[2014] UKPC 7
Privy Council Appeal No 0077 of 2012

JUDGMENT

Ramdeen (Appellant) *v* The State (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Neuberger
Lord Mance
Lord Kerr
Lord Sumption
Lord Toulson

JUDGMENT DELIVERED ON

27 March 2014

Heard on 23 January 2014

Appellant	*Respondent*
Edward Fitzgerald QC Ben Silverstone (Instructed by Simons Muirhead and Burton)	Howard Stevens QC (Instructed by Charles Russell LLP)

LORD TOULSON (WITH WHOM LORDS NEUBERGER AND KERR AGREE):

1. On 29 July 2008 at the Port of Spain assizes Julia Ramdeen and David Abraham were convicted of the murder of Carlos Phillip and sentenced to death. On 26 February 2010 their appeals against conviction were dismissed by the Court of Appeal of the Republic of Trinidad and Tobago. They applied for permission to appeal to the Board. The Board granted the appellant permission to appeal against conviction on three grounds. Abraham's application was refused.

2. The prosecution's case against the appellant was based on two different accounts of the killing: an account alleged to have been given voluntarily by the appellant in answers to the police and in a confession statement taken before a magistrate; and an account given by a self-confessed accomplice Bruzual, who gave evidence for the prosecution under a promise of immunity. The two accounts were radically different but the prosecution sought to rely on both. This made the trial unusual and presented difficulties for the trial judge, Brook J.

3. The grounds of appeal are that the judge misdirected the jury on the approach which they were to take to the separate accounts, that he wrongly failed to leave provocation to the jury as a possible defence and that he wrongly failed to direct the jury that the appellant's good character went not merely to her propensity to act as the prosecution alleged but also to her credibility. At the trial neither defendant gave evidence. The appellant's case, put through cross-examination, was that her confession statement was a fabrication of the police officer, who persuaded her what she should say by wrongful inducements, and that she took no part in the killing of the deceased. She accepted that she was present at the time of the killing, which took place in the apartment where she lived with Abraham, but it was put to Bruzual that the people who carried out the killing were Bruzual and another man, not Abraham. Abraham's defence was a denial that he was present.

Facts

4. On Christmas day 2003 the body of the deceased was discovered in a pond. He was naked, his mouth was gagged and his hands and feet were bound. There were superficial injuries to the head and face but the cause of death was aspiration of blood and stomach contents as a result of stab wounds to the neck, which penetrated the trachea and oesophagus. Three days later the deceased's burnt out car was found at another location.

5. The deceased was last seen alive on 23 December. On that evening there were mobile phone calls between the deceased and the appellant, who ran a call-girl business. She was arrested on 23 January 2004 by Inspector Phillip and other officers. She was taken to Chaguanas Police Station, where she was interviewed. She allegedly confessed to killing the deceased and agreed to give Inspector Phillip a written statement. This was taken in the presence of a magistrate.

6. According to the appellant's statement under caution, she and the deceased arranged by phone that he would come to her home for a threesome. She met him in the street and escorted him to her home. He was not drunk but all of a sudden started to behave in a drunken way. She went to the washroom to relieve herself and when she came out he was naked, he was staggering, he held on to her and he made advances. She pushed him off and told him to wait for the other girl who was due to come. She received a telephone call, but as she was answering it he grabbed her by the throat and untied her dress. She pushed him away, picked up a brick by the door and hit him on the side of the head. She stated that things then got "kind ah physical". She was pushed against a plastic table and a coffee maker fell over. She got up and hit him repeatedly with the brick. He fell to the floor and was making a noise. She asked him to shut up but he did not. She continued:

> "That is when I went inside the front bedroom in search of something to tie him. When I came back out he grabbed me by the second bedroom door and he slammed me on the wall. That is when ah hit him and he fell to the floor. Then I started tying him. I gagged him but he won't shut up. I then made a phone call to an acquaintance call Zai or Ziggy and that is when Ziggy told me that I have to kill Carlos Philip. He explained to me that I had to cut his jugular vein because if I don't kill him he would go to the police and have me arrested. So then I went to the kitchen and take out a knife. I begged him to stop making noise but he wouldn't. So I started cutting at his neck. I wasn't getting no penetration and I began to stab him in his neck on the right side…That was when blood started spraying. I took a bag and put it over his head and he started stifling and suffocating like he hacking blood. After a while he stopped moving. That was when ah wrap him in a white sheet. I sat with him until Zai came with one of his friends called Tallman."

7. On Zai's instructions she went to collect the deceased's car. Zai and Tallman put the deceased's body in the car and the appellant drove them to the place where the men disposed of the body. They then drove on to a remote spot where Zai left

the appellant and Tallman in order to fetch some fuel. When he returned, the deceased's car was soaked and set alight. They were given a lift by a car back to Chaguanas, where they separated. The appellant went back home and set about cleaning up.

8. In response to further questions the appellant said that she used a negligee strap, a cordless phone cord and a blouse to tie the deceased up and two stockings to gag him. In fact the deceased was found to have been gagged differently. After the interview the appellant was taken to her home and according to the police she identified the phone from which she took a cord to tie the deceased.

9. Bruzual was arrested on 8 March 2004 and made a statement under caution on the same day. On 25 August 2004 he made a fuller statutory declaration and on the following day he was given immunity from prosecution, on condition that his statutory declaration was true and that he gave evidence in accordance with it.

10. Bruzual's account in evidence was that on 23 December 2003 he was at the appellant's apartment from about midday with Abraham, whom he had first met at the apartment a few days earlier. The appellant joined them shortly before 7.00pm. A plan was made to carry out a robbery using a rental car which was to be provided by a man called Bevan George, but George failed to turn up with it. A new plan was then made to lure the deceased to the flat and to steal his car key while the deceased was in the bedroom with the appellant. Arrangements were made between the appellant and the deceased by phone and she brought him to the apartment. Meanwhile, Bruzual and Abraham hid in a separate room, taking blocks with them for possible use to enable them to kidnap the deceased and take his car. After the deceased arrived the appellant knocked three times on the door where Bruzual and Abraham were hiding, in accordance with the agreed plan. When Abraham opened the door, the deceased was naked. Abraham hit him on the head with a block and then pulled out a knife with which he began to stab the deceased. The deceased begged for his life. The appellant said that she could not help him and joined in hitting him two or three times on the head with a block. Bruzual admitted that he too hit the deceased on the jaw with a block. Abraham then dragged the deceased into the room where he and Bruzual had hidden and closed the door. When Bruzual opened it, he saw Abraham sawing the deceased's throat with the knife which he had been using. The appellant produced a cord to tie up the deceased and Abraham dragged him back out. Abraham put a bag over the man's face while the appellant tied his hands and Bruzual tied his feet. He was then wrapped in a sheet. The appellant fetched the deceased's car and the deceased was placed in it. The appellant drove them to George's house where George took over the driving. The body was dumped and the car incinerated.

The judge's directions

11. At the close of the evidence the judge properly conducted an "Ensor" hearing to discuss with counsel the issues in the case and the directions he should give to the jury. The transcript suggests that the judge had a sharper perception of the problems than counsel. He rightly wished to be clear how the prosecution was putting its case against the appellant in view of the differences between her statement under caution and Bruzual's evidence, which were not just about matters of incidental detail but were fundamental. According to the appellant's statement, the killing was done by herself alone after the deceased had come to the apartment for a threesome and had begun to act prematurely in a rough and drunken manner, causing a fight which had ended in her knocking him down and tying him up. According to Bruzual's evidence the deceased had been lured to the apartment in order to steal his car key when he was in a compromising position. Abraham and Bruzual took the precaution of arming themselves with blocks, which showed that they anticipated possible violence, but Abraham went much further by attacking the deceased with a knife, whereupon Bruzual and the appellant helped him. The judge wanted to know what the prosecution was presenting to the jury as the true version. In answer to his direct question "what are you inviting the jury to believe?", prosecuting counsel's reply was "I would invite the jury to consider the evidence of Bruzual as giving the entire picture".

12. In her closing speech prosecuting counsel took a somewhat different course, suggesting that the appellant's statement under caution and Bruzual's evidence might in some way be amalgamated to produce a composite version. The judge was properly concerned about this and raised the matter with counsel in the absence of the jury before summing up. Counsel for the defendants also expressed concern. The appellant's counsel suggested that possibly the only solution was for the jury to be discharged and for the prosecution to begin again with a clear and unambiguous statement of its case. Counsel for Abraham submitted that the jury ought not to be invited to deliberate on contradictory bases. Prosecuting counsel expressed regret that what she had said in her closing speech should have caused trouble. She repeated that it was the prosecution's case that Abraham was the killer and the appellant was a secondary party, but she wished to keep open the possibility that the jury might reject Bruzual's evidence and believe the appellant's confession statement. There was no objection from the defendants' counsel to that course, but the judge stated that he would have to direct the jury that the prosecution could not rely on the two parts of its case put together in the way that prosecuting counsel had appeared to suggest.

13. It is important to understand this background in order to consider properly the ground of appeal regarding the judge's directions to the jury on how they might approach the two versions of the killing. Mr Fitzgerald QC submitted that the judge fell into error by directing the jury that they must not accept parts of Bruzual's

evidence and parts of the appellant's statement under caution. This was to usurp the function of the jury. The judge should have told the jury that they were free to accept parts of Bruzual's evidence and parts of the appellant's statement, and that there were parts of that statement which could give rise to a defence of provocation even if the jury accepted the overall account of Bruzual. This ground of appeal is therefore linked with the ground of appeal about the judge's failure to leave provocation to the jury, to which we will come, but it is convenient to deal first with the complaint about his directions on how to approach the two versions.

14. In his general directions, the judge gave the jury a conventional direction that it was open to them to reject part of a witness's evidence but to accept, if they felt sure of it, other aspects of his or her evidence. When he came to identify the prosecution's case, the judge said:

> "How does the state puts it case against these two defendants? You will realise that it is based entirely on the first defendant's confessions and oral admissions, which are only evidence against her, and Bruzual's evidence which implicates both of them. You must put entirely out of your minds [prosecuting counsel's] suggestion in her closing address to you of marrying together these two accounts for the truth of what happened. You may not do that. You are aware that both of them cannot be true. In her confession, the first defendant admits to sawing at and stabbing the deceased's neck with a knife, whereas Bruzual testified, by implication, that the second defendant stabbed him in the back. Then he saw the second defendant sawing at his neck, and, also, went on to detail the first defendant's involvement in the enterprise.
>
> How do you approach the evidence on this topic? You must, first of all, consider the evidence of Bruzual, putting aside the first defendant's confession and the oral admissions, for the moment. The State relies on that part of Bruzual's evidence where the second defendant is said to have sawed at the neck of the deceased and by implication to have stabbed him, together with the post-mortem report describing the wounds and the cause of death to show that the second defendant is guilty of murder. It is open to you to convict the second defendant of murder if you are sure of this evidence…"

15. The judge proceeded to outline the evidence of Bruzual and also explained to the jury as a matter of law what the prosecution had to prove in order to show that the appellant was guilty as a secondary party. He concluded this part of his summing up by saying:

> "Therefore, before you can convict the second defendant of murder, on Bruzual's evidence, you must be sure that he caused, inflicted the fatal wound/injury, and, secondly, that when he did so, he then intended to kill or cause really serious bodily harm. And before you can convict the first defendant of murder, on Bruzual's evidence, you must be sure that (1) she took part in the attack, unlawfully, with the second defendant, and that (2) when she did so she either shared the second defendant's intention to kill or cause really serious bodily harm, or realised that the second defendant might use the knife as he did either intending to kill or to cause really serious injury and, nevertheless, joined the second defendant in the attack."

16. The judge then turned to the prosecution's alternative case:

> "If you are not sure about Bruzual's evidence you would find the second defendant 'not guilty'. But you would then go on to consider the case against the first defendant, only, but this time on the basis of her written statement under caution and the oral admissions in accordance with my final directions on 'approach'. You may use these admissions in no other way."

17. The judge gave the jury a strong and detailed warning about the dangers of convicting either defendant on Bruzual's uncorroborated evidence and told them explicitly that there was no corroboration. In this context he said:

> "You will appreciate that the account given in the written statement under caution alleged to have been given by the first defendant is diametrically opposed in a significant point of detail, namely, who sawed at the neck of the deceased with a knife. You may think that both that account and the account given by Bruzual cannot be both true. I direct you that you must not use the statement of the first defendant as corroboration of

> Bruzual's testimony in any way whatsoever. They must be viewed and dealt with mutually exclusively."

18. In summary, the judge made it very clear that the prosecution could not rely in support of its primary case on anything but the uncorroborated evidence of Bruzual. However, he did not suggest that the defence were prevented from relying on the appellant's confession statement. This was particularly pertinent to the defence of Abraham, who naturally relied heavily on the fact that the appellant had admitted sole responsibility for the killing. When dealing with the defence case the judge said:

> "[Counsel for Abraham] says if the statement under caution is believed, this is that of the first defendant, then she killed him. He argues that if Bruzual is believed, then, of course, the second defendant was the person who killed him. These are mutually exclusive, they are not complementary. Well, I've directed you in similar terms have I not, so he was right about that in my view."

19. In other words, while the prosecution could not rely on the appellant's statement as supporting Bruzual's evidence, it was open to the defence to use it to cast doubt on Bruzual's account. Indeed, the jury had to be sure that the statement under caution was not true before they could convict Abraham. Their verdict shows that the jury must have been sure that Abraham was the killer and that the appellant assisted him.

20. It is apparent from the judge's discussions with counsel that he was troubled about whether it was right to permit the prosecution to proceed firstly on the basis that Bruzual was to be believed and alternatively on the basis that Bruzual was not to be believed, but no objection was raised by counsel for the defendants and the issue is academic because the jury found that the prosecution's primary case was proved. The unusual and potentially confusing nature of the way in which the case had been put presented the judge with difficulties, but his directions were clear, fair and appropriate.

Provocation

21. Section 4B of the Offences Against the Person Act copies section 3 of the Homicide Act 1957, which applied in England and Wales until it was replaced by sections 54 and 55 of the Coroners and Justice Act 2009. It provides:

> "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

22. During the Ensor hearing the appellant's counsel submitted that provocation ought to be left to the jury on the basis of the description in the appellant's statement of the deceased's conduct towards her and her response. There was a lengthy discussion between counsel and the judge. He drew attention to the things which the appellant described doing after the deceased fell to the floor: she tied him up; she gagged him, but he would not stop making a noise; she phoned an acquaintance, who advised her to kill him so as to stop him from going to the police; she fetched a knife from the kitchen; she begged him to stop making a noise but he would not; she started cutting at his neck, but was not able to penetrate the skin, so she began to stab him in the neck; when blood started spraying she took a bag and put it over his head while he stifled and suffocated; when he stopped moving, she wrapped him in a white sheet. The judge asked counsel:

> "If we remind ourselves of the definition of 'provocation', some act, or series of acts or words spoken by the dead to the accused which would cause in any reasonable person and actually caused in the accused a sudden and temporary loss of self-control. Where is the evidence of her loss of control? Does the evidence not demonstrate a remarkable degree of being in control?"

23. Counsel replied that this was a matter for the jury, but the judge rightly observed that there had to be evidence of a loss of self-control for him to leave the issue to the jury. He invited submissions from the prosecution. Prosecuting counsel said that she believed in erring on the side of caution and invited the judge to leave the issue to the jury on the basis that it was better to take the more prudent course.

24. The judge's immediate response was that if both counsel wished him to leave the issue to the jury he would do so, but on the following morning he told counsel that on further reflection he remained of the view that it was fanciful to argue that it was a case where provocation applied, for the reasons which he had indicated on the

previous day. He stated rightly that he had a duty not to burden the jury with a defence that had no application.

25. The Court of Appeal held that the judge was wrong not to leave provocation to the jury, but it applied the proviso and upheld the appellant's conviction. Its reasoning for holding that the judge had been wrong not to leave provocation to the jury was as follows:

> "In the circumstances of the present case we consider that given the evidence of provoking conduct, there was a reasonable as opposed to a merely speculative possibility, that the appellant was provoked by that conduct so as to lose her self-control. The premature sexual advances of the deceased might have triggered in the appellant a loss of self-control resulting in the series of events that followed forming one transaction. Thus the appellant struck the deceased repeatedly with the brick to his head, tied him, gagged him, made a phone call, attempted to cut his neck and eventually stabbed him in the neck. The question of whether or not the phone call was an intervening act which disturbed the flow of events taking them out of the realm of loss of self-control was one for the jury."

26. The court applied the proviso on the basis that in convicting Abraham the jury must have been sure beyond reasonable doubt of the truth of Bruzual's account of the killing, and so must have rejected the appellant's statement that she had killed the deceased in the circumstances described in her statement. The court said:

> "It follows, that having rejected the statement, even if they had been properly directed on the issue of provocation, such directions would have been rendered irrelevant and they would not [sic] have convicted this appellant and therefore the failure of the trial judge did not result in a miscarriage of justice." (The words "would not have convicted" must be a typographical error for "would still have convicted").

27. Mr Fitzgerald submitted that a wrongful failure to leave provocation to the jury must almost invariably result in the conviction being quashed, because for the court to conclude whether a reasonable person might have acted as the defendant did is to usurp the function specifically given to the jury. In support of that argument

he cited a number of authorities. Mr Stevens QC in his written case on behalf of the respondent accepted that provocation ought to have been left to the jury, but he submitted that it was right for the Court of Appeal to apply the proviso in the particular circumstances of this case. The reason for this was that the evidence of provocation contained in the appellant's statement could not be accommodated within the account given by Bruzual, which the jury plainly accepted.

28. The Board does not consider that the resolution of this ground of appeal turns on the appropriateness of the exercise of the proviso. Rather, the question is whether there was any evidential foundation for a defence of provocation if the essential account of the killing given by Bruzual was true, as the jury must have found. According to that version, the deceased was lured to the apartment by the appellant and attacked by Abraham after the appellant knocked on the door where Abraham and Bruzual were hiding. The appellant then joined in the attack. There was no evidence that the deceased did anything which provoked Abraham to act as he did (nor has the suggestion ever been made on Abraham's behalf that he acted under provocation) and there was no evidence that the appellant was provoked to assist him. There was also no evidence that when the appellant helped Abraham by, for example, tying the deceased's hands, she was acting out of control.

29. Mr Fitzgerald QC suggested that the deceased may have acted, while Bruzual and Abraham were in hiding, in the way that the appellant had described in her statement, but that was part of a different narrative. There was simply no evidence that any fight went on between the appellant and the deceased while Bruzual and Abraham were in hiding. Such a suggestion was never put to Bruzual, who would hardly have been unaware if there had been any sound of fighting. The cycle of events which the appellant described in her statement under caution (the pushing against a plastic table, the knocking over of a coffee machine, the noise made by the deceased, the telephone call to Zai, etc) cannot fit within the account given by Bruzual. Mr Fitzgerald argued that something must have caused Abraham to launch such a violent assault on the deceased when the original plan was merely to steal his car key. Although the deceased had been invited for a sexual purpose, it is possible that Abraham may have become angry at the sight of him in a naked and aroused state, but that is speculation. As already stated, there was no evidence that Abraham was provoked by the deceased, nor that the appellant was provoked by the deceased to join in Abraham's attack on him. The Board also agrees with the trial judge that the appellant's statement under caution does not suggest that she was acting out of self-control, but the reverse. The Board therefore agrees with the Court of Appeal that a provocation direction would have been irrelevant to the case advanced by the prosecution on Bruzual's evidence, but it also considers that the judge was correct in his ruling.

Direction on character

30. The judge gave the jury a standard direction about the effect of the appellant's good character in relation to her propensity to have committed the offence with which she was charged. He said nothing about the effect of good character on her credibility, since she had not given evidence and she was not relying on the statement made by her under caution as being true. The complaint is made that he should have given the jury a good character credibility direction in relation to those parts of her statement which might be considered exculpatory. It would have been an odd and potentially confusing direction to have given in circumstances in which the appellant's case was that the statement under caution was fabricated by the police, but it is unnecessary to discuss the matter further, because Mr Fitzgerald properly accepted that this ground of appeal can only arise if the judge was wrong not to leave provocation to the jury.

31. The Board therefore rejects all three grounds of appeal. We add that we are impressed by the way in which the judge dealt with a difficult case. In the view of the Board, the way in which he did so was fair, clear and skilful.

Sentence

32. The appellant was granted permission to appeal to the Board against conviction on 18 March 2013. While the appeal was pending she applied also for permission to appeal against sentence on the ground that her execution more than five-years after conviction would constitute inhuman punishment: *Pratt and Morgan v Attorney General for Jamaica* [1994] 2 AC 1.

33. Mr Stevens submitted that the Board should refuse leave because it has no jurisdiction to entertain such an appeal, applying the decision in *Walker v The Queen* [1994] 2 AC 36.

34. Mr Fitzgerald submitted that *Walker* is distinguishable and that to allow an appeal against sentence would be consistent with more recent authorities.

35. There are potentially two questions to consider. One is whether the court has jurisdiction to entertain an appeal against sentence. The other is whether, and if so how, the court should exercise any such jurisdiction.

36. *Walker* was heard immediately after *Pratt and Morgan* and the judgments were given on the same day.

37. In *Pratt and Morgan* the Board allowed an appeal from a judgment of the Court of Appeal of Jamaica, which had dismissed an appeal against the refusal of a motion under section 25 of the Constitution of Jamaica for redress for infringement of the appellants' constitutional rights. The Board held that justice required their sentences to be commuted to life imprisonment.

38. *Walker* came to the Privy Council by a different route. There had been no constitutional motion. There was no substantive appeal against a judgment of the Court of Appeal. The Board categorised the proceedings in this way, at pp 43-44:

> "These proceedings are not in truth appeals against the judgments delivered by the Court of Appeal. There was no appeal against the sentence of death passed by the judges and if there had been the Court of Appeal would have had no jurisdiction to alter the mandatory death sentence: see section 13(1)(c) of the Jamaican Judicature (Appellate Jurisdiction) Act.
>
> …
>
> These defendants have adopted the arguments for the applicants in *Pratt v Attorney General for Jamaica* and seek to have their sentences set aside on constitutional grounds based upon the delay that has occurred in the years following the decisions of the Court of Appeal. Their Lordships are being invited to decide this question not as a matter of appeal but as a court of first instance; and this they have no jurisdiction to do."

39. Mr Stevens submitted that the Board is in the same position in the present case. In the matter of sentence it is being asked to exercise an original jurisdiction, and there is no power to appeal to the Court of Appeal against a sentence fixed by law: see section 43 of the Trinidad and Tobago Supreme Court of Judicature Act.

40. There are two linked points to consider: whether the Court of Appeal would have the power to do that which the Board is being invited to do and whether the Board would be exercising an original jurisdiction.

41. As an appellate court, the Board has no power to do that which the Court of Appeal of Trinidad and Tobago could not have done in similar circumstances. A similar situation arose in the Court of Appeal in *State v Pitman* [2013] Cr App No

44 of 2004. The appellant was convicted of a triple murder and sentenced to death. He appealed against his conviction and sentence. His appeal was dismissed and the mandatory death sentence was affirmed within nine months from the date of his conviction. Further appellate proceedings resulted in the Board remitting the case to the Court of Appeal for examination of matters which had not been part of the original appeal. On 18 December 2003 the Court of Appeal, presided over by the Chief Justice, dismissed the appeal. However, by this time over nine years had elapsed since the appellant's conviction. The court stated that *Pratt and Morgan* had been accepted as authoritative in the jurisdiction of Trinidad and Tobago on the issue of the effect of delay on the execution of the death penalty, and it ruled that the sentence of death should be commuted to one of life imprisonment, with a declaration under section 69A of the Interpretation Act that the appellant was not to be released before the expiration of 40 years.

42. Mr Stevens submitted that the Court of Appeal had no power to act as it did. From the report of the judgment there does not appear to have been argument about whether the court had such power or whether the only course for the appellant was to proceed by a separate application to the Supreme Court under the Constitution of Trinidad and Tobago.

43. Section 14 of the Constitution provides:

> "(1) For the removal of doubts it is hereby declared that if any person alleges that any provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.
>
> (2) The High Court shall have original jurisdiction
>
> a) to hear and determine any application made by any person in pursuance of sub-section (1); and
>
> b) to determine any question arising in the case of any person which is referred to it in pursuance of sub-section (4),
>
> and may, subject to sub-section (3), make such orders, issue such writs and give such directions as it may

> consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.
>
> …
>
> (4) Where in any proceedings in any court other than the High Court or the Court of Appeal any question arises as to the contravention of any of the provisions of this Chapter the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious."

44. In *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433 the appellant was convicted of murder and sentenced to death on 3 December 1999. He appealed against conviction and his appeal was dismissed by the Court of Appeal on 1 December 2000. He petitioned the Privy Council for special leave to appeal against conviction and sentence. On 12 May 2003 his petition for leave to appeal against conviction was dismissed, but on 12 January 2004 he was given permission to appeal against sentence. In the meantime, on 20 November 2003 the Board had ruled, by a majority, in the case of *Roodal v State of Trinidad and Tobago* [2005] 1 AC 328 that the statutory provision under which Roodal (and Matthew) had been convicted required to be modified so as to make the death sentence discretionary in order to conform with the Constitution. It ordered that the case should be remitted to the trial judge to decide as a matter of discretion what sentence to impose.

45. *Matthew* was heard in March 2004 and judgment was given on 7 July 2004. The Board held, by a majority of five to four, that *Roodal* had been wrongly decided and that the death sentence passed on Matthew was lawful and mandatory. However, the Board recognised that this decision left a serious problem, because Matthew had been led to understand from the Board's decision in *Roodal* less than eight months earlier that his sentence would now be decided by a judge exercising a discretion. The Board judged that it would be a cruel punishment for him to be deprived of that possibility and to be executed. It resolved the problem by exercising the power under section 14(2) of the Constitution to set aside the sentence of death and impose a sentence of life imprisonment. The Board explained its decision at para 32:

> "In *Pratt's* case their Lordships exercised the power vested in the Supreme Court of Jamaica by section 25(2)

> of the Constitution to make 'such orders…as it may consider appropriate for the purpose of enforcing…any of the provisions [relating to human rights and fundamental freedoms]' by allowing the appeal and commuting the death sentence to life imprisonment. There is a similar power in section 14(2) of the Constitution of Trinidad and Tobago. Pursuant to this power, their Lordships will allow the appeal, set aside the sentence of death and impose a sentence of life imprisonment."

46. The significance of that decision is that the Board held that it had jurisdiction under section 14(2) to substitute a sentence of life imprisonment for the sentence of death, notwithstanding that the death sentence had been lawful and its original imposition unappealable because mandatory. Moreover the case did not reach the Privy Council on appeal from a constitutional motion. It came as a direct appeal against sentence. The Board concluded that it would be inhuman to proceed with an initially lawful sentence by reason of the way in which the judicial process had operated after the sentence had been imposed and it considered that the just remedy was to substitute a sentence of life imprisonment.

47. Mr Fitzgerald relied on a number of other cases, but the factual position in the present case is not identical to any of them, and logical arguments can be advanced on both sides. The case has in common with *Walker* that the imposition of the death sentence was mandatory and therefore not susceptible to a valid appeal, but the same was true in *Matthew* where the Board nevertheless set aside the death sentence. It is true that in *Matthew* the appeal was against the constitutionality of the original sentence, but that afforded no reason for setting aside the sentence, because the appeal on that basis was rejected. The case had two striking features: it was subsequent events in the course of the judicial process that brought about an inhuman situation, which the court therefore had a responsibility to remedy if it lawfully could; and the court was seized of the case. The former required that the initially lawful sentence should be commuted as a matter of justice; and the two points in combination made it just that the Board should itself exercise the power provided by section 14 of the Constitution, rather than leave the appellant to the course which the Board said should be taken by the appellants in *Walker.*

48. The present circumstances are that the Board is seized of the appellant's case because permission was given to appeal against her conviction. Further, it is the appellate process, culminating in her appeal to the Board, which has led to the passage of time that would now make the execution of the sentence prima facie inhuman in accordance with *Pratt and Morgan*. In that respect there is an analogy with *Matthew*, where the Board considered that it was within its jurisdiction under section 14 to prevent the judicial process operating in such a way as would produce

an inhuman result. Since the appellant's case is before the Board by way of her (ultimately unsuccessful) appeal against conviction (just as in *Matthew* the case was before the Board by way of the appellant's unsuccessful appeal against sentence), I would hold that it is within its jurisdiction to interfere with the sentence on account of the delay which has now occurred, and that it is not necessary that the appellant should make a separate application to the High Court under section 14. I consider, therefore, that the Court of Appeal was correct in the course which it took in the analogous case of *Pitman*.

49. It may seem anomalous that the appellant should be given permission to appeal against sentence for which she would not have been given leave but for the fact of the Board having taken jurisdiction over the case by granting her permission to appeal against conviction, but the justice of doing so arises from the combination of the time which has now elapsed during the course of the judicial process and the fact that the Board is seized of her case. Its power to do so is under section 14.

50. As to discretion, Mr Stevens made the comment that in *Pratt and Morgan* the Board did not lay down a fixed rule and that some cases may call for factual investigation of a kind which the Board would not be well placed to carry out. Those general observations are right, but Mr Stevens said nothing more specific in relation to this appellant. Indeed he helpfully informed the Board, on instructions, that if it decided that it had jurisdiction to entertain her appeal and were minded to exercise it, the state would not oppose her sentence being commuted to life imprisonment. Mr Fitzgerald's submission is that the sentence should be quashed and the case remitted to the Court of Appeal for fresh consideration.

51. I conclude that it would have been open to the Court of Appeal to act in the present case as it did in *Pitman*, if the circumstances had been as they now are; therefore the Board is not being asked to do that which the Court of Appeal could not have done. I would hold that in the present circumstances her application for permission to appeal against sentence should be granted; and that as in *Matthew* the death sentence should be commuted to life imprisonment.

52. Lord Mance and Lord Sumption take the different view that the Board has no power to take that course and that the application for permission to appeal against sentence should be refused.

53. As I have endeavoured to emphasise, there is a difference between the existence of a jurisdiction and whether it should be exercised. Factors which might make it extremely desirable to exercise a jurisdiction, if it exists, cannot justify the court arrogating to itself a jurisdiction if on the proper language of the Constitution no such jurisdiction exists. The logic of Lord Mance's judgment is plain. On the

proper construction of the Constitution, the Board has no jurisdiction to decide that a sentence which was lawfully imposed should be set aside except after the presentation of a constitutional motion.

54. If that be right, the inexorable consequence is that in *Matthew* the Board did that which it had no constitutional power to do. For in *Matthew* the Board affirmed that the death sentence imposed on the appellant was lawful. The fact that in so deciding the Board was reversing, by the narrowest of majorities, a directly contrary decision of the Board in an earlier case certainly created a problem. It made it highly desirable, if the Board had had jurisdiction to determine that the death sentence should be commuted to one of life imprisonment, that the power should be exercised, but those unhappy circumstances could not give the Board a power to rub a lamp and magic into existence a jurisdiction which under the Constitution it did not have. The Board ought logically to have taken the course which the minority would take in this case, that is, of expressing by way of a strong obiter dictum that it would be unjust for the sentence to be carried out. Nevertheless the Board of nine judges explicitly acted under section 14 in determining itself that the death sentence should be commuted and it explicitly did so by analogy to *Pratt and Morgan*. The Board cannot have been unaware of the decision in *Walker,* which was simultaneous with the decision in *Pratt and Morgan*.

55. There is an alternative explanation to the possibility that in *Matthew* nine Homers nodded, which I prefer. The summary of the decision in *Walker* in the law reporter's headnote includes the following passage:

> "*Held*:… that the proceedings were not appeals against judgments of the Court of Appeal of Jamaica and the lawfulness *of the original convictions* and sentences was not disputed: and that, accordingly, since the Judicial Committee could not decide as a court of first instance whether execution of the defendants would now infringe their constitutional rights, there was no jurisdiction to deal directly with their cases by way of appeal against sentence." (emphasis added)

56. I regard the headnote as accurate. It is consistent with a reference in the judgment to the case of *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, which the Board distinguished in *Walker* on the basis that in that case there were appeals against conviction, and also against the mandatory death sentence, and the Board noted that if the appellants' unsuccessful arguments had succeeded they would have shown that the trial court ought not to have convicted.

57. In *Bowe v The Queen* [2006] 1 WLR 1623 reference was made to *Matthew* and the Board noted that the terms of the appeal in *Bowe* were framed so as to preclude reargument of points decided in *Matthew*. In *Bowe* the Board made it plain that the right of application to the Supreme Court by way of a constitutional motion is not a unique or exclusive procedure where the question arises in the course of proceedings before the Court of Appeal or the Board.

58. On that analysis the foundation of the jurisdiction in *Matthew* was that, although the sentence was found to have been lawfully imposed, the question whether subsequent events in the course of the judicial process made it wrong for the sentence to be executed arose as an incidental matter in those proceedings; and I reiterate that the Board's express reference to the case being analogous with *Pratt and Morgan* shows that it regarded delay in the course of the judicial process as a matter properly to be taken into account by an appellate court seized of an appeal for which it had given leave.

59. In the present case the Board is seized of the appeal. If the argument against conviction had been successful, the sentence of death would have been quashed. The appeal has failed, but in the meantime a period has elapsed which would make it simply wrong for the sentence to be executed. In those circumstances it appears to me that the court has jurisdiction to order that the sentence be commuted and that justice requires that we should. I cannot see a proper foundation for the argument that it would somehow be open to the Court of Appeal to substitute a determinate sentence and that the case should accordingly be remitted to it for further consideration.

Conclusion

60. The Board have decided that the appeal against conviction is dismissed. Leave to appeal against sentence is granted, and the sentence will be commuted to life imprisonment.

LORD NEUBERGER:

61. While all members of the Board agree that the three grounds of appeal against conviction fail for the reasons given by Lord Toulson, there is disagreement as to whether, as he has concluded, it is open to the Board to order that the sentence of death be commuted to life imprisonment.

62. The issue on sentence arises from the decision of the Board in *Pratt and Morgan v Attorney General for Jamaica* [1994] 2 AC 1, where it was held that carrying out a sentence of death would constitute inhuman punishment if it took place more than five-years after conviction. As a result of the appeal process in this case, it is now more than five-years since the appellant was convicted, and so she asks the Board to order commutation. The State does not challenge her right to commutation, but contends that the Board has no jurisdiction to order it, on the basis that it should be sought by way of a fresh originating motion brought by the appellant.

63. While I see considerable force in Lord Mance's reasoning as to why the Board does not have jurisdiction, I agree with Lord Toulson's conclusion that it does. Once the Board is seised of a matter, whether by way of an appeal against conviction or an appeal against sentence (or both), I consider that it has jurisdiction to deal with commutation of sentence, at least where the ground for commutation arises out of court procedures or decisions.

64. So far as the state of the authorities is concerned, it appears to me that there is one decision of the Board where it has been decided that there is jurisdiction to entertain the question of commutation in such circumstances, and no decision of the Board which is inconsistent with that view.

65. In *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, despite dismissing the appeal against a mandatory sentence of death, the Board decided to commute the death sentence, because, owing to a previous decision of the Board, the appellant had been led to believe that he would not be executed on the ground that the sentence was unconstitutional. If we were to hold that there was no jurisdiction to order commutation in this case, it would follow that *Matthew* was wrongly decided on this point. The fact that there was an appeal against sentence in *Matthew* cannot make any difference, as the point of concern here is that commutation is not based on any attack on the validity or correctness of the original sentence. And the fact that the reason for the commutation in this case is different is not a relevant distinction. While prospective change, as explained by Lord Mance, may well be a justification for the reasoning in *Matthew*, it was not the basis for the decision, and it still does not explain why the Board had jurisdiction to commute unless it has power to deal with commutation once it was seised of an appeal, if we do not have such jurisdiction here.

66. I do not regard *Walker v The Queen* [1994] 2 AC 36 as inconsistent with this conclusion. It involved an appeal against sentence, and the only ground of appeal in that case was that the death sentence should be commuted essentially for the reason in *Pratt and Morgan.* However, in giving the judgment of the Board, Lord Griffiths, when distinguishing an earlier decision of the Board, *Ong Ah Chuan v Public*

Prosecutor [1981] AC 648, relied on the fact that there was no appeal in *Walker* to the Board against conviction or sentence. In that case, therefore, there was simply no appeal to the Queen in Council to which the issue of commutation could be attached, whereas, in this case, as in *Matthew*'s, there is.

67. As for *Bowe v The Queen* [2006] 1 WLR 1623, which is relied on by both the appellant and the State in this appeal, I consider that it takes matters no further either way, as the point with which we are concerned did not arise, and was not addressed.

68. So far as legal principle is concerned, I readily accept, as already indicated, that there is obvious force in the notion that, on an appeal against conviction and/or sentence, the Board cannot consider an objection to the carrying out of a sentence of death which does not involve challenging the original lawfulness of the sentence. However, as I have also indicated, it appears to me that it is quite proper to conclude that, where there is a genuine appeal against conviction and/or sentence, the Board is seised of the criminal proceedings as a whole, so that, if satisfied that the carrying out of the sentence would be unlawful, the Board at least has power so to decide or recommend. Further, where the ground of unlawfulness is attributable to court decisions or court proceedings, it would be a little curious if the court did not have power to grasp the nettle, and had no alternative but to require yet further proceedings to be brought by an appellant, even though the Board was administratively able to determine the point in her favour.

69. Looking at broader issues of fairness and convenience, I believe that they both point in favour of the conclusion which I have reached. As for fairness, the basis for the conclusion that the death penalty should not be enforced is the inhumanity of the appellant being in a state of suspense for a long period, as to whether, and if so when, she will be executed. It surely follows that it must be right for the Board to do everything it properly can to bring that period of suspense to as speedy a firm conclusion as possible. From the appellant's perspective, there is a difference, and in reality it may well be a great difference, between being told that the Board has decided that the death sentence should be commuted, and being told that the State has formally indicated that it could not oppose a possible future motion to that effect. For a person in the appellant's position in the future, there would be no reason for the State to indicate its view to the Board, so that the prolongation of an appellant's period of suspense would be even more unsettling.

70. As to convenience, if the matter can be disposed of by the Board, it will save the delay, cost and court time involved in a fresh motion having to be brought by the appellant. The suggestion that there might be some sort of inconvenience in the course the Board is proposing in this case can be met by the fact that the State has not so argued, and the Court of Appeal does not appear concerned about such a

possibility – see *State v Pitman* [2013] Cr App No 44 of 2004. Obviously, if there were any issue as to whether the case was an appropriate one for commutation, the Board may well decide that it should not determine the point. But there is no suggestion of that in the present case.

71. For these reasons, which do little, if anything, more than encapsulate the reasons of Lord Toulson, I agree that the sentence of death imposed on the appellant should be commuted to a term of life imprisonment.

LORD MANCE (WITH WHOM LORD SUMPTION AGREES):

DISSENTING AS TO SENTENCE

72. I agree that all three grounds of appeal against conviction fail for the reasons given by Lord Toulson, and that the appeal in respect of conviction falls to be dismissed accordingly.

73. I do not consider that any basis exists for the grant of permission to appeal against sentence. The Privy Council is not seized of any appeal against sentence, and there is no basis on which it has jurisdiction in this case to seize itself of a jurisdiction which belongs, on a different basis, to the President or the High Court.

74. The applicant was convicted and, pursuant to the mandatory requirement of the law upheld by the Privy Council in *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, sentenced to death on 29 July 2008. The five-year period within which this mandatory sentence had to be implemented if its implementation was to be constitutional under the principle in *Pratt and Morgan v Attorney General for Jamaica* [1994] 2 AC 1 thus expired on 29 July 2013.

75. The applicant's remedy after 29 July 2013 to ensure that the death sentence was never implemented was to seek to have her sentence stayed and commuted or remitted by the President under section 87(2) of the Constitution or, if necessary, to apply at first instance to the High Court under section 14 of the Constitution (below). Sections 87 to 89 provide for and govern the exercise of the President's power. The President must act on the advice of a designated minister, who must in turn consult an Advisory Committee established for this purpose under section 88 of the Constitution, putting before it a written report of the case from the trial judge, to be considered at a meeting together with such other information derived from the record of the case or elsewhere as the minister may require to be taken into consideration.

76. Should relief not be forthcoming in this way, the remedy is to apply to the High Court under section 14 of the Constitution, which reads:

> "14. (1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.
>
> (2) The High Court shall have original jurisdiction
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1); and
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4),
>
> and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.
>
> (3) The State Liability and Proceedings Act shall have effect for the purpose of any proceedings under this section.
>
> (4) Where in any proceedings in any court other than the High Court or the Court of Appeal any question arises as to the contravention of any of the provisions of this Chapter the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious."

77. No one suggests that these remedies, involving applications to the President or the High Court, are not or would not be complete. Indeed, no one sentenced to death has been executed in Trinidad and Tobago since July 1999. The Advisory Committee and President or the High Court on any such application would consider all the circumstances, of the offence and as they exist now, and each or either would be able to substitute such other sentence (not including a death sentence) as was appropriate in their light after the expiry of the five-year period.

78. Notwithstanding these clear remedies, the applicant now applies for permission to appeal against sentence to the Privy Council, contending that it has an original jurisdiction duplicating that conferred by the Constitution on the President and the High Court, and that it should grant permission to appeal in respect of sentence and set aside the death sentence. At this point, however, the applicant has to recognise at least part of the force of the reasons why the drafters of the Constitution conferred the relevant jurisdiction on the President and High Court, since Mr Fitzgerald QC's written post-hearing submissions record that the applicant does not accept that her commuted sentence should necessarily be one of life imprisonment and continue:

> "It is submitted that the local Court of Appeal is the most appropriate court to address the sentencing issues in this case. Further, given that the *Pratt and Morgan* jurisdiction is a form of constitutional redress for violation of the right not to be exposed to cruel and unusual punishment, the full measure of that redress ought to be assessed in the light of the individual circumstances of any person subject to such breach."

79. For the same reason, the President under section 87 or the High Court properly seized by a constitutional motion under section 14 represents both the constitutionally prescribed and the appropriate forum, and the Privy Council should not lightly usurp all or any part of a local jurisdiction of either nature. In his post-hearing submissions, Mr Fitzgerald also urges "a constitutional necessity to devise some means to provide a prompt and effective remedy for the violation of the Constitution that would be involved in the maintenance of the death penalty" (para 3.4). There is no such constitutional necessity. The constitutional remedies already exist locally. It would circumvent them if the happenstance of a failed appeal to the Privy Council against conviction, during the course of which the five-year period expires (or after the expiry of the five-year period), were treated as entitling the present applicant to be treated any differently from the way in which others who have not so appealed are treated.

80. The inadmissibility of the present application is in any event clear from the Privy Council's previous decisions in *Walker v The Queen* [1994] 2 AC 36 and *Bowe v The Queen* [2006] 1 WLR 1623, from which there is no reason to depart. *Walker* was heard by the same constitution together with and decided on the same day as *Pratt v Morgan*, the judgment in each case being given by Lord Griffiths. Mandatory death sentences had been passed on all three applicants in 1982 or 1984, so that the five-year period established by *Pratt and Morgan* had long passed by the time the Privy Council gave special leave to appeal. Special leave was given solely to enable the Privy Council to examine whether it "had jurisdiction to deal directly with these cases by way of an appeal against sentence" (p 43E).

81. The Privy Council held that it had no such jurisdiction:

> "Their Lordships are being invited to decide this question not as a matter of appeal but as a court of first instance; and this they have no jurisdiction to do. The question of whether or not execution would now infringe the constitutional rights of the defendants has not yet been considered by a Jamaican court. The jurisdiction of the Privy Council to enter upon this question will only arise after it has been considered and adjudicated upon by the Jamaican courts. (p 44A-B)….
>
> [T]he powers of the…Privy Council are now governed by the Acts of 1833 and 1844 which must be recognised as superseding the royal prerogative …. In the absence of such a reference [under section 4 of the 1833 Act], the Judicial Committee's role is confined to acting as an appellate court: see *In re Nawab of Surat* (1854) 9 Moo PC 88 and *Thomas v The Queen* [1980] AC 125. (p 44C-D) ….
>
> It is nevertheless apparent that, in the light of the judgment in *Pratt* …., unless the sentences of these defendants are commuted on the advice of the Jamaican Privy Council, they have every prospect of making a successful constitutional application to the Supreme Court to have their sentences commuted to life imprisonment." (p 44G)

82. The same principles were affirmed by Lord Bingham giving the Privy Council's judgment in *Bowe* on 8 March 2006. In *Bowe* the Court of Appeal of the

Bahamas had by a majority held (on 10 April 2003) that it had no jurisdiction to consider a constitutional challenge to the constitutionality of a mandatory death sentence (passed on 25 February 1998), because any challenge must be by way of separate constitutional motion in the Supreme Court. This was under article 28 of the Constitution of the Bahamas, subsections (1), (2) and (3) of which broadly, though not exactly, correspond with subsections (1), (2) and (4) of section 14 of the Constitution of Trinidad and Tobago. Special leave was on 11 April 2005 given to appeal to the Privy Council raising the question of the Court of Appeal's jurisdiction to consider a constitutional challenge to the mandatory death sentence. Although the five-year period for implementation of the death sentence had elapsed, even by the time of the Court of Appeal's decision, there was no suggestion that this could provide a basis for challenging the constitutionality of the sentence passed, and, as will appear, the Privy Council expressly accepted that it could not.

83. The Court of Appeal in disclaiming jurisdiction in *Bowe* relied upon provisions of Bahamian law which have their precise counterpart in section 43 of the Supreme Court of Judicature Act of Trinidad and Tobago. In summary, no appeal against a sentence passed on conviction lies, even with leave, if the sentence is "one fixed by law": section 43(c). Further, even where an appeal against sentence is with leave permitted, section 44(3) restricts the Court of Appeal's powers, by providing that:

> "On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict whether more or less severe, in substitution thereof as it thinks ought to have been passed…"

The Court of Appeal reasoned that "where the law lays down a mandatory penalty on conviction, the court is denied jurisdiction to review the sentence and plainly cannot substitute any other sentence" (*Bowe*, para 9).

84. Lord Bingham, giving the judgment of the Privy Council in *Bowe*, accepted this proposition as such, stating that

> "Where the court's premise is met, the Board would accept that these conclusions must follow. But the appellants' challenge is directed to the premise." (para 9).

In other words, the issue in *Bowe* was whether the *mandatory* death penalty was constitutional in the Bahamas. If it was not, then there was no sentence "fixed by law". Lord Bingham cited in this connection *Reyes v The Queen* [2002] 2 AC 235 and *Fox v The Queen* [2002] 2 AC 284, which Mr Fitzgerald also cites on the present appeal. Lord Bingham might also have cited cases from other jurisdictions, in particular the trilogy of *Boyce v The Queen* (Barbados), *Matthew v State of Trinidad and Tobago* and *Watson v The Queen* (Jamaica) reported at [2005] 1 AC 400, 433 and 472, to which he had earlier referred (para 5). But the issue in all these cases was the constitutionality of the mandatory death penalty. That issue does not and cannot arise in the present case. *Matthew* has conclusively decided that the mandatory death penalty is constitutional in Trinidad and Tobago. It follows that in Trinidad and Tobago there is no basis for an appeal against a mandatory death sentence.

85. In his post-hearing submissions, Mr Fitzgerald raised a new submission to the effect that sections 43(c) and/or 44(3) require modification to ensure compliance with the Constitution by enabling an appeal against a fixed sentence and/or by reference to events subsequent to sentence. But, again, this is a challenge which ignores the established constitutional remedies which cater for those in the present applicant's position, including all those who have not lodged unsuccessful appeals against conviction.

86. In *Bowe*, the Privy Council had to address a further proposition relied on by the Court of Appeal: that any application for constitutional redress against the mandatory nature of the death penalty must, as a matter of procedure, be made by separate motion to the Supreme Court and not to the Court of Appeal. In the light of article 28(3) (the equivalent in Bahamas of section 14(4) of the Constitution of Trinidad and Tobago set out above), the Privy Council held that, where a sentence *as passed* was said to be unconstitutional, that question could be raised in either the Supreme Court or the Court of Appeal. But Lord Bingham emphasised that this did not mean that challenges to the *implementation* of a death sentence after five-years could be raised on appeal in either the Court of Appeal or the Privy Council.

> "11. The Board cannot accede to the suggestion that it lacked jurisdiction to entertain this constitutional challenge and remit the case to the Court of Appeal. It is true that the Board held, in *Walker v The Queen* [1994] 2 AC 36, that it had no jurisdiction to rule on the challenge there made. It so ruled because the sentence was constitutional when passed, and it was only the passage of time after sentence which was said to render it unconstitutional. That was not an issue which could be determined on an appeal against sentence. The Court of Appeal was wrong to treat that case as analogous with

> the present, since the appellants do contend that the sentences passed upon them, because mandatory, were unconstitutional when passed."

87. The present case falls directly within *Walker* as decided and as confirmed in *Bowe*. There can be and is no challenge to the constitutionality of the mandatory death sentence as passed. The only challenge is to its implementation, now that five-years have passed. The Privy Council has no more jurisdiction to entertain, or give permission to appeal in respect of, the latter challenge than was the case in *Walker* or than was confirmed to be the case in *Bowe*, paras 9 and 11. In *State v Pitman* [2013] Cr App No 44 of 2004, the Court of Appeal appears recently to have assumed without argument or discussion that it had such jurisdiction. It heard and dismissed an appeal against conviction which the Privy Council had remitted to it to rehear ([2008] UKPC 16). After noting the expiry of the five-year period, it proceeded without more to commute the mandatory death sentence which had been passed and to substitute life imprisonment with a direction that the appellant was not to be released for 40 years. In the light of *Walker* and *Bowe*, the Court of Appeal had, so far as appears, no jurisdiction to hear an appeal in respect of sentence on the grounds of the expiry of the five-year period or to resentence the appellant. The appellant should have been required to seek constitutional relief (which would no doubt have been available) in the ordinary way by application to the President or High Court.

88. Mr Fitzgerald submits that jurisdiction must on some undefined basis exist, in the light of the Privy Council's actual disposition of the appeal in *Matthew*. Since four out of the five members of the constitution in *Bowe* had been party to the decision in *Matthew* (Lords Bingham and Nicholls on the minority side, and Lords Hope and Rodger in the majority), and *Matthew* was mentioned in *Bowe*, that submission is from the outset unpromising. The circumstances in *Matthew* were unhappy and, hopefully, unrepeatable. Mr Matthew had been given a mandatory death sentence on 3 December 1999. On 20 November 2003 the Privy Council held by a majority of three to two in *Roodal v The State of Trinidad and Tobago* [2005] 1 AC 328 that the mandatory death sentence was unconstitutional in Trinidad and Tobago. Special leave to appeal was then given on 12 January 2004 to Mr Matthew to challenge the constitutionality of the mandatory death sentence which he had received. By inference, he may well have had an outstanding application for such permission at the time when *Roodal* was decided, and, certainly, once *Roodal* was decided the outcome of his application and appeal on sentence must on its face have appeared a formality. It was not to be so. The Privy Council convened a larger constitution of nine, and by a majority of five, for which Lord Hoffmann spoke, to four over-ruled its prior decision in *Roodal*.

89. This left what Lord Hoffmann acknowledged (para 30) as "a serious problem" both in relation to Mr Matthew who had been given to understand that a judge would resentence him, and also, Lord Hoffmann thought, in relation to Mr

Roodal and others in his position, if (despite the principle res judicata) a resentencing could not lead to any result other than the re-imposition of a mandatory death sentence. In this situation, Lord Hoffmann drew an analogy with *Pratt and Morgan*, concluded that it would be cruel and unusual punishment for Mr Matthew and any others sentenced to death and awaiting execution at the date of the judgment in *Matthew* to be executed, when they had been given the expectation of a review, and, after a brief reference to section 14(2) of the Constitution, held that Mr Matthew's sentence should be commuted to life imprisonment.

90. *Walker* was not cited or addressed in *Matthew*. *Bowe* proceeds on the basis that *Walker* remains good law. It is not possible to see any logical basis for a contrary view. *Matthew* was concerned with a unique situation, in which the Privy Council itself had by its prior decision held that the law was X (viz that the death sentence was discretionary in Trinidad and Tobago), so creating a legitimate expectation that Mr Matthew and others in similar position would be resentenced, and had then later held that the law was Y (viz that the death sentence was mandatory), so that there was no power to resentence, except to death. If there was ever a case where the hollowness of the declaratory theory of common law jurisprudence was demonstrated, it was this. It has been recognised at the highest level that, in very exceptional cases, European and common law courts do have power to declare the law with prospective effect only: see *In re Spectrum Plus Ltd* [2005] 2 AC 680. In that case, Lord Nicholls (with whose speech on this point Lord Hope, Lord Walker and Lady Hale agreed without qualification) said at para 40:

> "Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions."

91. In circumstances where a court itself has put first one meaning, and then another, on legislation it seems to me wholly appropriate that the court should have power, by a prospective order, to protect those who have suffered clear detriment by relying on its first ruling, and this is particularly so when the other party is the prosecution in criminal proceedings. That in my view is the clear rationalisation of the decision in *Matthew*. Further, and in any event, the situation on the present

appeal is in no way comparable to that in *Matthew*. There is no remotely similar reason for departing from the assigned constitutional procedure, which prescribes (so far as appears entirely reliable) cumulative constitutional remedies involving the President and the High Court in respect of the implementation of any death sentence after the five-year period. The situation is simply that the applicant is seeking permission for an appeal in which he seeks to clothe the Privy Council with an originating jurisdiction which constitutionally it does not have.

92. The argument that because there has been a (failed) appeal with permission against conviction, this in some way clothes the Privy Council with jurisdiction to hear an appeal against sentence which it does not otherwise have under the 1833 and 1844 Acts is one which I simply fail to comprehend. Jurisdiction to hear an appeal against sentence either exists as such or not at all. It cannot be parasitical on a failed appeal against conviction. The contrary would also be a recipe for confusion and future problems.

93. The argument that because the five-year period happens to have expired while the Privy Council was seized of the failed appeal against conviction is similarly one which I fail to comprehend. I add, for the record, that no one can or does suggest that this was the Privy Council's (or indeed any court's) fault. As a matter of fact, the courts at each stage appear to have dealt with this case with some celerity. After the conviction on 29 July 2008, appeal skeletons were lodged in June 2009, and the appeal decided on 26 February 2010. An application for permission to appeal against conviction to the Privy Council was then only lodged by the applicant on 28 September 2012. It had, necessarily, to be accompanied by an application for an extension of time. This was supported by an account of intermediate events which do not suggest any fault on the part of the court system but do suggest that, although some documents were from time to time (and may have remained) outstanding from the State's side, considerable time also elapsed independently of this on the applicant's side. An objection to permission being granted was lodged by the State on 1 February 2013, but permission was granted by the Privy Council on 18 March 2013, with the five-year period expiring four months later.

94. For the reasons I have given, the Privy Council has no jurisdiction to entertain the present application for permission to appeal in respect of sentence and it should be dismissed, leaving the applicant to her ordinary constitutional remedies, which there is no reason to doubt will be forthcoming.