Bowe (Junior) & Anor v. R. Rev 1 (Bahamas) [2006] UKPC 10 (8 March 2006)

Privy Council Appeal No 44 of 2005

(1) Forrester Bowe (Junior)
(2) Trono Davis *Appellants*
v.
The Queen *Respondent*

FROM

THE COURT OF APPEAL OF

THE BAHAMAS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 8th March 2006

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood

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[Delivered by ***Lord Bingham of Cornhill****]*

1. By an order made on 11 April 2005, special leave was granted to the appellants to appeal against a judgment of the Court of Appeal of the Commonwealth of the Bahamas dated 10 April 2003, "but only in respect of (a) the jurisdiction of the Court of Appeal (b) the constitutional history in the Bahamas as it differs from that of other Caribbean states and (c) the constitutionality of the executive act of carrying out a mandatory death sentence". Those are the issues the Board must resolve in these appeals.

2. The first-named appellant was convicted on 25 February 1998 of murdering Deon Patrick Roache on 23 October 1992. He was sentenced to death. His appeal against conviction was dismissed by the Court of Appeal on 23 October 1998, and on 10 April 2001 his appeal to the Board against conviction was dismissed.

3. The second-named appellant was convicted on 13 December 1999 of murdering Jerrad Ferguson. He also was sentenced to death. His appeal against conviction was dismissed by the Court of Appeal on 24 July 2000 for reasons given on 31 October 2000. The Board refused him leave to appeal on 17 July 2001.

4. On 21 October 2002 both appellants again petitioned the Board seeking leave to challenge the constitutionality not of the sentences of death passed upon them, the death penalty being explicitly recognised and preserved in successive constitutions of the Bahamas, but of the mandatory requirement that sentence of death be passed on adults (other than pregnant women) convicted of murder. The Crown consented to the grant of leave, and on 20 November 2002 the Board granted the appellants special leave to appeal. The Board further directed that the hearing of the petitions be treated as the hearing of the appeals, that the orders of the Court of Appeal affirming the appellants' sentences (but not the sentences themselves) be set aside and that the cases be remitted to the Court of Appeal of the Bahamas for reconsideration of the matter of sentence. It was recognised that the cases raised important constitutional questions which had not been raised in the Bahamas before and which ought first to be considered by the Court of Appeal.

5. The issues were not however considered by the Court of Appeal, which on 10 April 2003 held by a majority (Sawyer P, Churaman, Ibrahim and Osadebay JJA, Ganpatsingh JA dissenting) that it had no jurisdiction to entertain the appeals. It was that ruling which led to the grant of special leave on 11 April 2005 on the terms already recited. Those terms were framed so as to preclude re-argument of the points decided by the Board in *Matthew v State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433, *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400 and *Watson v The Queen (Attorney General for Jamaica intervening)* [2004] UKPC 34, [2005] 1 AC 472.

Jurisdiction of the Court of Appeal

6. In argument before the Board, counsel for the Crown did not, consistently with his consent when leave was granted in November 2002, seek to support the judgment of the Court of Appeal on the jurisdiction issue. Since the appellants adhered to their submission, advanced unsuccessfully in the Court of Appeal,

that that court did have jurisdiction, there was accordingly no live issue on this matter before the Board. But the matter is too important to be resolved by concession, and any misunderstanding should be dispelled.

7. The decision of the Court of Appeal majority was based, in the judgment of Sawyer P, on the following major propositions:

> (1) Subject to exceptions in the case of those under the age of 18 at the time of the killing or pregnant at the date of sentence, section 312 of the Penal Code of the Bahamas (now section 291) requires sentence of death to be passed on any defendant convicted of murder.
>
> (2) The Court of Appeal has no jurisdiction to entertain an appeal against a mandatory sentence.
>
> (3) Any challenge to the constitutionality of the mandatory life sentence laid down by section 312 could not be relied on by a defendant in the criminal proceedings but must be the subject of a separate constitutional motion in the Supreme Court.

It was suggested, in reliance on *Walker v The Queen* [1994] 2 AC 36, that the Board itself had no jurisdiction to grant leave and remit in the present cases.

8. The first of these propositions is correct and was not challenged in argument. It is plain from the history briefly summarised in *Jones v Attorney-General of the Bahamas* [1995] 1 WLR 891, 894-895, that the common law rule which required sentence of death to be passed on a defendant convicted of murder was given effect in The Bahamas in 1799, 1865 and 1927. The wording of section 312, providing that "Whoever commits murder shall be liable to suffer death", although ambiguous, was held to impose a mandatory sentence of death. The appellants accepted that *Jones* requires section 312 to be so interpreted, subject to any modification required or permitted by any relevant constititution. But they pointed out, correctly, that the issue in *Jones* related to the interpretation of section 312 and not to its constitutionality, which was not challenged.

9. For its second proposition the Court of Appeal majority relied primarily on section 11 of the Court of Appeal Act. This provides in subsection (1)(c) that

> "A person convicted on information in the Supreme Court may appeal to the court under the provisions of this Act—
>
> (c) with the leave of the court against the sentence passed on his conviction unless the sentence is one fixed by law.

Attention was also drawn to section 12(3):

> "On an appeal against sentence the court shall, if it thinks that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as the court thinks ought to have been passed, and in any other case shall dismiss the appeal."

Thus, the court reasoned, where the law lays down a mandatory penalty on conviction, the court is denied jurisdiction to review the sentence and plainly cannot substitute any other sentence. Where the court's premise is met, the Board would accept that these conclusions must follow. But the appellants' challenge is directed to the premise. Their contention is that section 312, as interpreted in *Jones*, is inconsistent with the Constitutions of 1963 and 1969, considered below, and that the section must be modified so as to conform with those constitutions by prescribing a discretionary instead of a mandatory sentence of death. The merits of this argument must be considered at some length hereafter. But for purposes of jurisdiction the incorrectness of the argument cannot be assumed, and if the argument is correct the Court of Appeal's reasoning breaks down, for it is not reviewing a sentence fixed by law and there is no objection to its substituting a lesser sentence for a discretionary sentence of death. In somewhat similar circumstances appeals against apparently mandatory sentences were entertained in *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235, *Fox v The Queen* [2002] UKPC 13, [2002] 2 AC 284, and *R v Hughes* [2002] UKPC 12, [2002] 2 AC 259. At this point the court fell into error.

10. The Court of Appeal's third proposition rested in the main on article 28 of the 1973 Constitution scheduled to the Bahamas Independence Order 1973 (SI 1973/1080). This Constitution contained in Chapter III provisions for the protection of certain fundamental rights and freedoms of the individual, which were the subject of specific provision in articles 15-27. These articles were followed by article 28, directed to the enforcement of the rights previously specified. Article 28 provides:

"28.—(1) If any person alleges that any of the provisions of Articles 16 to 27 (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 the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

(3) If, in any proceedings in any court established for The Bahamas other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the provisions of the said Articles 16 to 27 (inclusive), the court in which the question has arisen shall refer the question to the Supreme Court.

(4) No law shall make provision with respect to rights of appeal from any determination of the Supreme Court in pursuance of this Article that is less favourable to any party thereto than the rights of appeal from determinations of the Supreme Court that are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.

> (5) Parliament may make laws to confer upon the Supreme Court such additional or supplementary powers as may appear to be necessary or desirable for enabling the Court more effectively to exercise the jurisdiction conferred upon it by paragraph (2) of this Article and may make provision with respect to the practice and procedure of the Court while exercising that jurisdiction."

The majority of the Court of Appeal read this article as precluding it from entertaining a challenge to the constitutionality of a sentencing provision on an appeal against sentence in criminal proceedings. Redress must be sought in a separate application to the Supreme Court. The Board cannot accept these conclusions for two main reasons. First, they are inconsistent with the decision of the Board in *Chokolingo v Attorney-General of Trinidad and Tobago* [1981] 1 WLR 106, 111-112. Secondly, they are inconsistent with article 28. Subsection (1) of the article makes plain that the right of application to the Supreme Court for redress is "without prejudice to any other action with respect to the same matter which is lawfully available". Thus the right of application to the Supreme Court is not provided as a unique or exclusive procedure, an interpretation made still clearer by the proviso to subsection (2). The provision in subsection (3) for reference to the Supreme Court applies only where the question arises in proceedings in any court "other than the Supreme Court or the Court of Appeal": the inescapable inference is that if the question arises in proceedings in one or other of those courts, it shall be resolved in that court in those proceedings. In concluding otherwise the Court of Appeal majority fell into error.

11. The Board cannot accede to the suggestion that it lacked jurisdiction to entertain this constitutional challenge and remit the case to the Court of Appeal. It is true that the Board held, in *Walker v The Queen* [1994] 2 AC 36, that it had no jurisdiction to rule on the challenge there made. It so ruled because the sentence was constitutional when passed, and it was only the passage of time after sentence which was said to render it unconstitutional. That was not an issue which could be determined on an appeal against sentence. The Court of Appeal was wrong to treat that case as analogous with the present, since the appellants do contend that the sentences passed upon them, because mandatory, were unconstitutional when passed.

12. The Board is satisfied that the Court of Appeal had jurisdiction to entertain these appeals and regrets that it has not, in the event, enjoyed the benefit of the Court of Appeal's opinions on the important issues at stake.

<u>The relevant constitutional provisions</u>

13. To understand and evaluate the parties' conflicting submissions on the effect of the constitutional provisions in the Bahamian Constitutions of 1963, 1969 and 1973 it is necessary to make brief reference to some of those provisions.

14. The Bahama Islands (Constitution) Order in Council 1963 (SI 1963/2084) revoked the existing letters patent relating to the Islands and provided that the Constitution scheduled to the Order should come into force on the appointed day, 7 January 1964. Section 4 of the Order, so far as relevant, provided:

> "4.—(1) Subject to the provisions of this section, the existing laws shall continue in force after the commencement of this Order as if they had been made in pursuance thereof and notwithstanding the revocation of the existing Letters Patent but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.
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> (2) Where any matter that falls to be prescribed or otherwise provided for under the Constitution by the Legislature or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment, adaptation or modification to any such law made under this section) or is otherwise prescribed or provided for immediately before the commencement of this Order by or under the existing Letters Patent, that prescription or provision shall, as from the commencement of this Order, have effect as if it had been made under the Constitution by the Legislature or, as the case may be, by the other person or authority.
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> (3) The Governor may by order made at any time within two years after the appointed day make such amendments, adaptations or modifications to any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of the Constitution or otherwise for giving effect or enabling effect to be given to those provisions.
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> (4) The provisions of this section shall be without prejudice to any powers conferred by the Constitution or by any other law upon any person or authority to make provision for any matter, including the amendment or repeal of any existing law.

> . . . .
>
> (6) For the purposes of this section, the expression 'existing law' means any law, rule, regulation, order or other instrument made or having effect as if it had been made in pursuance of the existing Letters Patent and having effect as part of the law of the Bahama Islands immediately before the commencement of this Order."

Section 12(1) of the Order provided a two-year standstill period, and conferred special powers on the Governor:

> "12.—(1) Until the expiration of the period of two years immediately after the appointed day, nothing contained in any existing law shall be held to be inconsistent with any provision of sections 2 to 13 (inclusive) of the Constitution, and nothing done during that period under the authority of any such law shall be held to be done in contravention of any of those sections; thereafter Part I of the Constitution shall have full force and effect in the Bahama Islands save that no provision in any existing law which is declared by order of the Governor under subsection (9) of this section to be an excepted provision shall be deemed to be inconsistent with any provision of the said sections 2 to 13 (inclusive) and nothing done under the authority of any such provision shall be held to be done in contravention of any of those sections."

The section went on to provide that after the appointed day a Commissioner should examine existing laws with reference to the provisions of sections 2 to 13 of the Constitution: he was then to report, and a conference would be held to consider provisions impugned in the report.

15. Part 1 of the Constitution afforded protection to fundamental rights and freedoms of the individual. Section 1, so far as relevant, began:

> "Whereas every person in the Bahama islands is entitled to the fundamental rights and freedoms of the individual, that is to say, has 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 for the public interest, to each and all of the following, namely—
>
> (a) life, liberty, security of the person …"

There followed section 2, which in subsection (1) (and subject to exceptions specified in subsection (2)) provided:

> "No person shall be deprived intentionally of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted."

In section 3 it was provided:

> "(1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the Bahama Islands immediately before the coming into operation of this Constitution."

Section 14 provided for enforcement in terms substantially indistinguishable from those of article 28 of the 1973 Constitution, quoted in para 10 above.

16. Part II of the Constitution was entitled "The Governor". By section 25 the Governor was empowered to grant a pardon or a respite of punishment, to substitute a less severe form of punishment for that imposed by any sentence or to remit the whole or any part of any sentence. He was to exercise these powers after consultation with an Advisory Committee established under section 26. The members of this Committee were to be five in number, four Ministers appointed by the Governor after consultation with the Premier, and the Attorney-General, who (under section 84(1) of the Constitution) was empowered to institute, undertake, take over and continue criminal proceedings. The Governor was to preside at meetings of the Committee, and where a person had been sentenced to death he was to call upon the trial judge to make a report on the case, which would be taken into consideration at a meeting of the Committee.

17. The 1963 Order and Constitution were superseded by The Bahama Islands (Constitution) Order 1969 (SI 1969/590) and the Constitution scheduled to it, which in respects relevant to this appeal were to very similar effect. Section 4 of the 1969 Order reproduced the substantial effect of section 4 of the 1963 Order as quoted above, save that the definition of "existing laws", slightly expanded, was transferred to section 2, a definition section, and the Governor's

power exercisable for two years under the 1963 Order was to be exercisable for six months only. Provision was not made as in the earlier Order for a Commissioner, a report and a conference.

18. In Part 1 of the 1969 Constitution the earlier human rights provisions quoted above were reproduced in the same terms. In section 26(1) the Governor was given the same powers of pardon, respite, substitution and remission as in the 1963 Constitution, but by subsection (2) these powers were to be exercised in accordance with the advice of such Minister as might for the time being be designated in that behalf by the Governor, acting in accordance with the advice of the Prime Minister. Under section 27, the Advisory Committee was to consist of the Attorney-General and not fewer than three nor more than five other members (any of whom might, but need not, be Ministers), appointed by the Governor. The designated Minister was to attend and preside at any meeting of the Committee, and no business could be transacted unless three members were present, including the Attorney-General (who retained his prosecuting functions). The Governor (section 27(6)) was to exercise his functions in accordance with the advice of the Prime Minister. In a capital case, section 28 required the designated Minister to cause a report by the trial judge to be taken into consideration at a meeting of the Committee, but, after obtaining the advice of the Committee, he was to decide in his own deliberate judgment whether to advise the Governor to exercise any of his powers under section 26(1) of the Constitution.

19. The 1969 Order and Constitution were in turn superseded by The Bahamas Independence Order 1973 (SI 1973/1080) and the Constitution scheduled to it, which came into force on 10 July 1973. In revoking the 1969 Order, section 2 of the 1973 Order provided that

> "the revocation of the existing Order shall not affect the operation on and after the appointed day of any law made or having effect as if made in pursuance of the existing Order or confirmed in force thereunder and having effect as part of the law of the Bahama Islands immediately before the appointed day (including any law made before the appointed day and coming into operation on or after that day)."

Section 4 of the Order was similar in effect, so far as relevant, to section 4 of the 1963 and 1969 Orders, save that the Governor-General (as he had become) was to have twelve months to make such amendments to any existing law as might appear to him to be necessary or expedient for bringing that law into conformity with the provisions of the Bahamas Independence Act 1973 and the Order.

20. By article 1 of the Constitution, the Commonwealth of the Bahamas was declared to be a sovereign democratic state. By article 2, the Constitution was to be the supreme law and

> "subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

21. The provisions protecting fundamental rights and freedoms of the individual were now set out in Chapter III, but in the same terms, articles 15, 16 and 17 corresponding to sections 1, 2 and 3 of the earlier Constitutions. But there was a new provision, not found in the earlier Orders or Constitutions, in article 30:

> "30.—(1) Subject to paragraph (3) of this Article, nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of Articles 16 to 27 (inclusive) of this Constitution to the extent that the law in question—
>
> a. is a law (in this Article referred to as 'an existing law') that was enacted or made before 10th July 1973 and has continued to be part of the law of The Bahamas at all times since that day;
> b. repeals and re-enacts an existing law without alteration; or
> c. alters an existing law and does not thereby render that law inconsistent with any provision of the said Articles 16 to 27 (inclusive) in a manner in which, or to an extent to which, it was not previously so inconsistent.
>
> (2) In sub-paragraph (1)(c) of this Article the reference to altering an existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it; and in paragraph (1) of this Article 'written law' includes any instrument having the force of law and in this paragraph and the said paragraph (1) references to the repeal and re-enactment of an existing law shall be construed accordingly.
>
> (3) This Article does not apply to any regulation or other instrument having legislative effect made, or to any executive

> act done, after 9th July 1973 under the authority of any such law as is mentioned in paragraph (1) of this Article."

In Chapter VI of the Constitution ("The Executive") the Governor-General's powers to grant pardons and respites, to substitute penalties and to remit sentences were reproduced, as was the requirement that he act in accordance with the advice of Minister whom he, acting in accordance with the advice of the Prime Minister, was to designate (article 90(1) and (2)). The Committee was re-established, composed as before (article 91), and in capital cases the procedure was to be the same. The designated Minister was not obliged in any case to act in accordance with the advice of the Committee (article 92(3)).

22. The appellants' submissions on the successive Orders and Constitutions referred to above involved a number of steps which may, it is hoped fairly, be summarised as follows:

(1) These Orders and Constitutions guaranteed to the people of the Bahamas certain rights regarded as fundamental, including the right (although qualified) to life and the right (again qualified) not to be subjected to torture or to inhuman or degrading treatment or punishment.

(2) While article 30(1) of the 1973 Constitution contained a general savings clause similar in effect to those held by a majority of the Board in *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400; *Matthew v State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433; and *Watson v The Queen* [2004] UKPC 34, [2005] 1 AC 472 to be effective to preclude challenge to an existing law (if that law had not been amended after the relevant date) on grounds of inconsistency with the human rights guarantees of the Constitutions of Barbados, Trinidad and Jamaica, the 1963 and 1969 Orders and Constitutions of The Bahamas contained no such general savings clause.

(3) Section 4(1) of the 1963 and 1969 Orders imposed a mandatory duty to construe existing laws with such modifications, adaptations, qualifications and exceptions as might be necessary to bring them into conformity with the Constitution.

(4) If, as the appellants contend, section 312 is inconsistent with sections 2 and 3 of the 1963 and 1969 Constitutions, it must be construed with such modification as may be necessary to bring

it into conformity with the 1963 or 1969 Constitution, unless section 312 is saved by another provision of the respective Orders or Constitutions.

(5) The saving provision in section 3(2) of the 1963 and 1969 Constitutions relates to modes of punishment: it is effective to confer immunity on the death penalty but not on the mandatory requirement that the death penalty be imposed.

(6) In pursuance of the duty imposed by section 4(1) of the 1963 and 1969 Orders, section 312 was to be construed before 10 July 1973 as prescribing a discretionary and not a mandatory sentence of death: thus the savings clause in article 30(1) of the 1973 Constitution applied to section 312 as so construed.

23. The first step of this argument is, in the Board's opinion, sound. These Orders and Constitutions were intended to provide effective legal guarantees of certain rights regarded as fundamental. The rights themselves reflected those protected by the European Convention on Human Rights, which had after 1953 been extended to cover the Bahamas. But these constitutional instruments gave these rights enhanced protection, in a manner then unknown in the domestic law of the United Kingdom. Although qualified in some respects, these guarantees were clearly intended to be effective.

24. The second step of the argument is also correct: the Bahamian constitutional instruments of 1963 and 1969 did contain no general savings clause of the kind considered in the three authorities cited. The situation changed on 10 July 1973, and precludes challenge to any existing law not subject to modification before that date pursuant to section 4(1) of the earlier Orders. But article 30(1) does not operate retrospectively. This gives rise to the unusual feature of these appeals, that the compatibility of section 312 must be judged by the law obtaining before 10 July 1973.

25. The Board accepts the third step in the appellants' argument. Section 4(1) of the 1963 and 1969 Orders provides that laws "shall" be construed in accordance with the subsection, and confers no discretion. Whether section 312 was inconsistent with the human rights guarantees in the Constitutions before 10 July 1973, and so required modification to bring it into conformity with the Constitution, is the central issue which divides the parties and is discussed below. The fourth step in the argument follows if the third is sound.

26. The fifth step of the argument is correct. It was so held, in relation to different but closely analogous provisions, in *R v Hughes* [2002] UKPC 12,

[2002] 2 AC 259, paras 47-48, and *Fox v The Queen* [2002] UKPC 13, [2002] 2 AC 284. These are recent decisions, but the passage of time has not altered the meaning of the provisions. A different ruling was given in *Runyowa v The Queen* [1967] 1 AC 26, cited in *Hughes* but not followed, an authority to which further reference is made below.

27. The correctness of the appellants' sixth step depends on their establishing, as from a date before 10 July 1973, the disconformity of which they complain. If, however, they do establish such disconformity, section 4(1) of the 1963 and 1969 Orders enables, if it does not require, the court to cure it. The Board exercised this power in *Kanda v Government of Malaya* [1962] AC 322, 334; *Vasquez and O'Neil v The Queen* [1994] 1 WLR 1304, 1314; *Greene Browne v The Queen* [2000] 1 AC 45, 50; *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235, para 43; *Fox v The Queen*, above, para 11; and *R v Hughes*, above, para 51.

The main issue

28. The appellants contended that, judged by the standards prevailing in 1973 and on the materials available at that time, ignoring developments and decisions which came later (save to the extent that they referred to the past), the mandatory death penalty was an inhuman and degrading punishment. They focused their argument on section 3 of the 1963 and 1969 Constitutions rather than section 2, although referring to the latter, and rightly so, since their sentences were imposed in respect of criminal offences of which they had been convicted, and were in accordance with the law unless the constitutionality of section 312 could be successfully challenged. But the chronological condition of the appellants' argument is crucial, since counsel for the Crown rightly emphasised the danger of anachronism. It is ordinarily proper, when interpreting a constitution, to regard it as a living instrument capable of reflecting the standards and expectations of society as these change and develop over time. While the meaning of constitutional provisions does not change, their content and application may, and the judicial task is ordinarily to bring an objective, contemporary judgment to bear. That would, however, as counsel for the Crown rightly submitted, be a wholly inappropriate approach to the task now before the Board.

29. The appellants' case on this main issue may again be summarised in a series of propositions which it is convenient to set out before turning to consider them:

(1) It is a fundamental principle of just sentencing that the punishment imposed on a convicted defendant should be

proportionate to the gravity of the crime of which he has been convicted.

(2) The criminal culpability of those convicted of murder varies very widely.

(3) Not all those convicted of murder deserve to die.

(4) Principles (1), (2) and (3) are recognised in the law or practice of all, or almost all, states which impose the capital penalty for murder.

(5) Under an entrenched and codified constitution on the Westminster model, consistently with the rule of law, any discretionary judgment on the measure of punishment which a convicted defendant should suffer must be made by the judiciary and not by the executive.

30. The principle that criminal penalties should be proportionate to the gravity of the offence committed can be traced back to Magna Carta, chapter 14 of which prohibited excessive amercements and, in the words of one commentator, "clearly stipulated as fundamental law a prohibition of excessiveness in punishments" (Granucci, "'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning" 57 Calif Law Rev (1969), 839 at 846). It indeed appears that the cruel and unusual punishments clause of the Bill of Rights 1689 was intended not only to prohibit unauthorised punishments (such as Jeffreys CJ had inflicted on Titus Oates) but also to reiterate the English policy against disproportionate penalties (ibid, p 860). During the century which followed the "Bloody Code" held sway in England, with capital penalties for over 200 offences, prompting Professor Radzinowicz to observe (*A History of English Criminal Law*, 1948, vol 1, "The Movement for Reform", p 14):

> "The other main characteristic of this system was its rigidity. Practically no capital statute provided any alternative to the death penalty, which thus had to be pronounced irrespective of the special circumstances of particular cases. This method disregarded the fundamental principle which is essential to any effective system of crime-prevention and which has been aptly defined by Raymond Saleilles as *le principe de l'individualisation de la peine".*

The eighth amendment to the Constitution of the United States, adopted in 1791, reproduced the language of the Bill of Rights 1689, and was concerned primarily with selective or irregular application of harsh penalties: *Furman v Georgia* 408 US 238 (1972), 242. In *O'Neil v Vermont* 144 US 323 (1892), 339-340, three justices held that the amendment was directed, not only against punishments which inflict torture "but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted." In *Weems v United States* 217 US 319 (1910), 366-367, McKenna J speaking for the Supreme Court said:

> "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.
>
> Is this also a precept of the fundamental law? We say fundamental law, for the provision of the Philippine bill of rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning."

Since article 3 of the European Convention on Human Rights, article XXVI of the American Declaration of the Rights and Duties of Man 1948 and section 3 of the 1963 and 1969 Constitutions derive, despite differences of language, from the same source, the core meaning of each is the same. Lord Denning recognised the long-standing power of the court to quash a penalty which was excessive and out of proportion (*R v Northumberland Appeal Compensation Tribunal, Ex p Shaw* [1952] 1 KB 338, 350-351; *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052, 1057-1058). The matter was clearly and succinctly put by Saunders JA (Ag) in the Eastern Caribbean Court of Appeal in *Spence v The Queen* and *Hughes v The Queen* (unreported, 2 April 2001, Criminal Appeals Nos 20 of 1998 and 14 of 1997) when he said in para 216 of his judgment:

> "It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime".

The Board is of the same opinion, and is not aware that the principle has ever been authoritatively controverted.

31. The differing culpability of those committing the crime of murder was widely recognised well before 1973. As early as 1794 the Legislature of Pennsylvania enacted a statute which differentiated murders which were to be capital from murders which were not, reciting in section II:

> "And whereas the several offences, which are included under the general denomination murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment …"

This was also the view taken by the Royal Commission on Capital Punishment 1949-1953, whose *Report* (Cmd 8932, September 1953) has been described by a South African author as "the most profound official study of every facet of the problem of the death penalty ever made anywhere in the world" (B. v. D van Niekerk, "… Hanged by the Neck until You are Dead" (1969) 86 SALJ 457, 463). In paragraph 21 of its *Report*, on page 6, the Royal Commission stated:

> "Yet there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder."

It went on to observe (para 38, p 11) that "the circumstances in which murder is committed vary infinitely" and to express as "an inescapable conclusion" (para 535, p 190) that

> "the general liability under the existing law to suffer capital punishment for murder cannot be satisfactorily limited by such means [re-definition or classification into degrees], because no legal definition can cover all the multifarious considerations, relating to the offender as well as to his crime, which ought to be taken into account (and are at present taken into account by the Secretary of State) in deciding whether the supreme penalty should be exacted in each individual case".

It was of opinion (para 595, p 208) that "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder". The Royal Commission repeated this view when it described murder (para 606, p 212) as "a crime that varies widely in character and culpability, and for which the penalty of death is often wholly inappropriate". In reaching these conclusions the Royal Commission reflected

the evidence given by the Home Office (to the Royal Commission (1-2 Minutes of Evidence, p 13 (1949)), which was that

> "No simple formula can take account of the innumerable degrees of culpability, and no formula which fails to do so can claim to be just or satisfy public opinion."

The Board is mindful that in The Bahamas the definition of murder imports an intention to kill, and to that extent the breadth of the common law offence in England and Wales is somewhat narrowed, as it has been in some other Caribbean jurisdictions. In the Board's opinion, however, it is true, as it recently held in *Reyes v The Queen*, above, para 11:

> "it has however been recognised for very many years that the crime of murder embraces a wide range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are not equally heinous."

These are not insights which have been gained since 1973.

32. The citations given above lend some support to the appellants' third proposition. Other citations may be given. The Royal Commission, having examined in detail a sample of 50 cases, roundly asserted (in para 22, p 6, of its *Report*).

> "No one would now dispute that for many of these crimes it would be monstrous to inflict the death penalty."

The same view prevailed in the United States. In *Winston v United States* 172 US 303 (1899), 310, the Supreme Court referred to the "hardship of punishing with death every crime coming within the definition of murder at common law". This theme was echoed, again by the Supreme Court, in *Williams v New York* 337 US 241 (1949), 247-248, where the court held:

> "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country

> has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions – even for offenses today deemed trivial".

In *McGautha v California* 402 US 183 (1971), 198, it was said that there had in the United States been a "rebellion against the common law rule imposing a mandatory death sentence on all convicted murderers". Although dissenting, Burger CJ observed in *Furman v Georgia* 408 US 238 (1972), 402:

> "I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the American abhorrence of 'the common-law rule imposing a mandatory death sentence on all convicted murderers': 402 US at 198. As the concurring opinion of Mr Justice Marshall shows, *ante*, at 339, the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process. It recognized that individual culpability is not always measured by the category of the crime committed".

In *Woodson v North Carolina* 428 US 280 (1976), 301, an historical survey was said to make clear that

> "one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense".

33. In vindication of their fourth principle the appellants' counsel referred to the law and practice of many jurisdictions which, even while retaining the death penalty for murder, sought to distinguish between those murderers for whom death was an appropriate penalty and those for whom it was not. In the United States, as noted in para 31 above, the attempt to classify murders by degree began with the Pennsylvanian statute of 1794. Other jurisdictions followed, and within a generation the practice had spread to most states: see *Woodson,* above, p 290. But juries still proved unwilling to convict in cases where the crime was capital, and in 1838 Tennessee granted juries a sentencing discretion in capital cases, a practice again followed by other states: *Woodson*, above, p 291. By 1963 all the states had replaced their automatic death penalty statues with discretionary jury sentencing: *Woodson,* above, pp 291-292. In *Furman,* above, at p 299, Brennan J described death sentences as "rarely imposed" and death as "even more rarely inflicted", and White J, p 311, was able to say that "judges and juries have ordered the death penalty with such infrequency that the odds

are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist".

34. By the end of the eighteenth and the beginning of the nineteenth centuries, only a small proportion of those sentenced to death, even for murder, were executed in England and Wales: see Radzinowicz, *op cit.*, pp 151-158. But the indiscriminating quality of the mandatory death penalty caused concern, and a Royal Commission which reported in 1866 favoured a classification of murder by degree. Sir James Stephen, in his *History of the Criminal Law of England*, (1883), vol 2, pp 87, 89 favoured the grant of a sentencing discretion to the judge in capital cases because

> "it is practically impossible to lay down an inflexible rule by which the same punishment must in every case be inflicted in respect of every crime falling within a given definition, because the degrees of moral guilt and public danger involved in offences which bear the same name and fall under the same definition must of necessity vary … The fact that the punishment of death is not inflicted in every case in which sentence of death is passed proves nothing more than that murder, as well as other crimes, has its degrees, and that the extreme punishment which the law awards ought not to be carried out in all cases".

In 1930 a Select Committee of the House of Commons recommended abolition of the death penalty for a trial period of five years. In 1947-1948 attempts were made in Parliament to introduce degrees of murder, leading to appointment of the 1949-1953 Royal Commission. But, as the detailed statistical examination made by the Royal Commission made clear, 45.7% of those sentenced to death in England and Wales between 1900 and 1949 were not executed (including 90% of women) and in Scotland the percentage not executed was even higher (although the figure for women was 80%): *Report*, paras 42-45, pp 13-15. Thus, as the Royal Commission observed in para 46, p 15,

> "the liability to suffer the death penalty for murder is thus already limited to those murderers who in the opinion of the Home Secretary or the Secretary of State for Scotland deserve it, and the rigidity of the law is in practice circumvented".

For reasons which now seem unpersuasive, the Royal Commission favoured the grant of a sentencing discretion to juries (para 595, p 208); it did not contemplate that there could, consistently with justice, be no discretion. As is well known, the United Kingdom made an attempt to distinguish capital from

non-capital murder in 1957, and when this proved unsuccessful abolished the death penalty in 1965. Such evidence as there is of practice in The Bahamas suggests that, both before and after 1973, the proportion of those reprieved has been greater than the proportion of those executed.

35. In India it had for many years been recognised that cases might arise in which it might be proper to remit the general severity of the law, and courts were given an express power to recommend mercy: see, for example, the Letters Patent establishing the Supreme Court at Madras, 1800, p 34. The Indian Penal Code of 1860 went further: it gave the court power to sentence convicted murderers either to death or transportation for life on payment of a fine, save where the murderer was already serving a life sentence. In 1919 the Belgian courts were empowered, if there were extenuating circumstances, to substitute for the death sentence a sentence which might be as low as three years' imprisonment: Royal Commission Report, para 581, p 204. Account of mitigating circumstances could also be taken in South Africa (1935), Southern Rhodesia (by 1935), Swaziland (1938), Lesotho (1959) and Botswana (1964). In South Africa it was expressly recognised that while there might be some crimes within a specified category which would merit imposition of the death penalty, there would be others which would not: thus in *S v K en'n Ander* 1972 (2) SA 898, 902, where sentence of death had been passed on a rapist, the Attorney-General conceded on appeal, and the Appeal Court held, that the sentence was disproportionate. The Board is unaware of any jurisdiction in which, by 1973, the mandatory death sentence was retained and it was considered just to execute all who were convicted: by one means or another, the harshness of the old common law rule was mitigated. Even during a period in the 1950s -1960s when the death penalty was applied more frequently in South Africa than anywhere in the world, 21% of those sentenced to death were reprieved: van Niekerk, *op. cit.*, pp 457, 460.

36. The most explicit exposition of the reasoning underlying the appellants' fifth proposition is to be found in *Hinds v The Queen* [1977] AC 195, 225-228, a decision made after the 1973 watershed relevant to these appeals. The decision concerned a statutory mandatory sentence of detention "at hard labour during the Governor-General's pleasure". The Board, on this point unanimously, held this provision to be contrary to the Constitution and void. In so deciding the Board relied, first, on analysis of the Constitution of Jamaica and, secondly, on earlier authority. The Constitution of Jamaica, like the 1963 and 1969 Constitutions of the Bahamas, provided for a clear line of demarcation between the power and authority of the judiciary and the power and authority of the executive, a demarcation which is inherent in the rule of law. It was a demarcation supported by earlier authority. In *Deaton v Attorney-General and the Revenue Commissioners* [1963] IR 170, 182-183, referring to a provision

which left the choice of penalties to the executive, the Supreme Court of Ireland said:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case … The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of ~~the~~ that rule is for the Courts … the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive …".

In *Liyanage v The Queen* [1967] 1 AC 259, 287-288, the Board found no ground for inferring that, under the Constitution of Ceylon, judicial power was intended to be shared with the executive or the legislature. In *The State v O'Brien* [1973] IR 50, 59-60, the Supreme Court of Ireland again held a sentencing provision to be unconstitutional:

> "The section … placed it in the hands of [the Review Board] to determine actively and positively the duration of the prisoner's sentence, and not just to effect an act of remission. The determination of the length of sentence for a criminal offence is essentially a judicial function".

37. These authorities are relatively recent, but they have deep historical roots. In *Prohibitions del Roy* (1607) 12 Co Rep 63, Coke CJ stamped on executive pretensions to judicial power, declaring (p 64) that

> "no King after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the courts of justice."

Lester and Oliver (*Constitutional Law and Human Rights*, 1997, para 14) cite this case as authority for the proposition that the

> "power of doing justice in the courts has been irrevocably delegated to the judges and magistrates, so that the monarch may take no part in the proceedings of a court of justice."

To Dicey, commenting on the case in *An Introduction to the Study of the Law of the Constitution*, 1885, p 18, this was a rule "essential to the very existence of the constitution". Blackstone was of the same opinion. In volume I of his *Commentaries on the Laws of England* (1765), paras 268-269, he wrote:

> "In criminal proceedings, or prosecutions for offences, it would still be a higher absurdity, if the king personally sat in judgment; because in regard to these he appears in another capacity, that of *prosecutor* . . . In this distinct and separate existence of judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from executive power."

The power of punishing offences against the law of nature, he added in volume IV, para 8, "is now vested in the magistrate alone".

38. This body of authority would be unhelpful to the appellants if the sentence of death required by section 312 was intended and understood to mean what it said, leaving the Advisory Committee with no more than a residual power to mitigate a just sentence in exceptional cases. But in no jurisdiction with which the Board is familiar has this been the role of such a committee, which has in effect undertaken the judicial role of deciding who should live and who should die. The Advisory Committee established by the 1963 and 1969 Constitutions was, as the provisions summarised in paras 16 and 18 above made clear, an executive body, lacking even the independence and authority accorded to comparable bodies in Belize (see *Reyes v The Queen* [2002] 2 AC 235, para 9) and St Lucia (see *R v Hughes* [2002] 2 AC 259, paras 8, 15). It was, moreover, established, before 1973, that exercise of the prerogative of mercy was not the subject of legal right. It had been so held in *Hanratty v Lord Butler of Saffron Walden* (1971) 115 Sol Jo 386. As Beadle CJ had earlier held in *Dhlamini v Carter* NO [1968] Rhodesian LR 136, 153:

> "It is trite law that the exercise by the Government of a prerogative which includes a prerogative of mercy is entirely a matter for the Executive itself, and the courts have no jurisdiction whatsoever to inquire into the manner in which the prerogative power is exercised, always provided, of course, that the Government has the power."

The Board was later to rule to the same effect: *de Freitas v Benny* [1976] AC 239, 247. It is of course true that the practice followed in the Bahamas is indistinguishable in principle from that followed in England and Wales before abolition of the death penalty for murder in 1965, and a similar practice was followed in relation to mandatory life sentences for murder until compliance with the European Convention was held to require the making of sentencing decisions by the court. But there was an important difference, in that the human rights provisions giving rise to this requirement formed part of the domestic law of the Bahamas, enjoying enhanced protection, for some 37 years before such was the case in England and Wales.

39. In response to this detailed argument the Crown pointed out, first, that the law was not understood at the time or for a number of years afterwards to be as the appellants now contend and, secondly, that when that case was put in earlier times it was rejected. The first of these points is correct. The mandatory nature of the death sentence was not challenged in *de Freitas v Benny* [1976] AC 239 or *Abbott v Attorney-General of Trinidad and Tobago* [1979] 1 WLR 1342 or even in the much more recent case of *Jones v Attorney-General of The Bahamas* [1995] 1 WLR 891. The inference must be drawn that the argument was not recognised by lawyers to be available.

40. The second point is also correct. In *Runyowa v The Queen* [1967] 1 AC 26 the appellant sought to challenge a mandatory death sentence imposed upon him for attempting to set fire to a building. The Constitution of Rhodesia and Nyasaland contained a prohibition of inhuman and degrading punishment in the terms of section 3 of the 1963 and 1969 Constitutions of The Bahamas and a limited savings clause providing:

> "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 authorises 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."

The challenge was rejected. Much of the argument and the judgment turned on the liability of secondary parties, not germane to these appeals. On the issue which is germane the reasoning of the Board cannot, with respect, be sustained. First, the Board (at p 47) discounted the relevance of American authority which had been cited on the ground that different concepts were involved in the eighth amendment to the U.S. Constitution and the prohibition of inhuman or degrading punishment, and did not accept that a punishment could offend the

latter provision if it was "cruelly disproportionate." As shown above, this approach is incorrect. Secondly, the Board (at p 48) construed the prohibition as applying only to such types or modes or descriptions of punishment as were inhuman or degrading. That could not, it was said, be suggested of the death penalty, which was a punishment imposed before the appointed day, and the savings clause was held to support that construction. This reasoning did not, however, take account of the objection raised to the mandatory nature of the penalty, and is inconsistent with the reasoning in *Fox v The Queen* and *R v Hughes*, above, where the Board correctly held that the prohibition did apply to the mandatory nature of an otherwise lawful death penalty, which was not rendered immune from challenge by a savings clause in substantially this form. Thirdly, and most fundamentally, the Board in *Runyowa* effectively abdicated its duty of constitutional adjudication. Giving the judgment of the Board, Lord Morris of Borth-y-Gest first addressed the role of the legislature (at p 49):

> "If the contention of the appellant had been correct the courts in Southern Rhodesia should be involved in inquiries as to the constitutional validity of legislation which would extend altogether beyond the duty of consideration whether some law contravened section 60 for the reason that it imposed some novel form of punishment which is inhuman or degrading. A legislature may have to consider questions of policy in regard to punishment for crime. For a particular offence a legislature may merely decree the maximum punishment and may invest the courts with a complete discretion as to what sentence to impose - subject only to the fixed maximum. There may be cases, however, where a legislature deems it necessary to decree that for a particular offence a fixed sentence is to follow. As an example a legislature might decide that upon conviction for murder a sentence of death is to be imposed. A legislature might decide that upon conviction of some other offence some other fixed sentence is to follow. A legislature must assess the situations which have arisen or which may arise and form a judgment as to what laws are necessary and desirable for the purposes of maintaining peace, order and good government"

Then Lord Morris turned (at pp 49-50) to the role of the courts:

> "It can hardly be for the courts unless clearly so empowered or directed to rule as to the necessity or propriety of particular legislation. Nor can it be for the courts without possessing the evidence upon which a decision of the legislature has been based to overrule and nullify the decision. As Quenet A.C.J. said (in *Gundu*

> *and Sambo's* case), if once laws are validly enacted it is not for the courts to adjudicate upon their wisdom, their appropriateness or the necessity for their existence. 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. Harsh though a law may be which compels the passing of a mandatory death sentence (and may so compel even where aiding or abetting or assisting is by acts which, though proximate to an offence, are relatively trivial), it can be remembered that there are provisions (e.g., section 364 of the Criminal Procedure and Evidence Act in Southern Rhodesia) which ensure that further consideration is given to a case."

In the domestic context of the United Kingdom such observations would, at the time, have been orthodox. But the courts were required to interpret and apply a Constitution which guaranteed certain fundamental rights to the citizens of Rhodesia and Nyasaland. Under that Constitution the courts were empowered and directed to rule on the constitutionality of particular legislation, which might indeed raise questions about its necessity or propriety. The Board is bound to observe that if a person could be mandatorily sentenced to death with no legal redress of any kind on conviction of an offence which might be "relatively trivial", the human rights guarantees in the Constitution amounted to little more than a false prospectus. There is compelling force in the criticisms made of this decision by D Pannick, *Judicial Review of the Death Penalty*, 1982, pp 53-54. It should, in fairness, be acknowledged that the Crown did not, in its written case, rely on this decision, and in oral argument counsel recognised that some might call the decision "barbaric" and offensive to a modern sense of justice.

41. Two other decisions, both decided after 1973, may be discussed more briefly. In *Hinds v The Queen* [1977] AC 195, 226, Lord Diplock, giving the majority judgment of the Board, made observations not critical of the mandatory death penalty for murder. But the case did not involve a mandatory death sentence for murder, and no argument was addressed to the constitutionality of such a sentence. These observations cannot therefore be treated as authoritative. *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 concerned mandatory death sentences in Singapore for possession of more than 15 grammes of heroin. The constitutionality of that sentence was challenged,

and in giving the judgment of the Board rejecting the challenge Lord Diplock made observations (at p 673) approbatory of the mandatory death sentence for murder, while suggesting (at p 674) that the moral blameworthiness of those convicted of murder might vary more widely than in the case of drug traffickers. He pointed to the prerogative of mercy as a means of mitigating the rigidity of the law. But the Constitution of Singapore contained no provision comparable with section 3 of the 1963 and 1969 Constitutions, or the eighth amendment to the US Constitution, or article 3 of the European Convention. The decision, strongly criticised by Pannick (*op cit*, particularly at pp 133, 196-197), is not authority on the compatibility of a mandatory death sentence with a constitution containing such a provision, particularly where (contrary to the situation said by counsel to prevail in the case of drug traffickers in Singapore: p 657) the sentence is frequently commuted.

42. These appeals present a difficult and novel problem. If the appellants' case, based on principles established and authorities decided before 1973, is judged to be sound, should the appellants be barred from relief because the soundness of the case was not recognised at the time? The problem is acute, because the Board does judge the appellants' case, so based, to be sound. The Crown cogently argues that it is unreal to hold that the effect of the law was otherwise than was understood at the time. It is, however, clear that it took some time for the legal effect of entrenched human rights guarantees to be appreciated, not because the meaning of the rights changed but because the jurisprudence on human rights and constitutional adjudication was unfamiliar and, by some courts, resisted. The task of the court today is not to conduct a factual enquiry into the likely outcome had the present challenge been presented on the eve of the 1973 Constitution. That would be an inappropriate exercise for any court to adopt, perhaps turning on personalities and judicial propensities. The task is to ascertain what the law, correctly understood, was at the relevant time, unaffected by later legal developments, since that is plainly the law which should have been declared had the challenge been presented then. As it is, all the building blocks of a correct constitutional exposition were in place well before 1973. It matters little what lawyers and judges might have thought in their own minds: in the context of a codified Constitution, what matters is what the Constitution says and what it has been interpreted to mean. In 1973 there was no good authority contrary to the appellants' argument, and much to support it. In the final resort, the most important consideration is that those who are entitled to the protection of human rights guarantees should enjoy that protection. The appellants should not be denied such protection because, a quarter century before they were condemned to death, the law was not fully understood.

43. The Board will accordingly advise Her Majesty that section 312 should be construed as imposing a discretionary and not a mandatory sentence of death. So construed, it was continued under the 1973 Constitution. These appeals should be allowed, the death sentences quashed and the cases remitted to the Supreme Court for consideration of the appropriate sentences. Should the Supreme Court, on remission, consider sentence of death to be merited in either case, questions will arise on the lawfulness of implementing such a sentence, but they are not questions for the Board on these appeals.

Executive acts

44. This conclusion makes it possible to deal shortly with the appellants' argument on the constitutionality of the executive act of carrying out a mandatory death sentence. The argument rests on article 30(3) of the 1973 Constitution, quoted in para 21 above, and is, in brief, that even if the mandatory death sentence is accepted as constitutional and so protected, despite being (as is now recognised) inhuman or degrading, there is nothing to protect the executive acts necessarily inherent in carrying out the sentence. It would, however, be absurd to hold that the sentence is constitutional but giving effect to it is not. They must stand or fall together. This argument must be rejected.