

Privy Council Appeal No. 91 of 2001

The Queen

Appellant

v.

Peter Hughes

Respondent

FROM

**THE EASTERN CARIBBEAN COURT OF APPEAL
(SAINT LUCIA)**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 11th March 2002

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hutton
Lord Hobhouse of Woodborough
Lord Millett
Lord Rodger of Earlsferry

[Delivered by Lord Rodger of Earlsferry]

1. On 27 July 1998 in the High Court of Saint Lucia the respondent, Peter Hughes, was convicted of the murder of Jason Jean. At his trial witnesses gave evidence that they had seen Hughes, following some remark by Jean, strike him with a piece of post and a stone and jump on him. Jean died from head injuries with extensive bleeding and from a chest injury with a contusion to the heart.

2. Section 178 of the Criminal Code of Saint Lucia as revised in 1992 is in these terms:

“Whoever commits murder is liable indictably to suffer death.”

Section 1284 provides:

“Unless otherwise expressly provided, a Court may sentence any offender to any less punishment, other than death, than that prescribed.”

Section 1291 provides:

“The sentence, to be pronounced upon a person who is convicted of an offence punishable with death, is that he be hanged by the neck until he is dead.”

3. On the view that these provisions required that the death sentence be imposed on anyone convicted of murder, Hughes was sentenced to death by hanging.

4. He appealed against his conviction to the Eastern Caribbean Court of Appeal which dismissed the appeal on 8 February 1999.

On 19 April 2000, however, their Lordships' Board granted Hughes special leave to appeal against the sentence of death passed on him and remitted the case to the Court of Appeal to decide whether (a) the mandatory sentence of death imposed on him should be quashed (and, if so, what sentence (including sentence of death) should be imposed) or (b) the mandatory sentence of death imposed on him should be affirmed.

5. Their Lordships pause at this point to notice that on 11 November 1998, after a retrial in the High Court of Saint Vincent, Newton Spence was convicted of murder. He was sentenced to death, by virtue of section 159 of the Criminal Code of Saint Vincent which makes the death sentence mandatory in cases of murder. On 19 April 2000, on the same day as it granted special leave in the case of Hughes, their Lordships' Board granted Spence special leave to appeal against both his conviction and sentence. The Board remitted the matter of sentence to the Eastern Caribbean Court of Appeal on the same basis as in the case of Hughes, but decided to hear Spence's appeal against conviction.

6. Before Spence's appeal against conviction could be heard, however, in December 2000 the Court of Appeal heard argument in the remits in the case of Hughes and the case of Spence. The issues in the two cases were exactly the same. On 2 April 2001 the Court of Appeal (Sir Dennis Byron CJ and Saunders JA (Ag), Redhead JA dissenting) held that the mandatory death sentence for murder constituted inhuman or degrading punishment or treatment in terms of section 5 of the Constitution of Saint Lucia

as set forth in the Saint Lucia Constitution Order 1978 (SI 1978 No 1901) (“the Saint Lucia Order”):

“No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.”

The Court of Appeal also held that the mandatory death penalty was inconsistent with the identically worded section 5 of the Constitution of Saint Vincent, as set forth in the Saint Vincent Constitution Order 1979 (SI 1979 No 916) (“the Saint Vincent Order”). The Court of Appeal accordingly made orders quashing the sentences of death imposed on Hughes and Spence and remitting to the High Courts of Saint Lucia and Saint Vincent respectively to determine the appropriate sentence in each case.

7. Some months later, on 16 July 2001, the Board allowed Spence’s appeal against conviction on the ground that one of the jurors had been wrongly discharged [2001] UKPC 35. The Board accordingly quashed his conviction and remitted the case to the Court of Appeal to consider whether there should be an order for a (second) retrial. The Court of Appeal has yet to make a decision on that matter. The position therefore is that, at present, Spence does not stand convicted of any crime and is not under sentence of death. But, in the event of a retrial being ordered and of his being convicted of murder for a third time, he would again, inevitably, be sentenced to death if the mandatory death penalty were to be regarded as being consistent with the Constitution of Saint Vincent.

8. On 24 July 2001, the Board granted the Crown special leave to appeal against the decision of the Court of Appeal quashing the death sentence imposed on Hughes. At the hearing of the appeal Sir Godfray Le Quesne QC appeared for the Crown. At this stage his argument may be sketched in this way. First, Sir Godfray submitted that paragraph 10 of schedule 2 to the Saint Lucia Order (“paragraph 10”) prevented any court from holding that the mandatory death penalty was inconsistent with section 5 of the Constitution since the mandatory death penalty for murder had been lawful in Saint Lucia immediately before 1 March 1967. Paragraph 10 is in these terms:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 of the Constitution to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Saint Lucia immediately

before 1 March 1967 (being the date on which Saint Lucia became an associated state).”

A similar argument would apply to the case of Spence by virtue of paragraph 10 of schedule 2 to the Saint Vincent Order which made the same provision in relation to laws in effect before 27 October 1969 when Saint Vincent became an associated state. Secondly, even if he were wrong on the application of paragraph 10, Sir Godfray contended that the imposition of the mandatory death penalty could not be regarded as inhuman or degrading punishment or treatment in terms of section 5 of the Constitution. In particular he argued that the Constitution contained a specific mechanism for the individuation of the sentence in cases of murder. Even though the judge had to impose a death sentence, under section 76 the Minister was required to obtain a report from the judge and to place it before the Committee on the Prerogative of Mercy who had to consider it along with any other relevant material. Their advice to the Governor General on the exercise of the royal prerogative of mercy was binding (section 74(2)). As the Board had observed in *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50, 77F, “the act of clemency [was] to be seen as part of the whole constitutional process of conviction, sentence and the carrying out of the sentence”. By this composite process, involving both the judge and the Committee, the appropriate sentence was determined. The validity of that approach had been recognised by the Court of Appeal of Belize in *Lauriano v Attorney-General* [1995] 3 Bz LR 77.

9. In reply, Mr Fitzgerald QC rejected these arguments. He submitted, first, that section 178 of the Criminal Code of Saint Lucia did not provide that the death penalty was mandatory in the case of murder. Even if that submission were wrong, however, the Court of Appeal had been right to hold that the mandatory death penalty was inconsistent with section 5 of the Constitution. They had also been right to hold that they were not prevented from reaching that conclusion by paragraph 10. He further submitted that the mandatory death penalty was inconsistent with the respondent’s right to life under sections 1 and 2 of the Constitution. That contention was unaffected by paragraph 10 which would at most apply only to a challenge based on section 5. The argument based on sections 1 and 2 had been accepted by the Chief Justice in the Court of Appeal but Saunders JA (Ag) had found it unnecessary to deal with it.

10. In so far as there might be any live issue in the case of Spence, Mr Guthrie QC adopted Mr Fitzgerald’s submissions.

Before the hearing the attorneys-general of a number of countries had been given leave to intervene. In the event no separate submissions were made on their behalf. Although Mr Guthrie assisted the Board by presenting certain material in relation to those states, it is not in fact necessary to examine it. As can be seen, the focus of the arguments before the Board was on the present appeal and their Lordships will address the issues in that context too.

11. Immediately after hearing this Crown appeal, the Board went on to hear the appeal by Berthill Fox against the death sentence imposed on him by the High Court of Saint Christopher and Nevis. The issues in that appeal are similar to those in this case and their Lordships' conclusion on that appeal is similar to their conclusion in the present case. They have, however, prepared a brief separate opinion containing their advice in the appeal by Fox: *Fox v The Queen* [2002] UKPC 13.

12. After the case of *Fox* the Board heard the appeal by Patrick Reyes against the death sentence imposed upon him by the High Court of Belize. Mr Fitzgerald appeared for that appellant also and, again, his contention was that the mandatory death sentence was inhuman or degrading punishment or treatment, this time in terms of section 7 of the Constitution of Belize 1981. He also submitted that the mandatory death sentence was inconsistent with the appellant's right to life under sections 3 and 4 of that Constitution. In these respects, the issues in the case of *Reyes* were similar to the issues in the present case. There was one significant difference, however. The Constitution of Belize contains no exact equivalent of paragraph 10 in schedule 2 to both the Saint Lucia and the Saint Vincent Orders. The nearest equivalent – though rather different – provision is to be found in section 21 of the Constitution but it ceased to apply in 1986, five years after Belize achieved independence. In the appeal by Reyes the issue of whether the mandatory death penalty constitutes inhuman or degrading punishment or treatment is therefore raised in an even starker form, shorn of any complications from paragraph 10. In these circumstances the Board has found it more convenient to deal with that issue in the advice which it is tendering to Her Majesty in that appeal: *Reyes v The Queen* [2002] UKPC 11.

13. In the judgment prepared in *Reyes v The Queen* their Lordships have concluded that the mandatory death penalty is indeed to be regarded as inhuman or degrading punishment or treatment in terms of section 7 of the Belize Constitution. In

particular, in paragraphs 44 - 47, they have rejected the argument that the Belize Advisory Council, which advises the Governor-General on the exercise of the prerogative of mercy, could be regarded as providing the necessary individuation of the death sentence. While the act of clemency is, indeed, to be seen as part of the whole constitutional process of conviction, sentence and the carrying out of the sentence, it is an executive act and cannot be a substitute for the judicial determination of the appropriate sentence. In the circumstances their Lordships have found it unnecessary to express any views on the argument based on the right to life contained in sections 3 and 4 of the Constitution of Belize.

14. In *Reyes*, in relation to section 7 of the Constitution of Belize, Mr Fitzgerald in effect adopted the arguments which he had presented in this appeal in relation to section 5 of the Constitution of Saint Lucia. Sir Godfray had, of course, presented his submissions for the Crown and had replied to Mr Fitzgerald's arguments in this appeal also. So the decision in *Reyes* proceeds on the basis of arguments put forward in this appeal. Neither in this appeal nor in *Reyes* were their Lordships told of any legal or social differences between Belize and Saint Lucia which would cause the Board to adopt a different approach to these matters in this case.

15. Indeed, arguably, the position in Saint Lucia is a fortiori the position in Belize since the provisions relating to the composition and procedure of the Belize Advisory Council are designed to give it a greater degree of independence than those relating to the Committee on the Prerogative of Mercy in Saint Lucia. Their Lordships have in mind, for example, the requirement that one of the members of the Advisory Council should hold or have held judicial office (section 54(1) of the Constitution of Belize) and the requirement of a resolution of two thirds of the House of Representatives before a member can be removed (section 54(6)(d)). By contrast, under section 75(1) of the Constitution of Saint Lucia there need be no judicial member on the Committee and in terms of section 75(2) a member can be removed by a written direction of the Governor-General. In all the circumstances consideration of a sentence by the Committee is no substitute for the determination of sentence by "an independent and impartial court established by law" to which any convicted person has a right under section 8(1) of the Constitution.

16. It follows that, unless prevented by paragraph 10 from holding that the mandatory death penalty is inconsistent with

section 5 of the Constitution, the Board will indeed so hold, in conformity with their reasoning in *Reyes v The Queen*.

17. Before turning to consider the interpretation and effect of paragraph 10, on which the Crown rely, the Board must deal with the contention - advanced somewhat faintly by Mr Fitzgerald - that if properly interpreted section 178 of the Criminal Code does not provide for the death penalty to be imposed on all persons who are convicted of murder. In other words the death penalty is said not to be mandatory. Their Lordships note that, due to the different wording of section 159 of the Criminal Code of Saint Vincent, no similar argument would be open in the case of Spence.

18. The history of the matter is instructive. Clause 2 of the Ordinance for Consolidating and Amending the Law in Criminal Cases of 5 April 1851 provided that any person who commits any of a number of crimes specified in the clause “shall suffer death as a felon”. By an amending Ordinance of 28 December 1869 clause 2 of the 1851 ordinance was repealed, except in so far as it applied to murder. In 1888 the 1851 ordinance was repealed and a criminal code was enacted in its place. Section 252 of the code provided

“Every person who commits murder shall be liable to suffer death.”

The 1888 code was in its turn replaced by a revised code in 1920. In that revision what is now section 178 of the Criminal Code was to be found in precisely its present form.

19. The point to note in this brief historical survey is that the phrase “liable to suffer death” first appeared in section 252 of the 1888 code, which replaced clause 2 of the 1851 ordinance. Counsel did not suggest that the meaning of the phrase would have changed between the 1888 code and the present Criminal Code. It follows that, if it were truly the case that section 178 was to be interpreted as authorising, but not requiring, the imposition of the death penalty for murder, that would also have been the effect of section 252 of the 1888 code. In other words, section 252 of the 1888 code would have replaced the mandatory death penalty in the 1851 ordinance with a discretionary death penalty. Bearing in mind that the death sentence was mandatory for all murders in the United Kingdom until 1957, their Lordships regard it as unthinkable that it would ever have been the intention in 1888 to make the death penalty discretionary in what was then

the colony of Saint Lucia. Similarly, as the Board observed in *Jones v Attorney-General of the Commonwealth of The Bahamas* [1995] 1 WLR 891, 895A, if any such radical change in the law had been intended, it is inconceivable that it would have been enacted in anything other than clear and express words. For these reasons their Lordships are satisfied that section 252 of the 1888 code, like the clause which it replaced, would have been intended to make the imposition of the death sentence mandatory in the case of murder. On this basis the same conclusion would follow for section 178 of the current Criminal Code.

20. The wording of section 178 is consistent with that conclusion. Mr Fitzgerald contended that a person may be “liable to suffer death” even though he will not necessarily suffer death: it is sufficient that he is subject to the possibility of suffering death. There is, of course, no doubt that the phrase “liable to suffer death” would bear that meaning in certain contexts. But the entry for “liable” in the Oxford English Dictionary shows that the phrase may also mean that the person is “exposed or subject to” suffering death. Therefore, as the Board held in *Jones v Attorney-General of the Commonwealth of The Bahamas* [1995] 1 WLR 891, 894H, the word “liable” is ambiguous. Its meaning in section 178 must be determined by considering the terms of the Criminal Code as a whole. Consideration of those other provisions shows that in section 178 the phrase has the second meaning of “exposed or subject to”. As Mr Fitzgerald himself pointed out, the phrase “is liable indictably to” is found in many other sections of the Code. For example, under section 169(1) whoever commits manslaughter by negligence “is liable indictably to imprisonment for five years”, while anyone who commits manslaughter in any other case “is liable indictably to imprisonment for life” (section 169(2)). Similarly, under section 183(1) anyone who kidnaps any person “is liable indictably to imprisonment for ten years”. In all these other cases, however, by virtue of section 1284 the court may impose a lesser punishment. Section 1284 therefore shows that, when it uses the phrase “is liable indictably to”, the legislature is prescribing the penalty for the offence in question. If the sections containing that phrase stood alone, the only sentence that a court could impose would be the sentence to which the offender would be liable in terms of the particular section. The power of the court to impose a different, lesser, punishment is derived from section 1284 which was also to be found, in identical terms, in the 1920 version of the criminal code. To say the least, the drafting of the section leaves much to be desired. Their Lordships have no doubt, however, that, by inserting the phrase

“other than death”, the legislature intended to exclude the power to impose a lesser sentence in the case of murder where the punishment of death was prescribed by section 178. In his judgment the Chief Justice confirms that section 1284 has always been interpreted in this way. In these circumstances the Board is satisfied that the exclusion of the sentence of death from the scope of section 1284 has the effect that anyone convicted of murder must be sentenced to death in terms of section 178. The first argument for the respondent must therefore be rejected.

21. The critical dispute between the parties revolves, accordingly, around paragraph 10.

22. For the Crown Sir Godfray submitted that the Board should interpret paragraph 10 along ordinary lines. When this was done, it could be seen that the imposition of the death sentence in the present case fell within the terms of the paragraph. The requirement that sentence of death should be passed on anyone convicted of murder was, he said, “contained in” section 178 of the Criminal Code, while the mode of execution of the sentence, by hanging, was “contained in” section 1291. Passing sentence of death by hanging on anyone convicted of murder was therefore something “done under the authority of” the Criminal Code. So the imposition of the death sentence was not to be “held to be inconsistent with or in contravention of section 5 of the Constitution to the extent that” the Criminal Code authorised “the infliction of any description of punishment” that was lawful in Saint Lucia immediately before 1 March 1967. As the respondent admitted, the punishment of death by hanging was lawful in Saint Lucia immediately before that date. Therefore, the Board had simply to ask itself to what extent the Criminal Code authorised the infliction of the punishment of death by hanging. The answer was to be found in the terms of sections 178 and 1291 which made that punishment mandatory wherever someone was convicted of murder. The effect of paragraph 10 was, accordingly, that neither the mandatory terms of sections 178 and 1291 of the Criminal Code, nor the passing of the death sentence under the authority of those sections could be held to be inconsistent with, or in contravention of, section 5 of the Constitution. Sir Godfray argued that support for his submission could be derived from certain observations of Lord Griffiths, giving the judgment of the Board in *Pratt v Attorney-General for Jamaica* [1994] 2 AC 1, 28G-29B. Paragraph 10 constituted a complete bar to the respondent relying on that section of the Constitution.

23. On behalf of the respondent Mr Fitzgerald submitted that, on the contrary, the purpose of paragraph 10 was extremely limited. The legislature had intended to do nothing more than to eliminate the possibility of any convicted person arguing that, in itself, the punishment imposed for a particular offence was inhuman or degrading if the punishment was of a description which it had been lawful to inflict on someone convicted of the same offence immediately before 1 March 1967. Counsel highlighted differences in the approach taken by the Board to the interpretation and application of similar provisions in other constitutions and argued that the cases showed that the Board's thinking about such provisions had developed over the last thirty years or so. Like Sir Godfray, Mr Fitzgerald founded particularly on the decision in *Pratt v Attorney-General for Jamaica*. But he argued that, just as it was necessary to distinguish between the judicial act of imposing a sentence and the executive act of carrying it out, so also it was necessary to distinguish the sentence of death itself from the arbitrariness involved in imposing that sentence under legislation which made it mandatory. While the sentence of death by hanging was itself protected by paragraph 10 and could therefore not be challenged as inhuman or degrading punishment, the immunity did not extend any further. In particular it did not extend so as to prevent a court from holding that it was disproportionate, and hence inhuman or degrading punishment or treatment, for a judge to impose a sentence of death on someone convicted of a particular crime without having any possibility of considering whether the circumstances of the individual or of the crime merited such a sentence.

24. While appreciating and drawing in various ways on the arguments advanced by counsel on both sides, their Lordships have not been persuaded to adopt exactly the interpretation or application of paragraph 10 advanced by either side. Moreover, while they are indeed conscious that in earlier decisions the Board has had to interpret and apply provisions which were similar to paragraph 10, this is the first occasion on which it has been necessary to examine the application of such a provision in relation to a challenge to the mandatory nature of a sentence. Previous decisions can therefore provide only limited assistance. In these circumstances certain other provisions of the Constitution must be considered to see how far they cast light on the interpretation and application of paragraph 10 in this connexion.

25. In embarking on what must be a long and arid examination of the wording of paragraph 10, their Lordships, as always, have

in mind the guidance of Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, 328-9 as to the proper approach to the interpretation of constitutional provisions. In particular they recall that respect must be paid to the language which has been used ([1980] AC 319, 329E). In interpreting that language the warning of Kentridge AJ (Ag) in *State v Zuma* 1995 (2) SA 642, 652 para 17 is as salutary as it is succinct:

“it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.”

Their Lordships approach the text of paragraph 10 in the spirit of these observations.

26. Under the Constitution the people of Saint Lucia enjoy certain fundamental rights and freedoms. The supremacy of those constitutional rights and freedoms is secured by section 120 of the Constitution:

“This Constitution is the supreme law of Saint Lucia and, subject to the provisions of section 41 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

The Constitution controls not only the statute law but any law in force in Saint Lucia, including “any unwritten rule of law” (section 124). Therefore, unless paragraph 10 applies, any law, whether written or unwritten, which is inconsistent with the Constitution is to that extent void.

27. As their Lordships go on to explain in more detail, paragraph 10 serves two purposes and is an amalgam of two elements. One purpose - and indeed, the relevant wording might suggest, the primary one - is to introduce an exception to the supremacy of the right, under sections 5 and 120, that the law should not provide for anyone to be subjected to inhuman or degrading “punishment”. Paragraph 10 creates this exception by preventing a court from holding that a provision authorising certain kinds of punishment is inconsistent with section 5 of the Constitution and, hence, void by reason of section 120. It is worth noting that there is no exception for inhuman “treatment”.

28. Since this is only one of the purposes of paragraph 10, only some of the wording of the paragraph is designed to achieve it. The relevant wording is easily identified. This first element in the paragraph is found in the phrase “Nothing contained in ... *any*

law shall be held to be inconsistent with ... section 5 of the Constitution". The words in italics correspond to the words "any other law" and "inconsistent with" in section 120. In effect section 120 provides a lexicon for the interpretation of this aspect of paragraph 10. The extent of the immunity of any law from challenge is, of course, limited. Before considering the limit, their Lordships must identify the other element in paragraph 10.

29. The Constitution does not simply control what the law, whether written or unwritten, may provide; it exists also to place limits on what the state may do. The mechanism for achieving this begins in section 1 which recites that every person in Saint Lucia is entitled to certain fundamental rights and freedoms. Section 1 also enacts that the remaining provisions of Chapter I of the Constitution are to have effect for affording protection to those rights and freedoms, subject to the limitations contained in the provisions. The rights and freedoms, together with the relevant limitations, are then set out in sections 2 to 15 – including, of course, section 5. So far as relevant for present purposes, section 16(1) then provides:

“If any person alleges that any of the provisions of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him ..., then, without prejudice to any other action with respect to the same matter which is lawfully available, that person ... may apply to the High Court for redress.”

Section 16(2) gives the High Court original jurisdiction in certain matters and ends with a proviso allowing the High Court to decline jurisdiction “if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law”.

30. Under the Constitution, therefore, a person has certain fundamental rights and freedoms which are protected by sections 2 to 15. If any of those rights is contravened in relation to him, he can apply to the High Court for redress under section 16(1) or take any other available action to remedy the contravention. Under section 5 people have a right not to be subjected to inhuman or degrading punishment or treatment at the hands of the state. So far as “treatment” of that kind is concerned, again the right applies in all situations. But the purpose of the second element of paragraph 10 is to introduce an exception to the right not to be subjected to inhuman or degrading “punishment”, a right which is normally given effect by sections 5 and 16. It does this by preventing a court from holding that anything done under

the authority of a law, which is itself protected from constitutional challenge under paragraph 10, is in contravention of section 5. As a result, neither the High Court nor any other court can give redress under section 16(1) for that punishment.

31. This purpose is achieved by other words in paragraph 10: “*Nothing ... done under the authority of any law shall be held to be ... in contravention of section 5 of the Constitution ...*”. As the words in italics indicate, the clause has been crafted by reference to the terms of section 16. Subsection (1) refers to a person who alleges that “any of the provisions of sections 2 to 15 ... has been, is being or is likely to be contravened” in respect of him. Similarly, the proviso in subsection (2) refers to a means of redress for the “contravention” alleged. Again, section 16 can be seen to explain some of the language of paragraph 10 and, in that respect, to provide a lexicon for its interpretation.

32. The combined effect of the two elements of paragraph 10 explored so far can be stated in this way. The first element is designed to prevent a court from holding that a provision of the law is inconsistent with section 5 of the Constitution and is therefore void by virtue of section 120. The second element is designed to prevent anyone from seeking to circumvent that immunity of the law from challenge by claiming redress under section 16 on the basis that some act - although done under the authority of a law which cannot be challenged - is nevertheless inhuman or degrading and is, for that reason, in contravention of section 5. The two elements of the immunity thus afforded to the state are complementary. They are, however, subject to an important limitation.

33. With the limitation built into it, the first element is to be found in these words in paragraph 10:

“Nothing contained in ... any law shall be held to be inconsistent with ... section 5 of the Constitution to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Saint Lucia immediately before 1 March 1967 ...”.

The second element, with its limitation built in, can likewise be set out in this way:

“Nothing ... done under the authority of any law shall be held to be ... in contravention of section 5 of the Constitution to the extent that the law in question authorises the infliction of any description of punishment that was

lawful in Saint Lucia immediately before 1 March 1967
...”.

Section 120 of the Constitution provides the key to the language used to express the limitation in respect of both elements. Under that section any law which is inconsistent with any of the provisions of the Constitution is void, but only “to the extent of the inconsistency”. Paragraph 10 provides, however, that, “to the extent that” the inconsistency of the law in question comprises the authorisation of the infliction of the specified description of punishment, it is not to be held to be inconsistent with section 5. If, of course, the inconsistency extends beyond that, then, to the extent of that further inconsistency, the court can hold that the law is inconsistent with section 5 and so void under section 120. Similarly, “to the extent that” anything done is done in inflicting a punishment which is authorised by the law in question and is of the specified description, it is not to be held to be in contravention of section 5. If, on the other hand, the act in question goes beyond that, then, to the extent of that further contravention of section 5, the court can indeed hold that the act is in contravention of section 5 and grant redress under section 16.

34. In summary, the effect of paragraph 10 is to introduce two exceptions to the protection made available to the people of Saint Lucia by sections 5 and 120 and by sections 5 and 16 of the Constitution. The first exception prevents laws from being challenged for being inconsistent with section 5 but delimits very precisely the extent of the immunity thus conferred. The second exception prevents acts from being challenged for being in contravention of section 5. It follows, exactly, the contours of the immunity given to the law under the authority of which the act is done. In each case the exception operates only to the extent that the law in question “authorises” the infliction of a description of punishment that was lawful in Saint Lucia immediately before 1 March 1967.

35. Since paragraph 10 introduces these exceptions to the rights and protection which people would otherwise have under the Constitution, it must be construed like any other derogation from constitutional guarantees. In *State v Petrus* [1985] LRC (Const) 699, 720D-F in the Court of Appeal of Botswana, Aguda JA referred to *Corey v Knight* (1957) 150 Cal App 2d 671 and observed that

“it is another well known principle of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad, constructions.”

In case of doubt paragraph 10 should therefore be given a strict and narrow, rather than a broad, construction.

36. Their Lordships note that paragraph 10 conforms to a model which is used to express qualifications to the fundamental rights and freedoms set out in various sections in Chapter I. An exact equivalent, with the qualification “to the extent that the law in question authorises”, is found in section 6(5) as a qualification to the right to remit money received as compensation for the compulsory purchase of property to any country outside Saint Lucia. Another example is found in section 8(12)(c). Several provisions contain the rather different qualification “to the extent that the law in question makes provision” - for instance, sections 6(6)(a), 7(2) and 11(2). Yet another version in section 8(12)(b) has the qualification “to the extent that the law in question imposes”. The fact that the legislator has adopted these different formulae confirms that it is proper to attach significance to the precise words used in paragraph 10.

37. With these considerations in mind, their Lordships turn to see how paragraph 10 falls to be applied in this case. Neither Sir Godfray nor Mr Fitzgerald chose to distinguish sharply between the constitutionality of section 178 of the Criminal Code and the constitutionality of any sentence imposed under it. The two issues are so intimately bound up with one another that, as a practical matter, this was undoubtedly the correct approach. Nevertheless their Lordships think it preferable to state the two issues separately and to consider how paragraph 10 applies to them.

38. At its most basic Mr Fitzgerald’s submission is that section 178 of the Criminal Code, in so far as it provides for a mandatory death penalty in all cases of murder, is inconsistent with section 5 of the Constitution and so is void by virtue of section 120. The first issue relating to paragraph 10 is, accordingly, whether it prevents a court from holding that in this respect section 178 is inconsistent with section 5 of the Constitution and so void by virtue of section 120.

39. The second part of Mr Fitzgerald’s submission follows from his basic submission that section 178 of the Criminal Code is void: if that section is void, the mandatory death sentence

imposed on the respondent under the authority of that section must likewise be in contravention of section 5 of the Constitution and so unlawful. The remedy which he seeks is the quashing of the sentence. The second issue in relation to paragraph 10 is whether it prevents a court from holding, in this way, that the death sentence imposed under the authority of section 178 of the Criminal Code is in contravention of section 5 of the Constitution. As their Lordships have already noted, the scope of the second exception in paragraph 10 follows, exactly, the contours of the first exception relating to inconsistency of the law in question with section 5. For that reason, in this case, the answer to the second issue will mirror the answer to the first. So, if paragraph 10 allows the court to hold that section 178 is inconsistent with section 5 of the Constitution, it will also allow the court to hold that the sentence imposed under section 178 was in contravention of section 5, that it was therefore unlawful and that it must be quashed. Similarly, if paragraph 10 prevents the court from holding that section 178 of the Criminal Code is inconsistent with section 5 of the Constitution, the court will also be prevented from entertaining any challenge to the sentence itself by reference to section 5.

40. In terms of paragraph 10 nothing contained in section 178 of the Criminal Code can be held to be inconsistent with section 5 of the Constitution “to the extent that” section 178 “authorises the infliction of any description of punishment that was lawful in Saint Lucia immediately before 1 March 1967”. Sir Godfray was unquestionably right when he argued that section 178, when read with section 1291, authorises the infliction of the death sentence by hanging and that this description of punishment was lawful in Saint Lucia immediately before 1 March 1967. It follows that, in so far as section 178 authorises the infliction of that form of punishment, it cannot be held to be inconsistent with section 5 of the Constitution.

41. Mr Fitzgerald did not really dispute this first step in the argument. And that is entirely understandable since he accepted – as he had to – that section 2(1) of the Constitution permits the execution of a death sentence on someone duly convicted and sentenced for a criminal offence. A law providing for power to impose the death penalty in such circumstances cannot therefore be regarded as inconsistent with section 5 of the Constitution. Mr Fitzgerald’s argument was, rather, that, while a law providing for the death sentence per se cannot be regarded as inconsistent with section 5 of the Constitution, it can be regarded as inconsistent with section 5 to the extent that the mandatory nature of the

punishment makes it so disproportionate as to amount to inhuman punishment or treatment. It is inhuman to require any person to be sentenced to death without the opportunity for mitigation or for considering the appropriateness of that penalty in the particular case.

42. Mr Fitzgerald sought to derive support for his argument from the decision of the Board in *Pratt v Attorney General for Jamaica* where their Lordships declined to follow their earlier decision in *Riley v Attorney General of Jamaica* [1983] 1 AC 719. In *Pratt* the appellants had been sentenced to death in January 1979 and the warrant of execution had issued on three occasions between February 1987 and February 1991. The Board held that to carry out the executions after a delay of 14 years would constitute inhuman punishment contrary to section 17(1) of the Constitution of Jamaica. The death sentences were therefore quashed and sentences of life imprisonment were substituted.

43. Section 17 of the Constitution of Jamaica is in these terms:

“(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.”

The similarity between section 17(2) and paragraph 10 is obvious. In resisting the appeal in *Pratt* the Crown argued that their Lordships could not hold that the executions would be contrary to section 17(1) because of the exception in section 17(2). A similar argument had been accepted in *Riley*. The Board held, however, that the purpose of section 17(2) was to preserve all descriptions of punishment that were lawful immediately before independence and to prevent them from being attacked under section 17(1), but that section 17(2) did not address the question of delay in carrying out the punishment. Their conclusion was put in this way ([1994] 2 AC 1, 29E–F):

“Their Lordships will therefore depart from *Riley v Attorney-General of Jamaica* and hold that section 17(2) is confined to authorising descriptions of punishment for which the court may pass sentence and does not prevent the appellant from arguing that the circumstances in which the

executive intend to carry out a sentence are in breach of section 17(1).”

Mr Fitzgerald submitted that, similarly, in the present case the Board should hold that paragraph 10 was confined to authorising descriptions of punishment for which the court might pass sentence but that it did not prevent the respondent from arguing that the circumstances in which the judge imposed the sentence, without any discretion or any possibility of mitigation, were in breach of section 5.

44. Their Lordships accept the distinction which the Board drew in *Pratt* between authorising a description of punishment and authorising the carrying out of that punishment in circumstances of extreme delay. Here, however, there can be no doubt that section 178 “authorises” the infliction of the death penalty on all murderers, whatever their individual characteristics, whatever their type, whatever the circumstances of their crime may have been. Immediately before 1 March 1967 the law was the same. That being so, paragraph 10 does indeed prevent the court from holding that section 178 is inconsistent with section 5 to the extent that it “authorises” the infliction of the death penalty on all these different kinds of people and in all these different circumstances. For these reasons their Lordships cannot accept the argument advanced by Mr Fitzgerald on the basis of *Pratt*.

45. On the other hand, their Lordships are equally unable to accept the second, essential, step in the argument advanced by Sir Godfray. He says that, in applying paragraph 10, it is necessary not only to consider whether section 178 authorises the infliction of the death penalty but also to what extent it does so. The answer, he says, is that section 178 authorises the *mandatory* infliction of the death sentence. The conclusion should therefore be that paragraph 10 prevents any court from holding that the mandatory infliction of the death sentence is inconsistent with section 5 of the Constitution.

46. Although, like Mr Fitzgerald, Sir Godfray relied on observations of Lord Griffiths in *Pratt*, their Lordships are satisfied that, when viewed in its context, the passage in question does not support the view that the mandatory nature of the death sentence for murder is immune to challenge by virtue of paragraph 10. To explain this, their Lordships quote the paragraph concerned along with the preceding paragraph referring to the view of the minority of the Board in *Riley v Attorney-*

General of Jamaica who had interpreted section 17(2) in a more limited way. Lord Griffiths said ([1994] 2 AC 1, 28G–29B):

“The minority, who would have allowed the appeal, adopted a narrower construction of section 17(2) which limited the scope of the subsection to authorising the passing of a judicial sentence of a description of punishment lawful in Jamaica before independence and they held it was not concerned with the act of the executive in carrying out the punishment.

Their Lordships are satisfied that the construction of section 17(2) adopted by the minority is to be preferred. The purpose of section 17(2) is to preserve all descriptions of punishment lawful immediately before independence and to prevent them from being attacked under section 17(1) as inhuman or degrading forms of punishment or treatment. Thus, as hanging was the description of punishment for murder provided by Jamaican law immediately before independence, the death sentence for murder cannot be held to be an inhuman description of punishment for murder.

Section 17(2) does not address the question of delay and is not dealing with the problem that arises from delay in carrying out the sentence.”

Sir Godfray cited the second paragraph. It has to be remembered, however, that in *Pratt* the Board was not concerned in any way with the fact that the sentence of death was mandatory. As can be seen from the context, in the second paragraph the Board was simply adopting the distinction between the death sentence itself as a description of punishment for murder, on the one hand, and the delay in carrying out that sentence, on the other. For the purposes of that argument the mandatory or discretionary nature of the death sentence would have been entirely irrelevant: whether the death sentence had been imposed by virtue of a provision making it mandatory or by virtue of a provision conferring a discretion on the court, the Board would still have drawn a distinction between that description of punishment and the delay in carrying out the sentence. In this passage the Board was simply drawing the distinction, not making a point about the nature of the death sentence. For this reason their Lordships are satisfied that the passage cannot properly be regarded as authority for the proposition that the mandatory nature of the death sentence is immune from challenge by virtue of paragraph 10.

47. Their Lordships have already held that section 178 “authorises” the infliction of the death penalty on all murderers. If that were all that the section did, then by reason of paragraph 10 it could not be held to be, to any extent, inconsistent with section 5 of the Constitution. For the measure of the exception in paragraph 10 is simply the extent to which the law “authorises” the infliction of the specified type of punishment. In fact, however, section 178 goes much further than authorising: it does not merely authorise, it actually *requires* the infliction of the death penalty on anyone convicted of murder. The second step in Sir Godfray’s argument depends on classifying this requirement that the punishment be inflicted as simply one particular species of authorisation. That step is unsound, however. While every law which requires that an act be performed authorises that act, no law which merely authorises an act requires that it be performed. Therefore a law, like section 178, which requires that an act be performed contains a crucial additional element that goes beyond mere authorisation. Indeed at the heart of the appeals in all these cases lies the very fact that there is a world of difference between a law that requires a judge to impose the death penalty in all cases of murder and a law that merely authorises him to do so. More particularly, it is because the law requires, rather than merely authorises, the judge to impose the death sentence that there is no room for mitigation and no room for the consideration of the individual circumstances of the defendant or of the murder. These are, of course, the very matters upon which Mr Fitzgerald bases the constitutional challenge by reference to section 5.

48. Their Lordships therefore conclude that, to the extent that section 178 is to be regarded as authorising the infliction of the death penalty in all cases of murder, it cannot be held to be inconsistent with section 5 of the Constitution. But, to the extent that it goes further and actually requires the infliction of the death penalty in all cases of murder, the exception in paragraph 10 does not apply. It follows that, to this extent, the respondent enjoys his rights under sections 5 and 120. So, to this extent he can legitimately seek to persuade a court that section 178 of the Criminal Code is inconsistent with section 5 of the Constitution and so is void in terms of section 120.

49. Similarly, and to the same extent, the respondent could seek redress from the High Court under section 16(1) of the Constitution on the basis that the execution of a mandatory death sentence would be in contravention of section 5. The right to

seek redress from the High Court is, however, without prejudice to any other action that is lawfully available with respect to this matter. The Court of Appeal disposed of the appeal by quashing the sentence of death and remitting to the court below to consider the appropriate sentence. Before the Board the Crown did not question the availability of such a remedy in an appropriate case. As their Lordships have already noted, the sentence of death was passed by the judge under the mandatory requirement in section 178. If section 178 is held to be void in that respect, then any death sentence pronounced under it must be unlawful. An order quashing the sentence would be the most effective remedy in these circumstances. Therefore, to the extent that the judge was required to impose sentence of death under section 178, the respondent can legitimately seek to have the sentence quashed.

50. As already indicated, in these circumstances their Lordships will follow their decision in the case of *Reyes v The Queen* and hold that section 178 of the Criminal Code is inconsistent with section 5 of the Constitution to the extent that it requires that the death penalty be imposed on anyone convicted of murder. To that extent section 178 is void by virtue of section 120 of the Constitution. It follows that the Court of Appeal were correct to quash the death sentence passed on the respondent under the requirement in section 178. As in *Reyes*, it is unnecessary for their Lordships to deal with the respondent's argument based on the right to life in sections 1 and 2 of the Constitution.

51. As their Lordships have explained, the mandatory nature of the death penalty under section 178 derives from the fact that the death penalty is excluded from section 1284 which gives the court power to impose a lesser punishment than that prescribed in the section dealing with the particular offence. Paragraph 2(1) of schedule 2 to the Saint Lucia Order provides:

“The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.”

In exercise of this power, their Lordships construe section 1284 as modified so as not to include the words “other than death”. The effect is to make section 1284 apply to section 178, just as it applies to other sections that prescribe the punishment for particular offences. With section 1284 applying in this way, section 178 is no longer inconsistent with section 5 of the Constitution and is to be regarded as valid. It will therefore be

open to the court under section 178, in this case as in any other, either to impose the death sentence or to impose a lesser punishment, depending on the view which it takes, having regard to all the relevant circumstances.

52. The Chief Justice, with whom both the other judges concurred on this point, held that the decision as to whether the death penalty should be imposed should be a jury decision. Their Lordships are respectfully unable to adopt that view. In Saint Lucia the responsibility for choosing the appropriate sentence, except where the death penalty was mandatory, has always rested with the judges. They have the appropriate training and experience. They can set out the reasons for choosing any particular sentence. If they impose an excessive sentence, they can be corrected by the Court of Appeal. In all cases these advantages are valuable. They must be that much more precious when the choice is between life and death. It follows that the decision as to the appropriate penalty to impose in the case of murder should be taken by the judge after hearing submissions and, where appropriate, evidence on the matter. In reaching and articulating such decisions, the judges will enunciate the relevant factors to be considered and the weight to be given to them, having regard to the situation in Saint Lucia. The burden thus laid on the shoulders of the judiciary is undoubtedly heavy but it is one that has been carried by judges in other systems. Their Lordships are confident that the judges of Saint Lucia will discharge this new responsibility with all due care and skill.

53. For these reasons their Lordships will humbly advise Her Majesty that the appeal by the Crown should be dismissed but that the order of the Eastern Caribbean Court of Appeal should be modified so as to require the judge in the High Court of Saint Lucia to determine the appropriate sentence.