Trinity Term
[2015] UKPC 33
Privy Council Appeal No 0088 of 2012

JUDGMENT

Hunte and Khan (Appellants) *v* The State (Respondent) (Trinidad and Tobago)

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

before

Lord Neuberger
Lady Hale
Lord Mance
Lord Clarke
Lord Sumption
Lord Reed
Lord Toulson

JUDGMENT GIVEN ON

16 July 2015

Heard on 4 and 5 February 2015

Appellant (Hunte)
John Perry QC
Kate O'Raghallaigh
(Instructed by Simons Muirhead & Burton)

Respondent
Thomas Roe QC
Alexander Halban
(Instructed by Charles Russell Speechlys)

Appellant (Khan)
Julian B Knowles QC
Richard Thomas
Amanda Clift-Matthews
(Instructed by Simons Muirhead & Burton)

LORD TOULSON: (with whom Lord Mance, Lord Clarke, Lord Reed and Lord Sumption agree)

1. On 31 March 2008 at the Port of Spain Assizes, after a four week trial before Charles J and a jury, Timothy Hunte and Shazad Khan were convicted of the murder of Ramkhelawan Ray Charran and sentenced to the mandatory death penalty. Their appeals to the Court of Appeal of Trinidad and Tobago were dismissed. On 29 October 2012 they applied for permission to appeal to the Board. In the case of Khan the Board granted permission to appeal on a single ground. In the case of Hunte, the Board adjourned the application for permission to appeal on three grounds for an oral hearing, with the appeal to follow immediately if permission were granted. The Board has heard full argument on those grounds and it is satisfied that they raised matters which required full consideration by it. Permission to appeal on those grounds is therefore formally given.

2. If the appeals against conviction are unsuccessful, the appellants seek leave to appeal against sentence on the grounds that

a) it would now be unconstitutional for the sentences of death to be carried out (applying the principles established by the Board in *Pratt and Morgan v Attorney General of Jamaica* [1994] 2 AC 1), and

b) the Board being seized of their appeals against conviction has jurisdiction to order commutation of the sentences in accordance with its decision in *Ramdeen v The State of Trinidad and Tobago* [2014] UKPC 7; [2015] AC 562.

Facts

3. The deceased was shot and killed on 21 August 2003 at his home on Mon Plaisir Road, Charran Drive, Cunupia. He was sitting in a back room counting money. The prosecution's case was that Hunte was the killer and Khan assisted him in the commission of the crime by driving him to the scene, waiting outside for him in the car and driving him away immediately afterwards.

4. The murder was witnessed by a domestic employee, Nadine Maraj ("Nadine"), who was working in the kitchen when the killer entered the house. She later identified Hunte as the killer at an identification parade. Identification evidence was given by two other witnesses who were in the vicinity at the time. One was an employee of the

deceased named Ivan Ahibal ("Ahibal"). The other was the deceased's brother Toolsie Sharan ("Toolsie"). Ahibal identified both appellants at identification parades, Khan as the driver of the car and Hunte as the front seat passenger. Toolsie identified Hunte at an identification parade. Ahibal and Toolsie both described seeing Hunte come from the direction of the house after they heard several loud explosions. They said that he pointed a gun at them. They retreated and Hunte then got into the car, a white Nissan B15, which was driven away. Toolsie wrote down the car's registration number.

5. An hour or so later the car was found by a police officer parked about one mile from where the shooting had taken place. It was examined by forensic science experts who found a fingerprint on the rear-view mirror matching those of Hunte.

6. On 29 October 2003 Khan was arrested and interviewed in relation to the murder. He denied involvement in it and was released. On 17 November 2003 Hunte was arrested and taken to Barataria Police Station, where he was visited by a legal attorney, Joseph Melville ("Melville"). After the attorney had left, Hunte was seen by two police officers, Sergeant Phillip and Officer Charles, who alleged that he made an oral confession to murder. Later that day Hunte signed a confession statement in the presence of those officers and a Justice of the Peace ("JP"), Winston Best.

7. In summary, the Prosecution's case against Hunte was based on the identification evidence of Nadine, Ahibal and Toolsie, the fingerprint in the car and the confession evidence. The case against Khan was based on the identification evidence of Ahibal.

8. At the trial, Hunte's counsel objected to the admission of the confession evidence and the judge held a voir dire. Hunte denied making the oral confession and said that the written confession statement was a story fabricated by the police which he was induced to sign by a combination of physical mistreatment, threats and inducements. It was further submitted that the circumstances surrounding the obtaining of the alleged confession evidence involved serious police misconduct in other respects. On the voir dire evidence was given by a number of police officers, Hunte and Melville. The JP had in the meantime died. The judge ruled that the evidence was admissible. Before the jury, Hunte gave evidence denying that he had been present at the scene. He and Melville also gave evidence regarding events in the police station similar to that which they gave on the voir dire. Khan did not give evidence and his counsel elected not to make any closing speech to the jury.

Grounds of appeal

9. Hunte's grounds of appeal are that for a combination of reasons the judge ought not to have admitted the confession evidence. Khan's ground of appeal is that the judge failed to direct the jury properly on the subject of joint enterprise and secondary liability.

As developed in argument, the essence of Khan's complaint was that on the evidence a properly directed jury could have concluded that Khan was party to a conspiracy to rob rather than a conspiracy to murder, but the judge's directions failed to allow for that possibility.

Hunte

10. On the voir dire the judge received conflicting accounts of the circumstances leading to the disputed confession evidence. Melville said that he arrived at the police station on 17 November 2003 sometime after 3 pm and asked at the charge room desk to see Hunte. The police prevaricated and he was told by an officer named Jacob (or so he believed) that Hunte did not wish to see him. Melville challenged the officer to make a note of the incident in the police station diary, because he intended to make a formal complaint. As a result of his persistence, after a time Melville was taken to see Hunte in a room where several police officers were present. He asked to see Hunte in private, but this request was refused. He was told that the police feared that if Hunte were left with Melville on his own he might escape through a window. Melville suggested that he speak to Hunte in his cell, which could be locked, but the police were not prepared to go along with that idea. They insisted that any discussion between Melville and Hunte must be in the presence of police officers. In those circumstances Melville had a short whispered conversation with Hunte, after which he told the police that Hunte had nothing to say orally or in writing and was not prepared to give a statement. Before leaving the police station Melville told Hunte not to sign anything other than a fingerprint form. He also gave the police his telephone number to call in the event of any further development.

11. The main police witnesses on the voir dire were Sergeant Phillip and Officer Charles. Phillip said that Melville specifically asked to see Hunte in the presence of police officers. He described it as an unusual request. He had made no mention of it in his deposition before the magistrates' court, and he said that he could not find his pocket diary, which he must have mislaid. He asserted that a note was made about it in the police station report diary, which he read at the time and at a later date about which he could not be specific, but the document was not available.

12. Melville's evidence followed that of the police witnesses. Perhaps wisely, counsel for the prosecution did not attempt to put to him the inherently improbable suggestion that it was he who asked to see Hunte in the presence of police officers. The line taken in cross-examination was to elicit Melville's agreement that, within the constraints imposed on him by the police, he was able to inform Hunte of his right not to say anything, or to stand on an identification parade, and able to advise Hunte to exercise those rights.

13. Sometime later Phillip and Charles took Hunte to the Homicide Office at the police station. Although Melville had left his telephone number and asked to be called if there was any further development, he was not informed. According to the police, Hunte was cautioned and immediately stated:

> "Officer, I want to come clean. I was running from the police and Roshan tell me he going to link me up to go abroad and then he tell me he want me to shoot a man for him. The day before the thing happened, Roshan and the driver Richard carry me down Cunupia and Roshan show me an Indian man driving a big white car. The man was driving out the street he was living in. Roshan show me the house where the man live. The next day I went down by Roshan and me and the driver Richard went down by the man in a white B15. Richard was the driver. Richard stopped by the house and I drop out and I see a woman. I ask the woman where the man who does drive the white car and she carry me in a room and I see the man sitting by a desk. I fire four to five shots and the man – I shoot four to five shots and the man falls. I went and I take up about $6,000 and I walk out of the house."

14. According to the police, Hunte was told that he might be charged and was again cautioned. He was asked if he was willing to give a written statement before a JP and he agreed. The JP arrived shortly after 8 pm. After introductions had been made, the police officers left the JP to speak to Hunte alone. A few minutes later the JP summoned the police officers to inform them that Hunte was ready to give a statement. Hunte was again cautioned and signed the usual preamble to a written confession statement:

> "I, Timothy Hunte, wish to make a statement. I have been told that I need not say anything unless I wish to do so and that whatever I say will be taken down in writing and given in evidence. I have been informed of my constitutional rights and privileges to have an attorney, a relative or a friend present."

Hunte then dictated a confession, which Phillip wrote down verbatim. After Hunte finished making this confession, Phillip asked him 21 questions. Phillip wrote down the questions and answers on the statement, which was then signed by Hunte and the JP.

15. In cross-examination, Phillip said that the oral interview process took close to one hour. He was questioned about how it took so long if the interview began by Hunte making a confession in the terms alleged. Phillip said that Hunte was asked questions about his age, health, family and educational background. Phillip made no note of the interview in his pocket diary, but he said that Charles made a record while the interview was taking place on sheets of paper.

16. By the time that the matter came to trial, Charles had left the police force and was living in the USA. Charles said in his evidence that he made no note of the interview in his pocket diary, but that he wrote notes on leaves of paper which he later transcribed in some other diary. He had no idea what had happened to his record of the interview and he threw everything away when he left the police force.

17. In short, on the police evidence the oral confession was made during an interview of unexplained length, about which Hunte's lawyer had not been informed, and of which there was no contemporaneous record.

18. According to Hunte's evidence, after Melville had left the police station and he had been returned to his cell, Phillip and another officer, Sergeant Abraham, took him back out of his cell to an interview room. Abraham told him that he was not having a lawyer to save him and they began to question him about Roshan Mohammed and his co-defendant Khan. Hunte said that he did not know them. Phillip left the room and Abraham then began hitting him. After a while Phillip came back and Abraham left. Phillip said that he understood that Hunte had some other matters outstanding and the police could help him get rid of them if he cooperated. They wanted his help to proceed against Roshan, who was described by Phillip as a big man in crime. They wanted him to be a witness against Roshan and if he agreed to cooperate he would be allowed to go home that evening. Phillip explained that he would arrange for a JP to come to the police station to witness him sign a statement. He was not to tell the JP about Abraham hitting him, but he must play his part in signing the statement which would incriminate Roshan. He would then be allowed to go home.

19. Hunte said that he was taken back to his cell and sometime later he was taken to a front room in the office where Phillip began writing out some pages. Charles joined them and not long afterwards the JP arrived. The police officers went out, and he told the JP in answer to questioning that everything was alright and that he had not been mistreated. Phillip and Charles came back into the room. Hunte was shown some words which he was told to copy out and sign. Phillip handed some pages to the JP, which he signed and Hunte also signed in several places as directed. After this was all over, Hunte said that he asked when he was going to be allowed to go home, to which Phillip said that he would be told when it was time to go home.

20. After some introductory words, the judge's ruling on whether to admit the confession evidence was as follows:

> "The oral and written statements were challenged on the basis – on the grounds, rather, that the accused had been threatened, that promises had been made to him, inducements offered for him to give that statement and,

in the alternative, that he had not dictated that statement at all but that, in fact, that statement had been written by Sergeant Phillip.

The court, having heard all of the witnesses in this matter, is satisfied to the extent that it feels sure that the accused did dictate that statement, that it was dictated to Sergeant Phillip in the presence of Constable Charles and the Justice of the Peace, Best.

The court is also satisfied beyond reasonable doubt that the accused was cautioned before he gave the oral statement; that after he gave that oral statement he was informed that he may be charged for an offence and that he was cautioned according to rule 3 of the Judges' Rules; that he was further cautioned, informed of his rights and privileges, both at the time of interview, after the interview and before he gave the written statement.

The court is also satisfied to the extent that it feels sure that the accused had an opportunity to consult with his lawyer, Mr Melville, and did, in fact, so consult; that he was advised by his attorney of his right to remain silent; that he ought to remain silent, and that he should not sign any document, any statement and, of course, he was also informed that he ought not to go on an identification parade but that he should ask for a confrontation.

In all the circumstances, as I said before, having heard the evidence, having seen the witnesses, the court is satisfied that the statement was given and it was given voluntarily and, in the circumstances, I so rule the statement is admitted."

21. Mr John Perry QC submitted that there were clear breaches of the Judge's Rules and of Hunte's constitutional rights. In 1965 the judges of Trinidad and Tobago adopted the 1964 Judges' Rules applicable in England and Wales (as noted by the Board in *Attorney General of Trinidad and Tobago v Whiteman* [1991] 2 AC 240, 246). Accordingly they formed part of the protections enshrined by section 5.1 of the Constitution. Additionally, section 5.2(c)(ii) of the Constitution enshrines the rights of a person who has been arrested or detained to retain and instruct without delay a legal adviser of his own choice and to hold communication with him. That paragraph is reinforced by section 5.2(h), which protects the right of a person to "such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms". In *Whiteman's* case Lord Keith of Kinkel said, at p 247, that the language of a Constitution falls to be construed broadly and purposively so as to give effect to its spirit, particularly in relation to those provisions which are concerned

with the protection of human rights, and that there are no grounds for giving a restricted meaning to the words "procedural provisions" in section 5.2(h).

22. The Judges' Rules contain a number of guiding principles. These include:

> "(c) that every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so.
>
> …
>
> (e) that it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."

The principle set out in para (e) is described as overriding and applicable in all cases.

23. It appears to the Board to be incontrovertible that the police wrongly prevented Hunte from having private access to the services of Melville. Phillip's suggestion that Melville wished the police to be present when he saw Hunte is hard to believe. No explanation was suggested and Melville would have been acting in breach of his duty to his client. The Board is not surprised that counsel for the prosecution thought better than to put the suggestion to Melville in cross-examination. There was therefore a serious breach of an important constitutional right. There can be no excuse for such conduct on the part of the police.

24. It does not, however, follow automatically that the trial judge was wrong in law to admit the confession evidence. That requires the Board to consider two questions. The first is whether the evidence was admissible as a matter of law. If so, the second question is whether fairness nevertheless required it to be excluded.

25. As to the first question, the test of admissibility is whether the statements or alleged statements were voluntary in the sense identified in paragraph (e) of the Judges' Rules set out above. The trial judge asked herself the correct questions. She went further

by considering whether the alleged statements were in fact made by Hunte. That was a question for the jury. Strictly, the judge's task in determining admissibility was limited to determining whether the alleged confessional statements, if made, were voluntary, but there was no prejudice to Hunte in the judge considering also whether she was sure that the alleged statements were made. Having heard the witnesses, the judge determined that she was sure that the statements were voluntary and the Board has no proper basis for holding that she was wrong. It was suggested that the judge failed to give adequate reasons, but she had heard the evidence and her findings were sufficient.

26. As to the broader question of fairness, Mr Perry argued strongly that the combination of circumstances relating to the confession evidence was such as to make it unjust for the evidence to be admitted. He relied mainly on the following matters: the denial of an opportunity for Hunte to speak to his lawyer in private; the failure by the police to inform Melville that they were proposing to interview Hunte; the resulting absence of any independent witness as to what was said; and the unsatisfactory state of the police evidence regarding the interview, with an absence of any detailed account of what was said beyond the alleged opening words of Hunte and the absence of any contemporaneous record. The Judges' Rules required a record to be kept of the time at which questioning began and ended, but this was not done. Although a court has a discretion to admit evidence obtained in breach of the Judges' Rules, including confession evidence, provided that it was given voluntarily, Mr Perry submitted that in this case the matters complained of were so "significant and substantial" (adopting the language of the Court of Appeal in *R v Keenan* [1990] 2 QB 54, 69; 90 Cr App R 1, 13) that the admission of the confession evidence offended against the principle of fairness which is fundamental to a fair trial.

27. In response, Mr Thomas Roe QC made a number of points. He said that according to Hunte's own evidence, before he allegedly confessed to murder, he was given legal advice that he should not say anything and he understood that advice. He knew that he was entitled to ask for a lawyer to be present. Whatever the deficiencies of the evidence regarding the oral confession, there was no doubt that Hunte signed a written confession statement in the presence of a JP after the JP had spoken to him on his own. Mr Roe accepted that it was wrong for the police to have put 21 questions to Hunte after the making of the written statement, because this was prohibited by the Judges' Rules in the absence of exceptional circumstances which did not exist. However, those questions and answers did not alter or add to the substance of the account given in the written statement. The jury was given clear directions that they should disregard the confession evidence unless they were sure that Hunte made the oral statements and dictated the written statement; that what he said was voluntary and not obtained by beating, threats or promises; and that it was true.

28. The Board has given the matter close consideration, because Mr Perry has rightly and ably identified a number of seriously unsatisfactory features. The question for the Board is whether it considers that in the result Hunte was deprived of a fair trial. That

is not the Board's conclusion. Although the failure to allow Hunte to speak to Melville in private was inexcusable, the fact remains that he was advised not to make any statement to the police and he knew that he had that choice. As to the making of any confessional statement, Hunte undoubtedly signed a confession statement after he had been spoken to in private by the JP, who had inquired whether he had been properly treated. The judge was properly entitled to leave to the jury to decide whether they were sure that the alleged oral statements and the written statement were of Hunte's own making and could be relied upon. His appeal is therefore dismissed.

Khan

29. The prosecution's case was that the murder was a planned assassination in order to prevent the victim, Charran, giving evidence in a case against Roshan. Counsel for the prosecution made that plain in his opening speech to the jury. He also said that the state's case was based on what lawyers and judges referred to as the felony murder rule, about which he said that the judge would give the jury the appropriate legal directions at the appropriate time. No further reference to the felony murder rule was made in front of the jury. In particular, no reference to it was made by the judge when she summed up the case three weeks later. Mr Julian B Knowles QC submitted that the brief and unexplained reference to the felony murder rule made by prosecuting counsel in his opening speech would have caused misunderstanding and confusion in the mind of the jury when they came to consider their verdict. In the view of the Board that submission is unrealistic. The judge's directions about the nature of the prosecution's case and what it had to prove were perfectly clear.

30. Further reference was made by prosecuting counsel to the felony murder rule in the absence of the jury before the summing-up. He suggested that three possible verdicts were open to the jury in the case of Khan – guilty of murder, guilty of manslaughter or not guilty. The judge inquired as to the basis of a conviction for manslaughter, to which counsel replied "contemplation and foreseeability". He added that the prosecution's case was based on joint enterprise and felony murder. In response to the judge's request for further explanation, counsel suggested that the possibility existed that Khan may not have known that Hunte planned to carry out "a hit on the witness", but that he was party to a joint enterprise for something, making him liable for felony murder.

31. Trinidad and Tobago has a statutory form of felony murder rule. It is contained in section 2A of the Criminal Law Act 1979, which was introduced by the Criminal Law (Amendment) Act 1997. Subsection 1 provides:

> "Where a person embarks on the commission of an arrestable offence involving violence and someone is killed in the course or furtherance of that offence (or any other arrestable offence involving violence), he and

> all other persons engaged in the course or furtherance of the commission of that arrestable offence (or any other arrestable offence involving violence) are liable to be convicted of murder even if the killing was done without intent to kill or to cause grievous bodily harm."

32. The judge in her summing-up explained the definition of murder, that is, that it required unlawful killing with intent to kill or cause grievous bodily harm. She said:

> "The prosecution's case is that both accused committed this act together. Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are in it together as part of a joint plan or agreement to commit it, they are each guilty. No doubt you appreciate that the prosecution is saying that this offence was committed by Accused No 1 [Hunte] going into the house and shooting the man and killing him, but Accused No 2 [Khan] is the man who drove him there; who waited for him in the car, and then drove away with him."

33. In relation to Khan, she told the jury that the prosecution's case was based on Ahibal's identification. If they were sure that his identification was correct, it was open to them to infer that he was there as part of a plan to commit the crime, but they had to be sure that he was there with that intention. She said:

> "Now, mere presence at the scene of a crime is not enough to prove guilt. But if you find that a particular accused was on the scene, and intended, and did, by his presence alone, encourage the other in the offence, he is guilty. … You have to be satisfied to the extent that you feel sure, that it was not mere presence; that he was part of that plan, part of that joint enterprise with Accused No 1, to commit the offence, and that was the role that he played."

34. Mr Knowles accepted that the judge's directions regarding Khan's possible joint liability for the murder were unchallengeable as far as they went, but he submitted that she did not go far enough. He said that she should have given the jury additional directions on secondary liability consistent with *R v Powell and English* [1999] 1 AC 1. She failed to assist the jury on how they should approach the case if they were not sure that Khan was party to a joint enterprise to kill or cause grievous bodily harm, but was party to some lesser form of criminal joint enterprise. She should have told the jury that in that event Khan would be guilty of murder if, but only if, he foresaw that Hunte might use force with intent to kill or cause grievous bodily harm.

35. Khan's printed case was settled by counsel other than Mr Knowles. It referred to the fact that the judge made no reference to the felony murder rule or to an alternative

verdict of manslaughter in her summing up, and it stated that "no criticism is made of this approach".

36. On that basis, the judge had no cause to give the jury any further directions of the kind suggested. They would have been unnecessary and confusing. Such directions would have been relevant only if the case against the defendant involved the difficult topic of "parasitic secondary liability" (to use the expression coined by Professor Sir John Smith), ie possible liability for murder even though the defendant lacked the mens rea for murder if he was party to an agreement to commit some other crime in the course of which the victim was murdered.

37. As the argument developed, it became clear that the real complaint being advanced was not about a failure to give directions of the kind suggested, which would have been irrelevant to the case presented to the jury, but a more fundamental failure to leave a possible alternative verdict or verdicts to the jury (contrary to Khan's printed case).

38. The leading authorities on the question of when a judge is obliged as a matter of law to leave a lesser alternative verdict to the jury are the decisions of the House of Lords in *R v Coutts* [2006] 1 WLR 2154 and the Court of Appeal in *Foster* [2008] 1 WLR 1615 (in which a five-judge court considered the *Coutts* principle and its application). The reason for requiring a trial judge in some circumstances to leave an alternative verdict to the jury, even where neither the prosecution nor the defence has asked the jury to consider it, is that the courts have recognised that there may be a risk, identified in *Foster* at para 60, that faced with a stark choice between convicting a defendant who was plainly guilty of serious wrongdoing and acquitting him altogether, the jury may be influenced to convict of the crime charged, although a proper verdict on the evidence would have been a finding of guilty of some lesser offence. But the question only arises in cases where the evidence before the jury provides an obvious basis for conviction of an alternative offence. In *Coutts* Lord Bingham referred to an "obvious alternative offence which there is evidence to support" at para 23. Other judges used other formulations to the same general effect (summarised in *Foster* at para 54). It is not the law that a bare possibility that a defendant may have been guilty of a lesser offence makes it incumbent on the trial judge in all circumstances to leave an alternative verdict to the jury. In *Foster* the court approved the decision of the Court of Appeal in *R v Banton* [2007] EWCA Crim 1847, that the judge would be justified in not leaving an alternative verdict to the jury if he reasonably considered it to be remote from the real point of the case (see *Foster* paras 57-58).

39. Mr Knowles submitted that Khan may have been involved in a conspiracy to rob rather than a conspiracy to assassinate. Was that in truth a realistic and obvious alternative on the evidence before the jury? The evidence of Nadine was that on entering Charran's house Hunte asked no questions about where any money or valuables were

kept. He told her to lead him to the man who owned the Royal Saloon car in the garage and not to say anything. When she led him to Charran, seated at his desk counting money, Hunte made no demand for the money. He simply shot Charran twice at point blank range and afterwards took the money from the top of the desk. Her description of events suggested that Hunte's target was the man who drove the Royal Saloon car.

40. Outside the house Ahibal was asked to describe what he saw and did on hearing the explosion:

> "Q Now, after you hearing the explosion, what happened?
>
> A I looked back at the guy in the car again and I caught him staring back at me again.
>
> Q How long he looked at you?
>
> A For two to three seconds.
>
> Q When he looked back at you again, what did you see?
>
> A Well, I saw his face again."

41. On that description Khan showed no sign of alarm or surprise at the sound of gunfire. Rather, his cool and impassive behaviour suggested that for him it was not unexpected.

42. The only evidence on which to build a theory of a conspiracy to rob was the fact that money was taken by Hunte, but the contemporaneous evidence of the behaviour both of Hunte and of Khan is not realistically reconcilable with that theory. The Board concludes that the evidence did not obviously support a realistic finding that this was a conspiracy to rob in which Hunte carried out an unplanned murder.

43. If that had been a realistic scenario, Khan would still have been guilty of murder, albeit felony murder. That would have been relevant to sentence, but it is unnecessary to discuss that aspect further because it does not arise. For those reasons Khan's appeal is also dismissed.

Sentence

44. Both appellants seek leave to appeal against sentence on the grounds that a) it would now be unconstitutional for the sentence of death which was passed on each of them to be carried out, and b) the Board has the necessary jurisdiction to order commutation of their sentences. The respondent does not dispute proposition a), but it submits that the Board has no jurisdiction to order commutation of the sentences. It is accepted by the respondent that the High Court would have jurisdiction to order the commutation of the sentences on an application made under section 14(1) and (2) of the Constitution.

45. Section 14(1) provides:

> "For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion."

46. Section 14(2) gives the High Court original jurisdiction to hear and determine any such application, and to give such directions as may be appropriate for the enforcement of the protection to which the person concerned is entitled under the provisions of Chapter 1 of the Constitution.

47. Chapter 1 is concerned with the recognition and protection of fundamental human rights and freedoms. These include the right of the individual not to be deprived of life except by due process of law: section 4(a). In *Pratt* the Board held that in any case in which execution was to take place more than five years after sentence there would be strong grounds for believing that the delay was such as to constitute inhuman or degrading punishment or other treatment. It is accepted that the same principle applies under the Constitution of Trinidad and Tobago, which prohibits the imposition or authorisation of cruel and unusual treatment or punishment: section 5(2)(b).

48. The respondent's argument is that the Board does not have an original jurisdiction comparable to the original jurisdiction of the High Court recognised or conferred by section 14(1) and (2) of the Constitution, and that to order commutation of a lawfully passed sentence is beyond its jurisdiction as an appellate body reviewing the trial proceedings, as distinct from the jurisdiction which the Board would have if it were hearing an appeal from an application to the High Court based on the unconstitutionality of carrying out the sentence.

49. The identical issue arose recently in *Ramdeen*, in which the Board dismissed an appeal against conviction but held, by a majority of three to two, that it had jurisdiction to do as the appellants ask it to do in the present case. Mr Roe submitted that in this respect *Ramdeen* was wrongly decided and so was the earlier case of *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, in which the Board made a similar order.

50. The judgment of the majority in *Ramdeen* was written by me. I am now persuaded that it was wrong, that the Board did not have jurisdiction to order commutation of the sentence in *Ramdeen* or in *Matthew*, and that those decisions should not be followed.

51. The Board's jurisdiction is statutory. It originally dated from the Judicial Committee Act 1833, which gave jurisdiction to the Judicial Committee (in place of the full Privy Council) to hear appeals which by virtue of the Act or any other law, statute or custom, might be brought before [Her] Majesty in Council. Since Trinidad and Tobago has become a republic, the continuing jurisdiction of the Board derives from section 109 of the Constitution. Of present relevance, subsection 3 provides for an appeal to lie with leave of the Judicial Committee from decisions of the Court of Appeal in any civil or criminal matter in which an appeal could previously have been brought with special leave of Her Majesty. Subsections 6 and 7 provide that any decision of the Judicial Committee is to be enforced as if it were a decision of the Court of Appeal and that, in relation to any appeal in any case, the Committee is to have "all the jurisdiction and powers possessed in relation to that case by the Court of Appeal". It is therefore necessary to see what were the powers of the Court of Appeal in this case.

52. The constitution, jurisdiction and powers of the judicature are governed by Chapter 7 of the Constitution. Section 99 provides that there is to be a Supreme Court of Judicature consisting of a High Court of Justice and a Court of Appeal "with such jurisdiction and powers as are conferred on those courts respectively by this Constitution or any other law".

53. The principal statute is the Supreme Court of Judicature Act 1962. Sections 42 to 65 concern criminal appeals from the High Court. Appeals against sentence are dealt with in sections 43(c) and 44(3). These provide respectively:

> "A person convicted on indictment may appeal under this Act to the Court of Appeal … with the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

> "On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict

whether more or less severe, in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

54. The separation of the jurisdiction of the Court of Appeal, as an appellate body in criminal proceedings, from any decision as to whether a sentence of death lawfully imposed in those proceedings should be carried out is also reflected in section 64 of the 1962 Act. This provides:

"(1) Nothing in this Act shall affect the prerogative of mercy.

(2) The President on the advice of the Minister [meaning the Minister designated under 87(3) of the Constitution] on the consideration of any petition for the exercise of the President's power of pardon having reference to the conviction of a person on indictment or to the sentence, other than sentence of death, passed on a person so convicted, may at any time [refer the case or some point arising in it to the Court of Appeal]."

55. The sentence of death passed on the appellants was fixed by law: Offences Against the Person Act 1925, section 4. If it were argued that the law purportedly imposing a mandatory death sentence was itself unconstitutional, the Court of Appeal would have jurisdiction to entertain an appeal against such a sentence on the ground that it was not a lawful sentence at all: *Bowe v The Queen* [2006] UKPC 10, [2006] 1 WLR 1623. But in this case there is no dispute that the sentence imposed on the appellants was lawful and mandatory.

56. It follows that the Court of Appeal had no jurisdiction under the Supreme Court of Judicature Act to entertain an appeal against sentence, and in point of fact it did not do so. Therefore if the Board were now to grant leave to appeal against sentence and to order commutation of the sentence imposed on the appellants, it would be a) granting an appeal when there was no decision of the Court of Appeal to appeal against, and b) making an order which the Court of Appeal would have had no jurisdiction to make.

57. This analysis is supported by the decision and reasoning of the Board in *Walker v The Queen* [1994] 2 AC 36, which was decided by the same constitution and on the same day as *Pratt's* case. The appeal in *Pratt* was from a decision of the Court of Appeal of Jamaica, upholding the dismissal by the High Court of an application for constitutional redress under section 25(2) of the Jamaican Constitution, which was materially identical to section 14(2) of the Constitution of Trinidad and Tobago. In *Walker* the application was for leave to appeal against death sentences without any application being made for redress under section 25 of the Constitution. The argument was advanced that the jurisdiction of the Privy Council was wide enough to enable a

point on constitutionality to be raised at any time in any proceedings, notwithstanding that it had not been raised in the courts below.

58. The Board held that the present jurisdiction of the Judicial Committee is an appellate jurisdiction and that it had no jurisdiction to examine the case directly by way of an appeal against sentence. Lord Griffiths said at [1994] 2 AC 43-44:

> "These proceedings are not in truth appeals against the judgments delivered by the Court of Appeal. There was no appeal against the sentence of death passed by the judges and if there had been the Court of Appeal would have had no jurisdiction to alter the mandatory death sentence …
>
> Their Lordships are being invited to decide this question [the constitutionality of carrying out the death penalty after a lengthy period of delay] not as a matter of appeal but as a court of first instance; and this they have no jurisdiction to do. The question of whether or not execution would now infringe the constitutional rights of the defendants has not yet been considered by a Jamaican court. The jurisdiction of the Privy Council to enter upon this question will only arise after it has been considered and adjudicated upon by the Jamaican courts."

59. Then came the decision of the Board in *Matthew*, which was critical to the reasoning of the majority in *Ramdeen*. Matthew was given permission by the Board to appeal against a mandatory death sentence which he sought to argue was unconstitutional. Leave to appeal was given in the wake of the decision in *Roodal v State of Trinidad and Tobago* [2003] UKPC 78, [2005] 1 AC 328. In that case the Board held that the mandatory death sentence for murder was indeed unconstitutional and it remitted that case to the trial judge to decide the proper sentence. However, in *Matthew* the Board by a majority reversed its decision in *Roodal's* case and concluded that the sentence passed was lawful and mandatory. The Board nevertheless allowed Matthew's appeal against sentence. It found that it had the necessary power to do so in section 14(2) of the Constitution, and it exercised the power by analogy with the Board's decision in *Pratt*. Lord Hoffmann said at [2004] UKPC 33, [2005] 1 AC 433, para 32:

> "In *Pratt's* case their Lordships exercised the power vested in the Supreme Court of Jamaica by section 25(2) of the Constitution to make 'such orders … as it may consider appropriate for the purpose of enforcing … any of the provisions [relating to human rights and fundamental freedoms]' by allowing the appeal and commuting the death sentence to life imprisonment. *There is a similar power in section 14(2) of the Constitution of Trinidad and Tobago. Pursuant to this power, their*

Lordships will allow the appeal, set aside the sentence of death and impose a sentence of life imprisonment." (Emphasis added)

60. In *Ramdeen's* case it was argued that *Matthew's* case turned on special facts but the Board was not asked to hold that it was wrongly decided. The minority considered that *Matthew* could be explained as a case of prospective overruling of *Roodal*. The majority did not regard this as tenable, for it was not the basis of the decision in *Matthew*. That decision was explicitly based on the Board having a power to set aside the sentence under section 14(2) of the constitution, notwithstanding that it had held the sentence to be lawful and mandatory. The majority in *Ramdeen* reasoned that if the Board had no jurisdiction to decide that a sentence lawfully imposed should be set aside, except after the presentation of a constitutional motion, the Board could not have had constitutional power in *Matthew's* case to do what it did. Conversely, the majority concluded that if the Board had the power which it exercised in *Matthew's* case in circumstances where the case was properly before it for other reasons which merited permission to appeal, the same should apply in *Ramdeen's* case.

61. In the present appeal the respondent has mounted a frontal attack on *Matthew's* case as a precedent. The parties have helpfully provided the Board with the lengthy printed cases in that case and, perhaps more importantly, with the parties' later written submissions on points which had been raised during the hearing. They contain no reference to the point presently in issue. The Board's statement that it had jurisdiction under section 14(2) to set aside the mandatory sentence, by analogy with *Pratt's* case, seems to have been made without the benefit of any argument. It was not the real point in the case and there may well have been tactical reasons why neither side would have wished to challenge it. It is certainly the case that the judgment itself contains no clear explanation of the Board's reasoning and no reference was made to *Walker's* case, although the members of the Board must have been familiar with it.

62. The fuller arguments in the present case compel the conclusion that there is no satisfactory logical way of reconciling what was done in *Matthew* and *Ramdeen* with the reasoning in *Walker*.

63. The question remains whether *Matthew* and *Ramdeen* should nevertheless be allowed to stand as an exception to the *Walker* principle. Mr Knowles advanced forceful submissions about the importance of the doctrine of *stare decisis*. In *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50 Lord Slynn of Hadley giving the opinion of the majority of the Board stated the general principle at page 75:

"The need for legal certainty demands that [the Board] should be very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so."

64. Lord Hoffmann dissented from the decision in that case because of the importance which he attached to the principle of *stare decisis*. While accepting that the Board is not as a matter of law bound by its own previous decisions, at p 90 he made the important point that it is possible, with a final appellate body which does not sit in banc, for a panel not to contain anyone who was party to a recent governing precedent, or to be composed largely of members who were in previous dissenting minorities. He said:

> "… the power of final interpretation of a constitution must be handled with care. If the Board feels able to depart from a previous decision simply because its members on a given occasion have a 'doctrinal disposition to come out differently', the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean."

65. Particularly in a difficult case in which the panel is narrowly divided, it is always possible that a small change of constitution would have produced a different outcome. That is itself a powerful reason to be very slow to depart from a fully considered previous decision. To do otherwise would not only lead to uncertainty but would also risk the rule of law being seen as the rule of individual judges.

66. It is not possible to provide a comprehensive list of factors which may be sufficiently powerful to make it right to depart from the strong presumption in favour of respecting precedent, but in this case several can be identified.

67. First, by no stretch can the decision in *Matthew* on the relevant point be described as fully reasoned. And while the decision in *Ramdeen* was fully reasoned, it was largely founded on respect for the precedent established in *Matthew*, which the Board was not directly asked to overrule. Closer analysis of that case, and of the arguments advanced in it, have exposed the lack of a satisfactory foundation for it.

68. Secondly, the issue concerns the constitutional power of the judiciary to interfere by way of appeal with a lawful sentence. If the Board is persuaded that it has taken to itself a judicial power which it does not possess, it would be damaging to respect for the rule of law to continue to exercise a purported judicial power contrary to the provisions of the Constitution. This point is not weakened by the fact that the Board would have jurisdiction to interfere with the carrying out of the sentence on an appeal from a constitutional motion under section 14(1) and (2), because that is a procedure for which provision is made by the Constitution.

69. Thirdly, to allow *Matthew* and *Ramdeen* to stand as an exception to the principle in *Walker's* case would lead to uncertainty as to its extent (contrary to the purpose of

the *stare decisis* doctrine, which is to promote certainty) and to anomalies wherever the line is drawn. For example, in this case the Board has decided to give permission to appeal to Hunte but to dismiss the appeal. Supposing that *Ramdeen* were to stand, what would have been the position if at the end of the argument permission to appeal had been refused? Would the *Walker* principle or the *Ramdeen* exception have applied? There is no satisfactory answer.

70. For those reasons, the right course is for the Board to hold that *Walker's* case is inconsistent with *Matthew's* case and *Ramdeen's* case; that the latter cases should not be followed; and that the applications for leave to appeal against sentence should be refused.

71. Lady Hale considers that the majority in *Ramdeen* was right, and I have reconsidered the matter in the light of her opinion. Up to para 95 there is no difference between us. At para 96 Lady Hale states that she finds it a surprising proposition that, as she puts it, the Board is obliged to prolong the "death row" experience of someone who is entitled to commutation of the sentence by holding that the Board's only power to order commutation is on appeal from a constitutional motion and not on an appeal from the criminal court. She considers that such a conclusion is deeply unattractive (para 101) and morally unacceptable (para 106). I respect entirely the force of Lady Hale's view. I also agree that the result is unattractive. But I do not see it as morally unacceptable that the Constitution should provide different avenues for appealing against a sentence which was wrongly passed and for obtaining relief on constitutional grounds from the execution of a sentence which was lawfully imposed. Such a constitutional division is not unique to Trinidad and Tobago.

72. I would only add that it is not a necessary consequence of this decision that prisoners in like circumstances will have to spend longer on death row. At any time after 31 March 2013 (the fifth anniversary of their convictions) the appellants might have applied to the President under section 64 of the 1962 Act for the commutation of their sentences and, failing such relief, they could have applied to the High Court for relief under section 14(2) of the Constitution. True, it would have been cumbersome to have two sets of proceedings (as was said in *Ramdeen*), but it need not lead to additional time on death row. The question was raised in the course of argument whether the Court of Appeal hearing a criminal appeal can reconstitute itself as panel of the High Court, as can be done in England and Wales. We do not know the answer, but in any event it would be surprising if administrative arrangements could not be made, where appropriate, for appeals from a criminal court and from the High Court on a constitutional motion to be heard immediately after one another.

73. Before reaching this decision, the Board asked for the parties' submissions about the effect of such a ruling on the order made in *Ramdeen* and in subsequent cases where the Court of Appeal has made orders commuting the death penalty on the authority of

Ramdeen. The Board is satisfied that the ruling will not affect the validity of those orders, and the respondent has stated that it has no intention of seeking leave to appeal out of time against orders premised on the correctness of *Ramdeen*. The Constitution provides that the High Court and the Court of Appeal are to be superior courts of record: sections 100(2) and 101(2). The authorities show that the designation of a court as a "superior court of record" may be significant in different senses: see the judgment of Laws LJ in *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin), [2011] QB 120. (When the case reached the Supreme Court, Laws LJ's judgment was described by Lady Hale as "typically subtle and erudite": [2011] UKSC 28, [2012] 1 AC 663, para 30.) It is a characteristic of a superior court of record that it is validly authorised to make a binding determination as to its jurisdiction, subject only to its decision being set aside by a higher court. A recent statement of the principle that the orders of a superior court of record are valid until set aside, even if made in excess of jurisdiction (whether on constitutional or other grounds), is to be found in the decision of the High Court of Australia in *State of NSW v Kable (No 2)* [2013] HCA 26, (2013) 298 ALR 144. Without such a principle the judicial power of adjudication of rights and liabilities would be seriously defective, because those who acted on the faith of the validity of a court order would be at risk of a later finding that the order never had force because the court had exceeded its jurisdiction. Mr Knowles submitted that the Australian Constitution has special features and that sections 100(2) and 101(2) should be understood differently. In the judgment of the Board the principle set out above is not special to the Australian Constitution and applies to the High Court and Court of Appeal of Trinidad and Tobago.

LORD NEUBERGER: (agrees with Lord Toulson)

74. I agree with the conclusions reached on these two appeals in the judgment prepared by Lord Toulson on behalf of the Board. I add this short concurring judgment solely because I joined with him in *Ramdeen v The State of Trinidad and Tobago* [2014] UKPC 7; [2015] AC 562 in holding that the Board had jurisdiction to order commutation of the sentences of death in that case. I am now satisfied that that conclusion was erroneous for the reasons given by Lord Toulson in paras 51-62 in the judgment he gives in this case.

75. As Lord Toulson says in para 63 above, the question which nonetheless needs to be considered is whether we should depart from *Ramdeen* on this point because it was wrong, or whether we should adhere to it in the interests of certainty and consistency.

76. Certainty and consistency are vitally important features of any civilised justice system, and a court should never be eager to depart from one of its earlier decisions even if it is not bound by them. Nonetheless, I have no doubt that we should take this opportunity to say that the majority view in *Ramdeen* was wrong and to confirm that the mere fact that the Board is seized of a criminal case because it is entertaining an appeal against conviction or sentence does not give it any jurisdiction to order

commutation of a lawfully passed sentence of death on the ground that it would be unconstitutional for that sentence to be carried out.

77. First, the decision in *Ramdeen* is very recent. We are not here concerned with an argument that attitudes have changed since the decision under attack was given, an argument which might be assisted by the fact that the decision in question was of some antiquity rather than recent. The argument here is that the decision under attack was wrong when it was made, and, in such a case, the fact that the decision has had little time to be absorbed or accepted is a point against adhering to it if we think that it was wrong.

78. Secondly, if the decision in *Ramdeen* was allowed to stand, it would mean that the Judicial Committee would have arrogated to itself a constitutional power which it is now satisfied that it did not properly have. In the absence of any countervailing arguments to support adhering to *Ramdeen*, such a course would risk undermining the rule of law. It would potentially place the executive and the judiciary in conflict on a point of constitutional law on which the judiciary took the view that its position was legally wrong.

79. Thirdly, there would be procedural difficulties and conundrums if *Ramdeen* continues to apply: these are identified in para 69 above.

80. Fourthly, if, as is the case, we are satisfied that *Ramdeen* was wrongly decided on this point, but we do not effectively overrule it, the Board will sooner or later find itself faced with the unpalatable choice of applying the wrongly decided *Ramdeen* in other jurisdictions with similar constitutional principles as Trinidad and Tobago, or else having different constitutional principles applicable in jurisdictions with identical constitutions.

81. Fifthly, as the analysis in paras 60-61 above shows, the issue has been more fully argued in this case than it was in *Ramdeen*.

82. On the other hand, it is perhaps right to add that the fact that the decision in *Ramdeen* was by a bare majority of three to two is not a relevant factor in this connection – see eg *Fitzleet Estates v Cherry* [1977] 1 WLR 1345, 1349, and *Gibson v Government of USA* [2007] 1 WLR 2367, paras 22 and 37.

LADY HALE: (dissenting)

83. Why is it unconstitutional to carry out the death penalty years after it was imposed? As Lord Griffiths explained in *Pratt and Morgan v Attorney General for Jamaica* [1994] 2 AC 1, 29,

> "There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time."

That instinctive revulsion to the "death row" phenomenon emerged from an enlarged Board of the Judicial Committee of the Privy Council in 1993. Over ten days in June and July 1993, the Board heard the cases of *Pratt and Morgan*; over the next two days, the same Board heard the cases of *Walker, Douglas and Glanville v The Queen* [1994] 2 AC 36; judgment was given in both cases on 2 November 1993. The essential facts were the same but the procedures were different. In view of the importance of the issue now before us, I propose to go over the ground again.

84. *Pratt and Morgan* was an application for constitutional redress under section 25 of the Constitution of Jamaica (dismissed by both the Supreme Court and the Court of Appeal, but with an appeal as of right to the Privy Council). The appellants had been convicted of murder in January 1979 and sentenced to death. Their applications for leave to appeal were dismissed in December 1980 but reasons were not given until September 1984. Special leave to appeal to the Judicial Committee of the Privy Council was refused in July 1986. Warrants for their execution were twice issued and they were transferred to the condemned cells but twice they were granted stays. In April 1989 the United Nations Human Rights Committee held that certain articles of the International Covenant on Civil and Political Rights had been violated and recommended that the death sentences be commuted. Nevertheless, a third warrant was issued in February 1991 and they were again moved to the condemned cells. Then they applied to the Supreme Court for constitutional redress.

85. The Privy Council held that to carry out the sentences of death after a delay of 14 years would constitute inhuman punishment, contrary to section 17(1) of the Constitution. Accordingly, the sentences would be commuted to life imprisonment. Lord Griffiths commented (p 17):

> "The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope

> and despair in the 14 years that they have been in prison facing the gallows."

The Board took the view that before independence the law would have protected a Jamaican citizen from being executed after an unconscionable delay and that the independence Constitution had not deprived them of that protection.

86. A number of factors had to be balanced in weighing the delay. If the delay was entirely the fault of the accused, perhaps through escaping from custody or resorting to frivolous and time wasting legal procedures which would amount to abuse of process, he could not be allowed to take advantage of it. But these accused were not to be blamed for pursuing legitimate appeal procedures, applications for reprieve and applications to international human rights bodies. If doing so led to inordinate delay, that was the fault of the system:

> "In their Lordships' view a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. … Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence." (p 33)

Taking account of how the system ought to work, including appeals, consideration of reprieve, and what ought to be rare applications to international human rights bodies,

> "These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'." (p 35)

87. The width of the language of section 25(2) of the Constitution (the Jamaican equivalent of section 14(2) of the Constitution of Trinidad and Tobago) "enables the court to substitute for the sentence of death such order as it considers appropriate" (p 34). Hence the Board commuted the sentence of death of each appellant to life imprisonment. However, to avoid a flood of applications to the Supreme Court for constitutional relief, the Board pointed out that "substantial justice" would be achieved if the Governor-General were to refer all those who had been under sentence of death for five years or more to the Jamaican Privy Council, who would then recommend that their sentences be commuted to life imprisonment (under sections 90 and 91 of the Constitution).

88. *Walker*, on the other hand, was not an application for constitutional relief. Two of the accused had been convicted of murder and sentenced to death in 1982 and refused leave to appeal to the Court of Appeal in 1984. A third had been convicted and sentenced in 1984 and refused leave to appeal in 1987. The fourth had been convicted and sentenced in 1982 and his appeal had been dismissed in 1985. As the death sentence for murder was mandatory, there had been no attempt to appeal against sentence. (I assume that, as in Trinidad and Tobago, there was no right of appeal in Jamaica against a sentence which was "fixed by law".) At that stage, there was no application for special leave to appeal to the Privy Council. However, in 1993, the Board "took the exceptional course" of granting the accused special leave to appeal, in order to examine whether the Board could deal with the problem of inordinate delay awaiting execution by way of an appeal against sentence.

89. The Board drew a clear distinction between cases such as *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 (from Singapore), where it was argued that it was unconstitutional to impose the death penalty in the first place, and cases where the imposition of the death penalty was lawful at the time but the attack was against the executive acting to carry it out many years later. The Board was being asked to decide the latter issue at first instance, which it had no jurisdiction to do.

90. However, unless these sentences were commuted by the Governor-General on the advice of the Jamaican Privy Council, the accused had "every prospect" of making a successful constitutional application to the Supreme Court to have their sentences commuted to life imprisonment. The Board did not say so, but had that been refused at first instance and on appeal, no doubt they would have had every prospect of a successful appeal as of right to the Privy Council.

91. It may be worth noting that, while the Constitution of Jamaica prohibits "torture or inhuman or degrading punishment or other treatment" (section 13((3)(o), (6)), the Constitution of Trinidad and Tobago prohibits "cruel and unusual treatment or punishment" (section 5(2)(b)). However, as far as I know, the State of Trinidad and Tobago has never suggested that *Pratt and Morgan* does not apply to them.

92. In other respects, the laws of Jamaica and of Trinidad and Tobago are very similar. Section 43(c) of the Supreme Court Act of Trinidad and Tobago provides for appeals against sentence, but only where the sentence is not "fixed by law". Section 44(3) provides for the Court of Appeal to quash the sentence passed "if it thinks that a different sentence should have been passed" and then "to pass such other sentence warranted in law by the verdict".

93. In *Bowe v The Queen* [2006] UKPC 10, [2006] 1 WLR 1623, the Privy Council held that virtually identical provisions in the Court of Appeal Act of the Bahamas did

not preclude that Court from entertaining the argument that the death penalty was not, in fact, "fixed by law" because it would be unconstitutional to impose it. Furthermore, a challenge to the constitutionality of the penalty did not have to be taken through a separate constitutional motion under the Bahamian equivalent of section 25 of the Constitution of Jamaica and section 14 of the Constitution of Trinidad and Tobago, but could be taken on an appeal against sentence. The Constitution obviously contemplated that the courts could remedy a breach of the constitution if the question arose in ordinary proceedings before them. The Board distinguished *Walker* on the basis that there the sentences had been constitutional when passed – it was only the passage of time which had rendered it unlawful for the sentence to be carried out (para 11).

94. In this case, therefore, the State argues that this important distinction was overlooked by the Board in *Matthew v State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433. That was an appeal against sentence, on the ground that the mandatory death penalty for murder was unconstitutional and the law should be interpreted as making the death penalty discretionary. The Board, by a majority, rejected that argument (for reasons which need not concern us now), departing from the previous decision of the Board in *Roodal v State of Trinidad and Tobago* [2005] 1 AC 328. Nevertheless, the majority also concluded that it would be unfair to leave the sentence to be carried out, because the appellant had been led to believe, following *Roodal*, that the law would give him an opportunity of persuading a judge to impose a lesser sentence (as well as the possibility of a Presidential reprieve). Hence, on the analogy of *Pratt and Morgan*, the Board would allow the appeal and commute the sentence of death to one of life imprisonment (para 31). The case of *Walker* is not listed in the authorities cited to the Board and so the Board may not have addressed its mind to whether this was a course which could properly be taken on an appeal against sentence, as opposed to by way of a separate constitutional motion under section 14 of the Constitution of Trinidad and Tobago, which is in essentially the same terms as section 25 of the Constitution of Jamaica.

95. The distinction between *Walker* and *Matthew* is, of course, that in *Matthew* there was a properly constituted appeal before the Board for other reasons. In *Walker*, special leave had been given for the express purpose of deciding whether the solution to the "death row" problem in Jamaica could be found in granting special leave to appeal long after the event, rather than by bringing separate constitutional proceedings. Special leave can be granted even if leave to appeal to the Court of Appeal has not been granted, or even has not been sought. The Board might have taken the view that, as in *Bowe*, once the case was before the Board, there was jurisdiction to make such order as was necessary in order to prevent the violation of a constitutional right. What would it have done, for example, had the government announced that it would carry out the hangings that very day, before the prisoners could launch a constitutional motion? The logic of its decision is that the Board should never have given special leave to appeal – indeed that there was no jurisdiction to do so. It is possible to see the decision as a purely pragmatic one: better that there should be a swift, local solution to the death row cases than a flood of applications to the Board for special leave.

96. The question in the current appeals is whether, there being a properly constituted appeal before the Board for other reasons, the Board has power to commute the sentence of death or whether it has to refuse that relief and leave it to the appellant to bring separate proceedings in the High Court. In other words, is the Board obliged to prolong the "death row" experience, the very inhuman treatment which constitutes the violation of constitutional rights, because the matter has come before it on a criminal appeal rather than by way of constitutional motion? I find that a surprising proposition when section 14 of the Constitution clearly contemplates that the violation of constitutional rights can be remedied when it arises in the course of ordinary proceedings as well as by constitutional motion.

97. In these cases, the issue is the simple one of lapse of time since the death sentence was imposed. But there are three other cases from Trinidad and Tobago, now pending before the Board, in which the distinction between the imposition and the carrying out of the sentence is not so clear cut. They all involve people who suffer from mental illness or disability. In *Benjamin and Ganga v The State* [2012] UKPC 8 and *Taitt v The State* [2012] UKPC 38, the Board referred back to the Court of Appeal of Trinidad and Tobago the issue of whether the imposition of the death penalty upon persons suffering from mental illness or mental disability was unconstitutional. As far as we are aware, those cases have not yet been heard and determined in the Court of Appeal. Whatever the result, either side might then seek to appeal to this Board.

98. In the first of the pending cases, *Robinson v The State*, the accused has been given special leave to appeal against both conviction and sentence. The conviction appeal was heard separately on 16 June 2015 but judgment has not yet been given. It is common ground that the accused is a chronic schizophrenic. In the sentence appeal, it is argued both that the imposition of the death penalty upon a seriously mentally ill man is unconstitutional and that it would be unconstitutional to carry it out. The distinction is not very clearly drawn in the US authorities of *Atkins v Virginia* 536 US 304 (2002) and *Hall v Florida* 572 US --- (2014), which give the impression that both the imposition and the infliction of the death penalty upon a mentally disabled defendant would be contrary to the eighth amendment (prohibiting "cruel and unusual punishment", as does section 5(2)(b) of the Constitution of Trinidad and Tobago).

99. The State argues that, instead of remitting the constitutionality of imposing the death penalty to the local Court of Appeal, as was done in *Benjamin and Ganga* and *Taitt*, the Board should determine this for itself, because the Court of Appeal apparently considers itself bound by *Matthew* to decide that this is a pre-Constitution "existing law" preserved despite any unconstitutionality. Not only that, the State accepts that, even if the sentence was lawful when imposed, "it would not be proper for the state to carry it out if the person is mentally ill such that he does not understand what is happening to him", so that he could apply for an order to restrain its carrying out and "the question is whether this act can be ordered sooner". The State very properly says that this is for the Board to decide.

100. The second of the pending cases is *Pitman v The State*, which was first before the Board in 2008 (*Pitman v State* [2008] UKPC 16), when it was referred back to the Court of Appeal for consideration of both conviction and sentence because of fresh evidence of the appellant's very low intelligence. The Court of Appeal dismissed his appeal against conviction, and found that the death penalty had been properly imposed at the time, but because of the lapse of time, following *Pratt* and *Ramdeen,* it allowed his appeal against sentence and substituted a sentence of life imprisonment, with a minimum term of 40 years. He has been granted leave to appeal again to the Board against both conviction and sentence. It is argued that the sentence of death was the wrong starting point for the Court of Appeal in calculating the minimum term, because either the imposition or the infliction of the death penalty upon a mentally disabled offender is unconstitutional. The State makes no concessions in this case. The same arguments are raised in *Hernandez v State*, another case of a mentally disabled defendant, where the Board has not yet given permission to appeal.

101. It is, of course, for the Board to rule in due course on the constitutionality of imposing the death penalty upon a mentally disordered person. It is noteworthy that the State is prepared to concede the case in *Robinson*, where the accused is mentally ill, but not in *Pitman* and *Hernandez*, where the accused are of very low intelligence. Yet the US cases relied upon by the appellants are about mental disability. The fluctuating nature of mental illness makes it particularly difficult to distinguish between the imposition and the carrying out of the sentence. The prospect of the Board holding that the sentence was lawful when passed but that it would probably not be lawful to carry it out now, and then having to dismiss the appeal, in the expectation of a successful constitutional motion, is deeply unattractive. The Board would be permitting the inhuman or cruel and unusual punishment to continue because of what some would see as a pure technicality.

102. It would have been open to this enlarged Board to hold that *Walker* was wrongly decided. But even if *Walker* was rightly decided, it is authority only for the proposition that leave to appeal against sentence cannot be given for the sole purpose of arguing that a sentence which was lawful when imposed has become unlawful to carry out. There is, it seems to me, a strong case for holding that where an appeal is properly before the Board for some other reason, the Board should not close its ears to the argument that it would be unconstitutional to carry out the sentence. The Board is not taking jurisdiction for that purpose, but is using the jurisdiction that it undoubtedly does have in order to prevent a very serious (in fact the most serious imaginable) violation of the appellant's constitutional rights. If the Board takes the view that further factual findings are necessary before it can reach that conclusion, then of course it can remit the case to the Court of Appeal for that to be done.

103. Furthermore, the scope for the High Court to solve these problems on a constitutional motion under section 14 of the Constitution is also the subject of pending appeals before the Board. Like section 25 of the Constitution of Jamaica, section 14

provides that, without prejudice to any other action "with respect to the same matter" which is lawfully available, a person who alleges contravention of his constitutional rights may apply to the High Court for redress (section 14(1)); and the High Court may then make such orders, issue such writs or give such directions as it may consider appropriate to remedy the violation (section 14(2)).

104. In *Dottin and Others v Rougier*, the claimants brought a constitutional motion complaining of the failure of the President to commute their death sentences in the light of *Pratt and Morgan.* Among other things, they wanted declarations that it would be unconstitutional to carry out the death penalties which had been lawful when they were imposed many years before. They also wanted their sentences commuted to life imprisonment. The trial judge held that, while he could commute their sentences to life imprisonment, he could not engage in a re-sentencing exercise to work out their minimum terms (presumably as if the death penalty had been discretionary rather than mandatory). I am not aware of any appeal against that decision, but the issue is one of those which will come before the Board in *Henry and others v Attorney General of Trinidad and Tobago*. There the principal issue is whether deciding what should happen to a person who can no longer be executed is properly one for the executive or for the courts.

105. The Board in *Pratt and Morgan* had little difficulty in deciding that it could commute the death penalty to life imprisonment – rather than simply prohibit the executive from carrying it out. It is easy to understand why. The terms of section 25 of the Jamaican Constitution are very wide. The object is to prevent unconstitutional inhuman treatment. Keeping the offender on death row under sentence of death is the inhuman treatment. Hence commutation of the sentence was the right solution. The Board did not address its mind to whether or not it could impose a minimum term or indeed a lesser sentence than life imprisonment, although the Governor-General had power to do that, if so advised by the Jamaican Privy Council, under section 90(1)(c) of the Jamaican Constitution.

106. In my view, the majority in *Ramdeen* were right. *Walker* was essentially a pragmatic decision, designed to stop all the *Pratt and Morgan* "death row" cases being brought before the Board rather than the local authorities. But once a case is properly before the Board, I cannot see why the Board should not deal with it. Any other approach is simply to exacerbate the "death row" phenomenon which *Pratt and Morgan* found unconstitutional. That, to me, is morally unacceptable and, more importantly, not what the Constitution intended.