Privy Council Appeal No. 33 of 1994

Albert Huntley *Appellant*

v.

(1) The Attorney General for Jamaica and
(2) The Director of Public Prosecutions *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH DECEMBER 1994

Present at the hearing:-

LORD JAUNCEY OF TULLICHETTLE
LORD BRIDGE OF HARWICH
LORD GRIFFITHS
LORD MUSTILL
LORD WOOLF

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

In Jamaica, prior to the commencement of the Offences against the Person (Amendment) Act, 1992 ("the 1992 Act") on 13th October 1992, section 2 of the Offences against the Person Act 1864 ("the 1864 Act") required anyone convicted of murder to be sentenced to "suffer death as a felon". The 1992 Act repealed section 2 of the 1864 Act and substituted for that section a new section 2 which established two separate categories of murder; capital murder and non-capital murder. The new section 2(1) sets out the circumstances which constitute capital murder. They include a murder committed by a person in the course or furtherance of a robbery. This is however subject to section 2(2) of the new section which provides that if:-

> "... two or more persons are guilty of that murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the person murdered, or who himself used violence on that person in the course or furtherance of an attack on that person: but the murder shall not be capital murder in the case of any other of the persons guilty of it."

Section 3 of the 1992 Act made amendments to section 3 of the 1864 Act. It provided that "Every person who is convicted of capital murder shall be sentenced to death" and that:-

"(b) ...

'(1A) Subject to subsection (5) of section 3B, a person who is convicted of non-capital murder shall be sentenced to death if before that conviction he has -

(a) whether before or after the date of commencement of the Offences against the Person (Amendment) Act, 1992, been convicted in Jamaica of another murder done on a different occasion; or

(b) been convicted of another murder done on the same occasion."

Section 3B was added to section 3 of the 1864 Act by section 4 of the 1992 Act. Section 3B(5) requires a person to be given at least seven days notice before his trial of any conviction upon which it is proposed to rely and for that conviction to be admitted or "found to be proven by the trial Judge". Section 4 of the 1992 Act also amended the 1864 Act by introducing a section 3A into the 1864 Act. Section 3A(1) made the sentence for non-capital murder life imprisonment.

These provisions of the 1992 Act do not apply to persons convicted of murder prior to the commencement of the 1992 Act. However, those persons who, at the date of the commencement of the 1992 Act, were already under a sentence of death for murder are dealt with by section 7 of the 1992 Act. The object of section 7 is to ensure that the position of those awaiting execution before the coming into force of the 1992 Act is no worse than those convicted of murder after the coming into force of that Act. The section therefore provides that those under sentence of death when the 1992 Act comes into force are to have the murder of which they have been convicted classified as capital or non-capital murder by applying the same method of classification as would have been applicable if the 1992 Act had been in force when the murderer was convicted. They were also to have their appropriate sentence redetermined in accordance with the provisions of the 1864 Act as amended by the 1992 Act.

This appeal is a test case as to the effect of the Constitution of Jamaica and the common law requirements of fairness on this classification process.

The appellant is one of those to whom section 7 applies. He was convicted of murder on 13th July 1983 and sentenced to death. His crime was committed on 29th November 1980 when a teacher died as a result of being shot in the course of a robbery. The appellant and another man were the only

people to be arrested and charged with murder. However there was evidence that others were also involved. The deceased's death resulted from his being shot. No one identified the appellant as the person who fired the shot that caused the death. The prosecution case at the trial was that both accused were engaged in a joint enterprise. If the appellant fired the shot which proved to be fatal, his murder would therefore be classifiable as capital under section 7.

On the commencement of the 1992 Act, the appellant was one of three hundred prisoners on death row. As a result of the Board's decision in *Pratt and Morgan v. The Attorney General for Jamaica* [1994] 2 A.C. 1, quite apart from the 1992 Act, a substantial number of those prisoners can expect to have their sentences commuted. Nonetheless it is estimated that there are approximately twenty eight prisoners whose fate could depend upon the outcome of the classification process under section 7 of the 1992 Act.

The terms of section 7 of the 1992 Act dealing with the process of classification are as follows:-

> "7.-(1) Subject to the provisions of this section, with effect from the date of commencement of this Act the provisions of the principal Act as amended by this Act shall have effect in relation to persons who at that date are under sentence of death for murder as if this Act were in force at the time when the murder was committed and the provisions of this section shall have effect without prejudice to any appeal which at that date may be pending in respect of those persons or any right of those persons to appeal.
>
> (2) For the purposes of subsection (1), the case of every person referred to in that subsection shall be reviewed by a Judge of the Court of Appeal with a view to determining -
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> (a) whether the murder to which the sentence relates is classifiable as a capital or non-capital murder in accordance with the principles set out in the principal Act as amended by this Act;
>
> (b) whether sentence of death would in any event be warranted having regard to the provisions of section 3(1A) of the principal Act as amended by this Act (repeated and multiple murders); and
>
> (c) whether, and if so to what extent, a specified period should elapse before the grant of parole in a case where murder is classifiable as non-capital murder,

and shall determine the appropriate sentence in accordance with the principles set out in the principal Act as amended by this Act.

(3) Where, pursuant to subsection (2), a Judge of the Court of Appeal classifies a murder as capital murder, he shall by notice in writing to the person convicted of the murder, inform that person of the classification and of the rights conferred by subsection (4).

(4) A person who is notified pursuant to subsection (3) shall -

(a) have the right to have the classification reviewed by three Judges of the Court of Appeal designated by the President of that Court and to appear or be represented by counsel; and

(b) within twenty-one days of the date of receipt of the notice indicate in writing his desire for such review,

and any written representations in support of a change in that classification shall be made within the period of twenty-one days aforesaid.

(5) The Judges of the Court of Appeal referred to in subsection (4) shall review the classification referred to in that subsection and shall make the appropriate determination specified in subsection (2) and their decision shall be final."

The judge of the Court of Appeal who reviewed the appellant's case under section 7(2)(a) came to the conclusion that the appellant's murder was to be classified as capital murder and a notice of this was sent to him on 17th December 1992. The appellant did not receive any prior notice of the classification and he made no representations to the judge. Section 7 does not expressly require the judge to give reasons for his classification and the notice given to the appellant contained no reasons. However, subsequently a document was disclosed which does set out some reasons. It suggests that the reason for this classification was that the appellant was identified as one of the two persons present and his co-accused, while admitting being present, denied firing a gun. If these are the only reasons for the decision they provide little support for a finding that the appellant fired the fatal shot.

The appellant filed a notice of motion for constitutional redress dated 22nd January 1993. The notice of motion was subsequently amended. The Constitutional Court dismissed the motion on 23rd April 1993 and an appeal against this decision was dismissed by the Court of Appeal (Wright, Forte and Wolfe JJA.) on 29th November 1993.

The relevant provisions of the Constitution are contained in section 20. They are as follows:-

> "20.-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> ...
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> (5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty: ...
>
> (6) Every person who is charged with a criminal offence -
>
> (a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;
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> ...
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;
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> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses ...
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> (7) No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.
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> ...
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> (10) In paragraph (c) and (d) of subsection (6) of this section 'legal representative' means a barrister entitled to practise as such in Jamaica or, except in relation to proceedings before a court in which a solicitor has no right of audience, a solicitor who is so entitled."

The appellant raises three issues on this appeal. The first is as to whether section 20 has any application to the classification process contained in section 7 of the 1992 Act. (If it does it is obvious that there has not been compliance with at least section 20(6)). The second issue is closely related to the first issue since its outcome also depends upon section 20 applying to the classification process under section 7 of the 1992 Act. On the assumption that it does, the issue is whether section 7 of

the 1992 Act contravenes section 20(7) of the Constitution. The argument for the appellant as to section 20(7) is that the classification of a person as being guilty of capital murder involves his being found guilty of a criminal offence which at the time it took place did not constitute "such an offence". The third issue falls into two parts. The first part depends on whether the express requirement of section 7 should be supplemented by additional requirements in order to achieve the standard of procedural fairness required by the common law. The second part is as to whether there was compliance with any additional requirements which exist.

Prior to the hearing the Solicitor-General of Jamaica raised with the Registrar of the Judicial Committee the appropriateness of the second issue being raised before their Lordships as it had not been raised before the courts in Jamaica. Normally, in this situation, their Lordships would not have been prepared to hear argument on the second issue. However at the hearing the Solicitor-General acknowledged the closeness of the links between the first and second issues and because of this he very properly indicated that he would withdraw his objection as to the second issue being considered. This has the desirable consequence of enabling the Board to give a ruling on this issue which will avoid the possibility of further proceedings being necessary. Further proceedings would have prolonged the period of uncertainty as to the position of those prisoners who have been sentenced to death and are in the same situation as the appellant.

In considering all three issues it is critically important to start by identifing the true nature of the classification exercise under section 7. As already indicated, it places a person convicted of murder and sentenced to death prior to the coming into force of the 1992 Act in no worse a position than those convicted of murder after that date. It would have been possible for the 1992 Act to have been passed without including any provision requiring a classification process such as that contained in section 7. If this course had been adopted, the appellant would have had no grounds for complaint either under the Constitution or at common law. He would then have been convicted of murder and properly sentenced to death under legislation which was at the time in force. While the relevant provisions of the earlier legislation were repealed by section 2 of the 1992 Act, the normal position in Jamaica, as in England, is that the repeal of the earlier legislation does not affect any punishment already imposed. In the case of Jamaica section 25(2) of the Interpretation Act 1968 provides:-

> "Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not - ...
>
> (d) affect any penalty, fine, forfeiture, or punishment, incurred in respect of any offence committed against any enactment so repealed."

Mr. Geoffrey Robertson Q.C., on behalf of the appellant, was not prepared to concede that section 25(2) would apply to save the death sentence already imposed on a strict reading of the 1992 Act without section 7. It is not however necessary to determine whether, which appears doubtful, he was right not to make this concession because whether or not the Interpretation Act would apply does not affect the normal position of someone who is already under sentence when the law is changed. As to this section 25(2) of the Interpretation Act is clear. Accordingly, in considering all three issues raised by the appellant, section 7 of the 1992 Act should properly be regarded as a provision which does not subject the appellant to any additional or different punishment from that to which he had already been sentenced. On the contrary it provides a mechanism which can result in his punishment being reduced to life imprisonment if, under section 7, his conviction is properly classifiable as non-capital murder. In substance section 7 is a relieving provision.

This is not the approach to section 7 which Mr. Robertson would endorse. Mr. Robertson draws attention to the terms of section 7(1) which expressly provide for the provisions of section 2 regarding capital and non-capital murder to "have effect in relation to persons who at that date are under sentence of death for murder as if this Act were in force at the time when the murder was committed". He submits that it follows from this that as from the 1992 Act coming into force on 14th October the appellant's former sentence of death lapsed as authority for his execution. A sentence of death, if it was to be imposed, had to be reauthorised by a further finding not made at his original trial - that is to say a finding that his offence constituted one of the aggravated forms of murder, such as murder in the course of robbery and, in this case, where the prosecution alleged murder on the basis of a joint enterprise, a further finding that he was the man who actually caused the deceased's death.

If the correct application of section 20 of the Constitution and the requirements of fairness at common law involve a technical approach, focusing on form rather than substance, then there would be force in Mr. Robertson's argument. There can be no doubt that after the 1992 Act came into force, it would be unlawful to execute those who had previously been guilty of murder until after the classification process had been completed. Furthermore for a murder to be classifiable as a capital murder under the criteria contained in the 1992 Act, in the appellant's case, involved considering facts which were not essential to establish his guilt at his trial.

However in relation to all three issues, a technical approach is not the appropriate approach. Section 20 of the Constitution is in Chapter 3 of that Constitution which deals with fundamental rights and freedoms. As

was explained by Lord Wilberforce in *Ministry of Home Affairs v. Fisher* [1980] A.C. 319 at page 328, it calls "for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to". A person in the position of the appellant is therefore entitled to require the courts to adopt a non-rigid and generous approach to his rights which section 20 is designed to protect. However in doing this the court looks at the substance and reality of what was involved and should not be over concerned with what are no more than technicalities. The approach is the same whether this is to his benefit or disadvantage. The technicalities here are the mechanism used by the draughtsman of section 7 for ensuring that the appellant would be in no worse position in relation to the carrying out of the death sentence which had been passed before the commencement of the Act than he would have been if he had been convicted for the same offence after the commencement of the Act.

In considering the requirements of fairness, the same broad approach is appropriate. The common law supplements a statutory procedure laid down by legislation so as to ensure that the procedure is fair in all the circumstances. As Lord Reid pointed out in *Wiseman v. Borneman* [1971] A.C. 297 at page 308 when applying a "fundamental general principle" the court does not resort to "a series of hard and fast rules". In determining what fairness requires, the court should be concerned with the reality of what is involved.

Turning therefore to consider what are the results of adopting this approach to the first issue, the starting point is that section 7(2) requires "the case" of the appellant to "be reviewed". The reason that his case is to be reviewed is because at the date of the commencement of the Act he was "under sentence of death for murder" (section 7(1)). The statute makes it clear that the exercise that the judge is to perform is not to conduct a hearing but to determine "whether the murder to which the sentence relates is classifiable as capital or non-capital murder". The exercise is a limited one. To review "the case", the judge can do no more than review the record of the trial which has already taken place and determine on that record whether the murder should be "classifiable as a capital or non-capital murder" in accordance with the criteria introduced by the 1992 Act. Because of the limited nature of the exercise, as all counsel before the Board agreed, the review has to be conducted on the basis that a murder can only be classifiable as capital if the contents of the record are not consistent with any other result. The approach, to use the description adopted in argument, is the "proviso approach"; that is the approach adopted in applying the proviso when hearing criminal appeals. The judge has to ask himself - could a jury if properly directed come to any other conclusion on the evidence available at the trial? This is no doubt why although there are the other provisions in the 1992 Act which require notice to be given, there is no

provision for this in relation to the first stage of the classification process.

This being what is required of the judge when applying section 7 of the 1992 Act, is this, even giving section 20 a most generous interpretation, an exercise to which section 20 can apply? The answer is no. The classification exercise which the judge is performing is not comparable to charging a person with a criminal offence. The judge would, in the limited sense that the adoption of the proviso approach requires, have to determine factual issues, which at the trial may not have already been determined, for the purpose of the classification exercise. However this exercise remains a wholly distinct exercise from that contemplated by section 20 of the Constitution. The review which section 7 requires does not involve the judge determining guilt or innocence of the person who has previously been convicted of murder. It involves no more than the judge concluding whether the evidence at the trial which did take place would inevitably have resulted in a conviction of capital murder if the 1992 Act had been in force. If it did, then the sentence could not be reduced from that which had previously been passed. If it did not, the individual concerned would have the benefit of the doubt and his sentence would be redetermined as one of life imprisonment.

The appellant's argument as to the first issue therefore fails. So far as the second issue is concerned, the result has to be the same. Section 20(7) of the Constitution is designed to protect individuals against retroactive penal laws. A similar provision can be found in the various international declarations of human rights. Their purpose is reflected in a decision of the Supreme Court of the United States, *Ex parte Medley* (1889) 134 U.S. 835. In that case in giving the opinion of the court, Mr. Justice Miller after dealing with the earlier authorities on an "*ex post facto* law" said at page 840:-

> "... it may be said that any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed ... or which alters the situation of the accused to his disadvantage;"

Properly understood section 7 is not an *ex post facto* law in this sense. It does not increase the punishment or adversely affect the position of the person already convicted of murder and sentenced to death.

Looking at the substance of what is involved in applying section 7 of the 1992 Act, it does not involve finding the appellant guilty of an offence which did not exist at the time that he committed the murder. As he was already subject to a mandatory death sentence, there

cannot be any question of a penalty being imposed "which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed" contrary to section 20(7) of the Constitution. The judge, while having to decide whether the offence which the appellant committed is classifiable as capital or non-capital murder, is not purporting to find the appellant guilty of a different offence.

The fact that the appellant's argument fails on the first and second issues does not detract from his separate argument on the third issue. The review and classification exercise under section 7 of the 1992 is manifestly an exercise to which the principles of fairness have to be applied. The fact that the Act entrusts the exercise to a senior judge, a judge of the Court of Appeal, is consistent with no other view. The exercise, notwithstanding that it could not result in the appellant being in any worse position than he was prior to the 1992 Act coming into force, is one the outcome of which is obviously of vital importance to him. However, in considering what are the requirements of fairness, it is important not to ignore the fact that, while the appellant is complaining about the first stage, the exercise has two stages. The decision adverse to the appellant by the single judge can be "reviewed" by three judges. In the case of the appellant that review has not yet taken place. However if it had, the three judges would have been required to adopt the same "proviso approach" as the single judge. In other words the three judges would have to ask themselves the same question as the single judge. However, in their case, unlike the position with the single judge, there is the express provision for making representations contained in section 7(4). The person whose classification is to be reviewed is entitled to appear or be represented by counsel and to make written representations.

It is clear from the language of section 7 itself that the review by the single judge is closely related to the review by the three judges. In this respect the machinery of section 7 is very much of a class which has to be considered as a whole when deciding what fairness requires. The general approach in this situation was considered by the Board in the recent case of *Rees v. Crane* [1994] 2 A.C. 173. In giving the judgment of their Lordships in that case, Lord Slynn of Hadley applied the principles to be deduced from a number of authorities which were cited to the Board in order to demonstrate what should be the position where there was a three stage process, an initial stage which involved finding no fact nor even stating an opinion followed by two later stages. On the facts involved the Board decided, contrary to the general approach, that the person concerned, a High Court judge, had a right to be heard at the initial stage. As to the general position Lord Slynn of Hadley made the following comment (191G):-

> "It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the enquiry without observing the *audi alteram partem* maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage."

Lord Slynn however added that "there is no absolute rule to this effect" and the court in considering whether the general practice should be followed "should not be bound by rigid rules". As is pointed out in the 7th Edition of Administrative Law by Professor Sir William Wade and Dr. Forsyth at page 566:-

> "Preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the persons affected."

In applying this guidance to the function performed by the single judge, it is of significance that the appellant had no opportunity to make any contribution of any sort. If he was aware of the provisions of section 7, at best he would know that in due course a single judge would be carrying out the classification exercise but in practice it would be difficult for him to make any representations. It is relevant to note that if the judge had come to the conclusion that his murder was not classified as non-capital, the judge would have had power to determine under section 7(2)(c) "whether, and if so to what extent, a specified period should elapse before the grant of parole". The judge's decision to specify this period is not subject to review by the three judges. Thus if the person in the position of the appellant was not allowed to make representations before such a period was specified, he would be deprived of all opportunity of being heard on an issue which could also have a serious impact upon him. Since the 1992 Act came into force, a similar situation in England has been considered by the House of Lords in *R. v. Secretary of State for the Home Department ex parte Doody and Others* [1994] 1 A.C. 531. That case concerned the Secretary of State's power to release on

licence prisoners who had received mandatory sentences of life imprisonment. The House of Lords decided that the principles of fairness required the Secretary of State to afford to a prisoner serving a mandatory life sentence the opportunity to submit in writing representations as to the period that he should serve for the purposes of retribution and deterrence before the Secretary of State set the date of his first review and that the Secretary of State was required to give to the prisoner certain information to enable the prisoner to make representation. As Lord Mustill said, in giving a judgment with which the other members of their Lordships' House agreed, (at page 560):-

> "(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modifications; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

Because of this decision in *Doody*, it is not really contested before the Board that a person in the position of the appellant would have a right to make representations before a period was specified under section 7(2)(c). The question therefore arises - if that is the position in relation to section 7(2)(c), is not the position the same in relation to section 7(2)(a)? This is a persuasive argument but in their Lordships' view it should not prevail.

The legislation itself is not consistent with the argument since the inclusion of an express right of a person in the appellant's position to make representations to the three judges but no reference to this in the case of the single judge, suggests the contrary view was taken by the legislature. In drafting the legislation care had clearly been taken to try and achieve fairness. Reference can be made not only to the express provision for representations in section 7(4) but also to the express requirement for written notice to be given of an intention to rely on a second conviction under section 3B(5). This is by itself, however, far from conclusive. What in their Lordships' judgment is determinative is the fact that as Wolfe J.A. found "the single judge's role is nothing more than a winnowing exercise". As the Solicitor-General and the Director of Public Prosecutions contend, the advantage of a two stage process is that the first stage could take place in an expeditious and uncomplicated manner. The single judge could expeditiously conduct the process himself by examining the record keeping in mind the proviso test which he has to apply. This should enable him to give a prompt decision in favour of a prisoner which would remove any uncertainty as to whether he was still at risk of being executed. The desirability of early resolution of the

position of those sentenced to be executed has already been made clear by their Lordships by their decision in *Pratt and Morgan* to which reference has already been made. While it is important that someone in the appellant's position should not be deprived of the opportunity of making representations, it seems to their Lordships perfectly fair and just that the opportunity to make those representations should be deferred for the review by the three judges. At that stage more satisfactory representations will be able to be made. Although there is no express provision in section 7 to this effect, the fact that there is a right to make representations, does involve a prior entitlement to the reasons for the initial classification. The reasons do not need to be extensive but they should give the basis of the initial decision. Armed with this knowledge the person in the position of the appellant should be able to make meaningful representations. Bearing in mind the difficulty which can confront a person in the position of the appellant in obtaining a copy of the record and any necessary legal advice, there are obviously practical advantages in confining the making of representations to those cases which remain capital cases notwithstanding the operation of the "winnowing exercise". As Lord Reid also said in *Wiseman v. Borneman (supra)* at page 308:-

> "Even where the decision is to be reached by a body acting judicially there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see the material against him."

In this case the desirability of expedition outweighs the advantages, if any, which the defendant would receive as a result of being in a position to make representations at the first stage as well as the second.

Because this was a test case, their Lordships make no adverse comment about the fact that the appellate procedure was put in motion before the classification had been considered by the three judges. However in a future case, it may be considered more appropriate to know the result of the review by the three judges before the position is examined by the courts.

For the reasons given their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed.