Privy Council Appeal No. 2 of 1994

(1) The Attorney General of Trinidad and Tobago and
(2) The Director of Public Prosecutions *Appellants*

v.

Lennox Phillip also called Yasin Abu Bakr and 113 Others *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH OCTOBER 1994

Present at the hearing:-

LORD KEITH OF KINKEL
LORD GOFF OF CHIEVELEY
LORD BROWNE-WILKINSON
LORD WOOLF
LORD LLOYD OF BERWICK

*[Delivered by **Lord Woolf**]*

Lennox Phillip, also called Yasin Abu Bakr, ("Abu Bakr") and the 113 other respondents took part in an armed insurrection between Friday, 27th July and Wednesday, 1st August 1990. The insurrection was intended to overthrow the lawful Government of Trinidad and Tobago. After the insurrection had come to an end the respondents were arrested. On about 13th August they were charged with offences including treason, murder, unlawful and malicious setting fire, possession of ammunition, wounding with intent to do grievous bodily harm, assault and possession of firearms.

The respondents contend that their detention was unlawful. They rely on a pardon they had received during the course of the insurrection from the Acting President of Trinidad and Tobago, Joseph Emmanuel Carter. They commenced two sets of proceedings - the first being for leave to issue a writ of habeas corpus and the second being under section 14 of the Constitution of the Republic of Trinidad and Tobago for contravention of their right: (a) [33] to liberty and/or security of the person and not to be

deprived thereof except by due process of law and (b) to the protection of the law under section 4 of the Constitution.

The proceedings resulted in an earlier appeal to the Privy Council, *Lennox Phillip and Others v. Director of Public Prosecutions* [1992] 1 A.C. 545. The Board allowed the appeals of the present respondents. In their judgment, which was delivered by Lord Ackner on 10th December 1991, the Board held that the respondents had established a *prima facie* case that they were the beneficiaries of a valid pardon which would render their detention in prison on the charges unlawful, and that it was therefore for the Commissioner of Prisons and the Attorney General to justify their detention; accordingly, the respondents were entitled to a writ of habeas corpus as of right so that the lawfulness of their imprisonment could be immediately determined. They were also entitled to pursue their proceedings pursuant to section 14 of the Constitution. The Board held that it was not necessary for the proceedings to be deferred until after the validity of the pardon had been determined, upon the respondents making a special plea in bar to the indictment, when they were arraigned on the offences. In addition the Board directed that the habeas corpus and constitutional proceedings should be consolidated so that the validity of the pardon could be determined.

In those consolidated proceedings, on 30th June 1992, Brooks J. delivered judgment. He granted the respondents an order of habeas corpus and ordered that the respondents should be released from detention forthwith. The judge also granted a declaration that their detention and prosecution had contravened their constitutional rights as alleged and he ordered that the damages for the contravention should be assessed by a judge in chambers and paid by the State.

In Trinidad and Tobago, unlike the position now in the United Kingdom, there is no appeal against an order of habeas corpus. However there is an express right of appeal in "constitutional matters" under section 108(a) of the Constitution. The appellants appealed under that section to the Court of Appeal against the decision of Brooks J. The Court of Appeal, contrary to the contention of the respondents, held that there was jurisdiction to hear the appeal, but by a majority (Sharma and Ibrahim JJ.A., Hamel-Smith J.A. dissenting) dismissed the appeal. The present appeal is from that decision of the Court of Appeal.

On this appeal the respondents have not contested the decision of the Court of Appeal as to their jurisdiction. The issues have all depended upon the validity of the pardon. They are both of constitutional significance and practical importance to the appellants and the respondents. If the decision of the Court of Appeal is upheld, it will mean that the respondents, although they took part in an insurrection, will be entitled to such damages as the judge in chambers considers it is appropriate to award. If on the

other hand the appeal succeeds, then the respondents are at risk of being rearrested and tried; Mr. George Newman Q.C. indicated on behalf of the appellants that, when the outcome of the present appeal is known, a decision will be taken as to what action, if any, in the way of further criminal proceedings is appropriate. To assist the authorities to come to their decision, Mr. Newman indicated that the Attorney General and the Director of Public Prosecutions would welcome the views of the Board.

The grounds relied on by the appellants in order to establish the invalidity of the pardon are:-

(a) the pardon was obtained by duress and at the dictate of the respondents,

(b) the pardon related to offences not yet committed and

(c) the respondents did not comply with the condition to which it was subject.

The respondents argued that, even if the pardon is invalid, it would now amount to an abuse of process to prosecute them in respect of the offences with which they have been charged. The Director of Public Prosecutions also argued that the pardon had not been properly constituted or promulgated. He was, however, refused leave to advance a further argument, in support of which he had prepared a supplemental case. This was that the pardon was also invalid or a nullity because under the Constitution the power of pardon can only be exercised on the advice of the Cabinet and it had been issued without that advice.

The hearing before the Board lasted ten days. A substantial proportion of that time was taken up by an examination of the evidence which was considered by Brooks J. as to what had happened during the insurrection. This was in the form of affidavits from those involved and transcripts of telephone communications which took place between the prime actors. There was, as one would expect, considerable disparity between the descriptions of the events given in the different affidavits but the witnesses were not cross-examined on their affidavits. In addition the transcripts were not timed or dated so there was considerable difficulty in determining what was their correct sequence and the precise times to which they related. It was only in the course of the hearing before the Board that the counsel who appeared before their Lordships, who also appeared in the courts below, were able for the first time to unravel the evidence in a reasonably satisfactory manner. Because of the difficulties in ascertaining the course of events the Board granted the parties a greater indulgence to reinvestigate the evidence than would normally be the case when the Board has the advantage of the views on the evidence of the courts below.

However, even after hearing Mr. Newman at length on the facts, the Board is far from satisfied that the courts below, as Mr. Newman contended, were not fully aware of the salient features and effect of the evidence. The Board are happy to acknowledge that their judgments disclose that the courts dealt with this extremely sensitive and difficult case with great care and objectivity. The Board considers that it is unlikely that the explanation for the courts below not referring to or stressing certain features of the evidence, to which Mr. Newman attached particular importance, was that the courts below did not appreciate their significance. The explanation is more likely that the test which they applied in order to assess the validity of a pardon made this unnecessary. Their approach, as will appear hereafter, differs from that which the Board takes as to certain critical issues on this appeal and because of this it is not necessary in this judgment to set out the facts other than in outline. However it is emphasised that their Lordships have scrutinised the evidence with great care. It was examined in detail, both in the course of argument and during the period that the Board adjourned in order to examine the evidence itself.

The facts.

The respondents are members of a religious sect known as the Jamaat al Muslimeen. Shortly after 5.30 p.m. on Friday, 27th July about seventy of the Muslimeen led by Abu Bakr, who is their Imam, stormed the Trinidad and Tobago Television Building while a second group of about forty Muslimeen commanded by Bilaal Abdullah ("Abdullah") stormed the Parliament building ("the Red House") while it was in session. Among those in the Red House were the Prime Minister, Mr. Robinson and other ministers. The politicians in the Red House were held at gun point whilst visitors and civilians were allowed to leave.

The police headquarters which were opposite the Red House were set alight by a car bomb. A number of people were killed in the course of the attacks. Two vehicles were booby trapped and strategically placed outside the Television Building and were not disarmed until the following Wednesday, 1st August. Abu Bakr appeared on television during the Friday evening and alleged that the Government had been overthrown and that the Prime Minister and his Cabinet were under arrest.

When the Acting President heard of the insurrection he set up his command post at Camp Ogden. He was joined there by his military chiefs who included Colonels Theodore and Brown and other Government Ministers, lawyers and senior policemen. The Acting President in due course made a television appeal for calm and at about 9.00 a.m. on the Saturday he declared a state of emergency. While the military chiefs initially devised a plan for storming both the Red House and the Television Building, it was agreed that given the risk to innocent lives the preferable course would be to open negotiations to seek a peaceful solution.

The Members of Parliament at the Red House were kept bound hand and foot and made to lie prone on the floor at gun point. During the Friday evening Abdullah wanted the Prime Minister to give orders for the troops to be withdrawn. He bravely did not cooperate and was shot and wounded. Minister Richardson was also shot and wounded. Subsequently there were discussions between Abdullah and two other Ministers, Dookeran and Toney. This eventually resulted in Canon Clarke being enrolled as a mediator. Canon Clarke arrived at the Red House early on Saturday morning. While there he was provided with a document headed "Major Points of Agreement", a letter of resignation by the Prime Minister and a letter appointing Mr. Dookeran as Acting Prime Minister, which was signed by the sixteen Members of Parliament who were detained. The "Major Points of Agreement", in addition to referring to the letter of resignation and the letter appointing Mr. Dookeran as Prime Minister, stated that there was to be a general election in ninety days, that Mr. Dookeran, upon his appointment, was to secure an amnesty and that when Mr. Dookeran and Canon Clarke returned to the Red House with the amnesty "All [were] to be freed".

Canon Clarke and Mr. Dookeran then went to Camp Ogden and delivered the three documents. Canon Clarke explained that "there were many young people with guns (at the Red House) who were very agitated and would shoot at a moment's notice". He recommended that an amnesty should be given as a means of saving the MPs' lives.

Between midday and about 3.00 p.m. the same day Canon Clarke returned to the Red House for a short time with medical supplies and left with two letters, one recommending a pardon and the other advising against foreign intervention.

Initially, the Acting President was not prepared to sign a draft of an amnesty which had been prepared. But after Canon Clarke had expressed great fear for his life and those of the hostages, if he returned empty handed without some concrete response, the Acting President was persuaded to change his mind. He signed the draft and initialled a copy which he gave to Canon Clarke for delivery to the Muslimeen. He told Canon Clarke to tell them he had signed the original.

Canon Clarke arrived at the Red House with the amnesty after dark at a time when the Muslimeen, believing that the army were about to storm the building, were making preparations to execute members of the Government whom they held. However tension then eased considerably and, according to Abdullah, he announced an end to "the hostage status". It is convenient to regard this as being the end of the first stage of the insurrection.

The second stage continued until early Monday evening, 30th July, when, as arranged by Abdullah with Abu Bakr's agreement, a broadcast was made by the Prime Minister and Minister Richardson in which they announced that as a result of negotiations an agreement had been reached between the authorities and the Muslimeen. This was hardly an accurate description of what had happened. The negotiations between those in the Red House and those outside in fact had been desultory and spasmodic. In particular there was no confirmation of Mr. Dookeran's appointment and several of the Members of Parliament in the Red House had contacted their wives to ask them to urge the Acting President to make the appointment as the delay was preventing them from coming home. In addition certain supplementary demands were put forward on behalf of the Muslimeen. These included the appointment of a senator from the Muslimeen, for Abu Bakr to be appointed Minister of National Security and for Mr. Dookeran to be advised by the Opposition on the appointment of an interim Government. There was however throughout the second stage continuous gun fire for which out of control members of the police force were at least partly responsible.

During the third stage, which followed announcements to the media, communications between those in the Red House and the representatives of the official government improved. Negotiations were conducted largely between Abdullah and Colonel Theodore. On the Tuesday morning, 31st July, the Prime Minister whose condition was deteriorating was released. However the surrender of the Muslimeen and the main body of hostages was delayed. The Government were insisting that the Muslimeen should do so unarmed but Abdullah on the Muslimeen's behalf was trying to establish an arrangement which would ensure that, if the Muslimeen laid down their arms and came out from the Red House and the Television Building, they would be taken to a destination where they would be safe. Eventually, in the middle of the day, on Wednesday, 1st August, the surrender took place. All went substantially in accordance with the agreed arrangements except for one unfortunate incident. Quite contrary to those arrangements on their journey the Muslimeen were taken on a detour during which they were stopped, stripped and searched with the apparent object of finding the copies which had been made of the pardon.

Mr. Newman's criticisms of the findings in the courts below primarily related to the failure of the judges to attach sufficient significance to the extent to which the Muslimeen persisted in seeking agreement to their previous and new demands after Canon Clarke had returned to the Red House and the extent to which they were responsible for the gun fire which took place.

The judgments in the Court of Appeal and High Court.

It is the findings of Sharma J.A. in the Court of Appeal which are particularly helpful to the respondents. The

judge selected certain affidavits as being more creditworthy than others, basing himself on the fact that they were sworn only two and a half months after the insurrection whereas the other affidavits were sworn many months later. This, it has to be accepted, is not a particularly firm basis upon which to treat one witness as more credible than another. However the judge was in a stronger position in relying on the transcripts, subject to their order being correctly unravelled. He found that the transcripts clarified the following matters:-

"Although there were references to requests for political demands after the grant of the amnesty, the making of these requests did not hinder the process of negotiating the construction of machinery for the safe release of the hostages. They were not backed by further threats or by suggestions that the 'hostages' would be killed. Nothing in these discussions indicated that the Muslimeen did not accept and were not trying to implement the condition of the amnesty. On Tuesday 31st July, for example, Bilaal Abdullah asked Abu Bakr about future elections and Abu Bakr responded 'those things are not our business we are not politicians'.

The discussions concerning the political demands were encouraged by the State authorities for tactical reasons. At no point did the State authorities say to the Muslimeen - 'You have an amnesty, that is all you will get from us'. On the contrary they engaged in these discussions in a manner that would reasonably have led the Muslimeen to believe that they were open to negotiation. They did this not because they were open to negotiating but as part of their strategy, informed by consultations with an expert on hostage negotiations Dr. Schlossberj, to 'wear the Muslimeen down and try to maintain the initiative'.

It may be that some of the Muslimeen mistakenly believed that the amnesty was connected with Minister Dookeran being appointed as Prime Minister and hence some of the references to this prospect.

This explains the sense of the urgency among the Muslimeen as relayed by Canon Clarke and their ultimate resort to the International News Services on Monday 30th July after they were unable to contact the State authorities.

The transcripts reveal that it would not have been safe whatever Colonel Theodore may have said, to release the hostages before Wednesday 1st August."

The judge also attributed the breakdown in communications in part to a psychological strategy by the authorities to stall the negotiations in the hope that it would make the Muslimeen more compliant. This is not an inaccurate assessment of the situation, but Mr. Newman

is entitled to make the point that the adoption of these tactics would have been pointless if the Muslimeen were not making demands which the authorities were not prepared to accept.

The approach of the other members of the Court of Appeal did not require them to examine the evidence in the same way and they did not make findings as to what occurred after the grant of the pardon upon which the respondents particularly rely.

However Brooks J. also concluded that the delay in surrendering the hostages was not unreasonable and that a contributory factor for the delay was the shooting incidents for which the security forces were responsible. He also felt that there was continuing concern by all parties to ensure that the restoration of order had been achieved before the release could take place and that the Muslimeen had reasonable and understandable fear of reprisals. He found that "it was not a situation in which blame therefor could be cast entirely or substantially on one side or the other".

The power to pardon.

The terms of the pardon, of which the respondents were provided with a copy, were as follows:-

> "I, Joseph Emmanuel Carter, as required of me by the document headed Major Points of Agreement hereby grant an amnesty to all those involved in acts of insurrection commencing approximately 5.30 p.m. on Friday 27th July 1990 and ending upon the safe return of all Members of Parliament held captive on 27th July 1990.
>
> This amnesty is granted for the purpose of avoiding physical injury to the Members of Parliament referred to above and is therefore subject to the complete fulfilment of the obligation safely to return them."

Subject to the additional points raised by the Director of Public Prosecutions, which it is not necessary to resolve in order to determine this appeal, if the Acting President had authority to grant the pardon, then that authority is derived from section 87(1) of the Constitution which provides as follows:-

> "The President may grant to any person a pardon, either free or subject to lawful conditions, respecting any offences that he may have committed. The power of the President under this subsection may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof."

Section 87(1) of the Constitution has to be compared with the power which the President has under section 87(2) to pardon the subject of a pardon after he has been convicted. Prior to the Constitution there was already power to grant

a pardon after conviction but the power contained in section 87(1) before conviction was created for the first time by the Constitution.

In his judgment on the earlier appeal to the Board in this case, Lord Ackner considered that the new power had been modelled on the power to pardon given to the President by the Constitution in the United States. He referred to the observation of Alexander Hamilton in "The Federalist No. 74" in 1788 at page 222 that it existed because "in seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the Commonwealth". In an article "The President's Power to Pardon: A Constitutional History" by William F. Duker (William and Mary Law Review, Volume 18, Spring 1977, No. 3, page 475) it is pointed out that the power of the President of the United States to pardon is in turn inherited from the prerogative or common law power of the monarch in England and the United States courts "have looked to English jurisprudence for the meaning of a presidential power that corresponds to a power of the English Crown" (at page 508).

Formerly in England pardons were required in all cases to pass under the Great Seal. They can now be granted in England by warrant under the royal sign manual countersigned by the Secretary of State (see Halsbury's Laws, 4th Ed., Vol. 8, para. 950). That these are the methods of grant indicates the formal nature of a pardon at common law. It is an executive act of the State. Both under English law and under the Constitution of Trinidad and Tobago a pardon should not be treated as being analogous to a contract. It does not derive its authority from agreement. It is not dependent upon acceptance of the subject of the pardon. In England its authority is derived from the prerogative and in Trinidad and Tobago its authority is dependent upon the Constitution.

A pardon can however be subject "to lawful conditions" as, in Trinidad and Tobago, the Constitution makes clear. Where a pardon is subject to a condition, then the protection provided by the pardon may not be conferred until the condition has been complied with. However while the effectiveness of the pardon would then depend upon compliance with the condition, non-compliance with the condition would not affect the time of the grant of the pardon. The grant of the pardon is not to be treated as deferred pending compliance with the condition. This can be of importance when considering the initial validity of the pardon since this has to be judged at the time of the grant; though a pardon which is initially valid may subsequently be rendered valueless before it has had any effect due to non-compliance with a condition to which it is subject.

A striking feature of this case is that the Acting President states that he never intended the pardon documents which he signed or initialled to take effect as a pardon, unless and until he had received a recommendation from the duly appointed Prime Minister that a pardon should be granted. However here the Board agrees with the approach adopted in the judgments in the lower courts that whether or not a pardon has been granted is to be determined objectively and in the circumstances which prevailed a pardon must be regarded as having been granted.

A pardon must in the ordinary way only relate to offences which have already been committed. As Lord Ackner, having examined the relevant English and other authorities, made clear in his judgment in the earlier appeal to the Board, the effect of a pardon is to blot out, so far as the subject of the pardon is concerned, any responsibility which he has for any offences which are covered by the pardon. Such offences can no longer be a lawful cause for depriving him of his liberty or for taking proceedings against him in respect of the offence. It removes "the criminal element of the offence named in the pardon" but does not create any factual fiction or raise any inference that the person pardoned had not in fact committed the crime for which the pardon had been granted (at page 557). However while a pardon can expunge past offences, a power to pardon cannot be used to dispense with criminal responsibility for an offence which has not yet been committed. This is a principle of general application which is of the greatest importance. The State cannot be allowed to use a power to pardon to enable the law to be set aside by permitting it to be contravened with impunity. In accord with this principle section 87(1) of the Constitution limits the President's power to grant a pardon to any person "respecting any offences that he may have committed". It does not apply to offences not yet committed.

The President does, however, have the power as already mentioned to make the pardon subject "to lawful conditions". The pardon granted in this case was subject to a condition which required the Muslimeen to return safely all the Members of Parliament held captive and presupposed that the insurrection would only end upon their safe return. As this did not happen until the following Wednesday, it will be necessary to decide whether this pardon was in fact purporting to apply to offences not yet committed and, if so, whether this affected the validity of the pardon. These are different questions from the question which can also arise which is whether there was compliance with the condition which was imposed. In answering questions of this nature a technical and rigid approach is not to be used. Instead, in the case of a pardon, a purposive construction is to be adopted which seeks to uphold the validity of the pardon. If possible a condition will be construed in a way that means that if it does involve, whether expressly or by implication, trespassing on the principle that a pardon must not waive

responsibility for future offences, the degree of trespass is strictly limited so that it is acceptable, taking into account that the objective of the pardon is, for example, the commendable one of bringing peacefully to an end an insurrection or rebellion. If this were not the approach, there would be the undesirable consequence that it would be impossible to grant a pardon subject to a condition requiring the prompt laying down of arms, since such a condition in the case of an insurrection of any size could never be complied with instantaneously.

The effect of duress.

The principal characteristics of a pardon having been identified, it is now appropriate to examine in turn the grounds relied upon by the appellants to establish the invalidity of the pardon. The first of these is that the pardon was obtained by duress and at the dictate of the respondents. All the judges in the courts below rejected the appellants' arguments based on duress. Hamel-Smith J.A. alone would have allowed the appellants' appeal because the Acting President "was not exercising his own deliberate judgment under section 87(1) but was acting pursuant to the dictates of the agreement".

It is not necessary to decide on this appeal whether a pardon which is formally granted would ever be set aside for duress. For it to be capable of being set aside would require very exceptional circumstances, circumstances where, in the case of Trinidad and Tobago, it could be said that the document which records the purported grant of a pardon was not the President's document, notwithstanding that it bore his signature. Whether or not this is the situation has to be determined, not by applying contractual or equitable principles which govern agreements between individuals but principles which pay due regard to the fact that the pardon records the official decision of a Head of State. Heads of State and their governments are faced regularly with situations where they are forced to make decisions when they are subject to very great pressure. Sometimes they are compelled to take action in the public interest which at the time they consider to be the lesser of two evils and which, if they had not been subject to outside forces, they would never dream of taking. Decisions which can involve even the life of their citizens have to be taken on behalf of the State. This is part of the heavy responsibility of the office and, at least in any but the most exceptional of situations, if a Head of State or a government grants a pardon, it cannot avoid the consequences of that grant because it would have acted differently but for the pressure which existed.

Where the Head of State has made a formal decision which in normal circumstances would constitute a pardon, it is important that the State should not be able to resile from the terms of that pardon except in the most limited of circumstances. Were this not to be the position, the

advantages which can flow from the grant of a pardon could be lost since the prospective subject of a pardon would rapidly appreciate that it may not be possible for it to be relied on. The Constitution of Trinidad and Tobago supports this approach by providing in section 38(1) that the President shall not be answerable to any court for the performance of the functions of his office or for any act done by him in the performance of those functions. However section 38(1) does not go so far as to prevent the courts from examining, as did the courts below, the validity of the pardon.

No precedent has been found for any court setting aside a pardon on the grounds of duress. The closest analogous situation which has been identified is the decision of Tan J. in the High Court of Malaysia in *Mustapha v. Mohammad and Another* [1987] L.R.C. (Const.) 16. In that case, in considering an allegation of duress in relation to the appointment and removal of a Chief Minister, Tan J. (at page 94) looked for guidance as to the meaning of duress from the Oxford English Dictionary and Jowitt's Dictionary of English Law (Vol. 1, 2nd Ed.), both of which referred to direct physical violence, or pressure, or actual imprisonment to the person whose act is being challenged and regarded that degree of duress as being required in the situation there being considered. In the case of a challenge to the validity of a pardon at least direct action of this nature would be required to establish duress. The conduct relied upon in this case is not of this direct nature and the decisions in the courts below were clearly correct on this issue.

The Acting President was unhappy about signing the document which had been prepared by his legal advisers, but having considered the alternatives he did sign. He did not appreciate that he was in fact granting a pardon, but this was due to his misunderstanding of the legal consequences of what he was doing, not because he did not voluntarily sign and appreciate the terms of the document upon which the respondents rely.

Hamel-Smith J.A. attached importance to the reference made by the Acting President in the document that he was granting the pardon "as required of me by the document headed Major Points of Agreement". However this did not mean that the Acting President was not exercising his own judgment. The Acting President's initial reluctance to sign the document indicates that he was making his own decision and, if the pardon is otherwise valid, it cannot be impeached on the basis that the exercise of his discretion was pre-empted in some way by the "Major Points of Agreement".

Before leaving the question of duress it should be pointed out that the appellants did not advance any separate argument that the pardon, in the circumstances which exist here, was from the start invalid because its grant was contrary to public policy. The argument would be that the

Acting President had no jurisdiction to grant a pardon because of the existence of the insurrection with hostages being held against their will. Such an argument could provide a firm foundation for the Head of State deciding as a matter of principle not to grant a pardon in these circumstances to avoid the risk of encouraging repetition of such conduct. It would however be going too far to say that the Head of State lacked the jurisdiction to grant a pardon if he decided that this was the right policy. This of course is subject to the further submissions to which their Lordships now turn.

The effect of the condition.

The second and third grounds relied upon by the appellants are interlinked. The pardon which was granted by the Acting President clearly contemplated that the insurrection would come to an end at the same time as the respondents complied with the condition safely to return the hostage Members of Parliament. It therefore followed that, if the pardon was treated as coming into existence when the document was handed to Canon Clarke to be communicated to the respondents, there was inevitably going to be a period before the condition could be complied with during which the insurrection would continue. It was conceivable that no individual act of violence would occur in the interim, but that what can loosely be described as the crime of being in a state of insurrection would continue. The appellants argue that this means that the pardon was a nullity from the outset. They also argue in the alternative that, if the pardon was initially valid, the condition at least required the respondents, on being informed of the terms of the pardon, forthwith to make it clear that the insurrection was at an end and that the hostages were free to leave the Red House. The respondents on the other hand argue that, at most, all that was required was that the condition should be fulfilled within a reasonable time and on the findings of the courts below this had happened.

The way the issue was dealt with by the judges did not in fact accord precisely with either the approach of the appellants or that of the respondents; however it was more closely related to the approach of the respondents. Brooks J., while accepting that the four day delay in returning the hostages could not "really be regarded as unreasonable", primarily based his conclusion on the fact that the matters relied upon by the appellants, which occurred subsequent to the pardon, did not invalidate the pardon because the pardon only "took effect upon the safe return of all the hostages". Until that occurred there could not be a breach of the pardon and so there had been no violation of the pardon. Sharma J.A. was also of the opinion that the pardon being conditional became effective when the Members of Parliament were released and the respondents had surrendered. He took the view that, no express time having been imposed for compliance with the condition, the condition had to be

fulfilled within a reasonable time and in the circumstances he agreed with Brooks J. that this had been done. He was however also of the view that no new offence had been committed after the pardon was delivered. Ibrahim J.A. adopted a different approach. He regarded the condition as being a condition precedent to the pardon being effective. Its effectiveness was:-

> "... to be ascertained when the condition was fully satisfied. Till then, the respondents had nothing since it was open to the Ag. President to revoke it altogether or attach other conditions or even revoke the original condition or amend it. These things he could not do after the condition was satisfied. At best, it can be said the respondents had an offer of amnesty which offer became crystallized into an amnesty when the condition was satisfied by them."

Hamel-Smith J.A. adopted a similar approach to Ibrahim J.A. He regarded section 87(1) as enabling the President to make a conditional offer of a pardon and "by the imposition of appropriate conditions ... control the effect of any amnesty", and that the Acting President was:-

> "... allowing, in effect, the insurrection to continue and, one can assume, he was free to withdraw the offer if after a reasonable time the hostages were not released. That was his prerogative. He could have insisted that the hostages be released and the arms laid down on immediate delivery of the amnesty. While that might have been the most appropriate condition to attach, he did not, for whatever reason, consider it necessary. Without such a condition the effect of the purported amnesty was to allow the insurrection to continue until either the offer was withdrawn or the hostages released. The absence of such conditions could not have the effect of making the amnesty null and void as contended by the State."

The references which have been made to the previous judgments in the courts below indicate that, except for the judgment of Sharma J.A., the question of whether or not it was reasonable to defer the surrender of the hostages until the Wednesday was not really central to the judges' reasoning. In this those judgments were correct. The Acting President had no power to grant a pardon which would take effect at some uncertain time in the future, and which, in the case of this pardon, purported to pardon any offences which were committed in the meantime. The pardon did not say it was only to take effect if the condition was performed within a reasonable time. But if that was the meaning of the pardon, then it would have been invalid. This would be because such a pardon would permit a significant period of time to elapse prior to it taking effect during which the commission of further offences might occur. At the time of the grant of the pardon it was certainly possible, if not probable, that because the respondents had other demands outstanding (contained in

the "Major Points of Agreement") they would want to negotiate further prior to the hostages being handed over. In this highly unstable situation, compliance with the condition would only be reasonably practical after the elapse of a substantial further period of time during which the unlawful insurrection would continue. The Acting President could not in anticipation of achieving a surrender grant a pardon which was capable of giving protection to continuing offences over such a lengthy period, even though the delay in releasing the hostages was not, in all the circumstances, unreasonable, as Brooks J. and Sharma J.A. both found. The grant of a pardon in such circumstances would amount, as already explained, to dispensing with the law in a way which is not permissible.

The alternative way of seeking to justify this pardon is to treat the Acting President as having made an offer of a pardon subject to a condition which had to be complied with, by way of acceptance of the offer, in a strictly limited period, perhaps not best described as immediately or forthwith as Mr. Newman argued but within the sort of period conveyed by the use of the words promptly or as soon as practical (which may amount to very much the same thing). This would give practical effect to an offer of a pardon but would not amount to an impermissible licence to offend in the meantime. It would be difficult to interpret the document in this way. It would also involve adopting an inappropriate contractual approach to a non-contractual executive action by the Acting President. However, in any event, this interpretation would not assist the respondents because the time which elapsed before it could be said the offer was "accepted" was excessive.

A third approach involves attempting to treat the document as a statement of an intention to grant a pardon in the future if the respondents complied with the conditions laid down. Again the language of the actual document does not support this approach. However even if it did there would be the difficulty that no grant was made after compliance with the condition and a statement of intention could not fetter the discretion of the Acting President so that he could be compelled to honour his stated intention. In the courts below reliance was placed upon the decision of the Supreme Court in *United States v. Klein* (1871) S.C. 13 Wall. 128. In that case the opinion of the court was given by Chase C.J. It was a case involving a proclamation by the President granting an amnesty to all those who took part in the civil war, provided, *inter alia*, they swore an oath of allegiance. The Chief Justice treated the proclamation as an offer of a pardon although it was never followed by a formal grant of a pardon. In respect of that offer he said at page 142:-

> "It was competent for the President to annex to his offer of pardon any conditions or qualifications he

> should see fit; but after those conditions and qualifications had been satisfied, the pardon and its connected promise took full effect."

In that case the court was not however concerned with the problems created by the pardon being regarded as a licence to commit offences prior to it coming into effect. In relation to the President's pardoning power, Mr. Duker's article in the William and Mary Law Review *(supra)* significantly states at page 526:-

> "Because the power to pardon is given only for 'offenses against the United States', the crime must precede the pardon; it may not be anticipated. Otherwise the power that allows presidential clemency for the consequence of a violation would be a power to dispense with the observance of the law."

The situation which arises in this case cannot therefore be overcome by treating the document not as a pardon itself but as a conditional offer of a pardon or a statement of an intention to grant a pardon in the future. The best that can be achieved, in order to give validity to this pardon, would be to construe it as requiring the condition to be fulfilled not within what was in all the circumstances a reasonable time, that is by Wednesday, 1st August, but as a pardon subject to a condition which was to be complied with, as already mentioned, either promptly or as soon as practicable. This would involve the Muslimeen, when the pardon was received, acknowledging that, the pardon having been granted, they wished to treat the insurrection as at an end and, subject to the reasonable needs of self-defence, their laying down their arms and releasing the hostages. While it might be said that even on this approach there was a technical disapplication of the law, this can be accepted because of the willingness of the courts to lean towards giving effect to a pardon and to accommodate this technicality.

To uphold this pardon on this basis is of no practical assistance to the respondents. On any interpretation of the facts the respondents took a different approach. Having received the pardon, they sought to achieve their other objectives which were reflected in the "Major Points of Agreement". Although the period of negotiation may have been protracted by the tactics perfectly properly adopted by Colonel Theodore to bring the insurrection to a peaceful conclusion, until the end of the second stage of the insurrection, the Muslimeen were still intent on achieving their broader objectives. They were certainly not surrendering or treating the insurrection as at an end. In doing this they were not complying with the condition to which the pardon was subject and as a result, even on the most charitable interpretation, the pardon was no longer capable of being brought into effect by complying with the condition to which it was subject. It follows that Brooks J. and the majority of the Court of Appeal were wrong in treating the pardon as valid.

It may be said that this approach is undesirable. It unduly constrains the use of a pardon for beneficial purposes so as to avoid acts of terrorism and insurrection. It is not accepted that this needs to be the case. It is desirable that it should be appreciated by those who wish to obtain the protection of a pardon, which is subject to a condition of the sort which existed here, that the condition has to be complied with promptly. It cannot be used as a base upon which to achieve further indulgences.

Abuse of process.

In common law jurisdictions there exists a separate ground of protection for those who surrender in reliance on a conditional offer or promise of a pardon. The common law has now developed a formidable safeguard to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so. It could well be an abuse of process to seek to prosecute those who have relied on an offer or promise of a pardon and complied with the conditions subject to which that offer or promise of a pardon was made. If there were not circumstances justifying the State in not fulfilling the terms of its offer or promise, then the courts could well intervene to prevent injustice. (See *Reg. v. Milnes and Green* [1983] 33 S.A.S.R. 211).

The possibility of abuse of process arises on the facts of this case. On the findings of the judges in the courts below the Muslimeen in all the circumstances acted reasonably after the pardon was granted. On any view of the facts, as was pointed out in the judgments in the courts below, the Acting President thereafter prior to the surrender did not give any indication that the validity of the pardon was in question. On the contrary the negotiations which resulted in the ultimate surrender of the Muslimeen and the release of the hostages unharmed were conducted on the basis that they were entitled to the benefit of the pardon. However whether the facts give rise to an abuse of process would have been a question for the trial judge in the event of further criminal proceedings. Here to those facts there has to be added the very significant factor that to prosecute the Muslimeen now because of a decision of the Board that the pardon is invalid would be inconsistent with the decision of Brooks J. that they were entitled to an order of habeas corpus. That part of the decision of Brooks J. was final. It could not be the subject of an appeal and it would in the opinion of the Board, because of this, inevitably be a manifest abuse of process to circumvent the provision of the law of Trinidad and Tobago, that an order of habeas corpus is not subject of appeal, by bringing a further prosecution relying on the outcome of an appeal under the Constitution.

The result therefore of the decision of the Board is that the pardon was and is invalid. That means that it was not unlawful to initiate a prosecution of the Muslimeen in relation to the events arising out of the insurrection and to arrest them for the purposes of that prosecution. However in those proceedings the Muslimeen could well have been in a position to raise a plea in bar on the basis of abuse of process. The Board does not venture an opinion as to whether that plea would have succeeded; it would have been a decision for the court before whom the trial was to take place. However, the order of habeas corpus having been made, the Board is able to assist the Attorney General and the Director of Public Prosecutions, as they requested, by saying that after the order of habeas corpus was made it would be an abuse of process to seek once more to prosecute the Muslimeen for the serious offences committed in the course of the insurrection.

As the prosecution was not initially unlawful the detention of the Muslimeen in connection with the prosecution was also not unlawful or contrary to the Constitution. The fact that the prosecution could be subsequently stopped either by the trial judge accepting a plea based on an allegation of abuse of process or, as occurred here, an order of habeas corpus being made would not affect the lawfulness of any previous detention. Accordingly the constitutional claim of the respondents should not have succeeded. Their Lordships therefore allow the appeal and set aside the declaration granted by Brooks J. to the respondents and his order for damages to be assessed. In relation to costs, the Board does not interfere with the order for costs made by Brooks J. in respect of the respondents' application for habeas corpus but directs that otherwise there should be no order for costs either before the Board or in the courts below.