



The World Today

Reviewing Death Penalty Law

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The Caribbean Court of Justice (CCJ) has recently been asked by the Government of Barbados to consider a death penalty case. This should come as no surprise to informed laypersons in the Region, for the death penalty issue has repeatedly thrown up cases from the Caribbean to the Judicial Committee of the Privy Council. It was, therefore, only a matter of time before a death penalty case made its way to the CCJ.

But, notwithstanding the inevitability of this development, one may still wonder about the timing of the case. It may well be that the CCJ could have benefited from having a number of less controversial issues falling for consideration, before it takes on the sharply divisive question of the circumstances in which a person may be put to death by the State.

Mandatory Death

Throughout the region, independent Caribbean States have retained the death penalty for murder. As a result of the decision of the Judicial Committee of the Privy Council in *Lambert Watson v The Attorney General of Jamaica* (2004), mandatory sentences of death are no longer allowed in Jamaica. In essence, this means that in each death penalty case, the sentencing judges will be obliged to consider whether or not the person found guilty of murder should be executed.

Under the pre-existing system in Jamaica, as long as the accused was found guilty for certain types of murder (such as murder in the course of a robbery), then the sentence of death was automatic. In the *Lambert Watson* case, the Privy Council took the view that this approach amounted to inhuman or degrading punishment or treatment inasmuch as it required the sentencing judge to impose a sentence without regard to the individuality and individual circumstances of the guilty person. The Privy Council had earlier indicated its stance against mandatory death sentences in three cases from St. Kitts-Nevis, Belize and St. Lucia, namely, *Fox v R*, *Reyes v R*, and *R v Hughes*, all decided in March 2002.

The mandatory death sentence is therefore allowed in only a handful of Commonwealth Caribbean countries. More specifically, it is permitted today only in those countries where the so-called “savings clause” in the constitution allows the Government to retain laws that were valid before the date of independence. So, for example, because the mandatory death penalty was allowed in Trinidad and Tobago and

Barbados before these countries became independent, and because the savings clause allows both countries to retain pre-independence laws and forms of punishment, then the mandatory death penalty remains valid in these countries. This position was accepted by the Privy Council in *Matthew v The State* and *Boyce v R* in 2004.

Notice, however, that the Privy Council decisions concerning the mandatory death penalty are not actually decisions about the validity of the death penalty. Under these decisions, it is open for the Government to apply the death penalty, but the death penalty cannot be imposed as a mandatory sentence.

Delay at Death's Door

The question of delay in the execution of persons under sentence of death has also occupied considerable time and effort throughout the region. In 1993, in the now-famous *Pratt and Morgan* case, the Privy Council held that where the time period between the imposition of a sentence of death and execution exceeds five years, it shall be presumed that execution would amount to inhuman or degrading punishment or treatment, contrary to the Jamaican Constitution. This presumption has naturally been extended to all Commonwealth Caribbean States, as the language of the Jamaican Constitution on this point is the same as that of all former British colonies in the region.

In short, if the State does not ensure that execution takes place within five years of sentencing, the person found guilty of murder is apt to have his or her sentence commuted to life imprisonment. But we may now take the statement further: in *Pratt and Morgan*, the Privy Council referred to the *presumption* that the passage of five years would lead to commutation. Since then, however, in *Neville Lewis v AG of Jamaica*, the Privy Council has actually treated the presumption as a rule, so that once five years have passed, the Privy Council is very likely to regard execution as inhuman treatment.

The death penalty case now before the CCJ will, in all probability, touch and concern aspects of the approach taken by the Privy Council in the *Pratt and Morgan* and *Neville Lewis* Cases, among others. It would therefore be inappropriate for me to comment at this time on the virtues or deficiencies of this line of jurisprudence emanating from their Lordships' Privy Council.

By way of explanation, however, two additional observations are not out of place. First, the Privy Council is no longer the final court of appeal for Barbados, and nothing in the Agreement establishing the CCJ or in other sources of law, requires the CCJ to accept decisions of the Privy Council as precedents. It is open to the CCJ to give persuasive authority to Privy Council decisions but, by the same token, the CCJ may decide to depart from the reasoning and decisions of the Privy Council.

Secondly, the transitional character of the current case from Barbados is to be noted. Barbados has amended its constitution in order to negate the effect of the *Pratt and Morgan* ruling. Thus, for Barbados, it shall not be inhuman or degrading punishment or treatment to execute a guilty murderer after five years have elapsed. But

this constitutional amendment cannot be applied retrospectively, so it does not cover the current case. The amendment will, however, apply in most, if not all, future cases from Barbados that come before the CCJ.