

(1) Lincoln Anthony Guerra and
(2) Brian Wallen

Petitioners

v.

The State

Respondent

FROM

THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO

REASONS FOR DECISION OF THE LORDS OF
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
UPON A PETITION FOR A STAY OF EXECUTION
OF THE 25TH JULY 1994, DELIVERED THE
26TH JULY 1994

Present at the hearing:-

LORD GOFF OF CHIEVELEY
LORD LLOYD OF BERWICK
LORD NOLAN

[Delivered by Lord Goff of Chieveley]

On 18th May 1989 the two petitioners, Brian Wallen and Lincoln Guerra, were convicted of murder at Port of Spain Assizes and were sentenced to death. On 7th June 1989 notices of appeal against their convictions were lodged. Their appeals were dismissed by the Court of Appeal on 2nd November 1993. On 21st March 1994 petitions by both petitioners for special leave to appeal against conviction were dismissed by the Judicial Committee of the Privy Council. On the same day, attorneys acting for the Petitioners wrote to the Inter American Commission of Human Rights, and to the United Nations Human Rights Committee, complaining of violations of their human rights.

At 1400 hours on 24th March 1994 warrants were read to the two petitioners for their execution at 0700 hours the following morning, 25th March. On the same day, 24th March, constitutional motions were filed on behalf of both petitioners at the Registry of the High Court in Trinidad, claiming that the carrying out of the executions pursuant to the warrants would constitute a violation of their constitutional rights. Their Lordships understand that this was on the basis of the decision of the Judicial Committee in *Pratt and Morgan* [1993] 3 W.L.R. 995 in

which it was held that execution following a very long delay could constitute inhuman punishment and so would be unlawful under the Constitution of Jamaica, a similar provision being contained in the Constitution of Trinidad and Tobago.

A summons was immediately filed on behalf of the petitioners asking for a conservatory order staying the execution of the petitioners pending the determination of their constitutional motions. At 2200 hours on 24th March the summons was heard by Lucky J., who refused to grant a conservatory order. Notice of appeal to the Court of Appeal was filed immediately. The appeal was heard at 0100 hours on 25th March by Hosein J.A., sitting as a single judge of the Court of Appeal. At 0325 hours, Hosein J.A. dismissed the appeal, but gave leave to appeal to the Judicial Committee of the Privy Council, and granted a conservatory order for 48 hours pending an appeal to the Judicial Committee. At 0525 hours (1025 hours B.S.T.) the Judicial Committee granted a conservatory order staying execution for four days pending an appeal to the Judicial Committee. At about 0600 hours the Attorney-General moved the full Court of Appeal on an application to set aside the 48 hour stay of execution granted by Hosein J.A. On reading a faxed copy of the order of the Judicial Committee, the Court of Appeal adjourned the Attorney-General's application until 28th March. On 28th March, the Judicial Committee adjourned the petitioners' application for leave to appeal from the order of Hosein J.A. until 25th April, and extended the conservatory order until after the determination of the petition on 25th April.

On 31st March the Court of Appeal gave judgment on the Attorney-General's application. They concluded that Hosein J.A. had erred in granting leave to the petitioners to appeal to the Judicial Committee, without recourse to the full Court of Appeal, but decided, since the Judicial Committee was already seized of the matter, not to set aside the order of Hosein J.A.

On 18th April, Jones J. dismissed the petitioners' constitutional motion, and refused a stay of execution pending the exercise by the petitioners of their right to appeal to the Court of Appeal. On 25th April, the stay granted by the Judicial Committee lapsed, but the Attorney-General undertook that no execution would take place until the hearing of an application to the Court of Appeal for a stay; and on 29th April the Court of Appeal by consent granted a conservatory order directing the sentence of death be not carried out until after the determination of the appeal to the Court of Appeal. Attempts made on behalf of the petitioners to obtain an undertaking from the Attorney-General that no execution would take place pending any appeal to the Judicial Committee proved to be unsuccessful.

On 9th June, the Court of Appeal reserved judgment on the petitioners' constitutional motion. Following the execution of Glen Ashby on 14th July, the petitioners on

19th July again sought an undertaking from the Attorney-General that no executions would be carried out pending the determination of all appellate proceedings, including an appeal to the Judicial Committee; but such an undertaking was refused.

Judgment by the Court of Appeal on the petitioners' constitutional motion is now scheduled to be given in the near future. On the information available to their Lordships, it appears probable that it will be given at 0930 hours today, 26th July; but it is possible that it may not be given until the same time on 27th July.

It is against this background that counsel for the petitioners came before the Judicial Committee yesterday, 25th July, asking for a conservatory order directed to preventing their execution pending the determination of an appeal from the Court of Appeal, in the event that the Court of Appeal should dismiss their appeal and should then themselves not grant such a conservatory order.

If the Court of Appeal should dismiss the petitioners' appeal, they are entitled to appeal to the Judicial Committee as of right. However, in the light of recent decisions of the courts of Trinidad, it does not appear to be the normal practice for a court to grant a stay of execution pending an appeal to a higher court, even where the appellant is under a sentence of death. In these circumstances, and particularly having regard to the recent execution of Glen Ashby, their Lordships were much concerned that, if the petitioners' appeal to the Court of Appeal were to be dismissed, the petitioners might be executed before they had an opportunity to exercise their right of appeal to the Judicial Committee. Their Lordships therefore considered what steps were open to them to secure that such an event, which would plainly constitute the gravest breach of the petitioners' constitutional rights, and would frustrate the exercise by the Judicial Committee of its appellate jurisdiction, should not occur.

Naturally their Lordships were most concerned, as they were in the case of Ashby, that any order they should make would be within their jurisdiction, and would not in any way trespass upon the jurisdiction of the Court of Appeal, for whose judges they entertain great respect. However first of all, since the Attorney-General was represented before them by counsel, they enquired about his position with regard to the application by the petitioners for a conservatory order. Since it then transpired that the Attorney-General opposed the making of such an order, their Lordships next enquired whether the Attorney-General was prepared to solve the problem by giving an undertaking not to carry out the execution; but it was made plain to their Lordships that no such undertaking would be forthcoming. Their Lordships next considered whether it would be practicable to wait until after the Court of Appeal had given its decision, both on

the petitioners' appeal and, if that was dismissed, on the petitioners' inevitable application for a stay of execution; but having regard to the circumstances in which Ashby had been executed (which showed in particular that executions may now be carried out in Trinidad at short notice) and the difficulties of communication which became apparent in that case, they regretfully concluded that it would not be safe so to wait before themselves making a conservatory order. They invited counsel for the Attorney-General to place before them such argument as he thought fit that an order in the form asked for by the petitioners was beyond the jurisdiction of their Lordships; but it transpired that, while counsel was instructed not to consent to such a course being taken, he had no instructions to oppose it with reasoned argument.

In these circumstances their Lordships had to consider, without the benefit of argument from the Attorney-General, whether it was within the jurisdiction of the Board to make the order asked for. They first considered whether sufficient jurisdiction had been vested in them by virtue of the leave to appeal to the Judicial Committee granted by Hosein J.A. It seemed quite possible that this was so; but unfortunately, since a copy of the order of Hosein J.A. was not available for the Board, the point was not sufficiently clear for the Board to proceed on that basis. However they concluded that, if the order was so expressed as not to take effect until after the Court of Appeal had themselves declined to exercise their jurisdiction to grant a conservatory order, such an order by the Board could not constitute any encroachment upon the jurisdiction of the Court of Appeal. It was, as their Lordships have already stressed, a matter of great anxiety to them that no such encroachment should take place, and only when they were satisfied that it would not do so did they decide that they were free to accede to the petitioners' application for a conservatory order in the form asked for by them. But in any event, as has already been explained, only when it became plain that no other course was open to them to ensure that the jurisdiction of the Judicial Committee, as the final Court of Appeal under the Constitution of Trinidad and Tobago, should be protected in this matter and available for the enforcement of the petitioners' rights under the Constitution, did they decide to take that course.

It was for these reasons that, at the conclusion of the hearing yesterday, they announced their decision as follows:-

- (a) in the event of the Court of Appeal dismissing the Petitioners' appeal and not granting immediately thereupon the Petitioners' application dated 25th July 1994 for a conservatory order staying their execution; and

- (b) on the Petitioners undertaking by counsel in such an event to appeal to the Judicial Committee of the Privy Council against the order dismissing their appeal and to file all relevant documents in accordance with the time limits set out in the relevant rules.

A conservatory order be granted directing that the sentence of death be not carried out on the petitioners until after determination of such appeal by the Judicial Committee of the Privy Council.