SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 20 OF 1998

BETWEEN:

NEWTON SPENCE

Appellant

and

THE QUEEN

Respondent

and

SAINT LUCIA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 14 OF 1997

BETWEEN:

PETER HUGHES

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Adrian Saunders	Justice of Appeal (Ag.)

Appearances:

Mr. J. Guthrie QC, Mr. K. Starmer and Ms. N. Sylvester for the Appellant Spence
Mr. E. Fitzgerald QC and Mr. M. Foster for the Appellant Hughes
Mr. A. Astaphan SC, Ms. L. Blenman, Solicitor General, Mr. James Dingemans, Mr. P. Thompson, Mr. D. Browne, Solicitor General, Dr. H. Browne and Ms. S. Bollers for the Respondents

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2000: December 7, 8;
2001: April 2.

JUDGMENT

[1] **BYRON, C.J.**: This is a consolidated appeal, which concerns two appellants convicted of murder and sentenced to death in Saint Vincent and Saint Lucia respectively who exhausted their appeals against conviction and raised constitutional arguments against the mandatory sentence of death before the Privy Council which had not previously been raised in the Eastern Caribbean Court of Appeal.

Background

[2] The Privy Council granted leave to both appellants to appeal against sentence and remitted the matter to the Eastern Caribbean Court of Appeal to consider and determine whether (a) the mandatory sentence of death imposed should be quashed (and if so what sentence (including the sentence of death) should be imposed), or (b) the mandatory sentence of death imposed ought to be affirmed.

[3] The appellant Spence was the owner and driver of a bus in Saint Vincent. The deceased was a fare-paying passenger who exited the bus without paying. The appellant got out of the van with a gun and was subsequently seen to shoot the deceased who died the following day in the hospital. The Saint Lucian appellant Hughes was seen striking the deceased with a piece of post and a stone and jumping on the deceased after the deceased had asked him to "give me my thing". The deceased died from head injuries with extensive bleeding and a chest injury with contusion to the heart. Both appellants seek an opportunity to advance arguments in mitigation of the death penalty.

The Issues

[4] The issues which are raised in this appeal are based on provisions in the Constitutions of Saint Vincent and the Grenadines and Saint Lucia. I have decided to use the Constitution of Saint Lucia. The language and structure of the Constitution of Saint Vincent and the Grenadines are almost identical and in my view the minor variations do not result in any differences in meaning. I think that

the issues could fairly be dealt with under the four heads I list and the constitutional provisions on which they are based.

[i] Whether the provisions of para 10 of schedule 2 of the Constitution prevents the appellant from challenging the mandatory death penalty imposed. It prescribes:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 of the Constitution to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Saint Lucia immediately before 1 March 1967 (being the date on which Saint Lucia became an Associated State)".

[ii] Whether the mandatory death penalty contravenes section 5 of the Constitution which states:

> "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment".

[iii] Whether the mandatory death penalty contravenes section 1(a) and 2(1) which protect against the arbitrary deprivation of life.

> *Section 1:*
> *"*Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place or origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
> (a) life, liberty, security of the person, equality before the law and the protection of the law;
> *Section 2:*
> A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted.*"*

[iv] Whether the mandatory death penalty violates the Constitutional principle of the separation of powers.

[5] It is important to state at this stage that the appellants conceded that the Savings Clause prohibits any challenge being made to the imposition of the death penalty by hanging because that was a description of punishment which was lawful before

the constitution came into force. I think that is a fair and accurate statement of the position. This appeal did not contain any consideration of the question whether the imposition of Capital Punishment or the use of hanging as a method of execution contravened any provisions of the Constitution. The limited issue was whether the mandatory, or to use another word – the automatic, imposition of the sentence of death on a conviction for murder without consideration of mitigating factors offended the provisions of the Constitution.

Principles of Construction

[6] We were treated to very interesting arguments on the principles of construction that should be applied and on the respective roles of the Court and Parliament in relation to sentencing policy. I think that I should make a few comments, at the outset. I accept and I am guided by the caution given by Counsel for the respondents. Rules of interpretation governing Constitutions are different from those governing commercial documents. Courts, while giving a generous interpretation, must carefully look at the language used so as to give effect to it and not resort to an application of distilled values which would result in divination and not interpretation. **Matadeen v Pointu** (1999) 1 AC 98 at 108 c-f.

[7] However, it is our duty to give life and meaning to the high ideals and principles entrenched within the Constitution. The provisions of the Constitution that are relevant to this case are part of the fundamental rights and freedoms which have sought to entrench and guarantee that citizens enjoy the rights and dignity associated with humanity. These rights fit into the universal pattern as evidenced by declarations and covenants to which nations around the world, including our own, have subscribed. The linkage between our Constitution and the international legal norms for the protection of human rights and fundamental freedoms was expressed in the **Minister of Home Affairs v Fisher** (1979) 3 AER 21 at 25 in the well known words of Lord Wilberforce:

> "Chapter 1 is headed `Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with

> the Constitution of Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called `the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. Section 11 of the Constitution forms part of Chapter 1".

[8] The issue in this case, related as it is to the question of capital punishment, is part of a developing area of legal thought and jurisprudence on the value of human life. The legal norms that have been internationally accepted on this issue have undergone changes over the past half century. Any perusal of the relevant case law will demonstrate this. The differences between the older cases reflecting values that were harsher, more oppressive and discriminatory and the modern, which give effect to evolving standard of decency demonstrate a favourable modification of the rule of *stare decisis*. Courts are refusing to be bound by those older decisions which are inconsistent with current norms of international human rights law.

[9] In my view, this is an area of law where it is important to identify and consider the international legal norms affecting this issue while ensuring that the words of the Constitution are given their full force and meaning.

The Role of The Court

[10] The respondents argued that the Constitutional principle of the separation of legislative, executive and judicial powers placed sentencing policy under the purview of Parliament. Thus, Parliament and not the Courts have the power to provide for discretionary or mandatory sentences including the mandatory sentence for murder, unless the Court is satisfied that the mandatory sentence of death either infringes the doctrine of the separation of powers set out in the Constitution or contravenes or is inconsistent with other express provisions of the

Constitution. This submission was supported by judicial authority in the cases of **Hinds v the Queen** (1977) AC 195**; Ong Ah Chuan v Public Prosecutor** (1981) AC 648 and **Gerea v The Director of Public Prosecutions** (1986) LRC 3 all of which provide authority for the proposition that it is not inconsistent with the independence of the judiciary to have a fixed mandatory sentence imposed by Parliament. I agree with this proposition. The court does apply and enforce mandatory sentences in accordance with legislation to that effect.

[11] The point of difference in this case, however, is not the legality of mandatory sentences, for which there is abundant authority, but whether the mandatory sentence of death contravenes or is inconsistent with the express provisions of the Constitution.

[12] Counsel for the respondent argued eloquently that it was for Parliament and not the Courts to determine whether the death penalty should be automatically imposed on everyone who is convicted of murder. He argued that public opinion and political will were in favour of retaining the mandatory death penalty in cases of murder. He argued that this circumstance demonstrated an important difference from the United States where the rationale for the decision in the leading case of **Woodson v State of North Carolina** (1976) 428 US 280 included the fact that there was public dissatisfaction with the mandatory death sentence which was reflected by the not infrequent refusal of juries to convict murderers rather than to subject them to automatic death sentences. It was interesting to note in this context that the statistics produced by the State revealed that, in Saint Vincent and the Grenadines, over the last twenty years 509 persons were charged with murder 19 persons were convicted of that offence, and 412 were convicted of manslaughter. These statistics do not necessarily support the contention they were introduced to bolster in the light of the very small percentage of persons charged with murder who are convicted for that offence.

[13] I think that the answer is that whereas it is for Parliament to set sentencing policy, it is the duty of the courts to evaluate whether the laws passed by Parliament

contravene the Constitution, without fear or favour. It is trite that the Constitution is the supreme law, and legislation must conform with it. In this case it is the duty of the court to consider whether the mandatory imposition of the death penalty contravenes the Constitution. This role of the court was eloquently and persuasively expressed in the South African case of **State v Makwanyane v Mchunu** (Case CCT/3/94) (South African Constitution) by Caskalson P:

> "Para 87: The Attorney General argued that what is cruel, inhuman or degrading depends to a large extent upon contemporary attitudes within society, and that South African society does not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment. It was disputed whether public opinion, properly informed of the different considerations, would in fact favour the death penalty. I am, however, prepared to assume that it does and that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence."
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> "Para 88: Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."

The Savings Clause

[14] The second schedule of the Constitutions cited as the Transitional Provisions, contains a savings clause, in paragraph 10 set out above. This is relevant because

the laws of both countries prescribed that the sentence of death be imposed on conviction for murder, before the Constitution came into force.

[15] The respondents contend that the savings clause prohibits the court from holding that the mandatory sentence of death imposed under the authority of law is inconsistent with or contravenes section 5 of the Constitution. The meaning of this clause, which saves any description of punishment that was lawful on the appointed day is, crucial to the appeal.

[16] The appellants attempted to eliminate consideration of paragraph 10 of the second schedule by arguing that the clause was not applicable to this issue because there was no mandatory death sentence in force immediately before the appointed date. Section 71 of the Indictable Offences Act of 1912 of Saint Vincent (for example) provided that a person convicted of murder "shall be liable to suffer death as a felon". (There is a similar provision in Saint Lucia.) The argument advanced was that death was the maximum, but not the only sentence. I have rejected this argument because the legislative intent was clear and those words have been consistently interpreted by the courts, for well over a century, to mean a mandatory death sentence. See **Larry R Jones v Attorney General of The Bahamas** (1995) 1 WLR p.891 where the Privy Council held that notwithstanding the word "liable", in a similarly worded provision, the plain meaning of the section was that the death sentence was the mandatory punishment for murder in the Bahamas.

[17] It therefore remains necessary to determine the import of paragraph 10 of the second schedule of the Constitution. The first thing to note about this clause is that it is limited to section 5. It does not prohibit or restrict the court from making any holding with regard to any section other than section 5. Thus the grounds of appeal that allege contravention of section 1(a) and 2(1) of the Constitution are not affected by this clause.

[18] This principle was demonstrated in the Eastern Caribbean in the Privy Council decision in the case of **Greene Browne v The Queen** (2000) 1 AC 45 at p.49E. The Constitution of St. Christopher and Nevis included a similarly worded paragraph 9 of schedule 2. In that case the appellant had been convicted of murder and was sentenced under section 3(1) of the Offences against the Person Act which provides that the sentence of death should not be imposed on a person who appeared to be under the age of 18 years at the time the offence was committed but "in lieu thereof the court shall sentence him to be detained during the Governor General's pleasure". At the Privy Council the constitutional issue was raised as to whether the Governor General as part of the executive could properly exercise a discretion as to the duration of sentence. The court applied the constitutional principle of the separation of powers and held that the Constitution required that discretion as to duration of sentence must be exercised by the Court. At p.49 Lord Hobhouse said:

> "The validity of the provision is not saved by any provision of the Constitution which preserves the validity of previous laws. The Constitution, unlike that of other Caribbean countries, does not include a general preservation of the validity of all pre-existing law. Paragraph 9 of Schedule 2 to the Order does preserve existing law in relation to inhuman treatment referring back to section 7. but the relevant provision for present purposes is section 5(1). Deprivation of liberty otherwise than in execution of the sentence or order of a court is contrary to the Constitution."

[19] The second point is that even in relation to section 5 of the Constitution the prohibition is not a total one. It is limited "to the extent that the law in question authorizes the infliction of any description of punishment that was lawful… ". I interpret this to mean that the court cannot declare unconstitutional "the infliction of any description of punishment" that was lawful before Saint Lucia (and Saint Vincent and the Grenadines) became an Associated State. I think that there is a subtle but definite distinction between the punishment on the one hand and the method of imposing and carrying it out on the other. There can be no doubt that the description of punishment must include the sentence of death by hanging. But does it also include its mandatory imposition on all persons convicted of murder? The respondents have argued that the mandatory imposition of the sentence was

a lawful requirement before the appointed day. In my judgment, "mandatory" is not part of the punishment. It merely refers to the lack of judicial discretion in imposing the punishment. The sentence of death by hanging could be imposed with or without the exercise of a judicial discretion. In my view therefore what is saved is the sentence of death by hanging.

[20] There is no prohibition in that clause with regard to the issue of the method of carrying out the description of punishment. So that the court can declare that unconscionable delay in carrying out the lawful sentence of death is unconstitutional. This principle was only recently recognized and is an example of the development of domestic jurisprudence under influence of international human rights norms.

[21] As recently as the case of **Riley v Attorney General of Jamaica** (1983) 1 AC 719 it was the minority dissenting decision of Lords Scarman and Brightman that forcefully contended that a savings clause in terms similar to that of the Saint Lucia Constitution did not debar the court from examining whether delay in carrying out the sentence of death contravened the constitutional protection of section 5. It took just over a decade for this dissenting judgment to receive approbation by the Privy Council in the case of **Pratt v The Attorney General of Jamaica** (1994) 2 AC 1 **(Pratt and Morgan)**, where Lord Griffiths presenting the unanimous decision of the court said:

> "The purpose of section 17(2) is to preserve all descriptions of punishment lawful immediately before independence and to prevent them from being attacked under section 17(1) as inhuman or degrading forms of punishment or treatment. Thus, as hanging was the description of punishment for murder provided by Jamaican law immediately before independence, the death sentence for murder cannot be held to be an inhuman description of punishment for murder"... Their Lordships will therefore depart from **Riley v Attorney General of Jamaica** and hold that section 17(2) is confined to authorizing descriptions of punishment for which the court may pass sentence and does not prevent the appellant from arguing that the circumstances in which the executive intend to carry out a sentence are in breach of section 17(1)."

[22] Similarly, there is no prohibition with regard to the process by which a lawful sentence of death may be imposed so that a lawful sentence of death could be imposed after a hearing in which an offender had an opportunity to mitigate his sentence. We were not referred to any cases on this point but I think that it is a logical extension of the reasoning in **Pratt and Morgan**, above

[23] The respondents relied heavily on the old and much criticized Southern Rhodesian case of **Simon Runyowa v The Queen** (1967) A.C. 26 as a Privy Council case in which a savings clause was interpreted to protect the mandatory nature of the death penalty. In that case the appellant had been convicted of attempting to set on fire a building or structure and was sentenced to death. I would think that in the current climate of "evolving moral standards", this crime would not be considered sufficiently grave to warrant a sentence of death in countries with a constitution which prohibits inhuman punishment. A constitutional challenge to the imposition of a mandatory death sentence was rejected. In the decision of the Privy Council given by Lord Morris of Borth-y-Gest it was considered *inter alia* that the savings clause in section 60(3) of the Constitution protected the mandatory sentence of death. The section reads as follows:

> Section 60 (1) "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment. ... ... (3) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the doing of anything by way of punishment or other treatment which might lawfully have been so done in Southern Rhodesia immediately before the appointed day".

[24] I think that the wording of the savings clause is significantly different from the Savings Clause under consideration in this case. Little or nothing is excluded from a saving of "the doing of anything by way of punishment or other treatment". On the other hand the saving of the infliction of "any description of punishment" is clearly limited. I did not find that decision helpful.

[25] It is my judgment that the savings clause has a limited scope. In my view, it does not debar enquiry as to whether the lawful description of punishment, that is to say, death by hanging, is rendered inhuman or degrading by the failure to provide

for judicial discretion on its imposition. Additionally, the plain meaning of the clause is that it is does not debar challenges under any section of the Constitution other than section 5, so that the court is not debarred from considering the contentions of the appellant that the mandatory imposition of the lawful description of sentence of death by hanging on every one convicted of murder violates the provisions of section 1(a) and 2(1) of the Constitution. The decision in **Green Browne** above provides binding authority that the court can consider whether the constitutional principle of the separation powers is violated.

Whether Mandatory Sentence Violates Domestic Law

[26] A submission was made with special reference to Saint Vincent and the Grenadines. In that country The United Nations Declaration of Crime and the Treatment of Offenders Act 1984 (the UN Act) gave effect in domestic law to Art 5 of the Universal Declaration of Human Rights and Art. 7 of the International Covenant of Civil and Political Rights (ICCPR) both of which provide that no one may be subjected to torture, inhuman or degrading treatment or punishment. The submission is that this law is inconsistent with the mandatory death penalty and therefore makes it illegal. Reliance was placed on The United Nations Human Rights Committee case of **Eversley Thompson v St. Vincent** on 30th October 2000, where it was concluded that:

> "The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of the right to seek pardon or commutation, as required by article 6, para 4 of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to judicial review in all aspects of a criminal case."

[27] I do not propose to consider the argument of illegality. The prohibition in the statute against inhuman punishment must carry the same import as the prohibition in the Constitution. The Constitution is the Supreme Law, by which all legislation

is measured. If the appellant fails on the issue of unconstitutionality, he clearly could not succeed on the issue of illegality.

Whether Mandatory Sentence Violates Section 5 of the Constitution

[28] The appellants argue that a mandatory death penalty without consideration of the character and record of the individual offender or the circumstances of the particular offence is inconsistent with the fundamental respect for human dignity underlying section 5 of the Constitution which prohibits the imposition of inhuman punishment and treatment.

[29] As I understand the issue, it is based on the unique character of the sentence of death. It is different to and more severe than any other sentence. It takes away life. It has been known that persons convicted and sentenced to death have been subsequently proven innocent. This is not a general challenge to the power of Parliament to regulate sentences which the court could impose. There are some jurisdictions which have abolished the death penalty where the legislation imposes mandatory minimum terms of imprisonment. It is also based on the fact that a conviction for murder could be justified in relation to a wide range of behaviour, with differing degrees of culpability. This is an obvious proposition which has been widely recognized to the extent that many jurisdictions have legislation establishing a distinction between capital and non-capital murder. In many jurisdictions that have abolished capital punishment there is legislation that establishes a distinction between first degree and second degree murder – reflecting the need to impose different levels of punishment for the differing levels of gravity and culpability included within the legal definition of murder. I think that it is already a well established principle, in countries that retain the death penalty, that the sentence of death should only be imposed for the most serious crimes.

[30] The issue here is whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the

offender; whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate; whether the lawful punishment of death should only be imposed after there is a judicial consideration of mitigating factors relative to the offence itself and the offender.

[31] The respondents relied on the principle of *stare decisis*. In **Ong Ah Chuan v Public Prosecutor** (1981) AC 648 the appellant had been sentenced to death in Singapore for drug trafficking. The Privy Council rejected the contention that the mandatory imposition of the death sentence was unconstitutional. The appellants have persuaded me that this decision is not binding in this jurisdiction, and should not be followed by our Court. Perusal of the case reveals that the main challenge was based on the concept that it offended the provisions of the Constitution guaranteeing an offender equal treatment in like circumstances with other offenders. The argument that there was a breach of the prohibition against inhuman punishment because of the failure to provide an opportunity for mitigation was not made. Further it comes from a different jurisdiction, and it comes from a different time. In the intervening twenty years between then and now the internationally accepted norms of humanity have evolved. It is significant that even then, Lord Diplock in delivering the judgment of the Court recognized that there was a difference between the offence of drug trafficking and murder which could provide a rationale for imposing automatic death sentences in the former and not the latter. At 674 he said:

> "Wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated greed."

[32] We were referred to many cases from several jurisdictions. In many common law jurisdictions where the death penalty is retained the Courts have held that the rational, humane and fair imposition of the death penalty requires the exercise of guided discretion after consideration of mitigating circumstances of individual

offenders and offences. The leading United States case of **Woodson v North Carolina** (1976) 428 US 280 which is regarded as the originator of this principle in common law jurisdictions has been followed by other United States cases. That line of cases has established that consideration of aspects of the character of the individual offender and the circumstances of the particular offense is a constitutionally indispensable part of the process of imposing the ultimate punishment of death.

[33] In the Indian case of **Bachan Singh v The State of Punjab** (1980) 2 SCC 476 the Supreme Court of India affirmed the constitutionality of the death penalty provisions because it was subject to the judicial discretion of the courts exercising sentencing discretion in accordance with well recognized principles crystallized by judicial decisions directed along the broad contours of legislative policy. The decision revealed that the sentencing discretion relating to the death penalty is affected by the propositions that the normal rule is that the offense of murder is punishable with a sentence of life imprisonment, but that the court can impose a sentence of death but only if there are special reasons for doing so which must be recorded in writing. While considering the question of sentence for the offense of murder the court must have regard to every relevant circumstance relating to the offense as well as to the offender. It is only if the offense is of an exceptionally depraved and heinous character and constitutes on account of its design and the manner of its execution a source of grave danger to the society at large the court may impose the death sentence.

[34] These and other decisions to which the appellants referred demonstrated that in common law jurisdictions from which we could be persuaded, there was a strong line of judicial reasoning that recognized that the automatic application of the death penalty to all persons convicted of murder meant that the same irrevocable punishment was meted out in respect of crimes of varying severity and to offenders of varying culpability and antecedents, and therefore constituted a denial of the dignity and humanity of the individual offender.

[35] On the other hand, there is case law to support the contention of the respondent that there is a mechanism to introduce some flexibility to alleviate the harshness of the mandatory death sentence, in the mercy committee, a body provided by the Constitution for this purpose. They argued that the mercy committee was a forum which enabled mitigating factors to be considered and often resulted in the commutation of death sentences. This principle was enunciated in the important cases coming from Belize. The leading case being that of **Lauriano v Attorney General of Belize** (1995) 3 Bz LR 77, where Telford Georges P placed reliance on the existence of the prerogative of mercy as providing the necessary flexibility to the mandatory sentencing system. The difficulty I have in applying that concept is that the prerogative of mercy is a non-judicial power which is exercised after the lawful sentence of the court has been imposed. It is an additional protection which the Constitution provides to mitigate the lawful sentence of the Court. The constitutionality of the sentence cannot be based on the subsequent exercise of mercy. However, it seems to me that from the judgment it is clear that the President was of the view that there was merit in the proposition that the particulars of the offense and the offender should be considered to determine whether the sentence of death should be mitigated. In this context I should comment that the case of **Neville Lewis v Attorney General of Jamaica** does not elevate the status of the Mercy Committee to that of a judicial body. That decision while requiring that certain of the basic principles of natural justice be employed by the committee does nothing to change its character or status, and does not alter my view that its deliberation cannot be a substitute for a judicial power in determining the appropriateness of the sentence.

The relevance of the Inter-American Decisions

[36] I agree with the submission of Counsel for the respondent that the ACHR, the UDHR and the ICCPR cannot have the effect of overriding the domestic law or constitutions of these sovereign independent states. It is a matter of constitutional principle that if Parliament has legislated and the words of the statute are clear,

the statute must be applied even if its words are in breach of international law, **see Reg v Home Secretary, Ex-parte Brind** (1991) 2 WLR 588 at page 603-604."

[37] However, it is also well settled law that domestic provisions whether of the Constitution or statute law should as far as possible be interpreted so as to conform to the state's obligations under international law. **Neville Lewis; The Attorney General of Jamaica** and **Matadeen v Pointu** (1999) 1 AC 98, 114G-H.

[38] Both Saint Vincent and Saint Lucia are signatories to the above mentioned ACHR, UDHR and ICCPR and are bound by their provisions at International Law. The ACHR provides in Article 5[2] states as follows:

> "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment… ."

[39] The convention dealt specifically with capital punishment. It required certain standards by those States which retain capital punishment. Those standards include a prohibition against introducing new crimes which could be punished in that way. Under the ACHR it is provided in Article 4(4) that in no case shall capital punishment be inflicted for political offences or related common crimes. Article 4(5) states that capital punishment shall not be imposed upon persons who at the time the crime was committed were under 17 years of age or over 70 years of age nor shall it be applied to pregnant women. Article 4(6) says that every person condemned to death shall have the right to apply for amnesty, pardon or commutation of sentence which may be granted in all cases. It is significant that in Saint Vincent and Saint Lucia the existing laws prohibit the imposition of the death penalty on persons under the age of 18 years old and on pregnant women and that the Constitution provides a right similar to an application for amnesty, pardon or commutation of sentence through the mercy committee. I think it is fair to say that the regime of this Convention is already reflectred to a large extent in the domestic law in these jurisdictions.

[40] Issues with regard to the subjective state of mind and mental capacity of the offender may constitute defences to the crime of murder under the law in these

jurisdictions. Despite this, however, there is undoubtedly a wide range of behaviour which could properly result in a conviction for murder. It is a well established principle of our penal system that the court considers mitigating factors as part of the sentencing process in all crimes which do not carry capital punishment. This practice accords with the guarantee prescribed in the section of the Constitution against inhuman or degrading punishment. It is clearly inconsistent and to some extent illogical that when it comes to the imposition of the sentence of death that these humanizing practices are absent.

[41] Article 5(2) is in almost identical terms with and I dare say has the same meaning as section 5 in the Constitutions of Saint Vincent and Saint Lucia. Over the past two years the Inter-American Human Rights Commission has been considering the meaning of this provision and its impact on the mandatory death penalty in relation to cases coming from the Caribbean. The cases that are relevant to this issue have been the cases of **Downer and Tracy v Jamaica; Baptiste v Grenada** and **Eversley Thompson v St. Vincent** I have studied these judgments and conclude that the principles they espouse are consistent with the provisions of section 5 of the Constitution. The principles that have emerged from these cases can be summarized by saying that the death penalty is qualitatively different from a sentence of imprisonment, however long. Death in its finality differs more from life imprisonment than a 100 year prison term differs from one only a year or two. The imposition or application of the death penalty must be subject to certain procedural requirements. It must be limited to the most serious crimes. Consideration of the character and record of the defendant and the circumstances of the offence which may bar the imposition of the penalty should be taken into account.

[42] A person convicted of murder could have committed the crime with varying degrees of gravity and culpability. The mandatory death penalty precludes the court from considering whether the penalty is appropriate to the particular offence and offender and there is no possibility of review from a higher court. The mandatory imposition of death deprives the person of their right to life solely upon

the category of crime for which the offender is found guilty thereby eliminating reasoned basis for sentencing a particular individual to death and failing to allow a rational and proportionate connection between individual offenders, their offences and the punishment imposed upon them. The convention requires an effective mechanism by which a defendant may present representations and evidence to the sentencing court as to whether the death penalty is a permissible or an appropriate form of punishment in the circumstances of the case. The mitigating factors may relate to the gravity of the offence or the degree of culpability of the particular offender and may include such factors as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offence, and the possibility of reform and social readaptation of the offender.

[43] The experience in other domestic jurisdictions, and the international obligations of our states, therefore suggest that a court must have the discretion to take into account the individual circumstances of an individual offender and offense in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process.

[44] In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.

[45] This rationale conforms with my understanding of a prohibition against inhuman punishment and therefore explains and gives life and meaning to the express provision of section 5 of the Constitutions of Saint Lucia and Saint Vincent. I have found the jurisprudence to be persuasive and I adopt it in defining the extent of the protection which section 5 of the Constitution has guaranteed to every citizen.

[46] I am satisfied that the requirement of humanity in our Constitution does impose a duty for consideration for the individual circumstances of the offense and the offender before a sentence of death could be imposed in accordance with its provisions.

[47] In my judgment a distinction must be drawn between capital and non capital murder. In two Caribbean countries, Jamaica and Belize legislation has already been passed drawing this distinction, giving effect to the evolving standards of our time by prescribing differing severity of punishment within the wide range of behaviour that could result in a conviction for murder.

[48] The Offences Against Person (Amendment) Act 1992 of Jamaica gives legislative effect to the distinction between capital and non capital murder. The definition of capital murder in section 2 of the Act is both expansive and detailed. The classification of capital murder is related to the gravity of the offence and the record of the offender. Upon a conviction for non-capital murder, the offender can be sentenced to life imprisonment with a mandatory period of seven years before becoming eligibile for parole An analysis of the statute shows the following;

Factors determining Gravity of Offence

[i] If the deceased is a member of security police or correctional force in execution of duty or a judicial office;

[ii] If the murder is attributable to the status of that person as a witness, party or juror in litigation;

[iii] Murder committed in course or furtherance of serious crime or terrorism;

[iv] Contract murders.

Degree of Culpability

If two or more persons are convicted of murder it is not capital murder in the case of an offender who did not himself use force.

Record and Antecedents

[49] In Jamaica, a person convicted of non-capital murder can be sentenced to death if convicted of another murder whether on the same or different occasion

[50] In other jurisdictions even where the death sentence is abolished there is a distinction between first degree and second degree murder, and manslaughter.

Challenge on Basis of Arbitrariness

[51] The appellants contended that the mandatory imposition of the death penalty was arbitrary, without due process, unfair and therefore in breach of the provisions of section 1(a) and 2(1) of the Constitutions. The respondents rebutted on the basis that section 1(a) of the Constitution is not a free standing enacting section and that the laws are in exact conformity with the provisions of section 2(1) because the penalty of death was imposed in accordance with the law.

[52] The authorities support the proposition that section 1 of the Constitution is not an enacting section. See **Bloomquist v Attorney General of the Commonwealth of Dominica** (1987) AC 489; **Oliver v Buttigieg** (1967) AC 115 at 128 and **Grape Bay Limited v Attorney General of Bermuda** (2000) 1 WLR 574 at 582. However, it still must be given declaratory force and effect as an explanatory note for the sections that follow. It would seem to me that it contains the fundamental ideals upon which the Constitution is based and from which the duty of the Court as a protector of the rights of citizens could be deduced. In my view, there is no

doubt that section 2(1) of the Constitution requires the Court to ensure that any procedure which takes away life should be reasonable, just and fair. There seems to be great similarity between the arguments under this section and section 5 of the Constitution. Due process would undoubtedly exist by the presence of a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence.

[53] This concept has been expressed in the Caribbean case coming from Guyana of **Yassin v Attorney General** (C.A. 26th June, 1996), Carl Singh J.A. applying Shetty J in **Triveniben v State of Gujarat** (1997) LRC (Constr) 425:

> "Article 2 thus received a creative interpretation. It demands that any procedure which takes away the life and liberty of persons must be reasonable, just and fair. The procedural fairness is required to be observed at every stage and till the last breath of life."

[54] A procedure which provides for no opportunity to offer personal mitigation before imposing a mandatory death penalty is, not reasonable, not just and not fair and is therefore inconsistent with section 2(1) of the Constitution.

Mandatory Death Penalty offends Separation of Powers

[55] Under this heading the appellants argued that it was inappropriate to regard the "flexibility" provided by the mercy procedure as a part of the sentencing process. I have already addressed the issue and find it unnecessary to develop it further.

Remedies

[56] It would seem to me that the Court has power under para 2 of schedule 2 to modify the relevant statutes so as to bring them into conformity with the Constitution. See **Green Browne** (supra) where Lord Hobhouse said at p.50.

> "In their Lordships' judgment the answer to this part of the case is to identify the element of unconstitutionality in the relevant statutory provision and then to consider what change is necessary to give effect to the requirements of the Constitution and the appellant's constitutional rights. So far as the first part of this exercise is concerned, the relevant decision on the length of the sentence is entrusted to the executive not to the judiciary. It follows from this that what is required to make the provision comply with the Constitution is that the decision should be made by a court. If this is done the only objectionable part of the sentencing process is removed".

[57] In this case the most appropriate response will be a legislative one. In the meantime, however, the Courts may have to impose sentence on persons convicted of murder. The sentencing procedure must be modified to include the requirement that before passing sentence on a person convicted of murder the Court must allow the convicted person an opportunity to mitigate. The factors that must be taken into account upon a plea of mitigation should include the gravity of the offence, the character and record of the offender, the subjective factors which may have influenced the offender's conduct, the design and manner of execution of the offence and the possibility of reform and social re-adaptation of the offender. With regard to the appellants in this case no evidence or other material was adduced or presented to the Court in mitigation. It would seem necessary therefore to order that the matter be remitted to the trial Court for that purpose.

[58] In my view the decision as to whether the death penalty should be imposed should be a jury decision, because that would enable the existing legislation and practice to be read in conformity with the Constitution. The offender should have an opportunity to mitigate on the same terms as he currently has to defend, that is he should have the right to remain silent, to make an unsworn statement (where substantive law allows the same) or to give evidence on oath and be liable to cross-examination. He must also be allowed to call witnesses on his behalf, and to address the jury himself or by his counsel. The Prosecution should have the right to adduce evidence on the factors relevant to the decision to be taken and also to address. A verdict against imposition of the death penalty would require the judge to impose a sentence of imprisonment in the discretion of the trial judge.

[59] This requires the application of a new set of procedures on conviction for murder. After the offender has been given an opportunity to mitigate, and the Prosecution have adduced such relevant evidence as they see fit, and both sides have had an opportunity to address the court, the Judge must give the jury directions and invite the jury to determine whether the offence is of a capital or non-capital nature. The Judge must then impose sentence upon the jury's verdict.

[60] This court cannot be unmindful of the fact that there are several persons on death row who will be affected by this decision. I think it is reasonable that I should give my views on the procedure that should be adopted in relation to such persons. It would be impracticable to expect that the jury that convicted such persons now to render any further verdict in relation to them, even if it could be reconvened, because in some cases the efluxion of time may make that impossible. A High Court Judge that sets aside the mandatory sentence of death that was passed on such offenders should therefore make the decision as to whether the convicted person's offence was of a capital or non capital nature and impose sentence after a hearing in manner as outlined above.

Order

[61] I would determine that the mandatory sentence of death should be quashed in respect of both appellants and that the sentencing of these offenders be remitted to the respective High Courts in keeping with the terms of this judgment.

Sir Dennis Byron
Chief Justice

[62] **REDHEAD J.A:** The cases of these two appellants were remitted by the Privy Council for this court to consider whether:-

[a] The mandatory sentence of death imposed on the appellants should be quashed (and if so what sentence (including sentence of death) should be imposed); or

[b] The mandatory sentence of death imposed on the appellants ought to be affirmed.

[63] By Consent both appeals were consolidated and heard together. The appellant, Spence, was tried and retried by a jury and convicted on each occasion for the shooting to death of a passenger who boarded his bus and refused to pay his $1.00 fare. This Court on each occasion upheld his conviction. The Privy Council as I have said above has now remitted his case for a determination as to whether the mandatory sentence of death passed by the judge on him was in effect lawful.

[64] Peter Hughes, the other appellant was convicted of the murder of Jason Jean on November 12, 1993 and was sentenced to death by hanging. Likewise his case has been remitted for a determination as to whether the mandatory sentence of death pronounced on him by the trial judge was lawful.

[65] Learned Queen's Counsel, Mr. Edward Fitzgerald, on behalf of Peter Hughes submitted that the mandatory death penalty imposed on the appellant violates sections 1(a) and 2(1) of the Constitution, the combined effect of which he argued, guarantees the protection against the arbitrary deprivation of life.

[66] Section 1 of the Constitution of Saint Lucia, which is in identical terms with Section 1 of the Constitution of Saint Vincent and The Grenadines states:-

> 'Whereas every person in St. Lucia is entitled to the fundamental rights and freedoms that is to say, the right whatever his race, place of origin political opinions, colour creed or sex but subject to respect for the rights and freedoms of others and public interest, to each and all of the following, namely: -
>
> '[a] life, liberty, security of person equality before the law and the protection of the law;
>
> [c] -
>
> [d] –"
>
> 'the provisions of this chapter shall have effect of the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations of that protection as are contained in provisions being limitation designed to ensure that the enjoyment of the said

rights and freedoms by any person does not prejudice the rights and freedoms of others or the public rights"

Section 2(1)

"A person shall not be deprived of his life intentionally save in the execution of the sentence of a court in respect of a Criminal Offence under any law which he has been convicted""

[67] It is my considered view that when section 2(1) uses the word 'the sentence" as opposed to the use of "a sentence" the section is referring specifically to a particular type of sentence that is the sentence of death.

[68] Learned Queen's Counsel, Mr. Fitzgerald argued that section 2(1) has to be read in conjunction with section 1(a) which guarantees the right to life.

[69] In my view section 1(a) is declaratory of the fundamental rights and freedoms that Saint Lucians are supposed to enjoy under the Constitution. Section 1(a) in my view does not create substantive rights. It is only declaratory of the rights, which should be enjoyed by Saint Lucians. If that is so, I cannot agree with the submission advanced by Learned Queen's Counsel, Mr. Fitzgerald that section 2(1) and 1(a) guarantee a right not to be arbitrarily deprived of one's life. Section 2(1) says that 'a person shall not be deprived of (his) life save [or except] in the execution of the sentence of a court in respect of a criminal offence... .. of which he has been convicted'.

[70] In my opinion, a person charged with murder and who is found guilty of that offence cannot be said to be arbitrarily deprived of his life if he has gone through due process and the penalty for which he is convicted is the sentence of death.

[71] It would be otherwise, in my view, if he was randomly picked out from a group of persons and then without due process sentenced to death, then he would be deprived of his life arbitrarily.

[72] Learned Queen's Counsel, Mr. Fitzgerald submitted that the Saint Lucia Constitution is common with most Eastern Caribbean Constitutions and contains only a limited or partial savings clause. This merely prohibits according to Mr.

Fitzgerald, reliance on section 5 as a means of attacking any "description of punishment" that was lawful before independence.

Section 5:-

> "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment"

[73] Paragraph 10 of schedule 2 provides:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sections 5 of the constitution to the extent, that the law in question authorizes the infliction of any description of punishment that was lawful in St. Lucia immediately before 1st March, 1967."

[74] Mr. Fitzgerald argued that paragraph 10 of schedule 2 is also limited in scope. In support of his argument he referred to:

Greene Browne v The Queen (2000) 1 A.C.- 45

[75] At page 49 **Lord Hobhouse of Woodborough** said :

> "The validity of the provision is not saved by any provision of the Constitution which preserves the validity of previous laws. The Constitution unlike that of other Caribbean Countries, does not include a general preservation of the validity of all pre-existing laws.
>
> Paragraph 9 of schedule 2 [of the St. Christopher and Nevis Constitution] to the order does preserve existing law in relation to inhuman treatment referring back to section 2. But the relevant provision for present purposes is section 5(1). Deprivation of liberty otherwise than in execution of the sentence or order of court is contrary to the Constitution." Paragraph 2(1) of schedule 2 provides that:-
>
> > "The existing laws shall, as from 19th September, 1983 be construed with such modifications, adaptation qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order."

[76] Lord Hobhouse then went on to say:-

> "Therefore, it is the duty of the court to decide what modifications require to be made to the offending provision in the proviso and to give effect to its modified form, not to strike down the proviso altogether... "

[77] It stands to reason, in my view, that before any remedial act of construction can be employed by way of modification etc. the law in question must offend the Constitution.

[78] Mr. Fitzgerald, Queen's Counsel, in my view, made the subtle distinction between description of punishment (hanging) and "inhumane, degrading punishment." in that he argued that existing laws are only immunized from a challenge based on section 5, to the extent that the laws "authorize" the "infliction" of any **description of punishment** that was lawful before 1st March, 1962.

[79] He further argued that by "description of punishment" the constitution is referring to types of punishment, such as punishment by flogging, hanging or life imprisonment and not the whole legal regime under which those penalties were previously authorized. In other words paragraph 10 makes it impossible for a court to hold that either corporal punishment or hanging is in itself an inhuman type of punishment.

[80] But, according to Mr. Fitzgerald, it does not prevent a court from holding that the application of this lawful type or description of punishment to a particular individual or type of offender is so disproportionate as to be inhuman, even though the same individual or type of offender would have been subjected to it before 1st March, 1967.

[81] I find utmost difficulty to appreciate that the application of a lawful punishment or penalty would become unlawful in that it is regarded as arbitrary or discriminatory, or disproportionate to an offender in regard to a specific type of crime for which a particular sentence is prescribed by law merely because the person on whom the penalty is to be inflicted was not given an opportunity to mitigate. Moreover, its my view, that the act of hanging someone by itself must be regarded as degrading both to the person who is carrying out the hanging and the person who is hanged. I find support for this difficulty in.

Ong. Ah Chuan v Public Prosecutor (1981) AC 648.

[82] Lord Diplock in giving the opinion of the Board said at page 672:

> "It was not suggested on behalf of the defendants that capital punishment is unconstitutional per se. Such an argument is foreclosed by the recognition in article 9 (1) of the Constitution that a person may be deprived of life "in accordance with law." As their Lordships understood the argument presented to them on behalf of the defendants, it was that the mandatory nature of the sentence, in the case of an offence so broadly drawn as that of drug trafficking created by section 3 of the Drugs Act, rendered it arbitrary since it barred the court in punishing offenders from discriminating between them according to their individual blameworthiness. That it was contended arbitrary was and "not in accordance with law" "as their Lordships have construed in article 9(1)... "

[83] In my considered view a similar argument was advanced on behalf of both appellants in the instant appeal. It was contended on behalf of both appellants because they were not given the opportunity to mitigate before the sentence of death was pronounced on them the passing of the sentence was arbitrary in that their individual circumstances were not taken into account.

[84] At page 673 Lord Diplock continues:

> "All criminal law involves the classification of individuals for the purposes of punishment, since it appears those individuals only in relation to whom there exists a defined set of circumstances. The conduct and where relevant the state of mind that constitutes the ingredients of an offence. Equality before the law and equal protection of the law require that like should be compared with like. What article 12(1) of the constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment; more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some differences in the circumstances of the offence that has been committed... ... ...
>
> > "The question whether this dissimilarity in the circumstances justifies any differentiation in the punishment imposed upon individuals who fall within one class and those who fall within the other, and if so, what are the appropriate punishments for each class, are questions of social policy. Under the Constitution which is based on the separation of powers these are questions which it is the function of legislature to decide, not that of the judiciary. Procedure that the factor which the legislation adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the

> law. There is no inconsistency with article 12(1) of the Constitution... ... ...
> Whenever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt "of offenders upon whom the mandatory sentence must be passed"

[85] In my judgment merely because there is a variation in moral blameworthiness of persons convicted of the offence of murder that by itself cannot make a mandatory sentence which is otherwise lawful, unlawful.

[86] Of course it was advanced on behalf of the appellants that **Ong Ah. Chaun** is not binding on our court or at the least it is distinguishable. Notwithstanding that the challenge in that case was based on the submission that mandatory death penalty for drug trafficking was arbitrary and not in accordance with law, and that it was contrary to the principle of equality before the law.

[87] Mr. Fitzgerald, learned Queen's Counsel contended that the decision is now absolete, and in any event inapplicable to the Americas since it predates and takes no account of the development of a different approach to the protection of the right to life "(So as to exclude any, arbitrary deprivation of life) by the Inter-American Commission of Human Rights, and by regional courts such as Guyanese Court of Appeal.

[88] Mr. Fitzgerald submitted that the result reached in the case of **Ong** is so offensive to all Western Standards of Justice that it is simply inapplicable to the Caribbean context.

[89] Finally, he contended:

> "It was, after all, a decision reached by the Privy Council in the capacity as the final court of appeal for Singapore. As such it is not binding on the Eastern Caribbean Court of Appeal".

[90] I do not agree.

[91] I now turn to the Guyanese decision referred to by learned Queen's Counsel - **Yassin v The Attorney-General** (unreported) C.A. 26 June 1996

[92] Abdool Yassin (the appellant) and Noel Thomas were tried and convicted on 2nd of June, 1988. The appellant was represented at his trial by Mr. De Santos, who was then a private practitioner. The appellant and Thomas both appealed against conviction and sentence. The appeals were allowed and a retrial ordered. The appellant retained Mr. Desantos to represent him and Thomas at the re-trial which commenced in June, 1991 but was aborted and a new trial ordered.

[93] In April 1992 the appellant again fully briefed and retained Mr. Desantos but he shortly thereafter returned the fee and refused to represent them. Eventually, in December, 1992 both men were found guilty and sentenced to death. By that time Mr. Desantos had been appointed Attorney-General, they had appealed to the Court of Appeal of Guyana and both appeals were dismissed in June, 1994.

[94] Some 18 months later the appellant filed a motion in which he sought the commutation of death sentence to one of life imprisonment.

[95] The respondent named in that proceeding was the Attorney-General and Mr. Desantos appeared in person and argued against it. The motion was dismissed and the appellant appealed to the Court of Appeal. During the hearing of the appeal, Mr. Desantos made certain admissions, inter alia, that he was the minister designated by the President under Article 188(2) of the Constitution and therefore by virtue of Article 189(1) became the chairman of the Advisory Council on the Prerogative of Mercy. He also stated that at a meeting which considered the case of the appellant, and that, although he took his place as its chairman, he took no part in the deliberations.

[96] He, however, admitted that he did make recommendations to the President in that capacity and that the President had directed that the law should take its course.

[97] In light of the factual background one could readily appreciate Singh J. referring to the Indian case of:-

Triveniben v State of Gujarat (1992) L.R.C. 452 at page 447 when he said:

> "Shetty J. while considering the scope of Article 21 of the Indian Constitution noted 'Article 21 demands... ... that any procedure which takes away the life and liberty of persons must be reasonable, just and fair. The procedural fairness is required to be observed at every stage and till the last breath of life'.

[98] It is this passage which was relied on by the appellants as support "for the development of a different approach to the protection of the right to life" by regional courts."

[99] It will be observed that the Guyanese Court of Appeal was not calling into question the legality of a mandatory sentence of death.

[100] What was called into question was the fairness of the Attorney-General as the legal adviser of the appellant on a charge of murder and which later engaged the attention of the Advisory Council on the Prerogative of Mercy, whether the Attorney-General ought to have presided as its chairman.

[101] Even in **Neville Lewis**, et al., v. (1) **The Attorney-General** and (2) **The Superintendent of St. Catherine District Prison** (unreported) September, 2000.

[102] At page 26 Lord Slynn of Hadley recognized the automatic nature of the mandatory penalty in capital case when he said:-

> "The importance of the consideration of a petition for mercy being conducted in a fair and proper way is underlined by the fact that the penalty is automatic in capital cases. The sentencing judge has no discretion, whereas the circumstances, in which murders are committed very greatly."

[103] Mr. Fitzgerald, learned Queen's Counsel, submitted in the alternative that even if paragraph 10 protects the imposition of the mandatory death penalty upon all murderers from a challenge based on section 5 that paragraph does prevent the

applicant from challenging the imposition of the mandatory death penalty as inconsistent with Section 2(1) of the Constitution which, according to Mr. Fitzgerald affords a separate protection against the arbitrary deprivation of life.

[104] Paragraph 10 of schedule 2 of the Saint Lucia Constitution has received judicial interpretation in our courts, the Eastern Caribbean Supreme Court.

[105] Paragraph 10 of schedule 2 Saint Lucia is in identical terms as paragraph 9. Schedule 2 St. Kitts and Nevis.

[106] In **Richards v Attorney-General of St. Kitts and Nevis** (1993) 44 W.I.R. 142 Sir Vincent Floissac C.J. at page 142 after dealing with the specific issues in the case which are inter alia-

> [1] Whether section 7 of the constitution applies to or affects the constitutional validity of the so called inhuman, degrading types of punishment which were lawful before 27th February, 1967 (the prescribed date... ... ...)
> [2] whether death by hanging was a lawful type of punishment before the prescribed date... ... ...

[107] At page 144

Sir Vincent went on to say:

> "... ... . Section 7 cannot be read in isolation.
> It must be subject to paragraph 9 of the transitional provision... ... "

[108] (Section 7 of the St. Kitts/Nevis Constitution is in identical terms S.5 as the St. Lucia Constitution). Continuing at pages 144 and 145 Sir Vincent said:

> "Therefore the evident intent of section 3 of the Constitution order and paragraph 9 of its transitional provision is to assert the constitutional validity of any type of punishment which was lawful immediately before the prescribe date and any written or unwritten law which authorizes the infliction of that type of punishment to create a Constitutional estoppel against any assertion that any such punishment or law is inconsistent or in contravention of section 7 of the Constitution.
>
> Section 2 of the Offences against the Person Act provides that "whoever is convicted of murder shall suffer death as a felon"... ... ... Therefore the combined effect of section 3 of the Constitution Order and paragraph 9 of its transitional provisions is to exclude death by hanging from the purview of section 7 of the Constitution

and to assert the constitutional validity of that type of punishment, without the need to engage in endless philosophical controversy as to whether such punishment is tortuous inhuman or degrading."

[109] In **Simon Runyowa v The Queen** (1967) A.C. 26.

At page 45 Lord Morris of Borth-y-Gest said:

> "The argument that was advanced involved a consideration of the meaning, in its context of the word "punishment". It was not contended that it can be said that the death penalty is per se or necessarily an "inhuman or degrading punishment."
> Such a contention could in any event hardly have been advanced in view of the terms of section 57(1) of the Constitution. That subsection provides that "no person shall be deprived of his life intentionally save in the execution of a sentence of a court in which he has been convicted." The death sentence as a possible sentence is recognized. It was conceded therefore, that if in section 60 the words "inhuman or degrading punishment" refer to types or modes or description of punishments, the submission that Section 37(1) (c) of the Law and Order (maintenance) Act is ultra vires [and] must fail. The basis of the argument advanced is that the word punishment conveys the notion of the infliction of some penalty which is deserved or warranted by reason of the Commission of some offence. Hence so the argument ran a punishment which is out of relation to that which, in particular circumstances or in reference to an offence of a particular nature, is deserved, may be an "inhuman" punishment. The respects in which, according to the argument, it could be said that section 37(1) (c) provides a punishment which was "inhuman" and so was unconstitutional were (a) that it provided for a mandatory death penalty and accordingly gave a court no discretion in passing sentence to assess the gravity of the conduct in any particular case or to have regard to any extenuating circumstances;
> (b) that it so provided not only in respect of an actual perpetrator of a deed but also in respect of one who is a socius criminis, (c) that it so provided in the case of attempts and (d) it so provided in the case of residence whether or not at the time of the commission of the offence any other person was present in the residence."

[110] What was called for determination is the validity of the Law and Order Maintenance Act 1960 which imposed the mandatory death sentence on any person 'who by use of petrol, benzine, paraffin… … . Or any other inflammable liquid sets or attempts to set fire on any person or building.

[111] The validity of S.37(1) could not depend on some saving's clause such as paragraph 10 of schedule 2 of the Saint Lucia Constitution. So the interpretation for its validity stands unaided by any savings clause.

[112] At pages 47 and 48 Lord Morris said:-

> "The problem before their Lordships is that of construing the particular words of Section 60 of the 1961 Constitution. No person is to be subjected (a) to torture (b) to inhuman or degrading punishment or (c) to inhuman or degrading treatment. As a matter of construction their Lordships... ... ..consider that the ban that is imposed is on any such type or mode or description of punishment as is inhuman or degrading since it is not suggested, that the death penalty is not such type or mode of description it follows that the argument advanced on behalf of the appellant must fail... ... ..."

[113] Learned Queen's Counsel referred to Runyowa as barbaric interpretation. I would agree with him to a limited extent. In that the application, not the interpretation, of that decision would, in my opinion, have limited effect under our law. In that, in my opinion, it is "any description of punishment that was lawful in Saint Lucia immediately before 1st March, 1967".

[114] Hanging is a description of a punishment that was lawful only for the offence of murder. Therefore in my judgment the categories of offences cannot change and be placed under the umbrella of hanging and clothe with legality. One convicted of theft or rape could not lawfully suffer death by hanging because in my view neither of these offences would have been covered by paragraph 10 of schedule 2. As neither the law of rape nor the law of theft authorized hanging for any of these offences immediately before 1st March, 1967.

> "Before the coming into force of the Constitution of Trinidad and Tobago 1976 and indeed the 1982 Constitution capital punishment was accepted as a punishment and could be lawfully imposed, [for the offence of murder only] so that execution to a lawful sentence of death could amount to depriving a person of his life by due process and could not amount to cruel and unusual punishment contrary to Section 5 (2)(b)"

(Per Lord Goff of Chieverley in **Guerra v Baptiste** (1995) 4 AER 583 at 588-89)

[115] I consider now some of the decisions of the Inter-American Commission.

[116] [In **Downer v Tracey (Jamaica)** report No. 41/00

Consideration was given to Article 5(2) of the American Convention on Human Rights which prohibits inter alia, the imposition of cruel, inhuman or degrading punishment or treatment.

[117] At paragraph 203 the Commission wrote:

> "The mandatory imposition of the death penalty, however, has both the intent and the effect of depriving a person of their right to life based solely upon the category of crime which the offender is found guilty, without regard to the offender's personal circumstances or the circumstances of the particular offence. The commission cannot reconcile the essential respect for the dignity of the individual that underlies Articles 5(7) and 3(2) of the Convention with a system that deprives an individual of the most fundamental of rights without considering whether the exceptional form of punishment is appropriate in the circumstances of the individual's case."

[118] In **Rudoloph Baptiste (Grenada)** Report No. 38/00.

The Commission after referring to Article 5 (1) and (2) of the Grenada Constitution Sub-section 3 of Article 5 of the Grenada Constitution is in identical terms as S.5 of Saint Lucia Constitution.

[119] Subsection 2 of Article 5 is in identical terms as of paragraph 10 of schedule 2 of the Saint Lucia Constitution -

The Commission went on the say at paragraph 27 of its report:

> "In light of the terms of Article 5 of the Constitution the petitioners indicate that they accept that the sentence of death for murder does not violate the constitution of Grenada, and that Article 5(2) of Grenada's Constitution precludes the courts of Grenada or the Privy Council from interpreting the right to freedom from inhuman and or degrading punishment under the Constitution as prohibiting the administration of the death penalty in every case upon a conviction for murder." At the same time, the Petitioners argue that imposing a mandatory death sentence on Mr. Baptiste, without providing him with an opportunity to present evidence of mitigating circumstances relating to him or his offence violates Mr. Baptiste's rights under Articles 4,5,8 and 24 of the Convention."

[120] The Commission made reference to:

Woodson v North Carolina 49 C Ed.2d 944 (1976)

> "the United States Supreme Court held that the automatic imposition of the death sentence on all those convicted of specific offence is inconsistent with the evolving standard of decency that are the hallmark of a maturing society".

[121] At paragraph 76 the Commission wrote inter alia:-

> "It is also generally recognized that the death penalty is a form of punishment that differs in substance from as well as in degree in comparison to other forms of punishment.. It is the absolute form of punishment that results in the forfeiture of the most valuable rights, the right to life, and once implemented, is irrevocable and irreparable... ... . .. In the Commission's view, the fact that the death penalty is an exceptional from of punishment must also be considered in interpreting Article 4 of the convention".

Article 4 of the convention says in part.

> "4[1] Every person has the right to life respected. This right shall be protected by law and in general from the moment of conception. No one shall be arbitrarily deprived of his life.
>
> [2] –
>
> [3] –
>
> [4] –
>
> [5] Every person condemned to death shall have the right to apply for amnesty pardon or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority."

[122] Mr. Guthrie, learned Queen's Counsel, for the appellant Newton Spence adopted the arguments and submissions of Mr. Fitzgerald on behalf of his client and added that his client's position differs from the appellant Hughe's position in that Saint Vincent and the Grenadines ratified the declaration of the United Nations on the Prevention of Crime and Treatment of offenders.

[123] Article 4 of which states:-

> The provision contained in the Article of the Declaration shall have the force of law in the State.

[124] Article 5(3)

> 'Where a question arises whether any act constitutes torture, inhuman or degrading treatment or punishment the decision of the High Court herein shall be final and shall not be called into question."

[125] Mr. Astaphan, learned Senior Counsel, on behalf of the respondent argued that the duty of our court is to construe the provisions of our constitution and to avoid in doing so as if international treaties and norms were part and parcel of our constitution. In other words a judge in interpreting our constitution must always bear in mind that the constitution is the supreme law of the land and cannot be subjected or subservient to international law and norms. Indeed I agree that embodying fundamental rights [in international law] should as far as its language permits be given a broad construction.

(**Kentridge A.J. in Svzumaandors** 1995 (4) BCLR 4D1)

Lallah C.J. [Ag.] sounded a cautious note in interpreting the Mauritius constitution when he said in-

Union of Compement Site Owners and Lesses v Government of Mauritius 1 984 M.R. 100 at 107:-

> 'We should be very cautious, therefore, in importing wholesale into the structure and framework of our constitution a complete article of the kind, that article 14 of the Indian Constitution or the 14th Amendment of the American Constitution are."

[126] These observations were approved and accepted by Lord Hoffmann when he said in - **Matadeen & Ors. V Pointu & Ors v Minister of Education & Science** (1998) 3 WLR P.18 at 28:

> "Their Lordships consider that the observations, coming as they do from a judge with great experience in the international jurisprudence of human rights, should be borne carefully in mind. It is open to a democratic constitution to entrench a general principle of equality as in the United States and India; to "entrench" protection against discrimination on specific grounds as in New Zealand, or to entrench nothing, as in the United Kingdom. In order to discover into which of these categories the Constitution of Mauritius falls it seems to their Lordships that there is no

alternative to reading the constitution. It is therefore to the language of section 3 that their Lordships next turn."

[127] At page 32 Lord Hoffmann said:

> "Their Lordships consider that the fallacy in this argument is the assumption that a state party can comply with the, covenant only by enacting its principles as part of its constitutional law and conferring upon its courts the power to invalidate legislation which it considers to infringe those principles. In other words, it is wrong to assume that compliance with principles of article 2(2) must be justifiable in domestic law. On the contrary as article 2(2) makes clear, the covenant contemplates a diversity of constitutional arrangements, including both legislative and "other measures" by which effect may be given to the rights recognized in the covenant, including the right to equal protection of law."

[128] In **Svzuma and Ors** [supra]

[129] Kentridge A.J. at page 412 opined:

> "I am, however, sure that Froneman J, in his reference to fundamental "mischief" to be -remedied, did not intend to say that all principles of law which have hitherto governed our courts are to be ignored. Those principles obviously contain much lasting value. Nor, I am equally sure, did the learned judge intend to suggest that we should neglect the language of the constitution, while we must always be conscious of the values underlying the constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellect and moral preconceptions. But it cannot be too strongly stressed that the constitution does mean whatever we might wish it to mean.

We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the law giver is ignored in favour of a general resort to "values" the result is not interpretation but divination"

[130] In **Anthony Briggs v Baptiste and Others** (2000) 2 WLR 574

At page 585 Lord Millett said:-

> "Nevertheless their Lordships do not feel able to dispose of this appeal on this ground. They are sitting as the final Court of Appeal of Trinidad and Tobago i.e. the state concerned. They are concerned to apply the domestic law of Trinidad and Tobago. They have no jurisdiction to

> pronounce on the interpretation and affect of the convention or the meaning of Inter American Court's Orders. By adhering to the convention Trinidad and Tobago accepted the jurisdiction of the Inter American court on all matters relating to the interpretation or application of the convention... ... ..
>
> The interpretation of the constitution is a matter for the national courts and its scope and effect in domestic law cannot be enlarged by orders of an international court made outside the terms of the Convention to which the Government of Trinidad and Tobago assented. In determining such questions their Lordships would expect the national courts to give great weight to the jurisprudence of the Inter American Court but they would be abdicating their duty if they were to adopt an interpretation of the convention which they considered to be untenable.

Their Lordships consider that it is important to be clear about what **Thomas v Baptiste** [1999] 3WLR 249 decided and what it did not decide. It did not overturn the constitutional principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. It did not decide that the recommendations of the commission (which are not binding even in international law) or the orders of the Inter American Court are directly enforceable in domestic law. It mediated the proceedings before the Inter American system through the due process clause in the constitution. It confirmed the principle that the consideration of a reprieve is not a legal process and is not subject to the constitutional requirement of due process, and that the advisory committee is not bound to consider, let alone, adopt the recommendations of the commission."

[131] The first observation I wish to make is that the Convention of the Declaration of the United Nations on the Prevention of Crime and Treatment of Offenders which is enacted in the laws of Saint Vincent (referred to above) has nothing to do with capital punishment. This deals with the treatment of offenders while in custody or detention etc.

[132] Mr. Fitzgerald Q.C. submitted that the mandatory death sentence imposed on Hughes violates sections 1(a) and 2(1) of the Constitution which protect against the arbitrary deprivation of life.

[133] He contended that the mandatory death penalty imposed on Hughes was arbitrary and violated his right to life under section 2(1) of the Constitution. Mr. Fitzgerald further submitted that section 2(1) has to be read in conjunction with section 1(a)

which guarantees his rights to life and the protection of the law. Mr. Fitzgerald argued that when read together, 2(1) and 1(a) guarantee a right not to be arbitrarily deprived of life. I do not agree and totally reject this submission.

[134] It is beyond, doubt in my opinion, that section 1 of the Saint Lucia (and Saint Vincent Constitution) guarantees nothing. It is merely declaratory of the rights of Saint Lucians under the Constitution. The simple answer lies in section 16(1) of the constitution which mandates:

> "If any person alleges that any of the provisions of sections 2 to 15 inclusive of this constitution has been, is being, or is likely to be contravened in relation to him... ... ... .Then without prejudice to any other action with respect to the same matter which is lawfully available, that person... ... may apply to this High Court for redress."

[135] It is therefore not accidental that section 1 is omitted. The reason being that the fundamental rights, enshrined in the Constitution are to be found in sections 2 to 15.

[136] Section 2(1) of the Constitution, the other limb on which Mr. Fitzgerald relies, is very clear and unambiguous in its terms.

[137] It states quite clearly and unequivocally that a person shall not be deprived of his life intentionally save in the execution of the sentence of a court in respect of a criminal offence under any law or which he has been convicted.

[138] It is in my view very significant that the sub-section in mandating that one should not be deprived of his life intentionally, but goes on to say save (except) in the execution of the sentence of a court, the sub-section did not say a sentence of the court. The framers of the Constitution could only have one sentence in mind, that is, the sentence of death. That being the case.

[139] I am therefore of the view, that section 2(1) in itself excepted and exempted from the deprivation of life or as a right to life the sentence of death for the offence of

murder. It means therefore, that section 2(1) does not guarantee a right to life absolutely.

[140] And paragraph 10 of schedule 2 stands as a sentinel at the constitutional door to prevent any constitutional or other assault on anything done under the authority of any laws to be inconsistent with or in contravention of section 5 to the extent that the law in question authorities any description of punishment (i.e hanging) that was lawful in Saint Lucia immediately before 1st March, 1967.

[141] That being the case I reject the argument that sections 2(1) and 1(a) of the Constitution guarantee a right not to be deprived of life. In my view it could not be said that one is arbitrarily deprived of life when the Constitution sanctions the deprivation of life and anyone who is charged with the offence of murder and the lawful sentence of death is pronounced and this is done pursuant to the protection of law (see Lewis).

[142] The appellants' additional lime of attack is that the indiscriminate imposition of the death penalty on all those convicted of murder irrespective of mitigating circumstances vilolates section 5. I shall return to this argument in a while.

[143] Meanwhile I address a submission made by Mr. Fitzgerald, learned Queen's Counsel, for Hughes. He submitted that Article 1284 of the Saint Lucia Code gives the learned trial Judge a discretion and permits the Judge to impose a sentence other than death.

[144] Under Article 178 of the Criminal Code of Saint Lucia:

> "Whoever commits murder is liable indictable to suffer death."

[145] Article 1284 states:-

> "Unless otherwise expressly provided a court may sentence, any offender to any less punishment, other that death, than that prescribed".

[146] Mr. Fitzgerald drew attention to the side note which says "punishment may be less than maximum."

[147] He argued, accordingly, that under this section on interpretation a judge could impose a sentence less than the maximum i.e. a sentence less that a sentence of death. I do not agree. It is a matter of construction. If for example the words "other than death" which are separated by commas from the rest of the sentence were placed at the end of the sentence, the meaning is quite clear. Under S. 178 Mr. Fitzgerald, Q.C. argued that the use of the word liable gives the judge a discretion as to the maximum sentence he can fix.

[148] The simple answer in my view lies in the submission of Mr. Astaphan, Learned Senior Counsel, who argued that if this were so then it would not have been necessary for the legislature to enact a discretion in respect of all other punishment.

[149] In support he referred to **Larry Raymond Jones and others v The Attorney-General of The Commonwealth of the Bahamas** (1995) 1 WLR 891 where the same argument was advance. It was argued that under section 312 of the Penal Code of Bahamas:-

> "Whoever commits murder shall be liable to suffer death" It was then argued that those words import a discretion on the trial judge.

Lord Lane in delivering the advice of the Board at page 898 said:

> "If the word "liable" had meant that the court already had a discretion, the sub-section would have been unnecessary."

[150] I therefore reject the argument of Mr. Fitzgerald and hold that neither section 178 permits the learned trial Judge to exercise a discretion in sentencing nor does S. 1284 permit the learned trial Judge to impose a sentence less that the maximum sentence of death.

[151] But Mr. Fitzgerald went further, he argued, when asked, if the court did not agree with his interpretation, what would be his position? He said, that the court in that circumstance should rewrite the section.

[152] I have great difficulty in acceding to such request because in my view Learned Queen's Counsel is asking this court to do what is expressly provided for Parliament. The court's duty is to interpret legislation.

[153] Under schedule 2 paragraph 12(2)(1):

> "the existing law shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the supreme court order."

[154] In my judgment there must first of all be an inconsistency with the Statutory Provision and the Constitution. In the instant case there is none. Secondly in construing such inconsistency it must be capable of modification adaptation, qualification or exception if the statutory provision is not, then it must be declared invalid. But I do not know of any power in the court to rewrite the entire section of a stature to give it validity or change its meaning.

[155] Finally, I turn now to the vexed question of the appellant's claim that the imposition of death sentence on all those convicted of murder, irrespective of mitigating circumstances is inhuman and degrading punishment. The appellants concede that by paragraph 10 of schedule 2 one cannot mount an attack on hanging because it is a description of punishment that was lawful in Saint Lucia immediately before 1st March, 1967.

[156] In my judgment the Constitution by paragraph 10 Schedule 2 preserved execution for murder in its pristine form, that is to say anyone convicted of murder was automatically, not arbitrarily, sentenced to death. Nowhere in the law before 1st March, 1967 was there a requirement that one convicted of murder must be given the opportunity to mitigate before the sentence of death was pronounced. The imposition of the death sentence on anyone without being given the opportunity to

mitigate and the death sentenced that was passed was never regarded as inhuman or degrading.

[157] The sentence of death, after a murder conviction, being automatic not arbitrary, the Constitution devised and recognized a "regime" which would mitigate the harshness of the penalty for those who should not suffer death. Under S.76 of the Saint Lucia Constitution. Every person that has been sentenced to death must have his case considered by the committed on the Prerogative of Mercy which is not a legal process.

> "(**Thomas v Baptiste** (1999) 3 WLR 247) confirmed the principle that the consideration of a reprieve is not a legal process and is not subject to the constitutional requirement of due process... ... .."

(Per **Lord Millett in Briggs v Baptiste** (2000) WLR. 574 AT 585)

[158] Mr. Fitzgerald contended that if, in reality there needs to be a process of individualized determination to which of those convicted of murder should actually die then the necessary determination should be performed by the judiciary before and not by the executive, after the sentence of death is pronounced. Otherwise, he argued the sentencing function is being entrusted to the executive contrary to the principles of the separation of powers.

[159] Mr. Fitzgerald referred to:

Hinds v R (1977) A.C.195 at 226-c.d and **Greene Brown v R** (2000) A.C. 45

In Hinds 228 Lord Diplock said:-

> "The Royal prerogative of Mercy, which has been exercised in Jamaica since it first become a territory of the British Crown is expressly preserved by section 90 of the Constitution (Section 76 of the St. Lucia Constitution) which provides that it shall be exercised on Her Majesty's behalf by the Governor General acting on the recommendation of the Privy Council. It is, as is recognized by its inclusion in Chapter vi of the Constitution, an executive power, but as an executive power, it is exceptional and is confined, as it always has been since the Bill of Rights, to a power to remit in the case of a particular individual a punishment which has already been lawfully imposed upon him by a court – whether it be a punishment fixed by law for the offence for which he was found guilty or one determined by a judge in the exercise of his judicial function... ... ."

[160] In **Lauriano v Attorney-General & Another** (1996) 2 LRC 96

At page 112 Telford Georges P said:

> "In this case, however, it is the Constitution itself which vests in the Council the jurisdiction to advise commutation of penalty. The power has not been vested by an ordinarily enacted law, itself open to review on grounds of constitutional invalidity. It is artificial to attempt to review the mandatory sentence, which the courts must impose separate and apart from the constitutional provisions for its review enshrined in S.54 of the Constitution.
>
> This process can supply the necessary flexibility. The character and record of the offender and the circumstances of the particular offence are open to the consideration of the council. Viewed in its entirety the procedure appears to conform with standard of civilized society and not to be inhuman and degrading."

[161] This case was decided before the decision in Neville Lewis [supra] which has laid down guidelines which make the procedure before the mercy committee more open and moreover give the condemned man a right to put his case before committee. In this regard the system offers more flexibility and certainty could not be regarded in my view as inhumane. This flexibility in dealing with condemned persons who are automatically sentenced to death was recognized by Lord Slynn. In Neville Lewis (supra) when he said at page 26:

> "The importance of the consideration of a petition for mercy being conducted in fair and proper way is underlined by the fact that the penalty is automatic in capital cases. The sentencing judge has no discretion, whereas the circumstances in, which murder is committed vary greatly. Even without reference to international conventions it is clear that the process of clemency allows the penalty to be dispensed with and the punishment modified in order to deal with the facts of a particular case so as to provide for an acceptable result."

[162] Finally, Mr. Astaphan submitted that it has often been said in passages of previous, opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context taking into account the historical background and the purpose for which the utterance was made... ... ... The background of the Constitution is an attempt at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take those purposes into account.

[See **Matadeen v Pointu** (1983) WLR p.18 at 25].

[163] In 1965 Britain suspended the death penalty for murder for five years. (Murder Abolition of Death Penalty) Act 1965.

[164] In 1969 the death penalty for murder was totally abolished by both Houses of Parliament. There were numerous Royal Commissions and Committees set up to look into the question of the death penalty. There was a Royal Commission as early as in 1866 and one in 1953. All these, were long before these islands got statehood and finally independence.

[165] Hanging in these islands began in colonial times and continues up to date. When Britain granted these territories their independence their constitutions retained the death penalty in its original form. It is against this historical background that the Constitution must be looked at. (**Matadeen v Pointu** Supra).

[166] Some people may regard the mandatory death penalty and the death penalty as a whole as barbaric but it is for the people to influence Parliament to bring about the change. It is not the duty of the judge to amend the law to bring about that change. I may add that I am firmly of the view that in a truly democracy society the laws must reflect the wishes of people and to change the law with rapidity is tantamount to anarchy. Moreover stability in the law must be the basis of our system and certainty in the law is one of the bedrocks of stability.

[167] As Lord Hoffman has observed in his dissenting judgment in Lewis (Supra) that the Privy Council had previously decided in the negative the following:-

> [1] whether the Jamaican Privy Council, before deciding whether or not to recommend to the Governor General that a sentence of death be commuted, is required to disclose to the prisoner the information which it has received pursuant to section 91 of the Constitution (**Reckly v Minister of Public Safety and Immigration** No. 2 1966 A.C. 527)

[2] whether it would be unlawful to execute a sentence of death while the prisoner's petition remained under consideration by the Inter American Commission on Human Rights.
(**Higgs v Minister of National Security** ((2000) 2 WLR.1368;)

[3] whether the execution of the sentence of death can be unlawful because

[4] the prisoner, while, in detention, has been subjected to treatment which is unlawful or unconstitutional but unrelated to his being under sentence of death (**Thomas v Baptiste** (1999) 3 WLR. 249).

[168] At page 45 Lord Hoffman said:-

> "the Board now proposes to depart from its recent decisions in all three points. I do not think that there is any justification for doing so... ... .."

[169] Lord Hoffman also observed in his dissenting judgment in Lewis (supra) at pages 48 and 49:-

> "... ..the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean."

[170] With this I respectfully agree.

[171] For the forgoing reasons I would dismiss the appeal of both appellants and hold that the mandatory sentence of death passed on both appellants ought to be affirmed.

[172] I have read the judgments of the learned Chief Justice and Saunders J.A. [Ag.] Notwithstanding my dissent if I were to come to the same conclusion I would adopt the procedure for sentencing as outlined by the learned Chief Justice in paragraphs 61 and 62 of his judgment.

Albert J. Redhead
Justice of Appeal

[173] **SAUNDERS, J.:** Capital punishment is a topic that invariably elicits passionate comment. I think it is fair to characterise it as the subject that generates the most heated discussion in Commonwealth Caribbean jurisprudence. In part, this reflects the fact that internationally, particularly in the United States, capital punishment is a live issue. In the Commonwealth Caribbean countries, the debate surrounding the death sentence has become particularly controversial. The general public in these countries cannot but be concerned with the growing callousness that accompanies rising homicide rates. In the face of this, leaders of Governments have frequently been quoted in the Press voicing their emphatic support for retention of the death penalty, a position that is probably in keeping with the views of the vast majority of the Caribbean public. In the mean time however, undaunted, adequately funded human rights bodies have been stepping up their campaigns against the death sentence.

[174] Challenges to the death penalty and to various facets of its application are usually grounded on the human rights provisions contained in the written Constitutions of all of the independent English speaking Caribbean territories. Eminent counsel are retained to argue the appeals of death row prisoners. Their legal submissions have become more and more subtle and refined. Against this background of public clamor, strong political comment, agitation by human rights bodies and very skilful legal argument, the justice system has come under pressure and tremendous scrutiny in its handling of death penalty cases.

[175] Over the last two decades, new and challenging questions have been posed for determination by the courts. Judges, obliged to follow their consciences and their present understanding of the law, have been handing down decisions that underscore the view that they do not share a consistent approach to this area of the law. Nowhere is this more amply illustrated than in the judgments of our highest court, the Judicial Committee of the Privy Council. Important decisions on crucial issues of life or death are departed from, or expressly reversed, with an unsettling frequency. In **Pratt v Attorney General of Jamaica** (1994) 2 A.C. 1, the majority view earlier expressed in **Riley v Attorney General of Jamaica**

(1983) A.C. 719 was unanimously rejected and thus overturned. In **Fisher v Minister of Public Safety and Immigration** (No. 2) (1999) 2 W.L.R. 349 and **Thomas v Baptiste** (1999) 3 W.L.R. 249, differently constituted Boards, faced with basically the same legal question, arrived at opposite conclusions. Later, in **Higgs v Minister of National Security** (2000) 2 W.L.R. 1368, when the same question again arose for consideration, the Board understandably had some difficulty in reconciling those two earlier decisions. Ultimately, so as not to throw the law into even greater confusion, their Lordships felt obliged reluctantly to uphold the dubious justification advanced in **Thomas** for not following **Fisher**. But that was not the end of that matter. In **Lewis et ors. v Attorney General of Jamaica**, Privy Council Appeals Nos. 60/99, 65/99, 69/99 and 10/00 (unreported) September 2000, the majority overruled **Fisher** and **Higgs** and confirmed the correctness of **Thomas v Baptiste**. In the process, the Board also departed from its own decision in **Reckley v Minister of Public Safety and Immigration** No. 2 (1996) A.C. 527. Such is the relative uncertainty of the law in death penalty cases.

[176] The two matters now before us provide a further example of the new and challenging questions to which I have alluded. The cases involve appellants from Saint Lucia and Saint Vincent and the Grenadines respectively. Due to the similarities in the relevant statutory and constitutional provisions of these two countries and the common issue to be tried, the matters have been consolidated and heard together.

[177] In both states death by hanging is the punishment prescribed by law for murder. In each country this has been the case from yore. Section 178 of the Criminal Code of Saint Lucia now states: *"Whoever commits murder is liable indictably to suffer death."* Section 159 of the Saint Vincent and the Grenadines Criminal Code states: *"Any person who… … … … … is guilty of murder… … … ..shall be sentenced to death."* There are specific sub-sections in Saint Vincent and the Grenadines that pertain to persons convicted of murder who are pregnant or are under a certain age. Those sub-sections need not detain us as we do not concern ourselves with

them in these cases. Fundamentally, those sub-sections aside, once the jury convicts an accused of murder, the judge **must** sentence the prisoner to death.

[178] Both appellants were convicted of murder and sentenced to death. In each case, on separate occasions, their appeals to this court were dismissed. The appellants individually petitioned the Judicial Committee of the Privy Council taking issue, for the first time in their appeals, with certain constitutional aspects of the death penalty. The cases were remitted so that this court could consider the matters raised in the petitions. Briefly stated, the issue to be tried is whether the mandatory sentence of death is unconstitutional. At first blush it seems as though this is a trite question, one that has been asked and, in these courts, answered in the negative at least a hundred times already. But this is not necessarily the case.

[179] Before considering the matter, it is useful constantly to bear in mind three pertinent observations. First of all, death is a punishment like no other. It differs from all other punishments not by degree but rather by its very nature. It is completely irrevocable. It deprives the prisoner of the most fundamental constitutional right. Once this punishment is carried out all that remains of the prisoner is a memory of him. Secondly, murder is an offence for which the court has no discretion to determine the appropriate sentence. In deciding the punishment for other offences the court usually has a broad discretion and can pay regard to a wide variety of circumstances in arriving at a fit sentence. This is not the case upon a conviction of murder. Yet, and this is the third observation, murder is peculiarly a crime that admits of an enormous range both in character and in culpability. In other words, the circumstances in which murder is committed and the personal background and motive of the offender may vary radically from one accused to another.

[180] The appellants here assert that the mandatory death penalty is unconstitutional because it infringes those clauses that protect the citizen against inhuman punishment and the arbitrary deprivation of life. They submit that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect

for "the rule of law" and "the protection of the law". It is also argued that the mandatory death penalty violates the principle of the division of powers.

[181] Section 1 of the Saint Lucia Constitution, brought into force in 1979, states that:

> "Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right ... ... .subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely - a). life, liberty, security of the person, equality before the law and the protection of the law ... .the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest".

Section 2(1) provides that:

> "A person shall not be deprived of his life intentionally save in execution of the sentence of a Court in respect of a criminal offence under any law of which he has been convicted."

Section 5 provides that:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

[182] This Constitution is subject to certain "transitional provisions". Paragraph 10 of the transitional provisions states that:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 of the Constitution to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Saint Lucia immediately before 1st March 1967 (being the date on which Saint Lucia became an Associated State)."

The Saintt Vincent and the Grenadines Constitution contains identical provisions save that the date on which Saint Vincent became an Associated State was 27th October, 1969.

[183] In so far as their challenge is based upon a violation of section 5 (the prohibition against inhuman treatment), the appellants must first get around the "constitutional estoppel" created by paragraph 10 of the transitional provisions.

[184] Death by hanging, for the offence of murder, was a punishment that was lawful in both Saint Lucia and Saint Vincent and the Grenadines immediately prior to the date of commencement of Associated Statehood. Paragraph 10 therefore debars one from challenging that form of punishment for that offence on the ground that it is inhuman and degrading. See: **Richards v Attorney-General of St. Christopher and Nevis** (1992) 44 W.I.R. 141. The challenge mounted here, on the basis of section 5 of the respective Constitutions, is not against the punishment of death by hanging *per se*. Instead, the challenge here is to a legal regime that sanctions the imposition of the death penalty without regard to the range of circumstances in which the murder may have been committed and in the absence of any opportunity being afforded to consider the peculiar circumstances of the offender. The appellants here argue that while, as a consequence of paragraph 10, they are estopped from contending that the penalty of death by hanging, for murder, falls foul of section 5, they are nonetheless free to challenge its *mandatory* imposition upon *all* convicted of that offence.

[185] I am satisfied that when the matter is put in that manner paragraph 10 does not avail the respondents. Nothing said either in the case of **Richards** (supra) or in **Boodram v Baptiste** (1999) 1 W.L.R. 1709 deflects me from that view. In the former case, a careful reading of the three judgments, particularly that of Matthew JA, makes it clear that the challenge launched there was to the mode of execution, namely hanging. Similarly, in **Boodram's** case, the judgment itself plainly states in the following terms the issue that confronted the Board and was there decided:

> "The question for their Lordship's Board is whether hanging today in Trinidad is or is not a lawful method of execution."

In neither of these cases did the court pronounce upon the lawfulness of the mandatory aspect of the death penalty.

[186] Mr. Astaphan SC cited other decisions of the Privy Council as supportive of the view that paragraph 10 is an absolute bar to a challenge to the mandatory death penalty. These authorities included the minority view in **Riley** that was subsequently overwhelmingly approved by their Lordships; the decision in **Pratt** (the case that reversed **Riley**)*;* and the decision in **Runyowa v The Queen** (1967) A.C. 26*.* Of course, in examining **Riley** and **Pratt** one must appreciate that in Jamaica the constitutional provision that specifically bars challenges on the ground of inhuman punishment is reinforced with a general savings clause.

[187] In Jamaica the prohibition against inhuman punishment is found in section 17(1) of the Jamaica Constitution. Section 17(2) contains the savings clause that is in *pari materia* with paragraph 10 of the transitional provisions of Saint Lucia and Saint Vincent and the Grenadines. In **Riley**, the passage relied upon by counsel for the respondents was this:

> "As we have indicated, it is necessary to identify the act of the state which is challenged. It is not the judicial sentence of death: that was and remains a lawful act. If these proceedings were directed towards establishing the proposition that sentence of death is in itself a contravention of the Constitution as being an inhuman or degrading punishment, subsection (2) would be a complete answer. In Jamaica law a convicted man cannot be heard to say that sentence of death is itself a contravention of the Constitution, since it is authorised by a law which was in force when the Constitution came into effect and still remains in force. But that is not the purpose of these proceedings... "

It seems to me that in this passage, their Lordships were seeking to make a distinction of a kind not dissimilar to the one being made by the appellants here. Indeed, the passage quoted above would be entirely appropriate to the cases before us if one were to add to the last sentence the words: "The purpose instead is to challenge the inhuman treatment that inheres in the *mandatory* imposition of the sentence of death upon *all* persons convicted of murder". I do not read into the quotation from **Riley** anything that addresses or gives support to the mandatory character of the death penalty for murder.

[188] In **Pratt**, the Privy Council approved the construction placed on section 17(2) by the minority in **Riley**. Lord Griffith stated that:

> "The purpose of section 17(2) is to preserve all descriptions of punishment lawful immediately before independence and to prevent them from being attacked under section 17(1) as inhuman or degrading forms of punishment or treatment. Thus, as hanging was the description of punishment for murder provided by Jamaican law immediately before independence, the death sentence for murder cannot be held to be an inhuman description of punishment for murder."

The last part of the last sentence must be placed in its proper context and not given an overly broad interpretation. When Lord Griffith stated that the death sentence could not be held to be an inhuman description of punishment for murder, I do not believe that he thereby intended to sanction all methods of carrying out the death sentence. Nor did he intend to justify the carrying out of the sentence after substantial delay since that was the very point that his judgment decided. In my view Lord Griffith was also not concerning himself with the *mandatory* aspect of the death penalty. **Pratt** in my view only reiterated that the focus of section 17(2) is on the type or description of punishment that can be imposed, i.e. death by hanging for the offence of murder. That is the thing that is protected from challenge as being inhuman. I am not convinced that their Lordships had uppermost in their minds or intended to address the mandatory aspect of the death penalty.

[189] **Runyowa's** case appears to be a strong authority for the respondents. With the greatest of respect however, I would be hesitant to flaunt that case as an authority for the proposition being advanced here by the respondents. Not in these enlightened times. The case was decided in 1967. The Privy Council then held that the Southern Rhodesia savings clause analogous to paragraph 10, section 60(3), debarred a challenge to the mandatory death penalty for attempted arson. The reasoning of the Board suggests that had the legislature imposed, for *any* offence, a mandatory sentence of a description that was known in Southern Rhodesia before the appointed day then the courts would have considered that to

be a matter strictly falling within the province of Parliament. In the words of Lord Morris:

> "The provision contained in section 60 of the Constitution enables the court to adjudicate as to whether some form or type or description of punishment newly devised after the appointed day or not previously recognised is inhuman or degrading but it does not enable the court to declare an enactment imposing a punishment to be ultra vires on the ground that the court considers that the punishment laid down by the enactment is inappropriate or excessive for the particular offence."

[190] This kind of reasoning has been subsequently disapproved by the Privy Council. It does not allow for "a generous interpretation" of the Constitution nor does it avoid "what has been called 'the austerity of tabulated legalism', suitable to giving to individuals the full measure of the fundamental rights and freedoms... .." See: **Minister of Home Affairs v Fisher** (1980) A.C. 319. Fortunately, there are at least two good grounds for distinguishing **Runyowa**. In the first place, there was a section of the Southern Rhodesian Constitution, section 70(1)(b), expressly relating to a general saving of previously existing laws and the law under which the appellant was convicted was such a law. Their Lordships did take note of that section and the decision ultimately arrived at can easily rest on that provision. Further, the ambit of the specific saving clause in section 60 is broader than the one contained in the Saint Lucia and Saint Vincent and the Grenadines Constitutions. In Southern Rhodesia the clause saved laws "..to the extent that the law in question authorises the doing of anything by way of punishment **or other treatment** which might lawfully have been so done... ... " (my emphasis).

[191] I am therefore not persuaded by any of the cases cited by the respondents that paragraph 10 protects from challenge the mandatory death penalty as presently imposed for all convictions of murder in Saint Lucia and Saint Vincent and the Grenadines. An existing law may purport to authorise a particular form of

punishment along with a variety of acts, procedures or consequences associated with or accompanying that punishment. In the face of a constitutional challenge to such a law, I would construe the link between paragraph 10 and section 5 in this manner. The challenge in question can be advanced as long as, if the challenge is successful, the type of punishment the law authorises (e.g. death by hanging, imprisonment with hard labour, flogging) thereafter remains still capable of being lawfully imposed albeit perhaps in some context other than the one in which objection was made. Paragraph 10 saves only the type or form or description of punishment. Any inhuman or degrading treatment that is severable from such type of punishment is not saved. So, for example, the courts have permitted and upheld a challenge to the carrying out of the death penalty after a period of inordinate delay but, absent such delay, the death penalty itself still remained capable of being lawfully imposed. See: **Pratt v A.G.**

[192] It is now necessary to return to the question raised in the petitions and remitted to us for our consideration. Is the mandatory sentence of death unconstitutional? More specifically, does the mandatory aspect of the imposition of the death penalty offend against, in particular, section 5 of the Constitutions?

[193] In **Lauriano v Attorney General** (1996) 2 LRC 96, this issue was argued before the courts of Belize. At first instance, Brown CJ took the view that, in cases of murder, the ordinary sentencing powers of the court to take into account aggravating and mitigating circumstances were somehow transferred to and vested in the Belize Advisory Council when that body exercises the prerogative of mercy. According to him the Belize Advisory Council is "placed in the sentencing court's position."

[194] On appeal to the Court of Appeal of Belize, it does not appear that the matter of the mandatory death penalty was argued as fully as it has been before this court. The only case on point cited to the court might have been **Woodson v North Carolina** 428 US 280. Still, the learned President, Telford Georges, expressed his understanding of the view that there was

> "an unmistakable trend against the common law rule of mandatory death sentences... ..towards... ..the enlightened introduction of flexibility into the sentencing process and the recognition that individual culpability was not always best measured by the category of crime committed. This was a humanising development which reflected civilised and contemporary societal standards... ."

[195] As to whether mandatory death penalties constituted inhuman punishment, the learned President stated that:

> "We have not been addressed on the history of legislative enactments and judicial pronouncements in Belize and the Commonwealth Caribbean generally and will venture no observations. In the absence of a body of material supporting the proposition, the approach taken ..[by the plurality in Woodson]... . cannot automatically be transferred to the context of Belize".

[196] The court gave another reason for its decision not to follow *Woodson*:

> "... ... .it is the Constitution itself which vests in the council the jurisdiction to advise commutation of the penalty. The power has not been vested by an ordinarily enacted law, itself open to review on grounds of constitutional invalidity. It is artificial to attempt to view the mandatory sentence which the courts must impose separate and apart from the constitutional provisions for its review enshrined in section 54 of the Constitution.
>
> This process can supply the necessary flexibility. The character and record of the offender and the circumstances of the particular offence are open to consideration by the council. Viewed in its entirety the procedure appears to conform with the standards of civilised society and not to be inhumane and degrading."

[197] The respective Constitutions of Saint Lucia and Saint Vincent and the Grenadines also contain provisions regarding the prerogative of mercy. In each case the Constitution establishes "an Advisory Committee on the Prerogative of Mercy". The Committee is empowered to regulate its own procedure. Its membership comprises persons appointed by the Governor-General acting in accordance with the advice of the Prime Minister. Section 67(1) of the Saint Vincent and the Grenadines Constitution sets out the functions of the Advisory Committee in the following manner:

> "where any person has been sentenced to death (otherwise than by a court-martial) for an offence, the Minister for the time being designated

> under section 65(2) of this Constitution shall cause a written report of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained) together with such other information derived from the record of the case or elsewhere as he may require, to be taken into consideration at a meeting of the Advisory Committee on the Prerogative of Mercy; and after obtaining the advice of the Committee he shall decide in his own deliberate judgment whether to advise the Governor-General to exercise any of his powers under section 65(1) of this Constitution."

[198] I do not believe that anything contained in the provisions on the prerogative of mercy was intended specifically to supplement or derogate from the rights and freedoms declared and enshrined in Chapter 1 of the respective Constitutions. These are rights and freedoms over which the judiciary must have full superintendence. It is for courts of law to adjudicate such questions as how, when, whether and in what circumstances such rights may be enjoyed or infringed. Section 5 embodies a right that is qualified only by paragraph 10 of the transitional provisions. It would be an unsatisfactory response to the appellants' complaints to say that, under the Constitution, any inhuman treatment that flows from a law imposing the mandatory death penalty ***may*** be repaired by acts of clemency on the part of the executive branch. The fact that such clemency may be exercised cannot render such a penalty constitutional if it otherwise would not be.

[199] The respondents here are constrained to adopt the improbable explanation that the subject Constitutions, after carefully separating and distributing the powers of governance among three branches nevertheless, in relation to imposing the sentence of death, removed from the judiciary a vital part of its function and vested the same in the hands of the executive. I would only so interpret the Constitution if I have no other choice.

[200] In my view the constitutional functions of the Advisory Committee are not predicated upon the mandatory imposition of the death penalty upon all persons convicted of murder. In the sections that establish the Advisory Committee and set out its functions I see nothing that would dilute or affect the constitutional status and role of that Committee if the imposition of the death penalty were not

mandatory. The Committee may have fewer cases to consider but precisely as before, it will still have its work cut out to do.

[201] As long ago as 1949 in the United Kingdom, a Royal Commission was established on Capital Punishment. The Commission presented its report to Parliament in 1953. Paragraph 47 of that Report addressed the issue of the Prerogative of Mercy. The Commissioners reported that:

> "... .the exercise of the Prerogative should be an exceptional measure, interfering with the due process of law only in those rare cases which cannot be foreseen and provided for by the law itself. When, as now, one out of every two capital cases is commuted, the Prerogative ceases to be an exceptional measure and the Secretary of State becomes in effect an additional Court of Appeal, sitting in private, judging on the record only, and giving no reasons for his decisions... ... ... .The ability and integrity of the officials who advise the Secretary of State are not in doubt, but to entrust so wide a discretion to the executive, who cannot be effectively questioned about the manner of its exercise, does not fit into the constitutional framework of this country... ... ."

[202] If one were to substitute for the expressions "Secretary of State" the words "Advisory Committee" and for "the officials who advise" the phrase "those who constitute", then I would be very surprised if the above passage does not represent, in every respect, a fair and accurate commentary on current and past experiences relative to the exercise of the prerogative of mercy in both Saint Lucia and Saint Vincent and the Grenadines.

[203] In light of the decision of the Privy Council in **Lewis et ors. v Attorney General of Jamaica** - Privy Council Appeals Nos. 60/99, 65/99, 69/99 and 10/00 (unreported) September 2000, the Advisory Committee may now be required to modify its *modus operandi.* I cannot see however that the inroads made by **Lewis** into the non-judicial procedures hitherto followed by those involved in the exercise of the prerogative should affect any of the conclusions I have reached above.

[204] In seeking to uphold the constitutionality of the mandatory death penalty the respondents also relied on the Privy Council decisions in **Hinds v R** (1977) A.C. 195, **Lewis** (supra) and **Ong Ah Chuan v Public Prosecutor** (1981) A.C. 648.

The effectiveness of the authority of **Hinds**, a passage at page 225H-226B of the report, is blunted by the fact that the cited passage contains only the *obiter dicta* of Lord Diplock. In **Lewis** Lord Slynn's remarks at page 26 of the Advance Copy of the judgment must be seen in the context of the fact that the matter of the constitutionality of the mandatory death penalty was not then an issue before the Board. Lord Slynn would therefore not have had the benefit of full argument on the point. These dicta in **Hinds** and **Lewis** do not therefore carry as much weight as is claimed for them by Counsel.

[205] In **Ong Ah Chuan** the issue was squarely faced and it was held that there was nothing unconstitutional about the mandatory sentence of death. Opinions to the contrary from courts in India and America were brushed aside by Lord Diplock. Mandatory capital sentences were placed on precisely the same footing as all other mandatory fixed or minimum penalties imposed by Parliament and on that questionable premise, their validity was sanctioned.

[206] When their Lordships sat in **Ong Ah Chuan** they presided over an appeal from the courts of Singapore. We are here deciding what treatment or punishment, in Saint Vincent and the Grenadines and Saint Lucia, may or may not be inhuman or degrading. In making such a decision it can reasonably be argued that the guidance to be obtained from the final court of Singapore should not be of much greater significance than the assistance one can derive from the decisions of the highest courts of India and the United States of America. Moreover, in **Ong Ah Chuan** their Lordships were concerned with the mandatory death penalty not for murder but for drug trafficking and Lord Diplock appreciated the distinction between a mandatory death penalty for drug trafficking and one for murder when he noted that:

> "Wherever a criminal law provides for a mandatory sentence for an offence, there is a possibility that there may be considerable variations in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculating greed… ."

[207] This leaves for our consideration the wealth of cases cited by the appellants and the response of the respondents to those cases. There is firstly a line of American cases starting with **Woodson v North Carolina** *(supra)* and including **Roberts v Louisiana** 428 US 325, **Lockett v Ohio** 438 US 586, and **Sumner v Shuman** 483 US 66. Then there is the Indian Supreme Court case of **Bachan Singh v State of Punjab** (1980) 2 SCC 476. These cases all point in one direction.

[208] The respondents, citing **Matadeen v Pointu** (1999) 1 AC 98 at 111D-G, have urged the court to be very cautious in relying on decisions based on the American and Indian Constitutions. My first observation on **Mattadeen** is that, unlike the approach taken in **Ong's** case, the American authorities were duly considered by their Lordships and a rational basis was given for declining to follow them.

[209] **Mattadeen** is a case from Mauritius. The specific passages relied on by the respondents concerned the right not to be discriminated against. In this respect an analogy was drawn with the 14th Amendment of the American Constitution. The point made in that case by Lord Hoffman was that it was important to distinguish between those Constitutions that express rights in sweeping terms (as in India and America) and those that take pains to delimit the breadth of constitutionally declared rights. Thus, for example, section 13 of the Constitution of Saint Lucia, as of Saint Vincent and the Grenadines, sets out elaborate provisions defining the extent of the right of freedom from discrimination and prescribing the bases upon which it can be said that a law is discriminatory. The comparable Mauritius section was to the like effect.

[210] It is the manner in which the freedom from discrimination clause was drafted in Mauritius, the construction of the language of the particular provision, that therefore underpinned the caution that was alluded to in **Mattadeen** and relied upon here by counsel. Such drafting, such language, cannot be more sharply contrasted with the way in which section 5 is worded in the Constitutions of Saint Vincent and the Grenadines and Saint Lucia. The protection from inhuman

treatment is the one fundamental right in these Constitutions that has a "broad and wide ranging formulation". Unlike any of the other rights declared in these Constitutions, the entirety of section 5 runs to no more than a single sentence of sixteen words: "**No person shall be subjected to torture or to inhuman or degrading punishment or other treatment**". Apart from paragraph 10, which I have determined has no applicability here, section 5 has and permits of no qualifications. In this respect it is strikingly different from, for example, section 13 that addresses freedom from discrimination. To therefore use **Mattadeen** as a basis for rejecting American and Indian precedents that might shed light on an interpretation of section 5 is to misconceive the point being made by Lord Hoffman in that case.

[211] The Indian and American cases cited by the appellants, in support of the submission that the mandatory death penalty contravenes section 5, are buttressed by the recent case law of the Inter-American Commission of Human Rights. Article 5 (2) of the American Convention of Human Rights prohibits, inter alia, the imposition of "cruel, inhuman or degrading punishment". A series of decisions within the last two years, including **Downer & Tracey** (Jamaica) 41/00 (14 April 2000); **Baptiste** (Grenada) 38/00 (13 April 2000); and **Hilaire** (Trinidad) 66/99 (21 April 1999) pronounce upon the mandatory death penalty in relation to Article 5(2).

[212] Like Telford Georges P in **Lauriano** I perceive no substantial distinction between "cruel, inhuman or degrading punishment" as set out in the American Convention, "inhuman or degrading punishment… … … ." as provided for in section 5 of the Saint Lucia and Saint Vincent and the Grenadines Constitutions and "cruel and unusual punishment" as stated in the Eighth Amendment of the US Constitution. I therefore reject the submission that, on the basis of the different language of these instruments, different constructions must invariably flow.

[213] It was submitted for the respondents that the provisions of the American Convention on Human Rights cannot override the domestic law and Constitutions

of Saint Lucia and Saint Vincent and the Grenadines and that it is for this court and not the Inter American Court to interpret the Constitutions at hand. All of this is perfectly correct. But equally, this court should give great weight to the jurisprudence of the Inter American Court. See: **Briggs v Baptiste** (2000) 2 WLR 574. In **Mattadeen**, Lord Hoffman reiterated at page 31G of the judgment that:

> "It is a well recognised canon of construction that domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instruments. Again, their Lordships accept that such international conventions are a proper part of the background against which section 3 must be construed... ."

[214] In any assessment of a possible violation of section 5, a court must confront the question as to what criteria should be used to evaluate punishment or treatment that is inhuman or degrading. In my view we would be embarking upon a perilous path if we began to regard the circumstances of each territory as being so peculiar, so unique as to warrant a reluctance to take into account the standards adopted by humankind in other jurisdictions. Section 5 imposes upon the State an obligation to conform to certain "irreducible" standards that can be measured in degrees of universal approbation. The collective experience and wisdom of courts and tribunals the world over ought fully to be considered.

[215] The mandatory death penalty in these two countries, as presently applied, robs those upon whom sentence is passed of any opportunity whatsoever to have the court consider mitigating circumstances even as an irrevocable punishment is meted out to them. The dignity of human life is reduced by a law that compels a court to impose death by hanging indiscriminately upon all convicted of murder, granting to none an opportunity to have the individual circumstances of his case considered by the court that is to pronounce the sentence.

> "He might have been a tortured child, an ill-treated orphan, a jobless starveling, a badgered brother, wounded son, a tragic person hardened by societal cruelty or vengeful justice, even a Hamlet or Parasurama. He might have been angelic boy but thrown into mafia company or inducted into dopes and drugs by parental neglect or morally - mentally retarded or disordered". See: **Rajendra Prasad v State of Uttar Pradesh** per Krishna Iyer J as quoted in Judicial Review of the Death Penalty by David Pannick.

The law says that none of this matters. He must be sentenced to death once he has been found guilty of murder.

[216] It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime. If the death penalty is appropriate for the worst cases of homicide then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case. It is my view that where punishment so excessive, so disproportionate **must** be imposed upon such a person courts of law are justified in concluding that the law requiring the imposition of the same is inhuman. For all these reasons and upon the strength of the authorities presented to me I am driven firmly to one conclusion. To the extent that the respective sections of the Criminal Codes of the two countries are interpreted as imposing the mandatory death penalty, those sections are in violation of section 5 of the respective Constitutions.

[217] In reaching such a conclusion it does not perturb me that, in the past, the mandatory death penalty may have been regarded as a natural, inescapable, even acceptable consequence of all murder convictions. The spirit and intent of section 5 combined with the broad manner in which that section is drafted permit courts of law a wide discretion. Once paragraph 10 is not engaged, the court, at the instance of litigants with standing, is entitled to place punishments and treatments under continuous judicial scrutiny in order to ensure that they are not *or have not become* inhuman and degrading. A Constitution is a living document and the prohibition against inhuman treatment is peculiarly conditioned by "evolving standards of decency". Were it otherwise, then the full measure of the right assured to the citizen by section 5 would be severely compromised either by the paying of homage to unenlightened common law relics or by slavish adherence to the outmoded mores of yesteryear.

[218] Mr. Astaphan SC submitted that it was for Parliament and not the court to address the appellants' complaints. In some territories of the region, Parliament has indeed

intervened in order to ameliorate the inhumane consequences resulting from the mandatory death sentence for all murder convictions. So it is that the Jamaica legislature has amended the Offences against the Person Act in order to classify murder into capital and non-capital offences. The Belize legislature has also categorised murder and has given to the courts, in the case of a particular class of murder, the discretion to impose or refrain from imposing the death penalty. In the Republic of Trinidad and Tobago it appears that a Bill has been debated in Parliament, which also seeks to classify murder. In the British Dependent Territories of the Caribbean, capital punishment has been altogether abolished by a 1991 Order in Council.

[219] That some Parliaments in the region have seen it fit to respond positively to the *"unmistakable trend against the common law rule of mandatory death sentences…* .[in favour of] *… ..the enlightened introduction of flexibility into the sentencing process"* is a salutary development. Nevertheless, the granting of appropriate remedies to persons who complain of a violation of the right declared by section 5 (or of any of the other sections declaring fundamental rights and freedoms) is neither the duty of the executive nor the legislative branches of government. It is a specific, unqualified constitutional obligation of the judiciary. It would be equally remiss of the court to permit this task to be laid at the feet of the Advisory Committee on the Prerogative of Mercy or to sit back and await possible Parliamentary intervention.

[220] Counsel for the appellants addressed the court at some length on the submission that the mandatory death penalty offends against the principle of the division of powers. Sentencing is of course an essential part of the judicial function and the courts are astute to ensure that this function is not usurped by any other branch of government. See: **Greene Browne v R**. 1 A.C. 45 and **R v Melendez** Bz.L.R.. 289. If, as I have found, the mandatory death penalty is otherwise unconstitutional, then it becomes unnecessary to address this submission. Moreover, the idea that the Advisory Committee on the Prerogative of Mercy carries out a sentencing function is not one to which I can subscribe.

[221] Counsel also submitted that the mandatory death penalty violates sections 1(a) and 2(1) of the Constitution. These sections, according to Counsel, protect against the arbitrary deprivation of life. In light of my judgment, I also find it unnecessary to consider these further submissions and I will express no view on them.

[222] I agree with Sir Dennis Byron that the most appropriate response to a finding that the mandatory death sentence infringes section 5 would be a legislative one. Until there is such a response I would respectfully agree with the Order proposed by Sir Dennis and the sentiments expressed by him regarding the sentencing procedure to be observed in the future and the manner in which persons on death row should be treated. In closing I must express my appreciation to the lawyers involved in this matter for the very careful and thorough manner in which the cases of the appellants and the respondents respectively were researched, prepared and presented. Counsel's diligence was of tremendous assistance.

Adrian D. Saunders
Justice of Appeal (Ag.)