been inserted in the pardon.

In sum there was no condition as to time, or stopping the insurrection, throwing guns away, or to stop talking or asking for further political changes. In other words there was nothing to prevent them from doing any of these things.

In dealing with Mr. Newman's submissions on future offences, Mr. Robertson contended that first of all there were no new offences committed after the delivery of the pardon - if anything at all they were continuing offences.

In any event he invited us to consider what the position would be in the event the court held the insurrection had continued. One had to look at the pardon, and if the offence charged was an act of insurrection committed between 5.30 p.m. on Friday the 27th July and the safe return of the members of Parliament then it was encompassed by the pardon, he submitted.

I agree with Mr. Robertson that this was a conditional pardon, which became effective when the members of Parliament were released, and the Respondents had surrendered.

There is an inherent and obvious flaw in the argument of Messrs. Newman, and Thorne that the pardon purported to pardon future offences and was therefore invalid.

Indeed, if they are correct in their submissions, it would mean that all conditional pardons granted by the President would have to be fulfilled immediately upon the delivery of it. otherwise, the pardon will purport to pardon future offences.

In other words, the delivery of the pardon, and the fulfilment of it must be simultaneous. In my view this would be untenable. I mean for instance, if they are correct then in the instant case for the pardon to be valid, the members of Parliament would have had to be released upon delivery of the pardon. There are

many reasons to reject this conclusion. Firstly, there was no express term for the time within which the members of Parliament had to be released. If the President or his advisers wished them to be delivered within a certain time that should have been made an express condition of the pardon. Not having been expressed, then one had to imply that it would be done within a reasonable time. The trial judge felt that having regard to facts and circumstances then prevailing three days constituted a reasonable time, for the fulfilment of the delivery of the hostages.

It is not necessary for me to go into the overwhelming and undisputed evidence he relied on, but it was clear that it was neither advisable nor feasible nor safe to release the hostages forthwith.

As I said the trial judge so found and although this court is in a position to draw its own inferences (since there was no cross-examination on the affidavits) it will hesitate long before it departs from the findings of the trial judge, unless of course no reasonable tribunal would have arrived at such a conclusion.

In the circumstances, I accept Mr. Robertson's submission that the pardon of the Respondents was a valid one and covered all offences arising out of the insurrection between the 28th July and 1st August, 1990. In any event I am satisfied that no new offences were committed by the Respondents after the pardon was delivered.

THE THIRD ISSUE:

The third issue in this appeal is whether section 87(1) confers a power on the President to grant an amnesty.

This, was raised for the first time in this court by Mr. Thorne and his arguments on this issue were adopted by Mr. Newman.

All I merely wish to say, on this, is that I have read in draft the judgment of my brother Hamel-Smith J.A. and I agree with him for the reasons given that Mr. Thorne's submission should be rejected.

There remains one final point in this appeal and it is one of law -

RES JUDICATA:

The final point raised by the respondents in this appeal, was that the appellants were barred from proceeding with the constitutional motion because it was res judicata in the light of the determination of the habeas corpus proceedings. This was raised by the respondents in their skeleton argument, but was only pursued as a result of a casual enquiry from the court. It was therefore in this setting Mr Maharaj and Mr. Newman addressed us in the dying stages of this appeal.

I do not propose to deal with their submissions because I find that it is completely unnecessary to do so, in view of the decision to which I have come and also because I am of the opinion that the doctrine has absolutely no relevance to this appeal. Suffice it to say however, that the underlying principle of res judicata is that public policy demands that there must be an end to litigation, and that the same issue cannot be litigated

twice. In my view, the filing of this appeal in the Constitutional Motion is NOT a relitigation of the issue raised in the habeas corpus proceedings. This is simply a case where an unsuccessful litigant is exercising his undoubted right to appeal and question the decision of a trial judge in respect of a claim for damages, and in my respectful opinion he is perfectly entitled to do so. I can see no scope for the application of the doctrine in this case, and as I have already said I reject this submission entirely.

Before dismissing this appeal formally I wish to make the following observations..

This is the kind of case, which would have provided a severe test for any independent system of justice, particularly in a small country as ours. It is not difficult to see why. Trinidad and Tobago suffered immeasurably as a result of the ghastly and mindless acts of a motley band of dissidents.

As a result many innocent people lost their lives, and damage done to property was incalculable, and although members of Parliament and innocent people were held hostages, each citizen was a captive in his own home. Trinidad and Tobago had become an island wide prison.

It was not surprising therefore that when Brooks J, ordered that the respondents be freed, that the citizens were quite understandably horrified and enraged. How could any system of justice liberate people, who in open defiance of the law had committed the most barbarous and dastardly acts? What sane and civilised system of justice would countenance this?

What aggravated matters, was in addition to their criminal acts, the respondents had the effrontery to turn around and sue the State for damages.

This the citizens thought was too much.

Our system of justice became an easy target. It was viciously attacked, -berated and condemned.

In a setting like this it would have been a simple matter for a higher court to take the easy way out and shape its decision to accord with the will of the people. However, any system of justice which is worth having does not operate in this way. Of an independent judiciary we can boast, of an infallible one we cannot.

As judges we are not to be led by any crusading zeal to administer justice other than according to law.

In the case of Mandata Singh v. State, which concerned an application for bail by the appellant in a case of manslaughter I said "The court is not a representative body: its judgments are not supposed to represent the popular will of the majority, plain and simple. It is rather the custodian of tradition, the upholder of the truth. The majority may for emotional reasons believe that a citizen is not entitled to be set free because he is guilty of some foul or heinous crime and wish him to be accordingly punished by taking away his freedom of life, but if the court finds insufficient evidence or grounds, it is its duty to thwart the will of the majority, and let the citizen go free." In the name of an independent and impartial judiciary I maintain this stand. Our Constitution demands nothing less.

Lest this judgment of mine be misunderstood, and thus cause some perplexity and create fear in the minds of a few, I wish to make it abundantly clear that my decision does not in any way create an open charter for terrorists, nor is it to be regarded as encouragement or an open invitation to others to do likewise. This much is clear.

This appeal has been determined on its own peculiar facts, and has failed for the reasons which I have already given earlier in my judgment, hopefully, in an elaborate and lucid manner. I do not propose to repeat them.

If citizens are dissatisfied with the decision of the Court then it is their duty to ensure by their collective will through their members of Parliament to amend or repeal the "offending" provisions of the law and the Constitution. There is no other solution and nothing would be achieved and no useful purpose served by berating the judiciary or the administration of justice. It is not for the judges to re-write the Constitution.

Further, I will strongly urge and recommend that the law with respect to habeas corpus be changed and brought into line with the provisions which now prevail in England, to give the unsuccessful litigant a right to appeal.

In the result this appeal is accordingly dismissed. The appellants must pay costs here and in the court below, certified fit for two counsel.

S. Sharma,  
Justice of Appeal.