

## **Catholic Commissionr for Justice and Peace in Zimbabwe v. Attorney General of Zimbabwe and Others**

CATHOLIC COMMISSION FOR JUSTICE AND PEACE IN ZIMBABWE v ATTORNEY-  
GENERAL, ZIMBABWE, AND OTHERS 1993 (4) SA 239 (ZS)

ZIMBABWE SUPREME COURT

GUBBAY CJ, McNALLY JA, KORSAH JA, EBRAHIM JA and MUCHECHETERE JA  
1993 May 20, 21; June 24

### **Headnote**

The applicant, a human rights organisation, sought an order preventing the execution of four prisoners who had been sentenced to death in February 1987 and November 1988 on the grounds that, by March 1993 when it was proposed that the four be executed, their executions had been rendered unconstitutional in that the dehumanising factor of the prolonged delay between the dates of their being sentenced and the date of their proposed execution, viewed in conjunction with the harsh and degrading conditions under which they had been confined, contravened s 15(1) of the Constitution of Zimbabwe. Section 15(1) provides that '(n)o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment'. The constitutionality of the death sentences which had been imposed was not in issue; what was in issue was whether, even though the death sentences had been the proper punishments to have been imposed, supervening events had established that the prisoners' execution on the appointed dates would have constituted inhuman or degrading treatment in violation of s 15(1).

In explaining the delay of 52 and 72 months between the dates on which the prisoners had been sentenced to death and the date on which it was proposed that they be executed, the Minister of Justice, Legal and Parliamentary Affairs stated that their appeals had been dismissed during the period when the abolition of the death penalty was being considered. For that reason the Cabinet had deferred consideration of all applications for mercy. The Criminal Laws Amendment Act, 1992, which retained the death penalty for a limited number of offences, was promulgated on 8 May 1992. Two months prior thereto, when the Bill preceding the Act had been passed, the process of preparing submissions to the Cabinet commenced. The Cabinet had considered the papers concerning the four prisoners on 21 January 1993 and on 9 March 1993 the President had confirmed the Cabinet's decision not to commute their death sentences.

Since the passing of the death sentences the prisoners had been confined to the condemned section of the prison, each confined to a separate tiny cell under constant supervision for a minimum of 21 hours and 40 minutes. Contact with fellow prisoners was limited, and was confined to condemned prisoners only. In their affidavits, the prisoners spoke of being left in virtual solitary confinement in cramped and unhygienic conditions; of an absence of any meaningful contact with the outside world; of being permitted no reading materials other than of a religious nature; of total lack of facilities with which to pass the day; of being deprived of all clothing from mid-afternoon to early morning; of being taunted by prison officers with impending death by hanging; of the constant fear of being put to death; of being affected by the mental deterioration of some fellow inmates and by suicides and attempts thereat; of the acute fear experienced when it became known that one of their number was about to be hanged; and of

the terrible ordeal of hearing the sounds of executions being carried out. The Supreme Court held as follows:

Section 24(1) of the Constitution, in terms of which the application had been brought, empowers the Supreme Court to measure the effect of challenged legislation, or of a particular action or practice authorised by a State organ, against the particular fundamental right or freedom which it was claimed it offended. The Court clearly has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights and, particularly, where there is no other judicial procedure available by which the breach can be prevented.

Prisoners are not, by mere reason of a conviction, denuded of all rights they otherwise possess. A prisoner sentenced to death does not, therefore, forfeit the protection afforded by s 15(1) in respect of his treatment while in confinement.

Section 15(1) embodies broad and idealistic notions of dignity, humanity and decency. Whether a form of torture, punishment or treatment is assessed as being inhuman or degrading depends upon the exercise of a value judgment which has to take account not only of the emerging consensus of values in the civilised international community, as evidenced by decisions of other Courts and the writings of leading academics, but also of the contemporary norms operative in Zimbabwe and the sensitivities of its peoples.

The burden of proof that a fundamental right of whatever nature has been breached lies on him who asserts it. In relation to s 15(1), the issue of whether an individual has been subjected to torture or to inhuman or degrading punishment or treatment is essentially a matter of fact and, ordinarily, some evidence would have to be adduced to support the contention.

There is widespread judicial and academic acceptance of what is termed the 'death row phenomenon'. Much has been said and written by jurists, penologists and psychiatrists about the mental suffering endured by prisoners who have been sentenced to death. Confinement under sentence of death has been described as exquisite psychological torture, wherein many inmates suffer obvious deterioration and severe personality distortions. From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanising environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. He is kept only with other prisoners who have been sentenced to death. While the right of appeal may raise the prospect of being allowed to live, the intensity of the trauma is much increased by the knowledge of its dismissal. The hope of reprieve is all that is left. Throughout all that time the prisoner constantly broods over his fate. The horrifying spectre of being hanged and the apprehension of being made to suffer a painful and lingering death is, if at all, never far from his mind.

The attitude of the Courts to delay in the execution of the death sentence varies from jurisdiction to jurisdiction. Certain Courts have held that a condemned prisoner is not entitled to rely on the delay brought about by his exploiting such avenues for appeal or reprieve as may exist. It is, however, highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that by not making the maximum use of the judicial process available

the condemned prisoner would have shortened and not lengthened his suffering. In any event, in Zimbabwe there is only one appeal stage and any person sentenced to death has an automatic right of appeal: he has no choice in the matter since no person is hanged unless his sentence has been reviewed by the Supreme Court.

In the determination of whether the delay in the execution of the prisoner constitutes a breach of s 15(1), the period the prisoner has spent in the condemned cell must be taken to start with the imposition of the death sentence by the trial Court, for it is from that date that he begins to suffer the 'death row phenomenon'. (The position may be different in jurisdictions where, unlike in the case of Zimbabwe, the death sentence is not mandatory.)

Accepting that fear, despair and mental torment are the inevitable concomitant of a sentence of death, the following are among the factors to be taken into account in making a value judgment as to whether the delays go beyond what is constitutionally permissible. (a) Regard has to be had to the likely effect of the entire extent of the delay and not the cause thereof, the cause being irrelevant since it fails to lessen the degree of suffering. In this regard, it would be wrong to differentiate between strong and weak personalities, hence the assessment of the likely and not the actual effect of the delay upon the ordinary person. (b) In this instance, where the delays were of 72 and 52 months, regard had to be paid to how those periods of delay from sentence to the proposed date of execution compared with the average delays over those years since 1978 when executions were carried out in Zimbabwe. As against an overall average delay of 17,2 months, and making all reasonable allowance for the time necessary for appeal and consideration of reprieve, delays of 72 and 52 months are inordinate and create a serious obstacle in the dispensation and administration of justice. Having regard to judicial and academic consensus concerning the death row phenomenon, the prolonged delays and the harsh conditions of incarceration, a sufficient degree of seriousness had been attained to entitle the applicant to invoke on behalf of the condemned prisoners the protection afforded by s 15(1) of the Constitution.

As to the appropriate remedy, s 24(4) of the Constitution empowers the Supreme Court to 'make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or seeking the enforcement of the Declaration of Rights'. The issue was whether, as contended by the respondents, the Court should merely issue a declaratur to the effect that the execution of the condemned prisoners would be contrary to s 15(1) or whether, as argued by the applicant, it should quash the death sentences and substitute therefor sentences of life imprisonment. The Court held that, in the exercise of the wide discretion afforded by s 24(4), it should award a meaningful and effective remedy for the breach of s 15(1). It accordingly ordered that the death sentences imposed upon the four prisoners be vacated.

The Court also made certain recommendations for the revision and acceleration of the procedure relating to death sentence cases.

## **Case Information**

Application for a declaration that the execution of four prisoners sentenced to death would constitute a breach of s 15(1) of the Constitution of Zimbabwe. The facts appear from the nt of Gubbay CJ.

A P de Bourbon SC for the applicant.

A V M Chikumira for the respondents.

Cur adv vult.

Postea (June 24).

1993 (4) SA p243

## JUDGMENT

### Introduction

On 13 March 1993 it was reported in The Herald newspaper, which circulates throughout Zimbabwe, that the Minister of Justice, Legal and Parliamentary Affairs had announced that four men, Martin Bechani Bakaka, Luke Kingsize Chiliko, Timothy Mhlanga and John Chakara Zacharia Marichi, convicted of the crime of murder and under sentence of death, were to be hanged within the next few days. Reacting to this information the Catholic Commission for Justice and Peace in Zimbabwe lost no time in lodging with this Court an urgent Chamber application in respect of the four condemned prisoners. It sought, and obtained, a provisional order interdicting the three respondents, who are the Attorney-General, the Sheriff of Zimbabwe and the Director of Prisons, from carrying out the sentences, pending the decision of this Court whether to:

(i)declare that the delay in carrying out the sentences of death constitutes a contravention of s 15(1) of the Constitution of Zimbabwe; and

(ii)order that such sentences be permanently stayed.

Notice of opposition was duly filed by the respondents and, after the receipt of several sets of affidavits, the matter was set down, with the consent of the parties, and heard on 20 and 21 May 1993. This Court has had the benefit of the industrious research undertaken by both counsel into the authorities, for which it expresses its appreciation.

As foreshadowed in the provisional order, the important question that falls to be determined is whether this Court is obliged to intervene and prevent the respondents from carrying out the sentences of death passed upon the four condemned prisoners. It is claimed that by March 1993 the executions had been rendered unconstitutional due to the dehumanising factor of prolonged delay, viewed in conjunction with the harsh and degrading conditions under which prisoners are confined in the condemned section at Harare Central Prison.

It was not sought, nor could it reasonably be, to overturn the death sentences on the ground that they were unlawfully imposed. The judgments of this Court dismissing the appeals of the condemned prisoners cannot be disturbed. They are final. And the constitutionality of the death penalty per se, as well as the mode of its execution by hanging, are also not susceptible of attack. The sole contention is whether, even though the death sentences were the only fitting and proper punishments to have imposed, supervening events establish that their execution on the appointed dates would have constituted inhuman or degrading treatment in violation of s 15(1) of the Constitution of Zimbabwe. The challenge is not, therefore, to the judicial sentences, but to their execution after what are asserted to be inordinate delays. I would emphasise that it must not be thought that the fact that it is permissible to impose the death penalty in appropriate cases implies that it must be carried out in every instance where it has been upheld on appeal, regardless of the events which have occurred since the imposition or confirmation of that sentence.

## **The offences**

On 28 November 1988 Bakaka and Chiliko were jointly convicted of murder with actual intent to kill and of rape. They were sentenced to death on the first count and to nine years' imprisonment with labour on the second. It was proved that on the night of 14 March 1987 they had broken into the house of a 70-year-old woman who lived alone. They assaulted her severely, raped her, tied her up and left her to die while they proceeded to steal her property. The victim sustained a subdural haemorrhage resulting from a blow to the head. Her body was discovered, stripped of clothing, covered in blood and extremely bruised. Their appeals were dismissed on 15 July 1991.

On 17 November 1988 Mhlanga, a member of the Zimbabwe National Army, was sentenced to death for the murder of a 72-year-old male villager. He was also sentenced to ten years' imprisonment with labour for the rape of a 13-year-old girl. The evidence disclosed that, while proceeding at night along a footpath through the bush, the deceased heard a cry for help. It came from the child who was being raped by Mhlanga. The deceased stopped to enquire who was crying. Without receiving a response he was shot twice in the abdomen by Mhlanga. He died instantly. Mhlanga's appeal was dismissed on 22 January 1990.

Marichi broke into the residence of the deceased under cover of darkness. His entry did not go unnoticed by the deceased who armed himself with a pistol. He confronted Marichi in the passage of the house and fired at least once at him, but missed. Marichi then tackled the deceased, whom he succeeded in disarming. He fired at the deceased, striking the left collar bone. He then shot the deceased in the head. He was held by the trial Court to have fired deliberately with intent to kill and was sentenced to death on 26 February 1987, His appeal was dismissed on 13 November 1988.

## **The events subsequent to the passing of the death sentences**

### **(a) The physical conditions endured daily by the four condemned prisoners**

Since the passing of sentence of death upon them, the four prisoners have been incarcerated in the condemned section of Harare Central Prison. Pursuant to s 110 of the Prisons Act Chap 21 (Z) a condemned prisoner is confined in a cell, separately, under constant supervision both by day and night. The cell is approximately three-and-a-half metres long by two metres wide. By holding his arms outstretched a person is able to touch the opposite walls. There is a single window very high up from which only the sky is visible. The door of the cell has a small aperture through which prison officers are able to view the inmate. An electric light burns in each cell and is never extinguished. It supplies the sole source of illumination. There is no inbuilt toilet, the prisoner being obliged to utilise a chamber pot. A thin mattress is provided as well as two sets of clothing - the one to be worn inside the cell, the other when outside - in order to facilitate routine security checks and searches.

The cell is opened every morning at 06:00. The condemned prisoner is allowed out in a group for washing of the chamber pot and bathing. He is returned for breakfast. Lunch is served in the cell at 11:00 and supper at 14:00. The food is of poor quality. Ten cigarettes a day are provided.

The condemned prisoner is allowed two periods of exercise time of 30 minutes each in one of two exercise yards, between 09:00 and 11:00 and 13:00 and 15:00, in a group of about ten other condemned prisoners. No apparatus to exercise is supplied and the playing of games is forbidden. Communication with other condemned prisoners is permitted but not with any other grade of prisoner. In all he is confined in a cell for a minimum period of 21 hours and 40 minutes per day, during which he has no contact at all with any other prisoner. He is given a bible and other religious books but no other reading material.

At 15:00 the condemned prisoner is required to leave all clothing outside his cell. Thereupon he is incarcerated, naked, until the following morning. The cell is very cold in the winter months.

Visitations from family members of about ten minutes duration, in the presence of prison officers, are permitted periodically.

## **(b)The mental anguish of the four condemned prisoners**

It was proposed to execute Marichi on 16 March 1993 and the others on 19 March 1993. Save for this Court's intervention on 15 March 1993, Marichi would have been incarcerated in the condemned section for six years and 21 days, Mhlanga for four years, four months and two days; and Bakaka and Chiliko, for four years, three months and 24 days. Each alleged in his affidavit that throughout the period he has lived in daily fear of being put to death. Execution by hanging is constantly in mind. Chiliko deposed that when informed that his appeal had been dismissed he seriously contemplated committing suicide. He thought that it would be less painful to smash his head against the wall of his cell than to be hanged. Eventually he decided against it. Marichi, also, at some stage of his incarceration, considered suicide to be a preferable option.

The affidavits also reveal not infrequent taunting by prison officers of the impending hanging, the mental deterioration suffered by other condemned prisoners, the acute fear experienced when it becomes known that one of their number is about to be hanged and the terrible ordeal of hearing the sounds of the executions being carried out.

All this is graphically described in the affidavit of Admire Mthombeni. He was sentenced to death on 14 August 1987 for dissident related murders but was released on 4 September 1990 by virtue of a free pardon granted him under Clemency Order No 1 of 1990, made to mark Zimbabwe's Tenth Anniversary of Independence. His averments, which were not disputed by the respondents, read in part as follows:

'Because you spend so much time in your cell alone you endlessly brood over your fate and it becomes very difficult, and for some people impossible, to cope with it all.

The treatment meted out to you by the warders is very harsh. They are continuously hassling you and chasing you up.

If you make any complaint about anything to do with the conditions you run the risk of receiving a beating. One of the warders blows a whistle. Other warders come running and without further ado they start beating you with their baton sticks.

The warders are also continuously reminding you of the hanging which awaits you. They continually taunt and torment you about it. For instance, they would ask you why you are bothering to read when you are going to hang. They would also say that you are now fat enough to hang.

The gallows themselves are situated within the condemned section itself Whilst I was there, people were hanged in 1987 and 1988. Although apparently five people can be hanged at the same time the hangings used to take place in stages. This meant that for the rest of us the agony was prolonged.

In 1987 a total of 11 people were hanged. However, the process went on for about two weeks. Two people were hanged one day. The next day nobody was hanged. The following day another two people were hanged and so it went on.

During this period, the warders rattled our doors at 4.00 am which is the time they remove people from their cells for hanging. The effect was of course that I woke up suddenly terrified that I was about to be hanged. This was just another way in which they tormented us.

When a person was to be taken out for hanging the warders came into his cell in a group. They leg ironed him and handcuffed him.

Often, the person to be hanged resisted and the warders then used electric prodders to subdue him, I saw this through the peep-hole in my cell. The warders also told us that they did this.

We heard the sounds of wailing and screaming of those about to be hanged from the time they are removed from their cells at 4.00 am up to the time they were hanged at about 9.00 am.

We also heard the sounds of the gallows themselves....

The warders often told us detailed and lurid stories about the hangings themselves which they had witnessed. The aim of this was to torture us.

For instance, after one lot of hangings, they told us that the machine did not work properly. As a result, one of those to be hanged called Chitongo did not die. Instead, he somehow managed to get hold of the hangman and would not let go. We were told that the warders eventually had to get a hammer and then they hammered him to death.

On another occasion one of the warders showed one condemned man called Vundla a newspaper showing that he was about to be executed. We were not allowed access to any newspapers. The warder therefore deliberately showed this condemned person the newspaper to torture him.

As a result, Vundla managed to climb up to the window at the top of his small cell and from there he dived on to the floor and killed himself.

Many people could not cope with all this and become mentally disturbed. The warders treated these kind of people even worse than us. For instance, if a mentally disturbed prisoner soiled his cell the warders refused for days to have it cleaned up.'

## **The locus standi of the applicant**

Although the locus standi of the applicant to bring this application was initially objected to in an affidavit filed on behalf of the respondents, the contention was not pressed at the hearing, and correctly so.

The applicant is a human rights organisation whose avowed objects are to uphold basic human rights, including the most fundamental right of all, the right to life. It is intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the Constitution. Its non-frivolous submission is that, in the circumstances which presently obtain, the carrying out of the death sentences would amount to an abuse of the protection guaranteed the condemned prisoners under s 15(1).

It would be wrong, therefore, for this Court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they are not only indigent but, by reason of their confinement, would have experienced practical difficulty in timeously obtaining interim relief from this Court. See *Deary NO v Acting President and Others* 1979 RLR 200 (GD) at 203A-D.

In any event, since the grant of the provisional order the four condemned prisoners have effectively joined in the application. They have, of course, a direct and immediate interest in its determination.

## **The relevant constitutional provisions**

Section 24(1) of the Constitution, which is the provision pursuant to which the application was brought, vests in the Supreme Court the power to deal with constitutional issues as a Court of first instance. It enjoins the Supreme Court to examine challenged legislation, or a particular practice or action authorised by a State organ, in order to determine whether or not it infringes one of the entrenched fundamental rights and freedoms of the individual. The Supreme Court is empowered to measure the effect of the enactment or action against the particular guarantee it is claimed it offends. Clearly it has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights and, particularly, where there is no other judicial procedure available by which the breach can be prevented. Compare *Martin v Attorney-General and Another* (SC 53/93 (not yet reported)).

The protection embodied in s 15(1) of the Constitution reads:

'No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.'

Save for the derogations recently introduced by the Constitution of Zimbabwe Amendment (No 11) Act, 1990, which are not presently relevant, no further derogation from rights entrenched is permitted. The prohibitions are absolute. Justification cannot arise. See *S v A Juvenile* 1990 (4) SA 151 (ZS) at 169F (1989 (2) ZLR 61 (SC) at 91 G) at 169F).

## **The availability of the constitutional protection to the condemned prisoners**

It cannot be doubted that prison walls do not keep out fundamental rights and protections. Prisoners are not, by mere reason of a conviction, denuded of all the rights they otherwise possess. No matter the magnitude of the crime, they are not reduced to non-persons. They retain all basic rights, save those inevitably removed from them by law, expressly or by implication. Thus, a prisoner who has been sentenced to death does not forfeit the protection afforded by s 15(1) of the Constitution in respect of his treatment while under confinement. See *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Another* 1992 (2) SA 56 (ZS) at 61B-62E (1991 (1) ZLR 105 (SC) at 109G-111 G); and the cases there cited.

## **The construction of s 15(1) of the Constitution**

In *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 (2) SA 702 (ZS) at 717B-D (1987 (2) ZLR 246 (SC) at 26713-C) I expressed the view that s 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency. It guarantees that punishment or treatment of the individual be exercised within the ambit of civilised standards. Any punishment or treatment incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the infliction of unnecessary suffering, is repulsive. What might not have been regarded as inhuman decades ago may be revolting to the new sensitivities which emerge as civilisation advances. I went on to say that an application of this approach to whether a form of torture, punishment or treatment is inhuman or degrading is dependent upon the exercise of a value judgment (see at 7171 (SA) and

268C (ZLR)); one that must not only take account of the emerging consensus of values in the civilised international community (of which this country is a part), as evidenced in the decisions of other Courts and the writings of leading academics, but of contemporary norms operative in Zimbabwe and the sensitivities of its people.

## **The onus**

It was contended on behalf of the applicant that the burden of proof rested upon the respondents to satisfy this Court that to carry out the sentences at this time would not constitute inhuman treatment of the condemned prisoners. Reliance was placed on the judgment of the Supreme Court of India in *Deena & Deen Dayal and Others v Union of India and Others* [1984] 1 SCR 1, where Chandrachud CJ at 32E-F stated that, notwithstanding that in normal constitutional application the onus lies on the applicant, where it appears that a person is being deprived of his life or has been deprived of his personal liberty, the burden rests on the State to establish the constitutional validity of the impugned law.

This view is contrary to that expressed by Lord Scarman and Lord Brightman in their joint minority opinion in *Riley and Others v Attorney-General of Jamaica and Another* [1982] 3 All ER 469 (PC) at 480c, wherein it was said that it was for the applicant for constitutional protection to show that

'... the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading'.

With respect to Chandrachud CJ, I prefer the opposing view. I consider that the burden of proof that a fundamental right of whatever nature has been breached is on him who asserts it. In relation to s 15(1) of the Constitution, the issue of whether an individual has been subjected to torture or to inhuman or degrading punishment or treatment is essentially a matter of fact and, ordinarily, some evidence would have to be adduced to support the contention. The respondent is not obliged to do anything until a case is made out which requires to be met.

It is also to be noted that the view of Chandrachud CJ is persuasively criticised in Seervai's *Constitutional Law of India* 3rd ed Supp at 413-15. It is there pointed out that as s 354(5) of the Code of Criminal Procedure, which provided that sentence of death was to be carried out by hanging, bore no stamp of cruelty on the face of it, and as sentence of death had been held a constitutionally valid punishment (see *Bachan Singh v State of Punjab* [1983] 1 SCR 145), it was necessary for the petitioner who alleged that death by hanging was a cruel and barbarous punishment to lead evidence in support thereof, and that is what he did. Furthermore, a presumption of constitutionality in respect of s 354(5) operated in favour of the Union of India.

## **Judicial and academic acceptance of the death row phenomenon**

Much has been said and written by jurists, penologists and psychiatrists about the mental suffering endured by prisoners who have been sentenced to death.

Over 100 years ago Justice Miller in *Ex parte Medley* 134 US 160 (1890) at 172 opined that

'... when a prisoner sentenced by a Court to death is confined the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it ... as to the precise time when his execution shall take place'.

In *Furman v Georgia* 408 US 238 (1972) at 288 Justice Brennan gave as one reason for his conclusion that capital punishment is per se unconstitutional the fact that

'... mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death'.

More recently, in *District Attorney for the Suffolk District v Watson and Others* Mass 411 NE 2nd 1274 at 1283 Hennessey CJ said of the death penalty: 'The mental agony is, simply and beyond question, a horror.' And in *Re Kemmler* 136 US 436 (1890) at 447 the United States Supreme Court accepted that:

'Punishments are cruel when they involve ... a lingering death ... something more than the mere extinguishment of life.'

It may validly be argued, so it seems to me, that death is as lingering if a person spends several years in a death cell awaiting execution as if the mode of execution takes an unacceptably long time to kill him. The pain of mental lingering can be as intense as the agony of physical lingering.

Indian Judges have also made the same observations. In *Ediga Anamma v State of Andhra Pradesh* [1974] 3 SCR 329 at 335, Krishna Iyer J spoke of

'... the brooding horror of "hanging" which has been haunting the prisoner in her condemned cell for over two years'.

Later, in *Rajendra Prasad v State of Uttar Pradesh* [1979] 3 SCR 78 at 130 the same learned Supreme Court Judge remarked that

'... the excruciation of long pendency of the death sentence, with the prisoner languishing in near solitary confinement suffering all the time may make the death sentence unconstitutionally cruel and agonising'.

And in *Sher Singh and Others v State of Punjab* [1983] 2 SCR 583 at 591D-E Chandrachud CJ, in language borrowed closely from the minority opinion in *Riley and Others v Attorney-General of Jamaica and Another* (*supra*), said:

'The prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman and degrading punishment in circumstances of a given case.'

In a sociological study entitled *Condemned to Die: Life under Sentence of Death*, the renowned criminologist, Professor Robert Johnson, wrote:

'Death row is barren and uninviting. The death row inmate must contend with a segregated environment marked by immobility, reduced stimulation, and the prospect of harassment by staff. There is also the risk that visits from loved ones will become increasingly rare, for the man who is "civilly dead" is often abandoned by the living. The condemned prisoner's ordeal is usually a lonely one and must be met largely through his own resources. The uncertainties of his case - pending appeals, unanswered bids for commutation, possible changes in the law - may aggravate adjustment problems. A continuing and pressing concern is whether one will join the substantial minority who obtain a reprieve or will be counted among the to-be-dead. Uncertainty may make the dilemma of the death row inmate more complicated than simply choosing between maintaining hope or surrendering to despair. The condemned can afford neither alternative, but must nurture both a desire to live and an acceptance of imminent death. As revealed in the suffering of terminally ill patients, this is an extremely difficult task, one in which resources afforded by family or those within the institutional context may prove critical to the person's adjustment. The death row inmate must achieve equilibrium with few coping supports. In the process, he must somehow maintain his dignity and integrity.'

(At 4.) And:

'Death row is a prison within a prison, physically and socially isolated from the prison community and the outside world. Condemned prisoners live twenty-three and one half hours alone in their cells...'

(at 47). The author proceeded at 110:

'Some death row inmates, attuned to the bitter irony of their predicament, characterize their existence as a living death and themselves as the living dead. They are speaking symbolically, of course, but their imagery is an appropriate description of the human experience in a world where life is so obviously ruled by death. It takes into account the condemned prisoners' massive deprivation of personal autonomy and command over resources critical to psychological survival; tomblike setting, marked by indifference to basic human needs and desires; and their enforced isolation from the living, with the resulting emotional emptiness and death.'

See also Johnson's 'Under Sentence of Death: The Psychology of Death Row Confinement' (1979) 5 *Law and Psychology Review* at 141, and *Death Work* Chap 4 'Living and Working on Death Row' at 48; the unauthored note, 'Mental Suffering under Sentence of Death: A Cruel and Unusual Punishment' (1972) 57 *Iowa Law Review* 814 at 829-30; Kaplan 'Administering Capital Punishment' (1984) 36 *University of Florida Law Review* at 181-5; Bluestone and McGahee 'Reaction to Extreme Stress: Impending Death by Execution' 1962 *The American Journal of*

Psychiatry at 393. All these studies describe confinement under sentence of death as exquisite psychological torture, wherein many inmates suffer obvious deterioration and severe personality distortions, including denial of reality. The respondents recognise and acknowledge the actuality of the death row phenomenon. They do not criticise as partial or in any way exaggerated the psychological traumas and behavioural changes detailed in the literature above cited. Their answer is simply that such 'unabating stress' is inherent in the penalty of death. It is an unavoidable consequence. Where the anguish attains an unacceptable level due to delay in carrying out the sentence, it is always open to the condemned prisoner to move the Court for relief. The Court will ensure that the suffering ceases, but only insofar as the original punishment, which cannot itself become tainted with the inhumanity or degradation of the treatment, remains unaffected.

## **The attitude of the Courts to delay in executing sentence of death**

### **(a) The position in Zimbabwe up to the present time**

There is a very relevant judgment of the Appellate Division of the High Court of Rhodesia. It is in *DhImini and Others v Carter NO and Another* (1) 1968 (1) RLR 136 (A). The facts were that the three appellants had been sentenced to death prior to the declaration of Unilateral Independence on 11 November 1965. Their appeals were duly dismissed. The Government, under the 1965 Constitution, considered the question of the exercise of the prerogative of mercy and advised the Officer Adminstrating the Government to decline clemency. In accordance with that advice he confirmed the sentences on 27 August 1967. In seeking to interdict the first respondent, the Sheriff, from carrying out the sentences the appellants relied, inter alia, upon the submission that the delay between their imposition and the decision to confirm them was so inordinate as to constitute inhuman or degrading punishment in violation of s 60(1) of the lawful 1961 Constitution. Two of the appellants had been held on death row for two years and nine months and the third for one month short of two years. In rejecting the argument Beadle CJ at 154 in fine-155A said:

'If during the course of his punishment, a prisoner is subjected to inhuman "treatment", he can move the Court for relief and the Court will see that the "treatment" is stopped, but that does not affect the original "punishment" which cannot, itself, become tainted with the inhumanity of the "treatment".'

He continued at 155F-H:

'The inhuman treatment complained of in the instant case is the delay in carrying out the sentence. If, as I have already found, "treatment" is distinct from "punishment", and if the inhumanity of the treatment cannot taint the lawfulness of an otherwise lawful punishment, then the only remedy an accused, who has been sentenced to death, has under s 60(1) is to ask for an order that the delay should stop, something which no person sentenced to death is ever likely to do. Even if, therefore, in certain circumstances, delay may be considered as inhuman treatment, the remedy given an accused who is under sentence of death under s 60(1) is not one which is

likely to be of much value to him, as it gives him no more than the right to ask for the delay to cease.'

In conclusion, the learned Chief Justice remarked at 157A-C:

'This Court, under its ordinary jurisdiction, is given no power to hear an appeal from the decision of the Executive Council refusing to exercise clemency. On the contrary, as I have pointed out, it has no power to question the manner in which the Executive Council exercises its powers. If the Court had any power to interfere with the discretion of the Executive Council, it could, therefore, only have it under s 60(1), but, as I have pointed out, it is given no power under this section to interfere with a lawful punishment. Its powers are limited to stopping inhuman treatment or punishment, but it cannot, in dealing with inhuman treatment, interfere with a lawful punishment.'

With all deference to one of this country's most illustrious Chief Justices, I consider the approach he adopted to be flawed. Section 60(1) alone (which was cast in similar terms to the present s 15(1)) was examined on the critical issue of whether the Court had jurisdiction to deal with the complaint. What appears to have been completely overlooked was that under s 71(4) of the 1961 Constitution (the equivalent to the present s 24(4)) the Court was vested with special power to make whatever order was necessary to prevent a contravention of any of the fundamental rights and freedoms, including that specified in s 60(1). It was sitting as a Constitutional Court, not as the Appellate Division, and so was not restricted, as it believed itself to be, to those powers properly exercisable by an appellate body. In the event, whereas a right was acknowledged, a remedy was denied.

Moreover, and contrary to what was suggested by Beadle CJ, it is irrelevant to the condemned prisoner's assertion that the alternative to delay may be expeditious execution. It is not his wish for a speedy death that causes due process of law, insofar as it prohibits inhuman or degrading punishment or treatment, to proscribe delay. 'Rather', as pointed out by Pannick in his book *Judicial Review of the Death Penalty* at 85,

'the proscription results from the fact that it is unacceptable for the State to inflict mental torture on a defendant, irrespective of that defendant's preference for torture rather than execution. Furthermore, the claim of the appellant is not that further delay would be unconstitutionally cruel and that, therefore, the execution should be carried out immediately. The claim is, rather, that by reason of the delay already suffered, the execution if carried out would constitute cruel, inhuman or degrading punishment. The delay experienced should be added to the pain and suffering normally pursuant to execution in order to determine whether the carrying out of the death sentence would breach the appellant's fundamental rights under the relevant constitutional provision. Whether or not the death penalty is constitutional per se, the pain and suffering it causes may exceed constitutional limits when the agony caused by delay is added to the balance.'

Lastly, the judgment, having been given 25 years ago, is out of step with more enlightened thinking, as exemplified in the decisions of the Supreme Court of India, the minority opinion in *Riley's case supra* and others. It preceded the adumbration by Lord Willberforce in *Minister of Home Affairs and Another v Fisher and Another* [1979] 3 All ER 21 (PC) at 26a-e of the liberal

interpretative technique applicable to constitutional provisions relating to the protection of the individual - an approach that has more than once received the commendation of this Court. See, for instance, *Bull v Minister of Home Affairs* 1986 (1) ZLR 202 (SC) at 210H-211A (1986 (3) SA 870 (ZS) at 881C). Also, *United States of America v Cotroni* (1989) 42 CRR 101 at 109 (Supreme Court of Canada).

I have no difficulty, therefore, in holding that *DhIamini's* case *supra* was wrongly decided. This Court is free to depart from it. See Supreme Court Practice Direction No 2 of 1981, 1981 ZLR 417 (SC) (1981 (4) SA 981 (ZSC)).

## **(b) The position in India**

Although there is no provision in the Indian Constitution, framed in 1948-1950, which expressly proscribes torture or inhuman or degrading punishment or treatment, the Supreme Court of India has filled the void and brought the Bill of Rights in the Constitution into conformity with international norms as set out in art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and art 7 of the International Covenant on Civil and Political Rights. It held in *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746 that the right to live with basic human dignity, implicit in the right guaranteed under art 21, included the right not to be subjected to torture or to cruel, inhuman or degrading punishment or treatment. This all-important right was, therefore, read by the Supreme Court into the right to life and made part of domestic jurisprudence.

Taking the right of protection as the base, the Supreme Court has proceeded to consider the question of delay in the carrying out of sentence of death, such delay being a notorious feature of the India legal system.

In *Vatheeswaran v State of Tamil Nadu* AIR 1983 SC 361 the Supreme Court, sitting on appeal, considered the claim of the appellants, who had been justly sentenced to death, that to take away their lives after they had been left for eight years in illegal solitary confinement was a gross violation of the fundamental right guaranteed by art 21 of the Constitution. Chinnappa Reddy J (in whose judgment Misra J concurred) at 362 posed the question whether

'... in a case where after the sentence of death is given, the accused person is made to undergo inhuman and degrading punishment or where the execution of the sentence is endlessly delayed and the accused is made to suffer the most excruciating agony and anguish, it is not open to a Court of appeal or a Court exercising writ jurisdiction, in an appropriate proceeding, to take note of the circumstance when it is brought to its notice and give relief where necessary'.

And, quoting from the minority opinion in *Riley and Others v Attorney-General of Jamaica and Another* (*supra* at 479e-f), gave the answer at 363:

'It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and

degrading. The anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of the individual are vividly described in the evidence of the effect of the delay in the circumstances of these five cases.'

The learned Judge suggested, unnecessarily, however, that a delay of more than two years should be sufficient to invoke the application of art 21 (see at 367). The appeal was allowed. The sentences of death were set aside and substituted by life imprisonment.

It was the obiter dictum, and not the remainder of the judgment, that was promptly repudiated by the three Supreme Court Judges, including the Chief Justice, in *Sher Singh and Others v State of Punjab* (supra). The Court was faced with a writ petition for two condemned prisoners who had unsuccessfully exhausted their rights of appeal against the death sentence.

Chandrachud CJ at 590B-D pointed out that the narrow view that jurisdiction to interfere with a death sentence could be exercised only in an appeal against the judgment of conviction and sentence was unacceptable. The inquiry was whether it was harsh and unjust to execute it by reason of supervening events. The learned Chief Justice continued at 593B-F:

'A prisoner who has experienced living death for years on end is therefore entitled to invoke the jurisdiction of this Court for examining the question whether, after all the agony and torment he has been subjected to, it is just and fair to allow the sentence of death to be executed. That is the true implication of art 21 of the Constitution.... It is a logical extension of the self-same principle that the death sentence, even if justifiably imposed, cannot be executed if supervening events make its execution harsh, unjust or unfair.'

Finally, it was stated that it was normal for appeals to take over two years and that it would be ridiculous if a convicted person could, by bringing frivolous proceedings, ultimately delay execution so long that it had to be commuted under such a rule (see at 596A-B). In the result, the petition was adjourned in order for the Governor of Punjab to explain why the petitioners had not been executed for more than 18 months since the ultimate dismissal of their appeals.

In *Javed Ahmed v State of Maharashtra* AIR 1985 SC 231 the petitioner, aged 22 years, had been convicted of murder and sentenced to death. His appeal against the sentence had been dismissed and a petition for clemency later rejected by the President of India. He had behaved satisfactorily in prison, appeared genuinely repentant and anxious to atone for the grave wrongs he had done. Sentence of death had been awaited for two years and nine months. Chinnappa Reddy J and Venkataramiah J entertained the petition and substituted imprisonment for life for the death penalty.

On 7 February 1989 the aspect of delay came before five Judges of the Supreme Court in *Triveniben and Others v State of Gujarat and Others* (1989) 1 SCJ 383. Oza J, giving the lead judgment, laid down at 393 that the only delay which could be considered in a writ petition was from the date the judgment of the apex Court was pronounced, ie when the judicial process had come to an end. He made it clear that no fixed period could be held to make sentence of death

inexecutable and to that extent overruled the decision in *Vatheeswaran's case supra*. Shetty J in a separate concurring judgment said at 410 paras 74 and 75:

'It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture....

As between funeral fire and mental worry, it is the latter which is more devastating, for funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there was every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the Court requesting to examine whether it is just and fair to allow the sentence of death to be executed.'

In *Madhu Mehta v Union of India* (1989) 3 SCR 775, which followed six weeks later, a writ petition brought on behalf of one Gyasi Ram was allowed and the death sentence altered to imprisonment for life. The condemned prisoner had been waiting a decision on his mercy petition by the President of India for over eight years. It was held that he had suffered mental agony of living under the shadow of death for far too long.

### **(c)The position in the United States of America**

The Supreme Court of the United States has never directly addressed the issue of delay in carrying out sentence of death. But it is of some significance, if only historical, that in the course of its decision in *Ex parte Medley* (*supra*) the Supreme Court referred to a few weeks in solitary confinement awaiting execution, with limitations on visitation and uncertainty as to the exact date the execution would take place, as 'an additional punishment of the most important and painful character' (at 171).

The modern starting point is the cause celebre involving Caryl Chessman. There are two decisions which dealt with his protest that the mental suffering caused by the years spent on death row was 'cruel and unusual punishment'. In the first, *People v Chessman* 52 Cal 2d 469 (1959), although the Court recognised that mental suffering had occurred, it focused only on the submission that the unusual length of the confinement on death row, 11 years, was due to unconstitutional delays on the part of the California judiciary. It held that the California Courts had proceeded without unreasonable delay and that the State of California had not, therefore, been guilty of cruel and unusual punishment. This rationale implies that, no matter the extent of Chessman's mental agony because of his confinement, and irrespective of the length thereof, his suffering would not have been a factor in determining whether cruel and unusual punishment had occurred as long as there was a legitimate reason for him to be confined.

In the subsequent case of *Chessman v Dickson* 275 F 2d 604 (1960) the Court of Appeals for the North Circuit denied a stay of execution. The complaint that the delay, now close on 12 years, constituted cruel and unusual punishment and would render the execution a denial of Chessman's fundamental rights, received short shrift from Chambers CJ. He said at 607-8:

'It may show a basic weakness in our government system that a case like this takes so long, but I do not see how we can offer life (under a death sentence) as a prize for one who can stall the processes for a given number of years, especially when in the end it appears the prisoner never really had any good points. If we did offer such a prize, what year would we use as a cutoff date? I would think that the number of years would have to be objective and arbitrary.

But counsel for petitioner suggest that we take a subjective approach on this man's case. We are told of his agonies on death row. True, it would be hell for most people. But here is no ordinary man. In his appearances in Court one sees an arrogant, truculent man, ... spewing vitriol on one person after other.

We see an exhibitionist who never before had such opportunities for exhibition. (All this I get from the record.) And, I think he has heckled his keepers long enough.'

Conspicuously absent from this so-called reasoning was why Chessman's personality, as assessed by the Court, would reduce the level of his mental suffering below that required for the application of the constitutional standard. See the criticism by an anonymous writer in 44 *Minnesota Law Review* at 994.

In *United States ex rel Townsend v Twomey* 322 F Supp 158 (1971) the United States District Court accepted that the petitioner had been confined on death row for 15 years and nine months, the delay in carrying out the sentence being due principally to the skilful and persistent efforts of counsel to secure his release. It acknowledged that the length of his confinement under sentence of death seemingly was unconstitutionally cruel, but deemed itself barred from so ruling by the Supreme Court's decision in *In re Kemmler* (supra) that electrocution was not a cruel and unusual punishment, and by that Court's decision in *Trop v Dulles* 356 US 86 (1958) that the death sentence per se was constitutional. However, it granted the petitioner a new trial on the ground of the admission of an illegally obtained confession. The Federal Appellate Court reversed this decision. It held the conviction to be valid but that the death sentence could not be carried out because of serious flaws in the selection of members of the jury. It remanded the case for sentencing or, in the alternative, a new trial. See 452 F 2d 350 (7th Cir 1972).

More recently, in *Potts v State* 376 SE 2d 851 (Ga 1989) the Supreme Court of Georgia rejected the plea that a period of over 13 years on death row justified the setting aside of the death penalty. Smith J quoted extensively from an article by Professor Little in (1984) 36 *Florida University Law Review* at 201-2 to the effect that the suffering on death row was no worse than that endured by an innocent patient who was to serve out a 'death sentence' imposed by disease - a condition which, though cruel, was far from unusual and out of the run of human experience. No further attempt was made by the learned Judge to analyse the growing body of judicial and academic discussion on the issue of delay as a basis for setting aside a death sentence.

Much the same narrow reasoning was expressed in *Richmond v Lewis* 948 F 2d 1473 (1991). One of the grounds advanced on behalf of the appellant was that the carrying out of the death sentence after 16 years on death row would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In rejecting it O'Scannlain, Circuit Judge, stated at 1491:

'We know of no decision by either the United States Supreme Court or this Circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation, and Richmond has cited no such decision.'

He went on to cite with approval a dictum in the case of *Andrews v Shulsen* 600 F 408 (1984) at 431 (where the petitioner had been on death row for ten years) that to accept the argument would be 'a mockery of justice', given that the delay was attributable more to the petitioner's actions than to the State's. (The decision was, however, reversed on other grounds, sub nom *Lewis v Richmond* 113 S Ct 528 (1992).)

A far more progressive and compassionate approach is evident in *People v Anderson* 493 P 2d 880 (1972). The Supreme Court of California was there concerned with whether the death sentence violated art 6 of the State's constitutional prohibition against cruel or unusual punishment. In holding that it did, Wright CJ stressed the torturousness of delay involved in the carrying out of the death penalty. He said at 892:

'It merits emphasis that in assessing the cruelty of capital punishment under art 1, s 6, we are not concerned only with the "mere extinguishment of life", ... but with the total impact of capital punishment, from the pronouncement of the judgment of death through the execution itself, both on the individual and on the society which sanctions its use. Our concern is that the execution which ultimately follows pronouncement of the death sentence has in fact become the "lingering death" which the *Kemmler* Court conceded would be cruel in the constitutional sense.'

And continued at 894-5:

'The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. Respondent concedes the fact of lengthy delays between the pronouncement of the judgment of death and the actual execution, but suggests that these delays are acceptable because they often occur at the instance of the condemned prisoner. We reject this suggestion. An appellant's insistence on receiving the benefits of appellate review of the judgment condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription.'

The California State Constitution was later amended in a manner which overruled the decision by exempting the death penalty from the prohibition against cruel or unusual punishment. Nonetheless, the observations of Wright CJ remain entirely apposite.

The decision of the Supreme Judicial Court of Massachusetts in *District Attorney for Suffolk District v Watson* Mass 411 NE 2d 1274 (1980) portrays the same advanced perception. It held the death penalty to be violative of the State's Constitution which prohibited cruel punishment.

The delay and pain of waiting for execution was an important part of the rationale, as especially expressed in the opinions of Hennessey CJ and Liacos J. The former said at 1283:

'The mental agony is, simply and beyond question, a horror.... '(W)e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and actual infliction of death." *Furman v Georgia* (supra at 287-8) (Brennan J concurring). "(T)he process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture" *People v Anderson* 6 Cal 3d 628 at 649 and "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon". *Solesbee v Balkcom* 339 US 9 at 14 (1950) (Frankfurter J dissenting).

The fact that the delay may be due to the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on the condemned individual, and the right to pursue due process of law must not be set off against the right to be free from inhuman treatment. Moreover, it is often the very reluctance of society to impose the irrevocable sanction of death which mandates, "even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out". *Furman v Georgia* (supra 408 US at 289 in 37) (Brennan J concurring).'

In equally strong vein Liacos J remarked at 1290-91:

'The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done the prisoner's mind must afflict the conscience of enlightened government and give the civilized heart no rest.'

He continued in graphic terms at 1292:

'The condemned must confront this primal terror directly, and in the most demeaning circumstances. A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract. Apart from cases of suicide or terminal illness, this certainty is unique to those who are sentenced to death. The State puts the question of death to the condemned person, and he must grapple with it without the consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme form of debasement.'

See also the similar observations in the lead opinion of Tauro CJ in *Commonwealth v O'Neal* Mass 339 NE 2d 676 (1975) at 680-81.

It is, I think, apparent from this survey that both the Supreme Judicial Court of Massachusetts and the Supreme Court of California have indicated an appreciation of the relevance of delay per se as a ground of constitutional attack upon the death penalty. The other decisions either failed to view the delay in a constitutional setting, or held that it was not an accountable factor since

caused by the condemned prisoner's pursuit, to the full, of his judicial remedies - an approach which 'both ignores the drive for self-preservation and penalises the exercise of a legal right' (per the anonymous writer in 1972 Iowa Law Review at 831).

## **(d)The position in the West Indies**

There are two decisions of the Judicial Committee of the Privy Council that bear on the matter. In *Abbott v Attorney-General of Trinidad and Tobago and Others* [1979] 1 WLR 1342 (PC) the appellant had been convicted of murder and sentenced to death at Port-of-Spain Criminal Assizes on 16 July 1973. His appeal was dismissed on 9 July 1974, and a further appeal to the Privy Council was, in turn, dismissed on 20 July 1976. Six days later he petitioned the Governor General for the exercise of the prerogative of mercy. This was declined on 23 February 1977, it being directed that the appellant was to be executed on 22 March 1977. On 15 March 1977 the appellant filed a motion claiming that his pending execution would contravene his fundamental human rights under s 14 of the Constitution because of the delay from 26 July 1976 to 12 March 1977 in dealing with his petition for reprieve. The motion was rejected and the order was later affirmed by the Court of Appeal. The appellant then exercised his right, in a constitutional matter, to appeal to the Privy Council.

It was held, as in *De Freitas v Benny* [1976] AC 239 (PC), that the appellant could complain neither about the delay totalling three years preceding his petition for clemency, caused by his own action in appealing against his conviction, nor of that of two years subsequent to the denial of his petition. Nonetheless it was remarked that the first period of delay was 'greatly to be deplored' (at 1345E). The appellant's case depended solely on the period of somewhat less than eight months which was allowed by the State to elapse between the lodging of the petition for pardon and its rejection. The contention that such a delay was so inordinate as to invoke a contravention of his constitutional right was castigated as 'quite untenable'. The opinion delivered on behalf of the Judicial Committee by Lord Diplock concluded at 1348B-D:

'Their Lordships accept that it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not "by due process of law"; but since nothing like this arises in this instant case, this question is one which their Lordships prefer to leave open.'

The learned author, Pannick (op cit), disapproves strongly of the pronouncement that the first period of delay of three years was to be disregarded as due to an utilisation of the appellate procedure. He comments at 85:

'...(I)t ignores the degree of mental torture suffered; it deters the defendant from claiming his rights to review by Appellate Courts of the penalty of death; and it penalises the claiming of the right to appeal by providing that the exercise of that right prevents the defendant from claiming that his treatment has breached his right not to suffer cruel or inhuman punishment. The

defendant's reluctance to suffer a long delay before execution, his knowledge that if he appeals against sentence or conviction any delay resulting therefrom will not render his execution unconstitutionally cruel, and his failure accurately to assess his chances of winning an appeal against conviction or sentence, may deter the defendant from appealing, and thereby overturning, a sentence of death unlawfully imposed.'

This criticism is impressive in its logic and I adopt it. It is supported by the quoted passage in the opinion of Hennessey CJ in Watson's case *supra*. There are dicta to the same effect in *Vatheeswaran v State of Tamil Nadu* (*supra* at 364) and *Sher Singh and Others v State of Punjab* (*supra* at 595F-H).

In *Riley and Others v Attorney-General of Jamaica and Another* (*supra*), the five appellants had been convicted of murder between March 1975 and October 1976 and sentenced to death. In each case an appeal had been dismissed. From April 1976 political factors in Jamaica led to a suspension of all sentences of death, but on 30 January 1979 the House of Representatives resolved to retain capital punishment. Thereupon, the executions were set on dates between 29 May and 12 June 1979. The appellants then applied to Court for a declaration that the executions would be contrary to s 17(1) of the Constitution of Jamaica, contending that the prolonged delay, due substantially to circumstances outside their control, had caused them sustained mental anguish, thereby rendering the punishment inhuman and degrading. Their application failed both at first instance and on appeal. A further appeal to the Privy Council followed.

The majority opinion of Lord Bridge (concurring in by Lord Hailsham and Lord Diplock) was based specifically on s 17(2) of the Constitution.

His Lordship reasoned that, since at the time immediately before the Constitution came into effect, execution of a death sentence would have been a punishment of a description which was lawful, notwithstanding any delay between its passing and the issue of the death warrant, execution of the death penalty would be 'to the extent' that the law authorised within the meaning of s 17(2) and, therefore, would not contravene s 17(1) (see at 473b-d). In the course of the opinion it was again reiterated that any delay necessarily occasioned by the appellant procedures pursued was to be excluded (see at 471e and j).

In a joint dissenting opinion Lord Scarman and Lord Brightman held the appellants to have established a breach of s 17(1) of the Constitution. They said at 476b-d that:

'The "treatment" which is *prima facie* "inhuman" under ss (1) is the execution of the sentence of death as the culmination of a prolonged period of respite. That species of "treatment" falls outside the legalising effect of ss (2). Subsection (2) is concerned only to legalise certain descriptions of punishment, not to legalise a "treatment", otherwise inhuman, of which the lawful punishment forms only one ingredient. Subsection (1) deals with "punishment" and "other treatment". In the instant case the punishment is the execution of the death sentence. Subsection (2) is directed both to "punishment" and to "other treatment". The "other treatment", if inhuman, is not validated by ss (2), in our opinion, merely because lawful punishment is an ingredient of the inhuman treatment.'

And continued at 479d:

'It is no exaggeration, therefore, to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading. As the Supreme Court of California commented in *People v Anderson* it is cruel and has dehumanising effects. Sentence of death is one thing: sentence of death followed by lengthy imprisonment prior to execution is another.'

In conclusion it was stated at 480a-c:

'The cruel and dehumanizing experience suffered by these appellants does meet the test. But we doubt whether actual effect should be the test. It would be quite unacceptable to differentiate in the application of s 17 between victims of strong character and those of weaker character. The test must be, in our view, that of the likely effect of the experience to which they have been subjected. Evidence, of course, of actual effect will be very relevant and, indeed, necessary in order to reach a conclusion as to likely effect.

We answer, therefore, the question as to the meaning and effect of s 17(1) as follows. Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment .... Such a case has been established, in our view, by these appellants.'

In my respectful view the minority opinion is to be preferred to that of the majority. It applied the liberal interpretation of fundamental rights recommended in *Minister of Home Affairs v Fisher* (supra) and accords with the evolving standards in any civilised country. It was referred to with approval by the Supreme Court of India in *Vatheeswaran v State of Tamil Nadu* (supra) and in *Sher Singh and Others v State of Punjab* (supra). In an editorial comment in 1983 *West India Law Journal*, Aubrey Fraser, a former Trinidadian Judge of Appeal, wrote at 12:

'If it were possible to look into the future it might be within the justifiable expectation of the present generation of lawyers in Jamaica, and other countries of the Commonwealth Caribbean, that the enlightenment offered in this dissenting judgment, which should soon join that rare collection of law-making dissents, might within this decade, reach beyond the realm of hope, to rescue some of the condemned who, since the middle of the 1970s and onwards, have been awaiting with anguish the execution of their lawful sentences.'

In *Re Applications by Thomas and Paul* [1986] LRC (Const) 285, the High Court of Trinidad and Tobago held that the delays that had occurred since the pronouncement of sentence of death were a result of the invocation by the appellants of all the appeal procedures, followed by the bringing of the present motion. And no delay could be attributed to the State which was so protracted as to amount to unreasonable incarceration.

Although the Court took the passing of the sentences as the starting point of the delay, its reasoning was based on what was, with respect, an unacceptable premise that the applicants were responsible for the delays and therefore it did not lie in their mouths to complain about them.

## **(e)The extradition judgments**

In *Soering v United Kingdom* (1989) 11 EHRR 439 the European Court of Human Rights decided for the first time that extradition could amount to a breach of art 3 (the prohibition against torture or inhuman or degrading treatment or punishment) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Soering, a German national, was wanted for murder in Bedford County, Virginia, United States of America. He fled to Europe but was arrested in England on a charge of cheque fraud. Six weeks later he was indicted for two brutal murders in Bedford County and, in consequence, the United States requested his extradition under its 1972 Extradition Treaty with Great Britain. The then Federal Republic of Germany, which had abolished the death penalty, also requested his extradition. Being his country of origin, it too had jurisdiction to try him for the alleged murders. The United Kingdom Government asked the US Department of State for an assurance that if Soering were surrendered he would not be executed, but was only provided with an affidavit from the District Attorney for Bedford County stating that he would inform the sentencing Judge that 'it is the wish of the United Kingdom that the death penalty should not be imposed or carried out'. Shortly thereafter a hearing was held in England, upon the request of the United States, for Soering's extradition, and the Court found him extraditable. Appeals against the decision failed and ultimately Soering was ordered to be surrendered to the United States. In the meantime, however, he filed a complaint with the European Commission of Human Rights, which body advised the United Kingdom not to extradite until it had the opportunity to investigate the claim. The United Kingdom complied.

Before the Commission Soering alleged, inter alia, that his extradition to the United States would involve the United Kingdom in a violation of art 3 in that the conditions of incarceration of prisoners under death sentence at Virginia's Mecklenburg Correctional Centre was inhuman and degrading. By a majority of six to five the issue was decided against him, but the Commission referred the case to the Court, accepting that it required its attention.

The European Court unanimously found that there was a real risk that a Virginia Court would sentence Soering to death and that, if he was surrendered for trial, art 3 would be violated. This determination was based on its assessment of death row conditions at Mecklenburg Correctional Centre. The following passages in the judgment reflect the position of the

'56. The average time between trial and execution in Virginia, calculated on the basis of the seven executions which have taken place since 1977, is six to eight years. The delays are primarily due to a strategy by convicted prisoners to prolong the appeal proceedings as much as possible. The United States Supreme Court has not as yet considered or ruled on the "death row phenomenon" and in particular whether it falls foul of the prohibition of "cruel and unusual punishment" under the Eighth Amendment to the Constitution of the United States.

...

106. The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years (see para 56 above). This length of time awaiting death is, as the Commission and the United Kingdom Government noted, in a sense largely of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law. The automatic appeal to the Supreme Court of Virginia normally takes no more than six months (see para 52 above). The remaining time is accounted for by collateral attacks mounted by the prisoner himself in habeas corpus proceedings before both the State and Federal Courts and in applications to the Supreme Court of the United States for certiorari review, the prisoner at each stage being able to seek a stay of execution (see paras 53-4 above). The remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed.

Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.

...

111. For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedure safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services (see para 65 above).

However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by art 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration (ie by extradition to the Federal Republic of Germany).

Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of art 3.'

One important feature that distinguishes this from most human rights cases is that the violation alleged was potential or theoretical rather than actual. Another is that, although the Court acknowledged that most of the period of six to eight years on death row at Mecklenburg is attributable to collateral attacks on the conviction through habeas corpus proceedings in the Federal Courts and is, therefore, largely of the condemned prisoner's own making, it noted that it is 'part of human nature that the person will cling to life by exploiting those safeguards to the full'.

In his note on the case in (1991) 85 American Journal of International Law at 145, Professor Richard Lillich suggested that, but for the unusual factors of Soering's age, alleged mental disorder and the request by the Federal Republic of Germany for his extradition, the European Court would not have invalidated the extradition and, therefore, the Court meant to limit its ruling on the death row phenomenon to the most egregious of cases. But, as convincingly answered by Michael Shea in (1992) 17 Yale Journal of International Law at 110, such a narrow interpretation ignores the Court's rejection of the argument that the appeal process was designed to protect the death row inmate who could always choose to accelerate the process by waiving his appeal rights (see para 106 of the judgment). In short, neither Soering's youth nor his country of origin were either crucial to or determinative of the result.

In *Re Kindler and Minister of Justice* (1991) 67 CCC 3 d 1 the Supreme Court of Canada, by a majority of four to three, on facts very close to those in the Soering case, refused to block the extradition of the fugitive appellant to the United States. It is unnecessary to deal in any detail with the lengthy separate judgments save to indicate that, for the majority, La Forrest J at 15 took the view that:

'While the psychological stress inherent in the death-row phenomenon cannot be dismissed lightly, it ultimately pales in comparison to the death penalty. Besides, the fact remains that a defendant is never forced to undergo the full appeal procedure, but the vast majority choose to do so. It would be ironic if delay caused by the appellant's taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice.'

On the other hand Cory J, for the minority, summarised his conclusions at 44-5 thus:

'Capital punishment for murder is prohibited in Canada. Section 12 of the Charter provides that no one is to be subjected to cruel and unusual punishment. The death penalty is per se a cruel and unusual punishment. It is the ultimate denial of human dignity. No individual can be subjected to it in Canada. The decision of the Minister to surrender a fugitive who may be subject to execution without obtaining an assurance pursuant to art 6 is one which can be reviewed under s 12 of the Charter. It follows that the Minister must not surrender Kindler without obtaining the undertaking described in art 6 of the Treaty. To do so would render s 25 of the Extradition Act inconsistent with the Charter in its application to fugitives who would be subject to the death penalty.'

## **(f) Decisions of the United Nations Human Rights Committee**

In recent years the Human Rights Committee, under art 5 para 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, has handed down decisions on whether the length of detention on death row amounted to a violation of the prohibition against 'torture or cruel, inhuman or degrading treatment or punishment' under art 7 of the Covenant. In each, the alleged victim, the 'author', was a Jamaican national. They are Earl Pratt and Ivan Morgan, Communication Nos 210/1985 and 225/1987 (24 March 1988); Carlton Reid, Communication No 250/1987 (20 July 1990) and Randolph Barrett and Clyde Sutcliffe, Communication Nos 270/271/1988 (30 March 1992). Although the periods were taken from the imposition of the sentences, and ranged from two years to 10 years, the Committee found that the claims had not been substantiated. In the last-mentioned it was stated at 8 para 8.4:

'In States whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies. A delay of ten years between the judgment of the Court of Appeal and that of the Judicial Committee of the Privy Council is disturbingly long. However, the evidence before the Committee indicates that the Court of Appeal rapidly produced its written judgment and that the ensuing delay in petitioning the Judicial Committee is largely attributable to the authors.'

This observation called forth a dissent from one of the members, who said at 10:

'The conduct of the person concerned with regard to the exercise of remedies ought to be measured against the States involved. Without being at all cynical, I consider that the author cannot be expected to hurry up in making appeals so that he can be executed more rapidly.... In this type of case, the elements involved in determining the time factor cannot be assessed in the same way if they are attributable to the State party as if they can be ascribed to the condemned person. A very long period on death row, even if partially due to the failure of the condemned prisoner to exercise a remedy, cannot exonerate the State party from its obligations under art 7 of the Covenant....'

It is this latter approach that I find the more compelling.

## **The condemned prisoner's entitlement to rely on the factor of delay**

Such cases as *Chessman v Dickson* (supra); *Richmond v Lewis* (supra); *Re Kindler and Minister of Justice* (supra) propound the narrow and somewhat intolerant view that, as the condemned prisoner is never compelled to undergo the full appellate and habeas corpus procedures, the period of his confinement on death row resulting therefrom cannot be considered a violation of his fundamental rights, no matter the agony that he is suffering. It is true that the prosecution has no incentive or benefit in consciously delaying the execution of a person who has been sentenced

to death. Nevertheless in some countries such as the United States, delay is a necessary incident to the operation of the due process protections in the criminal justice system.

The contrary approach, and one more in accord with an humane understanding of the desire to 'cling to life' as long as possible, is persuasively expressed in such cases as *Vatheeswaran v State of Tamil Nadu* (supra) where it was said at 364:

'We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay.'

See also *People v Anderson* (supra at 895) and the *Soering* case supra para 106.

It seems to me highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that, by not making the maximum use of the judicial process available, the condemned prisoner would have shortened and not lengthened his suffering. The situation could be otherwise if he had resorted to a series of untenable and vexatious proceedings which, in consequence, had the effect of delaying the ends of justice.

I hasten to add that, in any event, the position in Zimbabwe, where there is only one appeal stage, is much different from that prevailing in the United States. A person sentenced to death in this country has an automatic right of appeal to the Supreme Court in terms of s 44(2) of the High Court of Zimbabwe Act 29 of 1981. If he is indigent and so unable to afford legal representation (as is the case with over 90% of condemned prisoners) legal aid counsel is appointed at the expense of the State.

Section 114 of the Prison Regulations, 1956, as amended, requires the officer-in-charge of the prison to which the condemned prisoner is first admitted to forthwith advise him of his right to appeal. More often than not he is assisted with the drafting of a notice of appeal by a prison officer. But even where no notice of appeal is lodged, the trial proceedings are still transcribed, pro deo counsel appointed to argue the matter and the propriety of the conviction and sentence reviewed by the Supreme Court. I know of no instance where the Cabinet has proceeded to debate the prerogative of mercy without being aware that the death sentence has been upheld on appeal. There is a commendable insistence that the appeal process be exhausted. The condemned prisoner has in reality no option - an appeal must go forward.

Obviously, the system is such as to completely disable the condemned prisoner from postponing his execution by embarking upon a series of appeal procedures. And unless he is one of the fortunate few who continues to be legally represented subsequent to sentence, he has no control over the expedition with which his appeal will be heard. The time scale lies solely in the hands of the State. It is only after the appeal record has been prepared that legal aid counsel is again briefed to represent the condemned prisoner.

It necessarily follows, to my mind, that any inordinate delay between the imposition of the death penalty and the date of the confirmation by the Supreme Court falls outside the responsibility of the condemned prisoner.

## **The commencement of the period of delay**

This issue is closely related to the one preceding.

In *Triveniben v State of Gujarat* (supra) a Full Bench of the Supreme Court of India ruled at 393 para 16 that the delay

'... which could be considered while considering the question of commutation of sentence of death into one of life imprisonment could only be from the date the judgment by the apex Court is pronounced, i.e. when the judicial process has come to an end'.

As explained in the judgments of Oza J at 391 para 13 and Shetty J at 409 para 71, an Appeal Court when dealing with a death sentence may take account of the delay and the cause thereof along with other circumstances. It must weigh up every factor for and against the appellant. But were it to find the disposal of the case not to be sufficiently mitigatory as to warrant the quashing of the sentence and the substitution of a lesser punishment, it would be inappropriate in a subsequent writ application to fall back on the same delay to impeach the execution. In other words, the stage at which significant delay between the imposition of the sentence and the hearing of the appeal is to be considered is by the apex Court. It is by that forum that the mental agony of the condemned prisoner brought about by protracted delay must be taken into account as a mitigatory circumstance. This is because the passing of sentence of death upon a conviction of murder is not mandatory. It is only to be imposed in the rarest of cases. As explained in *Machhi Singh and Others v State of Punjab* (1983) 3 SCC 470:

'A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigatory circumstances have to be accorded full advantage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.'

In this country the criminal procedure in respect of the crime of murder is different. Where an accused has been convicted, sentence of death is mandatory, except where he is able to establish, on a balance of probability, the existence of extenuating circumstances (see the proviso to s 314A(a) of the Criminal Procedure and Evidence Act Chap 59 (Z)). Extenuating circumstances are all the factors which, in the minds of reasonable men, may serve to reduce the moral, albeit not the legal, blameworthiness of the accused in the commission of the murder. See, for instance, *S v Chaluwa* 1985 (2) ZLR 121 (SC) at 130B. Any delay from the imposition of the sentence to the hearing of the appeal cannot be taken into account by the Supreme Court in its determination of whether the opinion of the trial Court as to the absence of extenuating circumstances was one which no reasonable Court would have reached; for the incidence of delay does not qualify as a circumstance capable of reducing an appellant's moral guilt in perpetrating the murder. It is entirely irrelevant to the commission of that offence.

This procedural distinction clearly renders the ruling in Triveniben's case *supra*, which was applied in *Madhu Mehta v Union of India* (*supra* at 782G-H), factually inappropriate to the local jurisprudential context.

In *Abbott v Attorney-General of Trinidad and Tobago and Others* (*supra*) it was conceded on behalf of the appellant, and so held by the Judicial Committee, that the delay of three years between sentence and the rejection of the appeal was to be disregarded as due to an unsuccessful attempt by the appellant to have his conviction set aside. I have already indicated my respectful disagreement with this view. I would only add that in the *Soering* case *supra* the European Court of Human Rights took as the delay *Soering* would have to endure if extradited to Virginia, found guilty of murder and sentenced to death, the six to eight years it would take him, from that date, to pursue all the judicial processes available.

Most importantly, in Zimbabwe, as I have mentioned, an appeal against sentence of death is automatic. It is based as much upon the desire of the State to ensure as best it can that the conviction and sentence are justified, as that of the condemned prisoner to have the conviction set aside or the sentence reduced. Moreover, as the responsibility to prepare the record of the trial proceedings for the appeal Court rests with the State, and since the vast majority of condemned prisoners are without legal representation immediately subsequent to the conclusion of the trial and until, at earliest, the completion of the record, this interim period of delay is one over which they have no control whatsoever.

Accordingly, I am entirely satisfied that in the determination of whether there has been a breach of s 15(1) of the Constitution, the period the prisoner has spent in the condemned cell must be taken to start with the imposition of sentence of death. After all, it is from that date that he begins to suffer what is termed the 'death row phenomenon'.

## **The value judgment**

The Minister of Justice, Legal and Parliamentary Affairs explained in his affidavit that the appeals of the condemned prisoners were dismissed by the Supreme Court during a time when abolition of the death penalty was under discussion by Government. The Cabinet, accordingly, deferred consideration of the prerogative of mercy in respect of all death sentence prisoners; execution would have denied them the benefit of a commutation should the debate have culminated in a decision to abolish.

The Criminal Laws Amendment Act 1992, which retains sentence of death only for murder, treason and certain military offences, was promulgated on 8 May 1992. At that date 45 prisoners were awaiting confirmation or commutation of sentence of death. After the Bill had been passed by Parliament, which preceded the Act by two months, the compilation of the requisite papers for submission to Cabinet began. Confidential reports had to be prepared by the Social Welfare Department. This involved interviews with both the condemned prisoners and their relatives. Reports also had to be obtained from the trial Judges and a memorandum from the Minister. Many copies of various documents, including the judgments of the High Court and the Supreme Court, had to be made.

It was as late as 21 January 1993 that the papers pertaining to the four condemned prisoners were considered by Cabinet and the necessary decisions taken. And it was on 9 March 1993 that the President confirmed the decisions not to commute the sentences.

Although it must be accepted that it was both reasonable and fair, while the debate ranged, for Cabinet to have opted for a moratorium on executions, it is doubtful, to my mind, that the subsequent delay of one year between the passing of the Bill and 9 March 1993 can be justified. However that may be, the criterion is the effect of the entire extent of the delay on the four condemned prisoners and not the cause thereof. The cause is irrelevant for it fails to lessen the degree of suffering of the condemned prisoners. See *Vatheeswaran v State of Tamil Nadu* (supra at 364).

It has been stressed with frequency that sentence of death should be carried out as expeditiously as possible. See the remarks of Lord Diplock in *Abbott v Attorney-General of Trinidad and Tobago and Others* (supra at 1345E) and of Beadle CJ in *Dharamini and Others v Carter NO and Another* (supra at 156E-F). The reason is self-evident. It is to minimise the period of terrible anguish. Certainly, s 116(1) of the Prison Regulations recognises the undoubted psychological stress that a condemned prisoner has to endure, for it is there provided that a prison officer who notices anything in the demeanour or behaviour of such a prisoner indicating that he has become mentally disordered must immediately report in writing to the officer-in-charge. And the repealed s 118 required regular searches of condemned prisoners because of the risk of suicide.

From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanising environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is 'the living dead'. See Vogelmann 'The Living Dead' (1989) 5 South African Journal of Human Rights 183 at 195; Mihalik 'The Death Penalty in Bophuthatswana' (1990) 107 South African Law Journal 465 at 471-2; Johnson and Carroll *Litigating Death Row Conditions: The Case for Reform* (1985) at 8-5 and 6. He is kept only with other death sentence prisoners - with those whose appeals have been dismissed and who await death or reprieve; or those whose appeals are still to be heard or are pending judgment. While the right to an appeal may raise the prospect of being allowed to live, the intensity of the trauma is much increased by knowledge of its dismissal. The hope of a reprieve is all that is left. Throughout all this time the condemned prisoner constantly broods over his fate. The horrifying spectre of being hanged by the neck and the apprehension of being made to suffer a painful and lingering death is, if at all, never far from mind. Grim accounts exist of hangings not properly performed. See *State v Frampton* Wash 627 P 2d 922 (1981) at 93 5-6; Gardiner 'Executions and Indignities' (1978) 39 Ohio State Law Journal at 191-2.

The four condemned prisoners have spoken of the agony and torment they suffer. They maintain that the harsh prison conditions to which they are subjected daily add substantially to the measure of their misery. They are left virtually in solitary confinement in cramped and unhygienic conditions; there is an absence of any meaningful contact with the outside world; they are permitted no reading material save that of a religious nature; there is a total lack of facilities with which to pass the day; they are deprived of all clothing from mid-afternoon to early morning; they are taunted by prison officers with impending death by hanging; they are

affected by the mental deterioration of some fellow inmates and by suicides and attempts thereof; they are able to hear the sounds of executions being carried out.

Of course, in an enquiry into a breach of s 15(1) of the Constitution, it would be wrong to differentiate between strong and weak personalities. That is why what is to be assessed is the likely and not the actual effect of the length of the delay upon the ordinary individual. See *Riley and Others v Attorney-General of Jamaica and Another* (supra at 479g-h and 480b).

Accepting that fear, despair and mental torment are the inevitable concomitant of sentence of death, the question is whether the delays of 52 months and 72 months, with which this Court is concerned, go beyond what is constitutionally permissible.

In the making of a value judgment regard is to be had, inter alia, to how the periods of delay from sentence to the proposed dates of execution compare with the average delays over those years from 1978 when executions were carried out in this country.

The information with which this Court has been provided reflects the following:

Year of Number of Average delay in execution executions months from date of sentence

1978 19 4,3

1979 22 4,7 1980 Nil --

1981 Nil --

1982 2 13,5

1983 13 18,5

1984 2 22 1985 10 33,2

1986 5 22,8

1987 10 39,6

1988 5 35,6

Overall 88 17,2

The differences between the average period of delay for each individual year as well as that over the nine years, when compared with the present figures of 52 months and 72 months, regrettably indicate a significant upward trend. Viewed against the average of 17,2 months in respect of 88 executions, there is an additional delay of 34, 10 months in respect of Bakaka, Chiliko and Mhlanga, and 54, 10 months in respect of Marichi. Even relative to the year 1987, when the

delay peaked to an undesirable average of 39,6 months, the additional delays to which the four condemned prisoners have been subjected are 12,6 months and 32,6 months respectively.

Making all reasonable allowance for the time necessary for appeal and the consideration of reprieve, these delays are inordinate. As such they create a serious obstacle in the dispensation and administration of justice. They shake the confidence of the people in the very system. It is my earnest belief that the sensitivities of fairminded Zimbabweans would be much disturbed, if not shocked, by the unduly long lapse of time during which these four condemned prisoners have suffered the agony and torment of the inexorably approaching foreordained death while in demeaning conditions of confinement.

Having regard to the impressive judicial and academic consensus concerning the death row phenomenon, the prolonged delays and the harsh conditions of incarceration, I am convinced that a sufficient degree of seriousness has been attained as to entitle the applicant to invoke on behalf of the condemned prisoners the protection against inhuman treatment afforded them by s 15(1) of the Constitution.

In making this value judgment it has been necessary to remain uninfluenced by the fact that the demand for humane and civilised treatment is made on behalf of those who showed no mercy to their victims but subjected them to extreme cruelty and brutality.

Because retribution has no place in the scheme of civilised jurisprudence, one cannot turn a deaf ear to the plea made for the enforcement of constitutional rights. Humaneness and dignity of the individual are the hallmarks of civilised laws. Justice must be done dispassionately and in accordance with constitutional mandates. The question is not whether the Court condones the evils committed by the four condemned prisoners, for certainly it does not. It is whether the acute mental suffering and brooding horror of being hanged which has haunted them in their condemned cells over the long lapse of time since the passing of sentence of death is consistent with the guarantee against inhuman or degrading punishment or treatment. For, like art 21 of the Constitution of India, s 15(1) stands as sentinel over human misery, degradation and oppression. Its voice is that of justice and fairness. It can never be silenced on the ground that the time to heed to its dictates ended with the passing of the death penalty. It echoes through all stages - the trial, the sentence, the incarceration on death row and, finally, the execution. See *Sher Singh and Others v State of Punjab* (supra at 593F).

## **The appropriate remedy**

Section 24(4) of the Constitution empowers the Supreme Court to

'... make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or seeking the enforcement of the Declaration of Rights'.

I shall repeat what was said in *In re Mlambo* 1992 (4) SA 144 (ZS) at 155J (1991 (2) ZLR 339 (SC) at 355C) that:

'It is difficult to imagine language which would give this Court a wider and less fettered discretion.'

And would add that even the proviso to the subsection, which enacts that the Supreme Court may decline to exercise its powers where other and adequate means of redress are available to the complainant, is not mandatory. The discretion remains.

The argument on this issue turned upon whether this Court, if satisfied that the executions of the four condemned prisoners would be unconstitutional as being contrary to s 15(1), should merely issue a declaratur to that effect, as contended for by the respondents; or quash the sentences of death and substitute in their place sentences of life imprisonment, as prayed at the hearing by the applicant.

The power to 'commute' sentence of death is an executive power. Though it exists essentially for the protection of the condemned prisoner, he has no right to be heard in the deliberations of the Cabinet. He may only submit a mercy petition. He has a 'de facto' right to expect the lawful exercise of the power but no legal remedy is available to him (see s 31K(2) of the Constitution), save where an infringement of one or more of the protective provisions of the Declaration of Rights can be shown (see *Riley and Others v Attorney-General of Jamaica and Another* (supra at 476h)), in which event, the Supreme Court is mandated by the Constitution to fulfil its protective role and enforce the particular fundamental right. In so doing the Supreme Court is not to be taken as interfering with the 'pardoning power' of Cabinet or the President. The judicial power and the executive power over sentences are readily distinguishable. See *United States v Benz* 282 US 304 (1931) at 311.

It is to be noted that in *Javed Ahmed v State of Maharashtra* (supra) the Supreme Court of India quashed the sentence of death, replacing it with imprisonment for life, notwithstanding that the President of India had refused clemency. And in *Madhu Mehta v Union of India* (supra) the same distinguished Court issued a similar order, even though the mercy petition had not yet been considered by the Executive.

It is essential that this Court, in the exercise of its wide discretion, should award a meaningful and effective remedy for the breach of s 15(1). That, in my view, may best be achieved by ordering that the sentences of death be vacated.

## **The order**

In the result I would order as follows:

1. The application is allowed with costs.
2. The sentence of death passed upon Martin Bechani Bakaka, Luke Kingsize Chiliko, Timothy Mhlanga and John Chakara Zacharia Marichi is, in each case, set aside and substituted with a sentence of imprisonment for life.

## **Recommendations:**

The Minister of Justice, Legal and Parliamentary Affairs has fairly recognised that, to some extent at least, shortcomings in the system have been revealed. For he stated in his affidavit:

'My Ministry will henceforth examine ways of ensuring speedy processing of petitions for clemency, in cases of prisoners facing the death penalty.'

Such action is, to my mind, imperative. There can be no doubt that to have allowed about ten months to elapse from the date Government resolved to retain the death penalty for murder to 21 January 1993 when Cabinet finally considered these four matters was far too long. It is a delay that simply fails to reflect any sense of urgency. And the period of six weeks to 9 March 1993, when the warrants of execution were issued, was also excessive.

It seems to me that the whole procedure relating to death sentence cases requires to be revised and accelerated.

In the first place, I would suggest that once an accused person has been sentenced to death, the trial Judge should direct that the proceedings be transcribed forthwith; that immediately the appeal record has been prepared and lodged with the Registrar of the Supreme Court, the appeal should be set down for hearing as an urgent matter. Once dismissed, no time should be lost in attending to all the procedures necessary for the submission of the matter to Cabinet.

Secondly, consideration should be given to extending the services of the pro deo counsel who appeared at the trial to the drafting of the notice of appeal; and, in the event of the appeal being dismissed, to the preparation of a petition for mercy. In this way the condemned prisoner would be represented by a legal practitioner from the date of sentence to a stage when assistance was no longer required. The latter would be in a position to ensure total expedition with regard to the preparation of the record and the hearing of the appeal.

Thirdly, a self-imposed rule should be applied by Cabinet that the decision of whether or not to exercise the prerogative of mercy be made within a period of, say, three months from the date the appeal against the death sentence was dismissed.

McNally JA, Korsah JA, Ebrahim JA and Muchechetere JA concurred.

Appellant's Legal Practitioners: Scanlen & Holderness. Respondents' Legal Practitioners: Civil Division, Attorney-General's Office.