17.05.2017

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 2 of 2012

BETWEEN:

JABARI SENSIMANIA NERVAIS — Appellant

AND

THE QUEEN — Respondent

Before: The Hon Sandra P. Mason, the Hon. Andrew D. Burgess and the Hon. Kaye C. Goodridge, Justices of Appeal

2016: January 7, March 7
2017: May 17

Mr. Andrew Pilgrim, QC in association with Ms. Naomi Lynton for the Appellant

Mr. Charles Leacock, QC in association with Mr. Lancelot Applewhaite for the Respondent

DECISION

MASON JA:

Introduction

[1] This appeal first engaged the attention of this Court on 24 February 2015. On that occasion, Mr. Andrew Pilgrim QC, counsel for the appellant, informed the Court that he had been unable to comply with its order to file

the requisite documents: grounds of appeal and submissions. The matter was then adjourned to 23 June 2015. However on that date, Mr. Lancelot Applewhaite, counsel for the respondent, was unwell. So too was one of the members of the appellate panel on the next adjourned date of 20 October 2015. Hearing of the appeal began on 7 January 2016 and was adjourned to 28 January 2016 to allow the Director of Public Prosecutions, Mr. Charles Leacock QC, to present submissions with respect to the death penalty on behalf of the respondent. Unfortunately, that date could not be kept. It was the date for the funeral of Mr. Applewhaite. Hearing resumed and concluded on 7 March 2016 when the Court reserved its decision.

[2] On 21 February 2012, after a trial which lasted just over 2 weeks, the appellant was found guilty of the murder of Jason Burton on 17 November 2006. The appellant was subsequently sentenced to death.

He has appealed that conviction and sentence.

Summary of Facts

[3] On the evening of 17 November 2006, the deceased was plying his trade as a vendor from a booth in the area of Nazarene Gap, Jackson, St. Michael. There were several persons around, some patronising the deceased's business and others playing dominoes.

[4] At about 9.30 p.m., an alarm was raised that some men dressed in black were approaching the area. This caused the persons congregated in the area to run away, the deceased among them. Shots rang out and as the deceased ran, he was struck by a bullet. He ran a little further until he met his uncle who was sitting on a chair by the road. The deceased spoke to his uncle who put him to sit on the chair but the deceased soon fell off the chair. He was dead.

The Prosecution's Case

[5] This was mainly circumstantial.

[6] A total of sixteen witnesses were called. Eight of these were police officers, one pathologist and one forensic scientist. Of the others, one was the deceased's father who identified the body, another was the deceased's uncle in whose presence the deceased died, another was present at the scene but had run away and hid after hearing the four shots, later to discover a bullet hole in his car. Two witnesses were tendered for cross examination by the prosecution after it was discovered that they had been present in the court at the start of the trial. They were however not cross examined.

[7] The sixteenth witness, Jason Holder, testified that one night in November 2006, he saw the appellant whom he had known for only "a couple of years". The appellant visited his home in St. Joseph in a car in the company

of "a couple of fellows" and asked him for money to put gas in the car. The witness gave him $10.00.

[8] Apart from this evidence by Jason Holder, the case against the appellant depended on oral admissions alleged to have been made by the appellant as well as a written statement said to have been made by the appellant to the investigating officers.

The Defence Case

[9] The appellant gave an unsworn statement in which he denied knowledge of any criminal activity at Jackson.

[10] The appellant told of being arrested by the police on 6 July 2007, taken to the police station and beaten while in custody. This arrest was in connection with a stolen car. The appellant stated that after it was accepted that the car although burnt by him that day, proved not to have been stolen, he was taken back to the station, questioned about "the man in Jackson" and then beaten. He was taken to his residence where a search for a gun was conducted by police officers. The appellant was then transferred to another station where he was charged "with an issue with my baby mother" and released.

[11] The appellant was then prompted by counsel to relate the events of 17 November 2006. According to the appellant, on the day in question, he

woke up late and went with his girlfriend to the beach until 4.00 p.m., then went to karaoke from 8.00 p.m. until 2.00 a.m. the next day.

[12] On 18 August 2007, he was at home playing video games with his friend Richard until he started to feel sleepy. He went to bed and was later awakened by "men in masks with guns". These men searched his bedroom and took him and Richard to the police station where he was assaulted and beaten and forced to "sign papers". He was denied a phone call to his family in order to procure the services of a lawyer.

[13] The appellant called two witnesses: a police officer to produce the Police Public Medical Journal in which there was a notation dated 8 July 2007 detailing complaints of pain by the appellant. A second notation dated 20 August 2007 indicated that after mental status examination, there was no evidence of psychiatric illness on the part of the appellant and he was considered fit to plead and to instruct counsel.

[14] The second witness, Richard Alleyne, spoke of being at the appellant's house on 17/18 August where they played video games. After the appellant had gone to bed, he also fell asleep only to be awakened by noise and footsteps of a group of people who turned out to be police officers. He was searched and handcuffed and together with the appellant transported to the

police station. There he heard the appellant being assaulted and beaten. A statement was later taken from Alleyne and he was released.

The Appeal

[15] The appellant filed six grounds.

[16] At the hearing, Mr. Pilgrim QC, who was not counsel at the trial, requested permission to begin his submissions with ground 4 which he asserted would "make it easier to traverse" the other grounds. This permission was granted. We will therefore consider the grounds in the order in which they were argued by Mr. Pilgrim QC.

Ground 4

[17] On this ground, the appellant charged that the judge erred in asking the jury to be fair to the prosecution. His particular complaint was related to the judge's summation at page 484 lines 22 to 23 of the trial record:

> "You must be fair to both sides; be fair to the accused and be fair to the prosecution as well".

[18] In his written submissions, counsel considered that this statement erroneously expanded the function of the jury and imposed on them the artificial duty to take into consideration what would be fair to the prosecution. He submitted that this consideration does not exist at law.

[19] In his oral submissions, Mr. Pilgrim QC, stated that the direction to be fair to the prosecution suggested that there was a balance between the prosecution

and the defence in a criminal trial; that there was some undefined personality in the prosecution who the jury needed to protect from unfairness; and that the jury was being asked to protect an interest in the trial other than the appellant who was the only person who is entitled to a fair trial.

[20] Counsel submitted that the summation was unbalanced and essentially a direction to convict the appellant because where there was an opportunity to be neutral, those opportunities were avoided in favour of an opportunity to be critical of the defence or to be harsh on the appellant in one form or the other.

[21] Mr. Pilgrim QC reiterated that the summation was unbalanced in that there was a tendency by the judge to give a reasonable direction and then spoil it by a statement which either denied the jury the opportunity to decide a material fact in the case or tainted the approach by sounding so prosecutorial that the jury were likely to feel that there was only one way to decide.

[22] In support of this submission of the unbalanced nature of the summation and prosecutorial favouring, Mr. Pilgrim QC adverted to several passages. The first of these was page 493 lines 14 to 17 where the judge stated:

> "From the statement given by the accused, it would seem that his will did not crumble because he is saying that he did not make the statements at all; it is therefore a question for you to decide".

[23] In Mr. Pilgrim QC's estimation, this presented a dichotomy for the jury in that they would now become unsure whether to accept defence counsel's address which focussed on oppression with regard to the written statement as opposed to the judge's suggestion that having stated that he did not give the statement, the appellant was not oppressed and this was "nothing to do with his will crumbling".

[24] Mr. Pilgrim QC next considered the issue of intention within the context of the oral statements of the appellant. He suggested that the judge's statement at page 477 lines 5 to 9 is a direct example by the judge in denying the jury the opportunity to decide a material fact:

> "You must not convict this accused of murder unless you are sure that when the accused fired those shots in the direction of the men fleeing from under the mango tree at Trench Town in Jackson that he intended to kill those persons or cause them serious bodily harm".

[25] For Mr. Pilgrim QC, the jury was not being "allowed to deliberate on the fact of who shot who" but rather that the judge was already directing the jury to find that it was the appellant who had shot the deceased. In his estimation, the judge had effectively usurped the function of the jury by determining a material and most important fact: that the act was done with an intention to kill. Thus the effect of the judge withdrawing from the jury

the vital question of whether the appellant fired the shot was that there was a miscarriage of justice.

[26] Mr. Pilgrim QC's next area of concern was the judge's statement at page 480 lines 5 to 10:

> "For example, the accused man has said that he never said any of the words alleged by the several officers to have been spoken by him. The officers have given you precise evidence of words spoken on specific occasions and dates as these conversations were entered in their notebooks".

[27] Mr. Pilgrim QC queried the judge's use of the word "several" when in fact there were only two police officers concerned in the taking of the statement. He asserted that alluding to "several officers" would have had some impact on the jury's minds especially in light of the fact that with the defence saying that the oral statements were fabricated, the judge was now saying that the evidence was precise in relation to specific occasions and dates.

[28] Mr. Pilgrim QC also inveighed against the judge's use of the phrase "made much of" in a couple of instances. At page 485 lines 12 to 15 the judge said:

> "This is an important direction as I have said because you will recall that counsel for the defence has made much of what she sees as discrepancies in the evidence of the prosecution".

[29] Mr. Pilgrim QC noted that "the reason that discrepancies are important in this case is because it is the thrust of the defence case" because in order to

succeed in its case, the defence must prove that the police officers were lying. At page 487 lines 3 to 5 the judge stated:

> "Now, in her address to you, counsel for the accused made much of the fact that you must hold police officers to a higher standard".

and at lines 9 to 15 she continued:

> "While you may hold police officers to a higher standard in certain matters than you do yourselves, you must ensure that it is a reasonable standard. They are like us, human beings with frailties. It is not fair to conclude that if one officer says something different to another, that one must be lying because police officers can only ever recall an occurrence in exactly the same way".

[30] Mr. Pilgrim QC suggested that the judge appeared to be giving special treatment to the police. In his written submissions, he noted that the mistaken witness direction is inapplicable to police witnesses since police officers record occurrences in their notebooks and are permitted to read from their notebooks while giving evidence. In addition when the two police officers gave similar evidence about the oral and written statements their credibility was called into question by the defence. The effect of the mistaken witness direction according to counsel, effectively minimised the submission of defence counsel on the discrepancies in the police officers' evidence and lessened the impact of the directions on inconsistencies, discrepancies and lying witnesses. Mr. Pilgrim QC thought that it was

therefore the duty of the judge to point out that the issue of human frailty did not relate to police officers when it came to the rendering of evidence.

[31] Mr. Pilgrim QC was also concerned about the manner in which the judge recounted the evidence. He noted that instead of reading back the evidence of the witnesses, the judge tended to give a narrative account as if the evidence was fact. He also highlighted at page 506 lines 9 to 20 the judge's use of "they" in reference to the evidence of the police officers:

> "Subsequently, on 18th August 2007 and at about 5:40 a.m. he went on duty to the residence of accused Jabari Nervais, at 3F Avenue, Sisnett Road, Bannister Land, St. Michael. He was accompanied by Constable Cumberbatch now Sergeant. They saw Nervais at this residence. They identified themselves, told him that they wished to interview him in connection with the death of Jason Burton, arrested him and took him to the Major Crimes Unit at the Glebe, St. George. At 6:00 a.m. they again informed him of their intention to interview him and informed him of his rights to an attorney-at-law before or during the interview should he wish one".

Discussion

[32] We cannot be in agreement with Mr. Pilgrim QC when he alleged that the judge appeared to be favouring the prosecution in preference to the defence when she told the jury that they must be fair to both sides, the accused as well as the prosecution. Taken in the context of when the impugned statement was made, it is evident that the judge was merely continuing her direction to the jury to conduct a calm and dispassionate view of the

evidence and exhorting them not to be subject to any extrinsic influences. It must be noted that in addition to this impugned statement, at the time of giving the case for the accused, while reminding the jury that the accused had nothing to prove and that it was for the prosecution to prove its case, the judge told the jury at page 530 lines 12 to 19:

> "When you judge the evidence of the accused and his witnesses, you must use as I have told you earlier, precisely the same fair standards that you will use to assess the evidence of the prosecution witnesses. What weight you attach to the evidence of any witness be it a prosecution witness or as here, the accused and the defence witnesses is a matter entirely for you, Mr. Foreman and members of the jury".

[33] This Court was presented with a similar argument in **Allan Athelstan Woodall v R Criminal Appeal No 14 of 2008 (unreported decision of 21 April 2011)**. On that occasion, the Court at para 71, reminded that it is the judge's duty in summing up to ensure that there is a fair and objective presentation of the case for the prosecution as well as the case for the defence. The Court also made reference to the judgment of Simon Brown LJ in the English Court of Appeal case of **R v Nelson [1996] EWCA Crim 707**.

[34] In that case His Lordship iterated that integral to a fair trial is the principle that the judge should "hold the ring as an umpire". He regarded that while the judge must remain impartial, there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. This is so

because while the defendant has the right to have his defence faithfully and accurately placed before the jury, he is not entitled to have it rehearsed blandly and uncritically in the summing up.

[35] His Lordship continued:

> " ... to play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence".
>
> ...
>
> "Judges exist to see that justice is done. Justice requires that the guilty be convicted as well as that the innocent go free. Judges who go to the trouble of analysing the competing cases and who give the jury the benefit of that reasoned analysis assist in that process".

[36] Those observations faithfully represent this Court's opinion.

[37] Mr. Pilgrim QC gave examples which in his estimation made the summation unbalanced. When considered as presented by Mr. Pilgrim QC, there would seem to be some merit in this criticism, were it not for the fact that the examples were not examined by counsel within the context of which they were stated by the judge. In other words, Mr. Pilgrim QC sought to isolate the statements from the context of the summation in order to support his

suppositions. It is our opinion that in every instance, each of the passages challenged by Mr. Pilgrim QC, the judge had meticulously prefaced her statements with the relevant direction.

[38] Where the judge alluded to the facts, she was careful to remind the jury of their role, function and responsibility, namely that the determination of whether or not to accept the facts ultimately lay with them. It is not possible nor necessary to recount every such occasion. We shall however reference a few of these.

[39] Before making the statement at page 477 with which Mr. Pilgrim QC took issue (see para 23 above), the judge had already given a direction on intention and had reminded the jury of their role in relation to the oral and written statements. Immediately after this said statement, the judge had exhorted the jury at lines 10 -15:

> "In deciding whether he intended to kill these persons or cause them serious bodily harm, look closely at the oral and written statements of the accused and if you accept in the case of the orals that they were made and in the case of the written statement that it was made voluntarily, then go on to look at these statements more closely".

[40] The criticism in relation to the mistaken witness at page 487 (see para 28 above) and its inapplicability to police officers is similarly unjustified. The judge had only just completed the direction on discrepancies and inconsistencies when she segued quite naturally into the reflection of the

standard to which police officers are to be held, a higher standard than the ordinary witness. The judge was in agreement with defence counsel on this issue and in light of the fact that this was the basis on which the defence was laying its case: the fallibility of police officers and the oral and written statements. It cannot be said that she erred.

[41] Bearing in mind that the jury were present when the police officers recounted their evidence, reading directly from their notebooks, when necessary, this over criticism of the judge's use of the word "frailties" cannot be countenanced. It is seen that after advising the jury that the police officer as a witness must be held to a higher standard than the ordinary witness, the judge went on to explain how they should treat such evidence. At lines 16 to 21, she said:

> "What you must do, is apply the test that I have explained to you as to how you should assess witnesses. In other words, you may find that in spite of them being police officers, two persons may give different evidence and it is for you to determine, whether they are lying or merely mistaken because of poor recollection or some such thing".

[42] In addition the judge at pages 488 to 494 later went on to give a thorough direction and caution on how to treat the oral and written statements, reminding the jury throughout that the admissibility of these statements was entirely up to them.

[43] In our opinion counsel's fulmination at the judge's use of certain words or phrases – "several", "they", "made much of" – appeared to be catching at straws. The jury having sat through the trial would have been acutely aware that "several" could only have related to the two police officers who gave evidence of the statements. To use the word "they" when recounting the police officers' evidence could not have in any way influenced or prejudiced the jury's minds nor could the phrase "made much of". Jurors are astute enough to understand that such phrases are used to alert them to pay special attention to the specific issue.

Grounds 3 and 5

[44] These are effectively covered by counsel's submissions under ground 4 and this Court's discussion thereof.

[45] Ground 3 alleged that the "Learned Trial Judge erred in applying the mistaken witness direction to police witnesses" while ground 5 complained that the "Learned Trial Judge usurped the function of the jury by determining a material question of fact, to wit, that the accused fired the shots".

Ground 2

[46] On this ground, counsel for the appellant argued that the "Learned Trial Judge erred in law when she directed the jury that the evidence of Jason Holder was corroborative of the Prosecution's case".

[47] Mr. Pilgrim QC referred to the following statements made by the judge in her summation at page 504 lines 10 to 12:

> "This evidence is significant members of the jury, because it corroborates the written statement of accused Nervais".

At page 539 lines 24 to 25:

> "... and the corroboratory evidence of Jason Holder, the friend of the accused ..."

And at page 540 lines 16 to 17:

> "This evidence is in conflict with the evidence of the accused as to his movement on the night of November 17th, 2006".

[48] Mr. Pilgrim QC complained that by stating that the evidence of Jason Holder corroborated the evidence of the prosecution, this was a misdirection to the jury. He stated that when this mischaracterisation was pointed out by defence counsel namely, that Jason Holder did not specify the particular date that the appellant had gone to his house referring only to "sometime in November", the judge did not move to correct her error. According to counsel, the effect of this was to leave the jury with the mistaken impression that the witness was able to confirm elements of the statement alleged to

have been written by the appellant and this could have potentially impacted on whether the jury accepted the written statement to be true. In his written submissions, counsel cited the English Court of Appeal case of **R v Moon [1969] 1 WLR 1705** where it was held that "such a misdirection could be corrected only in the plainest terms". In that case it related to directions on self defence.

Discussion

[49] We accept that there is some merit in Mr. Pilgrim QC's contention on this ground. It is also admitted that the judge could quite properly have given a direction on corroboration but we are not persuaded that this misstep was so significant as to affect the safety of the conviction.

[50] We consider that the judge's decision to reread the relevant portion of her summation and her acceptance at the behest of defence counsel that there was in fact no corroboration came at a critical juncture of the trial. This was almost immediately before the jury retired to deliberate and so this intervention would most certainly have resonated with the jury and have been at the forefront of their minds as they left the courtroom.

[51] In addition, the jury had been quite exhaustively throughout the summation directed on the manner in which they should consider the oral and written statements. It had been emphasised that the admissibility of the statements

was entirely their province and instructed that if they did not accept or believe them, the appellant was to be found not guilty.

[52] The jury had to consider as argued by Mr. Applewhaite for the respondent, whether it was significant that at the time of giving his written statement in August 2007, a date close to the date of the incident in November 2006, the appellant was unable to give a specific date and spoke only of "a night in November" when he also visited the witness, Jason Holder, but that yet some 6 years later in February 2012, in his alibi evidence, he was able to specify the date as 17 November 2006 and particularise every event that took place on that date.

[53] It was therefore a question of credibility and the weight to be attached to the admissible evidence that was for the jury alone. It is evident that the jury believed that evidence proffered through the oral and written statements and rejected the alibi defence.

Ground 1

[54] This ground which complained that the "Learned Trial Judge erred in disclosing to the jury her decision to admit the written statement of the appellant into evidence" was not very strenuously pursued by Mr. Pilgrim QC.

[55] Although counsel noted that the statement made by the judge at page 490 lines 16 to 17 that "a written statement was produced by the prosecution and admitted into evidence by me" could possibly have prejudiced the mind of the jury on the question of whether the statement had been given voluntarily, he acknowledged that Barbadian jurors were very much more aware of the procedure involving the *voir dire,* namely the reason for it and how it is conducted.

[56] Consequently we are satisfied that with this concession by counsel, this ground has no merit.

[57] We find that the suggested deficiencies in the judge's careful and thorough summation to which counsel has taken exception are not enough to have resulted in a miscarriage of justice.

[58] In the result, the verdict was safe and satisfactory.

Ground 6

[59] This ground baldly states that "the sentence imposed is excessive".

[60] Mr. Pilgrim QC in his written submissions contended that the mandatory nature of the sentence renders it excessive. He based this statement on the Inter-American Court of Human Rights Judgment in the case of **Boyce et al v Barbados Inter American Court of Human Rights judgment of November 20, 2007** which highlighted that the mandatory nature of the

death sentence was in contravention of the Inter-American Human Rights convention to which Barbados is a party. Counsel also referred to this Court's observation in the same case which preceded that case and alternatively referenced, **Joseph and Boyce v Attorney-General et al Criminal Appeal No. 29 of 2004** that "the recommendations of an international body to which the state has subscribed should be accorded due respect".

[61] According to counsel, the effect of a mandatory death sentence denies the judiciary any discretion to impose a sentence it thinks fit and that in denying this discretion, the convicted person is denied the benefit of having his sentence tailored to his particular culpability.

[62] In addition, Mr. Pilgrim QC at the hearing, sought to be identified with the submissions made by Mr. Leacock, QC.

[63] In the conclusion of his written submissions to this Court, Mr. Leacock QC asserted that:

> "... the death penalty in section 2 of the Offences Against the Person Act, Chapter 141 is discretionary in Barbados and may be imposed in appropriate cases after full mitigation and any representation from the Crown."

He concluded that:

> "The imposition of the mandatory death penalty for all convictions of murder in Barbados without mitigation and individualised sentencing is **Patently Unconstitutional**."

[64] In the presentation of his oral submissions, Mr. Leacock QC traced the history of the death sentence, its imposition under relevant legislation, how it has been considered by other jurisdictions and finally the direction in which he thought this Court should go.

[65] Mr. Leacock QC noted that when the case of **Boyce and Joseph v R [2004] 64 WIR 37** was considered by the Privy Council, it was determined that while the mandatory nature of the death sentence is cruel and inhuman punishment, that penalty has been saved by **section 26** of the Constitution.

[66] Mr. Leacock QC however submitted that on accepting the compulsory jurisdiction of the Inter-American Court, Barbados was bound by the decisions of that court. When the case of **Boyce and Joseph** was argued before that court, the court ruled that the imposition of the mandatory death penalty being in contravention of the American Convention on Human Rights, a convention of the Organisation of American States, of which Barbados is a member, was a breach. That court recommended a repeal of **section 26** of the Constitution.

[67] Mr. Leacock QC drew attention to the developing jurisprudence with respect to the death penalty in other Commonwealth Caribbean jurisdictions in that while the death penalty was not itself being challenged, it was rather the mandatory nature of it.

[68] Mr. Leacock QC referred the Court to a number of cases from these jurisdictions but more specifically the case of **Newton Spence v R Criminal Appeal No. 20 of 1998** from Saint Vincent and the Grenadines and **Peter Hughes v R Criminal Appeal No. 14 of 1997** from Saint Lucia (**Spence and Hughes**); and the Bahamian case of **Bowe and Davis v R [2006] UK PC 10 (Bowe and Davis)**.

[69] In **Spence and Hughes,** Byron CJ of the Eastern Caribbean Supreme Court, as he then was, was of the opinion that since courts must consider mitigating factors as part of the sentencing process in other criminal cases, legislation should be amended to provide that before a death sentence is imposed, an opportunity to mitigate should likewise be accorded on a conviction for murder. Byron CJ determined that until such legislation is provided, he would proffer some guidelines for the courts of that jurisdiction when considering whether or not to impose the death penalty.

[70] In **Bowe and Davis,** the Privy Council, after quashing the death sentence, remitted the case to the Supreme Court of the Bahamas for consideration of

the appropriate sentence whereupon Hall CJ set out in a practice note sentencing procedures for persons convicted of murder.

[71] While not specifically asking this Court to choose from either of these positions, Mr. Leacock QC recommended that since the courts in all of the other Commonwealth Caribbean territories had "struck down" the mandatory death penalty without the benefit of specific legislation, Barbados ought to follow suit, taking into account that this country in imposing the death penalty is in breach of international law with respect to human rights legislation. He argued in conclusion that imposition of the death penalty in Barbados should be discretionary.

Discussion

[72] The Privy Council in the case of **Boyce (Lennox)** and **Joseph (Jeffrey) v R [2004] 64 WIR 37 (Boyce and Joseph),** held that the mandatory death penalty in Barbados is constitutional. In arriving at this decision, the Privy Council had regard to **section 2** of the **Offences against the Person Act**.

[73] This section provides:

> "Any person convicted of murder shall be sentenced to, and suffer, death".

[74] The Privy Council also considered **section 1** of the **Constitution** which provides:

> "[1] This Constitution is the supreme law of Barbados 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".

[75] Finally, the Privy Council considered **Chapter III** of the **Constitution** which affords protection of fundamental rights and freedoms of the individual. Included in these rights and freedoms and with which we are presently concerned, is the protection from torture or inhuman or degrading punishment or other treatment. **Section 15** states:

> "(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> (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 punishment or the administration of any treatment that was lawful in Barbados immediately before 30th November 1966.
>
> (3) The following shall not be held to be inconsistent with or in contravention of this section:
>
> (a) the imposition of a mandatory sentence of death or the execution of such a sentence;
>
> (b) any delay in executing a sentence of death imposed on a person in respect of a criminal offence under the law of Barbados of which he has been convicted;
>
> (c) the holding of any person who is in prison, or otherwise lawfully detained, pending execution of a sentence of death imposed on

that person, in conditions, or under arrangements, which immediately before 5th September, 2002

(i) were prescribed by or under the *Prison Act,* as then in force; or

(ii) were otherwise practised in Barbados, In relation to persons so in prison or so detained.

[76] The Privy Council had specific regard to **section 26,** the savings clause, which reads as follows:

> "[26] (1) 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 section 12 to 23 to the extent that the law in question –
>
> (a) is a law (in this section referred to as "an existing law") that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados 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 sections 12 to 23 in a manner in which, or to and extent to which, it was not previously so inconsistent.
>
> (2) In subsection (1)(c), 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 subsection (1) "written law" includes any instrument having the force of law; and in this subsection and subsection (1) references to the repeal and re-enactment of an existing law shall be construed accordingly.

[77] The head note of **Boyce and Joseph** so far as it is relevant reads as follows:

> That the effect of reading ss 1 and 26 of the Constitution together showed that existing laws, such as s 2 of the Offences Against the Person Act 1994, were immunised from constitutional challenge on the ground that no such law could be held to be inconsistent with ss 12 to 23 of the Constitution; accordingly, such law had to be accepted as valid.
>
> That the provisions of ss 1 and 26 of the Constitution were completely specific and as the Constitution contained no provision other than s 1 which affected the validity of any law (or required its amendment) it followed that all existing laws (including s 2 of the Offences Against the Person Act 1994) were unaffected by ss 12 to 23 of the Constitution; it would be difficult to maintain any argument based on the 'living instrument' principle that the law should be updated when the plain and obvious purpose of s 26 was that existing laws should not be updated by reference to ss 12 to 23; further.

[78] Lord Hoffman who delivered the advice of the majority in that case had this to say:

> "[2] The language and purpose of s 26 are so clear that whatever may be their lordships views about the morality or efficacy of the death penalty, they are bound as a court of law to give effect to it. As Lord Bingham of Cornhill

> said in Reyes v R [2002] UKPC 11, 60 WIR 42, at p 55, para [26], 'The court has no licence to read its own predilections and moral values into the Constitution'. And their lordships do not understand Mr. Starmer QC, who ably represented the appellants, to dispute that if one simply reads the Constitution, there is no basis for holding the mandatory death penalty invalid for lack of consistency with s 15(1)".

[79] The Privy Council after consideration of this country's obligations under the various international treaties held:

> "[4] That although the courts would, so far as possible, construe domestic law in conformity with a State's obligations under international treaties (particularly in relation to treaties entered into after the Constitution had entered into force), this approach to construction was only applicable if the domestic legislation was ambiguous and all other considerations were equal; in the present case, there was no ambiguity and accordingly to give effect to international obligations by the application of s 4(1) of the Barbados Independence Order 1966 would be perverse.

[80] Lord Hoffman observed at para 25:

> "...their lordships feel bound to approach this appeal on the footing that the mandatory death penalty is inconsistent with the international obligations of Barbados under the various instruments to which reference has been made. This does not of course have any direct effect upon the domestic law of Barbados. The rights of the people of Barbados in domestic law derive solely from the Constitution. But international law can have a significant influence upon the interpretation of the Constitution because of the well-established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the State's international obligations. 'So far as possible' means that if the legislation is ambiguous (in the sense that it is capable of a meaning which either

> conforms to or conflicts with the [treaty]; see Lord Bridge of Harwich in *R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696* at 747) the court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty".

[81] When this same case came on for hearing before the Caribbean Court of Justice (CCJ), styled as **The Attorney General et al v Jeffrey Joseph** and **Lennox Boyce [2006] CCJ 1 (Joseph and Boyce)**, that court was principally concerned with the justiciability of the exercise of the Governor General's powers under s 78 of the Constitution and the commutation of a sentence of death.

[82] Before addressing these issues, the court took the opportunity to outline its approach to Privy Council judgments. At para 18 the court stated that:

> "[18] The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals came and the written law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court. Accordingly we

> reject the submission of counsel for the appellants that such decisions were and are not binding in Barbados: See Bradshaw v The Attorney General Appeals Nos. 31 and 36 of 1992 (Barbados) unreported at page 28 and [1995] 1 WLR 936 (PC); (1995) 46 WIR 62 (PC)".

[83] The Court also considered the relationship between domestic law and unincorporated treaties at paras 55 and 56 and came to the following conclusion:

> "[55] In states that international lawyers refer to as 'dualist', and these include the United Kingdom, Barbados and other Commonwealth Caribbean states, the common law has over the centuries developed rules about the relationship between domestic and international law. The classic view is that, even if ratified by the Executive, international treaties form no part of domestic law unless they have been specifically incorporated by the legislature. In order to be binding in municipal law, the terms of a treaty must be enacted by the local Parliament. Ratification of a treaty cannot ipso facto add to or amend the Constitution and laws of a State because that is a function reserved strictly for the domestic Parliament. Treaty-making on the other hand is a power that lies in the hands of the Executive. See: JHRayner (MincingLane) Ltd v Dept of Trade & Industry [1990] 2 AC 418 at page 476. Municipal courts, therefore, will not interpret or enforce the terms of an unincorporated treaty. If domestic legislation conflicts with the treaty, the courts will ignore the treaty and apply the local law. See: The Parlement Belge (1879) 4 PD 129.
>
> [56] It does not at all follow that observance of these rules means that domestic courts are to have absolutely no regard for ratified but unincorporated treaties. The classic view is that the court will presume that the local Parliament intended to legislate in conformity with such a treaty where there is ambiguity or uncertainty in a subsequent Act of Parliament. In such a case, a municipal court will go only so far as to look at the treaty in order to try to resolve the ambiguity. See: R v

> Home Secretary, ex parte Brind [1991] 1 A.C. 696 and R v Chief Immigration Officer, ex parte Salamat Bibi [1976] 1 W.L.R. 979 @ 984 per Lord Denning, MR.

[84] In light of the above, it stands to reason therefore, that the CCJ having determined that this Court is bound by decisions of the Privy Council unless and until those decisions are overturned by the CCJ, this Court is bound by the decision of the Privy Council in **Boyce and Joseph** that the mandatory death penalty is and remains a constitutionally sanctioned punishment for murder in Barbados. And this despite the fact that the mandatory death penalty is inconsistent with and in violation of international human rights law ratified by Barbados because, while the mandatory death penalty is inhuman and degrading punishment within the meaning of the Constitution, it is provided for in a law which predated the Constitution and is thereby afforded immunity from judicial challenge. In addition, the relevant treaty having not been incorporated into domestic legislation, there can be no ambiguity or uncertainty in our law as determined by the Privy Council in **Boyce and Joseph**, and reiterated by the CCJ, it is not binding on Barbados although it should be accorded respect as stated by this Court in **Boyce and Joseph**.

[85] This Court cannot therefore be swayed by the actions of the courts in other Commonwealth Caribbean jurisdictions but rather we are mindful of the

exhortations of the Privy Council and the CCJ in the two cases, **(Boyce and Joseph)** and **(Joseph and Boyce)**, that despite any personal view which judges may entertain about the morality or efficacy of the death penalty or even while accepting that degrees of culpability may vary, this Court has an obligation to respect the Constitution and any laws that retain capital punishment.

[86] Additionally, as stated by Lord Hoffman, while judges might be considered as the mediators between "the high generalities of the constitutional text and the messy detail of their application to concrete problems, and while judges in giving body and substance to fundamental rights will naturally be guided by what are thought to be the requirements of a just society", it is not for judges to give effect to these changes and attitudes in society by giving a teleological interpretation to the Constitution.

[87] The death penalty has been preserved by **section 26** of the Constitution. While the Inter American Court might have decried Barbados' position with regard to the death penalty, it can only recommend repeal of that section of the Constitution. That Court is not part of the Barbados judicial system and cannot therefore supersede the Privy Council and the CCJ. The Constitution is supreme and it has conferred the power upon Parliament to amend and/or repeal legislation. The Court's power is limited to interpreting the law. It is

therefore ultimately up to and incumbent upon Parliament and not this Court to effect any needed change to **section 2** of the **Offences Against The Person Act.**

[88] In the premises and as found by the Privy Council, this Court concludes that **section 2** of **the Offences Against The Person Act** does not contravene the Constitution and is valid as enacted, notwithstanding the terms of **section 15** of the **Constitution.**

Disposal

[89] The appeal is therefore dismissed.

Justice of Appeal

Justice of Appeal

Justice of Appeal