Christopher Bethel *Appellant*

v.

The State *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL UPON A PETITION FOR SPECIAL LEAVE TO APPEAL AS A POOR PERSON OF THE 22nd October 1998,

Delivered the 10th December 1998

Present at the hearing:-

Lord Hoffmann
Lord Clyde
Lord Hutton

[Delivered by ***Lord Hoffmann****]*

On 22nd October 1998 their Lordships granted the petitioner, Christopher Bethel, special leave to appeal against the decision of the Trinidad and Tobago Court of Appeal dismissing his appeal from a conviction for murder before Lucky J. and a jury on 23rd January 1996, when he was sentenced to death. Their Lordships treated the hearing of the petition as the hearing of the appeal and remitted the case to the Court of Appeal to consider the matters in the petition, hear such evidence as it thought fit and to decide whether the conviction should be affirmed or set aside and, in the latter case, whether a retrial should be ordered. It is not their Lordships' practice to give reasons for either allowing or dismissing a petition for special leave to appeal but in view of the unusual nature of the

[51] present case they think it would be appropriate to do so.

The petition upon which their Lordships granted special leave was the second which the petitioner had submitted, the first having been dismissed on 4th December 1997. There is no procedural bar to the second petition and this is not the first occasion upon which leave has been granted upon such a petition, but their Lordships would not normally entertain a second petition based upon matters which could have been raised in the first. It is therefore necessary to explain why this was regarded as an exceptional case.

The case against the petitioner at the trial was undoubtedly a strong one. On his own admission in a statement to the police which the jury must have accepted, he and his co-accused had gone with a cutlass and a gun to rob the deceased, who had been the co-accused's employer. They ransacked the deceased's house, stole various items of electrical goods, bundled the deceased into the back of his van and drove him 40 miles to a place where he met his death by being strangled and drowned head down in a barrel of water. Afterwards the petitioner sold some of the stolen goods. Each accused, in his statement to the police, denied being involved in the murder and blamed the other. The jury must have found there had been a common purpose to kill or cause grievous bodily harm and convicted them both.

The appeal to the Court of Appeal was based upon complaints of misdirection by the trial judge. These were rejected and the first petition to their Lordships for special leave, which alleged similar matters, was dismissed. No more need therefore be said about the merits of the conviction on the evidence before the jury.

The second petition is based upon alleged misconduct by the petitioner's counsel at the trial. In an affidavit dated 21st May 1998 the petitioner said that before his trial he was notified by the Legal Aid Board that Mr. Ian Brooks, counsel of 3 or 4 years call, had been appointed to represent him. He wrote twice to Mr. Brooks asking for a meeting but received no reply. The "very first occasion" that he saw Mr. Brooks was in court on the first day of the trial, when the latter introduced himself to the judge. Despite the fact that he had been in a cell under the court

from 8.00 a.m. until the time when proceedings commenced at 9.00 a.m., Mr. Brooks had not been to see him. The first occasion Mr. Brooks saw him outside court was for ten minutes on the third or fourth day in a meeting room under the court. He asked the petitioner whether he was guilty and the petitioner said that he was not. He then asked him to write his defence on a piece of paper. On the following day the petitioner gave him the piece of paper (the contents of which are not specified in the affidavit) and Mr. Brooks said that he would not run such a defence. When the petitioner protested he "got extremely uptight" and said that he was the lawyer and would do the case his way. Although he had complained of being beaten by the police, Mr. Brooks did not cross-examine on the circumstances in which the statement under caution was taken and did not challenge its admissibility. Finally, although he told Mr. Brooks that he wanted to give evidence, he was prevented from doing so. In fact, he had, at the invitation of the judge, stood up and was on his way to the witness box when Mr. Brooks touched him and told him to remain silent.

In the Court of Appeal none of these matters was raised by the petitioner's counsel, Mrs. Alice Yorke Soo Hon. The petitioner's affidavit does not suggest that he had instructed her to do so. It appears however from an affidavit dated 21st May 1998 by the petitioner's solicitor Mr. Oury that on 14th February 1997, after the appeal had been argued and while judgment was reserved, the petitioner wrote to complain that he had not been allowed to give evidence. The letter suggests that he had done so as a result of hearing in prison that such an allegation had formed the basis of a successful appeal to the Privy Council in another case. On the other hand, there is also correspondence before their Lordships in February 1996, soon after the trial, in which the petitioner wrote to Mr. Desmond Allum S.C., whom he then hoped would represent him, making substantially similar complaints.

In this state of affairs, the London solicitors engaged in the preparation of the first petition put the petitioner's allegations to Mr. Brooks at an interview which took place in August 1997 while he was visiting London. According to a file note of the meeting, Mr. Brooks said that he had met the petitioner 12-15 times before the trial and visited

him every day before and after the hearing. The case was called and adjourned at least five times before the trial and on each occasion Mr. Brooks said that he had spent at least an hour with the accused. Mr. Brooks said he had explained to the petitioner the advantages and disadvantages of giving evidence - in particular, the fact that he would be liable to cross-examination - and that the petitioner had chosen not to give evidence. He had never complained of bad treatment by the police but said that the statement under caution was not his statement and that he had signed a blank piece of paper. He had cross-examined unsuccessfully on this point. In view of this comprehensive denial of the petitioner's allegations, his solicitors did not include the point in the first petition.

After the dismissal of the first petition, they continued to investigate the matter. There appeared to be no documents to support either version of what happened. Inquiry in Trinidad did not reveal any statement which Mr. Brooks had taken from his client. The petitioner swore an affidavit substantially repeating his earlier allegations, although admitting that his earlier statement that he had not seen Mr. Brooks until the first day of the trial was untrue. Mr. Brooks had been present for a number of earlier adjournments but the petitioner still maintained that they had not spoken. In this state of the evidence, their Lordships adjourned the hearing of the second petition to give Mr. Brooks the opportunity to put his version of the matter on affidavit.

In his affidavit, Mr. Brooks again says that he saw the petitioner and spoke to him on a number of occasions before the trial, though for rather shorter periods than those which he appears to have given in the interview last August. He says twice that the petitioner told him that he had "participated in the crime to the fullest extent" and that he had volunteered his statement to the police. In other words, he had made a confession of guilt. Despite numerous questions from Mr. Brooks, he said nothing to cast doubt upon the voluntariness of the statement or the identification parade he had attended, nor had he suggested any witnesses to be called on his behalf. This, said Mr. Brooks, left him with no choice in the conduct of the defence. He had discussed the case together with the co-accused and his attorney and both accused had decided that

in view of the fact that each was blaming the other, neither would give evidence. Finally, he says that the petitioner told him that he had "contrived a story" and wanted to go into the witness box to give it, but he told him this would be ill-advised and the petitioner accepted the advice.

Their Lordships have set out the evidence at some length in order to indicate the matters which seem to them to call for investigation. They are very conscious of the ease with which it is possible for condemned prisoners, as a last resort, to invent allegations of refusal to accept instructions or incompetence on the part of counsel who defended them or conducted their appeals. It is also, for practical reasons, not possible for their Lordships to investigate such allegations and the only course open to them is either to dismiss the petition or to refer the matter back to the Court of Appeal for investigation. Their Lordships wish to make it clear that the fact that such allegations are made and persisted in, despite denial by the counsel involved, does not amount to a reason for referring the matter to the Court of Appeal. Ordinarily, their Lordships will not be inclined even to entertain such allegations when they are raised for the first time before the Board and in those cases in which they think it appropriate that counsel should be asked to respond to the allegations, they will accept his explanation. They therefore think that the petitioner's solicitors were right, in the light of the explanations given by Mr. Brooks last August, not to pursue the matter.

In this case, however, there are two reasons why they find it difficult to dispose of the matter on this basis. The first is the apparent absence of any documentation concerning the instructions which Mr. Brooks obtained from his client. They are bound to say that they are surprised that in a capital case no witness statement was taken from the petitioner or other memorandum made of his instructions. In view of the prevalence of allegations such as those now made, they think that defending counsel should as a matter of course make and preserve a written record of the instructions he receives. If this appeal serves no other purpose, it should remind counsel of the absolute necessity of protecting themselves from such allegations in the future. The second is the new matter introduced by Mr. Brooks in his affidavit which is to some extent different from the record of the interview with the

petitioner's London solicitors. In particular, their Lordships are concerned at the disclosure that the petitioner made a full confession to Mr. Brooks, which must have put Mr. Brooks in a gravely embarrassing position in the conduct of the defence. It seems to their Lordships that it is possible to argue that in the circumstances Mr. Brooks should have advised his client that his position was compromised and that he should be represented by someone else.

It may well be that all these matters are capable of satisfactory explanation but in view of the fact that this is a capital case, their Lordships feel unable to say that there is nothing which calls for further inquiry. For this reason, they made the order which they did. But they wish to emphasise that they regard the case as exceptional and not to be taken as encouragement for allegations against counsel to be raised for the first time before the Board.