New Legal Breakthrough for Death Row Prisoners: *Pratt v Attorney General for Jamaica**

Jane Hearn

Issues

In this case the appellants, Earl Pratt and Ivan Morgan, appealed to the Privy Council against the sentence of death imposed some 14 years earlier. On 15 January 1979 Pratt and Morgan were convicted in Jamaica on a charge of murder committed on 6 October 1977. Since their conviction they had been held in cells for prisoners sentenced to death in Saint Catherine District Prison. On three separate occasions (1987, 1988 and 1991) the death warrant had been issued and the prisoners had been taken to the condemned cells adjacent to the gallows.

This appeal raised the question of whether prolonged delay in carrying out the death penalty constitutes inhuman or degrading punishment within the terms of s17 of the Jamaican Constitution and is a sufficient ground on which to commute the death penalty to life imprisonment. A second but central issue arose as to whether, in calculating the time involved, delay caused by the legitimate exercise of the prisoner's rights to appeal are to be included with delay caused by actions of the State.

The Court held that prolonged delay in carrying out a sentence of death after that sentence had been passed could amount to "inhuman . . . punishment or other treatment" contrary to s17(1) of the Jamaican Constitution irrespective of whether the delay was caused by the shortcomings of the state or the legitimate resort of the accused to all available appellate procedures.

The Court stated that capital appeals should be expedited and legal aid made available quickly. The aim should be to hear a capital appeal within 12 months of conviction and it should be possible to complete the entire domestic appeal process within approximately two years (including appeal to the Judicial Committee of the Privy Council). Their Lordships concluded that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman degrading punishment or other treatment". The Court recommended that the Governor-General refer all existing cases where the prisoner had been on death row for five years or more to the Jamaican Privy Council for advice to commute the death sentence to life imprisonment.

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* (1993) 3 All ER 769.

Although the case is primarily concerned with a question of Jamaican constitutional law the decision is regarded by human rights activists as a significant legal breakthrough in the global campaign against the death penalty. The Privy Council has effectively condemned the 'death row' phenomenon as out of step with modern international human rights standards and the case is expected to lead to renewed constitutional challenges to the death penalty in the USA. The case is also significant for its reliance on the decisions of international human rights bodies and the influence of international legal materials on the development of common law and constitutional interpretation.

Procedural History

The circumstances of the procedural history of the case are central to the question of delay and for background purposes an abbreviated version is set out below. The case followed a complicated and drawn out procedural path which begins with the dismissal of the appellants' application for leave to appeal to the Jamaican Court of Appeal. The accused lodged an appeal within three days of their conviction but it was not until 15 December 1980, nearly two years after the decision at first instance, that the Court of Appeal heard and dismissed their application for leave to appeal. The delay was caused in part by attempts to secure legal aid for the accused. No date of execution was set and no reasons were given at the time of judgment. A further three years and nine months passed before reasons were handed down on 24 September 1984 after a written request from Pratt. It transpired that no reasons had been prepared because the papers had been misfiled and forgotten.

In the meantime Pratt had petitioned the Inter-American Commission on Human Rights (IACHR) and on 28 January 1986 he petitioned the United Nations Human Rights Committee (UNHRC) under the International Covenant on Civil and Political Rights (ICCPR).

The first warrant of execution was issued on 13 February 1987 for the death penalty to be carried out on the 24 February 1987, eight years after the original sentence was imposed. On 23 February the Governor General stayed execution until the decision of the Inter-American Commission on Human Rights and the United Nations Human Rights Committee became available.

On 9 July 1987 IACHR requested that the appellants' execution be commuted for humanitarian reasons. But the Jamaican Privy Council, having considered the case for the second time issued a warrant of execution on 23 February 1988 for execution on 1 March 1988. On 29 February the Governor-General stayed execution again pending the decision of the UNHRC.

On 6 April 1989 the UNHRC held that the failure by the Court of Appeal to give reasons for 45 months was a violation of Article 14 and recommended that the death sentence be commuted to life imprisonment.

The Jamaican Privy Council reconsidered the case for the third time on 17 September 1990 and rejected the UNHRC recommendations and the date for execution was set for 7 March 1991. On 21 February 1991 the Governor General issued the third stay of execution while he sought legal advice on the legal status of decisions of regional and international human rights bodies.

On 28 February 1991 the appellants commenced proceedings in the Supreme Court for constitutional redress under s25(1)c of the Constitution claiming that their execution after such a prolonged delay of some 12 years since they were sentenced to death would be 'inhuman . . . punishment or other treatment' and thus in breach of s17(1)d of the Constitution.

On 14 June 1991 their application to the Supreme Court was dismissed and on 8 July the Court of Appeal dismissed their appeal. The appellants then appealed to the Judicial Committee of the Privy Council.

Common Law Practice

The starting point of this decision was the history of UK practice. Drawing on earlier statutes and the practice in both England and Scotland, Lord Griffith concluded that the practice was always to execute prisoners sentenced to death expeditiously. It had also been official policy that the colonies were expected to adopt the same approach.

In support of this view he noted that the rules and practice for appeals to the Judicial Committee of the Privy Council in death penalty cases had been established by the Colonial Secretary to ensure speedy appeals and provided that executions would only be stayed so long as the strict timetable had been adhered to. Those rules were in force in Jamaica before independence, the Jamaican Governor General in Privy Council having adopted them in 1962, but they had not been followed in this case. The rules were written on the premise that the date for execution had already been set and the Jamaican Privy Council would have already made a decision whether or not to commute the sentence.

The Crown argued that these rules had fallen into disuse in Jamaica and were no longer a legal requirement. Lord Griffith rejected the argument and recommended that the preexisting rules and practice be reinstated.

He was particularly critical of the failure of the Governor General to comply with ss 90 and 91 of the Jamaican Constitution. He held that s 91 imposes a duty on the Governor General immediately to refer death penalty cases to the Jamaican Privy Council for advice on whether sentence should be commuted. He could find no plausible reason why the Jamaican Privy Council had not heard the matter in 1981 or shortly after. (A short moratorium between 1979 and 1981 was in force during which a Senate Committee of Inquiry was appointed to report on the use of the death penalty.)

Lord Griffith found that the failure to refer the matter to the Jamaican Privy Council, the failure to adhere to the rules and practice relating to appeals to the Judicial Committee of the Privy Council, and inefficiency of the Court of Appeal by not providing reasons until three years and nine months after the appellants application was dismissed were the main causes of delay in this case.

Computing the Delay Period

Two issues arose for consideration. Firstly, whether delay caused by legitimate recourse to appellate procedures should be included with delay caused by actions of the state in the calculation of the time involved. Secondly, how long must the period of delay be to breach the threshold of inhuman or degrading treatment. In deciding these issues their Lordships departed from previous Privy Council authority and drew on decisions of the European Court of Human Rights and the Supreme Court of India.

The decision in favour of including delay caused by legitimate appeals is a significant departure from prevailing judicial attitudes. In the USA it has been argued that it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures.[1] Previous Privy Council decisions also supported this view.[2]

While their Lordships agreed that escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process cannot be allowed, they departed from the majority in *Riley v A-G Jamaica* and drew on the dissenting judgments of Lord Scarman and Lord Brightman in that case to support their own view that time spent on legitimate appeal procedures should be included in computing the total time period. Their Lordships also relied on Gubbay CJ in *Catholic Commission for Justice and Peace in Zimbabwe v A-G* and Gubbay CJ's dissent from the contrary view in *Abbott v A-G of Trinidad and Tobago.*

In *Soering v UK*[3] the European Court of Human Rights found that a decision of the UK Home Secretary to extradite a West German national to the USA to face trial for murder was a breach of Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms.* Article 3 provides that no one should be subjected to torture or to inhuman or degrading treatment or punishment. The Court held that although the delay in executing prisoners in Virginia, where prisoners were held on death row for six to eight years, was largely caused by repeated application by the prisoner for a stay of execution that such a long period of delay might breach Article 3.

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1 *Richmond v Lewis* (1990) 948 F 2d 1473; *Kindler v Canada (Minister for Justice)* (1991) 84 DLR (4th) 438 (Supreme Court of Canada). For further analysis of US decisions, see *Catholic Commission for Justice and Peace in Zimbabwe v A–G* (unreported, 24 June 1993).

2 *Abbott v A–G of Trinidad and Tobago* [1979] 1 WLR 1342; *Riley v A-G of Jamaica* [1982] 3 All ER 469; [1983] 1 AC 719.

3 (1989) 11 EHRR 439.

The Indian Supreme Court in *Vatheeswaran v State of Tamil Nadu*[4] supported the view that the dehumanising character of delay is not altered by the cause of that delay. The Court held that when appellate courts consider whether to impose the death sentence the cause of delay is immaterial. The Court went on to state that delay exceeding two years breached Article 21 of the Indian Constitution and entitled a prisoner to have the sentence quashed. Later cases refined the position so that a death sentence can only be set aside if the delay exceeds the date set for the execution by the 'Apex Court' which is bound to take into account delay when passing sentence.[5]

In summing up Lord Griffith commented that the total period of delay, now amounting to almost 14 years, was double the time that the European Court of Human Rights considered would be an infringement of article 3 of the European Convention. Clearly, the decision of the European Court of Human Rights was a significant influence on the thinking of the seven judges.

During the course of judgment Lord Griffith also referred to the decisions of two international human rights bodies, the IACHR and the UNCHR on this case. However, he found that both bodies may have been misled into believing that without reasons from the Court of Appeal no further action could be taken and this probably affected their decision.

The IACHR found that the failure to provide reasons between 1981 and 1984 was a breach of Article 5(2) of the *American Convention on Human Rights* and amounted to cruel, inhuman and degrading treatment. The Commission recommended that his sentence be commuted for humanitarian reasons.

The UNHRC held that the failure of the Court of Appeal to deliver reasons for 45 months was a violation of Article 14(3)(c) and Article 14(5) of the ICCPR which provide that everyone is entitled to be tried without delay and has the right to his or her sentence being reviewed by a higher authority.

The UNHRC also held the Jamaican government in breach of Article 7 which provides that:

> No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his consent to medical or scientific experimentation.

While the UNHRC did not find that delay in judicial proceedings constituted for them cruel, inhuman and degrading treatment it did find the intense anguish caused by the issue of two death warrants, the removal of the prisoners to the condemned cells and the delay in notifying them of the stay of execution in

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4 [1983] 2 SCR 348.

5 *Smt Triveniben v State of Gujarat* (1989) 1 SCJ 383. The Supreme Court approved the judgment in *Sher Singh v State of Punjab* [1983] 2 SCR 582. In *Sher Singh v State of Punjab* the Court rejected a rigid rule that delay exceeding two years automatically entitled the person under sentence of death to invoke Article 21 and demand the quashing of the sentence.

relation to the second warrant did amount to cruel and inhuman treatment within the meaning of Article 7.

The UNHRC recommended that in capital punishment cases States have an imperative duty to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant. They also stated that although capital punishment is not per se unlawful it should not be imposed in circumstances where there have been violations by the State party of any of its obligations under the Covenant. Thus where States breach their obligations under the ICCPR they should forfeit their right to carry out the death penalty.

Directing their comments to Commonwealth countries in general, the Privy Council in Pratt said that a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence allowing a reasonable time for appeal and consideration of reprieve. Whilst the decisions of the UNHRC and the IAHRC are not binding it is arguable that, together with the decision of the European Court of Human Rights decision, they influenced the thinking of the seven judges in this case. The standards set by the Privy Council for review of death penalty sentences is consistent with the reasoning of the UNHRC and sends a clear message that the modern phenomenon of 'death row' breach internationally accepted human rights standards.