ST. LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 13 OF 2000

BETWEEN:

IANTHE HARDING
Administratrix of the Estate of
ALFRED HARDING
Deceased
[Substituted by Order of this Court dated January 30, 2001]

Appellant

And

1. **THE SUPERINTENDENT OF PRISONS**
2. **THE ATTORNEY GENERAL OF ST. LUCIA**

Respondent

Before:

THE HON. MR. SATROHAN SINGH	**JUSTICE OF APPEAL**
THE HON. MR. ALBERT REDHEAD	**JUSTICE OF APPEAL**
THE HON. MR. ALBERT MATTHEW	**JUSTICE OF APPEAL**

Appearances:

Mr Martinus Francois for the appellant.
Mr Anthony Astaphan Senior Counsel of the Dominica Bar, Miss Louise Bledman, Solicitor General and Miss Sheryl Mathurin Crown Counsel with him for the respondent.

January 29, 2001
February 26, 2001

JUDGMENT

[1] **SINGH J.A.:** On July 31, 2000, **Hariprashad-Charles J**, in a **Constitutional Motion**, found in favour of the appellant **Alfred Harding**, and awarded him **compensatory damages in the sum of $25,000**: for the alleged contravention by the respondents of his fundamental right and freedom guaranteed by the

provisions of **Section 5 of the St. Lucia Constitution Order 1978** (**the Constitution**) not to be subjected to torture, inhuman or degrading punishment or other treatment. The Learned Judge made no award for **aggravated**, **punitive** or **exemplary damages**.

THE APPEAL

[2] The appellant is dissatisfied and has appealed against the Judge's award of $25,000; for compensatory damages and her denial of an award for Aggravated and Exemplary Damages. In his original Notice of Appeal, the appellant prayed that the Judge's "award be increased accordingly." In an amended notice of appeal the appellant prayed "for an award of compensatory, aggravated and exemplary damages in the sum of **five million dollars**. However, in a further amended notice of appeal the appellant reduced that claim to **$500,000** or such sum as the Court thought appropriate, with costs.

THE CROSS APPEAL

[3] There is a **respondents' notice** wherein the respondents contend for a variation of the judgment of the Trial Judge on liability and quantum. They prayed that:

> "(i) The declarations or orders that the fundamental rights and freedoms of the Appellant guaranteed by **Section 5 of the St. Lucia Constitution Order 1978** (hereinafter referred to as the Constitution) were contravened, be set aside;
>
> **In the alternative**
>
> (ii) The declaration or order that the Appellant is entitled to and is awarded the sum of $25,000.00 as damages for the contravention of the Appellant's fundamental rights and freedoms guaranteed by the Constitution, be set aside or reduced."

THE ISSUES TO BE DETERMINED

[4] The **primary issue** therefore for determination by this Court, is what in law constitutes **torture, inhuman, degrading punishment or other treatment**, as

contemplated by **Section 5 of the Constitution**. The **secondary issue** would be to determine whether the facts and circumstances proved by the appellant were enough to satisfy that contemplation. Then, if there could be a happy marriage between those facts and the contemplation of **Section 5 of the Constitution**, the **third issue** would be whether this Court should interfere with the Judge's award of $25,000.

[5] Because of the substantive ground in the respondents' notice which challenged the Judge's ruling on liability, it would make for a more elegant approach to this judgment that I proceed **seriatim** on these issues. There was also one peripheral issue: Whether on the accepted facts the appellant had established a case of **False Imprisonment**. I would therefore now address the primary issue.

TORTURE, INHUMAN, DEGRADING PUNISHMENT OR OTHER TREATMENT

THE FACTUAL MATRIX

[6] **Section 5 of the Constitution** protects a person from inhuman treatment by providing that such person should not be subjected "**to torture, or to inhuman or degrading punishment or other treatment**."

[7] The accepted evidence relevant to this appeal showed that the **appellant was a vicious notorious and dangerous criminal out of Barbados with a propensity for violence**. He had spent the greater part of his 51-year-old life in prison. He began his criminal activities at the age of 12. He was wanted in Barbados for **Attempted Murder**. He has criminal convictions in Barbados and in Canada.

[8] On August 26, 1999, the appellant was approached by two St. Lucian police officers in a store in Castries. One of the officers asked to have a word with him. In typical gangster movie style, he pulled a gun at the officers, aimed it at them and said "I don't think so." The officers 'took cover'. The appellant ran out the store. After a rooftop chase over several buildings in Castries, St. Lucia, in broad daylight, the police arrested and charged him with possession of an unlicensed

firearm and nine rounds of ammunition, without a permit. On August 27, 1999, he was sentenced by a Magistrate to an extended term of imprisonment.

[9] Because of the aforementioned notoriety, and propensity, the prison considered him a security risk and placed him in the maximum security section of the prison, which also accommodated death row prisoners, away from the general prison population. He was in cellular **confinement**. He was not placed in **solitary confinement**.

[10] He was placed in mechanical restraints with chains tied to his ankles secured by two padlocks for 10 months, 15 days, 10 hours and 45 minutes according to Mr Francois, until June 15, 2000, without any removal, and thereafter, on occasional restraints when he had to go to the bathroom or to see his lawyer.

[11] The appellant was an asthmatic before his confinement. The Trial Judge found that his cell was not flooded with 2" of water as he alleged but that the floor was cold. He was made to sleep on the floor with a blanket, but, after he was seen by a doctor, he was given a wooden bed to sleep on some two months later. The evidence showed that the majority of inmates at that prison slept on the floor. He was privileged.

[12] The Trial Judge found against the appellant on his allegation of denial of visitation rights and on his allegation that he suffered physical injuries as a result of the shackling. These findings I accept as correct. The medical evidence supported this latter finding of the Judge. Indeed, the evidence showed that the appellant never complained to the doctors who visited him or to anyone, that he suffered from physical injuries.

[13] The Learned Trial Judge found that the appellant endured pain and suffering as a result of being placed in the mechanical restraints for the extended period of time. However, the appellant never alleged and there was no evidence on the record to support such a finding. I therefore reject that finding.

[14] The appellant did not allege, and there was no evidence that he was deprived of the elementary necessities of life in prison such as food and water. The evidence showed that he was allowed one hour of exercise daily in the open corridor of the maximum security unit.

[15] The evidence was also of crystalline clarity that the appellant had regular visits from two doctors whilst he was confined.

[16] There was no allegation and no evidence that the first respondent, in shackling the appellant and housing him in the maximum security section of the prison, did so **maliciously, outrageously, contemptuously or with intent or motive of punishing or inflicting pain and suffering on the appellant**. Indeed, the Learned Trial Judge found that there was no evidence that the first named respondent "was arrogant as well as abusive and outrageous in his action." The Judge went to say:-

> "I am of the view that the Superintendent of Prisons felt that he had a dangerous criminal on hand and he did not know how and where to confine him in his already over-populated and antiquated prison. There were too many incidents of escaped prisoners at the prisons so the Superintendent took no chances with the Applicant. He decided to shackle him and place him in solitary confinement from the inception. But I have also concluded, the shackling and solitary confinement were in breach of the Prison Rules and amounted to torture, inhuman and degrading punishment to warrant an award of damages."

[17] The evidence also disclosed that in dealing with the prisoner as mentioned above, the first named respondent acted in breach of the **Prison Rules**.

[18] On those facts, the Learned Judge determined the Constitutional Motion as follows:

> "Having considered the submissions of both Counsel, and applying the clear and unambiguous provisions of the Prison Rules and the legal principles in respect to torture, inhuman or degrading punishment or treatment, I come to the following conclusions:
>
> (a) Shackling of the Applicant for an extended period of ten months and fifteen days, including while he slept and ate, without the order of the Visiting Justices was brutal and a severe assault on the person and psyche of the Applicant. Mercifully, it was only the intervention of his Counsel that led to its permanent removal of the shackles. This is a clear breach of the Prison Rules. It amounted to a form of torture.
>
> (b) The occasional shackling of the Applicant whenever he visits the bathroom or he is visited by his legal adviser is also a violation of the Prison Rules. Shackling is permissible but in very *limited circumstances*. While the Superintendent may order a prisoner to be placed under mechanical restraints in order to prevent him injuring himself or others, or damaging property, or creating a disturbance, he *must notify forthwith a Visiting Justice and the Medical Officer*. If the latter is not done, then the shackling of the prisoner becomes unlawful.
>
> (c) The cellular or solitary confinement of the Applicant to a cell for ten months and fifteen days is also a breach of the Prison Rules and is a form of torture or inhuman or degrading punishment. Cellular confinement is permissible only with the authorization of the Board of Visiting Justices and may last only for a month unless renewed by the Visiting Justices. Even if there were good reason to confine a prisoner to a cell, he must be allowed reasonable access to exercise and sunlight.
>
> (d) On the allegation that the Applicant was placed in wet cell with two inches of water, this is a factual issue and I do not believe him. I have already given my reasons for arriving at this conclusion.
>
> (e) Based on the evidence, I do not believe the allegation made by the Applicant that he was denied visitation rights. I further conclude that even if he was and it was contrary to the Prison Rules, it could not amount to torture, inhuman and degrading punishment or treatment to justify a contravention of section 5

of the Constitution. See: **Thomas –v- Baptiste** [supra} and specifically page 9 of the Judgment of Lord Millet."

[19] On the "wet cell" finding the Learned Judge expressed this opinion:-

> "**I do not believe the applicant's evidence that his cell was flooded with two inches of water. I ask myself the question: why should the Superintendent of Prisons be so cruel to the applicant? After all, it is my considered opinion that the Superintendent of Prisons shackled and confined the applicant to the single cell because he was faced with a troubling situation of having to deal with escaped prisoners who are supposedly dangerous. He was not going to let this prisoner escape. So, he decided to take precautionary measures from the outset. Suffice it to say he did so in violation of the Prison Rules**."

[20] From the above findings of the Learned Trial Judge, it is reasonable to conclude that her sole reason for concluding that the appellant was tortured and was made to suffer inhuman or degrading punishment was because his shackling and confinement were inflicted on him in breach of the **Prison Rules** simpliciter. The Learned Judge's findings did not show any form of bad faith or a desire to punish in the first named respondent.

[21] The Learned Judge quite correctly, in my view, for reasons given by her, found that the appellant suffered no injury to his dignity and pride and no disgrace or humiliation. This finding was based on the appellant's sordid reputation. I now approach the law on the matter.

[22] **THE LAW**

It is accepted by both sides that the **Prison Act** and the **Prison Rules of St.Lucia** which were made into law prior to March, 1, 1967, have been preserved in their pristine form by **Section 10 of Schedule 2 of the Constitution**. Mr Francois described them as good law. Accordingly, any act done in accordance with this **Act** and these **Rules** would not contravene the provisions of **Section 5** of the **Constitution**.

[23] As a corollary, it is my view, that not everything done in contravention of this **Act** or these **Rules**, would, **without more**, contravene **Section 5 of the Constitution**. That brings me to the center of gravity of this appeal, what constitutes **Torture, Degrading or Inhuman punishment**.

[24] **Section 5 of the Constitution** is in the same terms as **Article 3** of the **European Convention of Human Rights**. I agree with Mr Astaphan that assistance therefore to determine this issue would be found in the European or Strasburg jurisprudence. Numerous authorities were submitted for the Court's consideration by both sides including **Hilton –v- United Kingdom (1978) 3 EHR R104: Baptiste –v- Thomas; Civil Appeal No. 17 of 1998: Thomas –v- Baptiste (1999) 3 WLR 249: Selmourni –v France (1999) 7 BH RR1: Ireland –v- the United Kingdom Series A No. 25: Tyer –v- United Kingdom, HER Court HR Series A No. 26. The legal position disclosed in these authorities does not seem to be in controversy.**

[25] From these authorities I crystallise the following principles which I accept as good law. Each word of **Section 5** has a separate and distinct meaning. They apply to specific forms of punishment such as the deliberate and intentional infliction of intolerable pain and suffering, or treatment which causes severe and unacceptable pain and suffering whether physical or mental or both, calculated to dehumanize, or results in the deprivation of the elementary necessities of life and which triggers off instinctive human revulsion.

[26] In **Article 3 of the European Convention on Human Rights,** the Convention distinguished between inhuman or degrading treatment, and torture, thereby attaching special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

[27] **Torture** constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment. It implies a suffering of particular intensity and cruelty.

[28] What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case. There has to be a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In **Soering –v- United Kingdom (1989) 11 EHRR R 439** it was stated that:

> "As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and the application of the notions of inhuman and degrading treatment or punishment in extradition cases."

I accept and adopt this approach especially in the context of this case. The appellant was a foreign fugitive.

[29] The ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of **Section 5 of the Constitution**. The assessment of this minimum is, in the nature of things, relative. It depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.

[30] Treatment could be both **'inhuman'** because it was premeditated, was applied for hours at a stretch and 'caused, if not actual bodily injury, at least intense physical and mental suffering', and also **degrading** because it was 'such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance. In order for a

punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment.

[31] A person may be humiliated by the mere fact of being criminally convicted. However, what is relevant for the purposes of **Article 3** and **Section 5 of the Constitution** is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed on him. The prohibition contained in **Article 3 of the Convention** and **Section 5 of the Constitution** is absolute. No provision is made for exceptions. In order for a punishment to be 'degrading' and in breach of **Section 5 of the Constitution**, the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element or humiliation referred to above.

[32] "**Inhuman punishment or other treatment** means or requires punishment or treatment which causes a minimum level of intense physical or mental suffering, whether or not inflicted deliberately or intentionally, or results in the complete or substantial deprivation of the elementary necessities of life over an extended period of time. **(See Hilton –v- United Kingdom: Thomas –v- Baptiste and Ireland –v- United Kingdom)" [Supra]**

[33] The words "**degrading punishment or treatment**" ought to be given their natural and ordinary meaning. Degrading treatment is treatment which humiliates or debases. Therefore, in considering whether an alleged treatment or punishment is "**degrading**" within the meaning of **Section 5 of the Constitution**, the Court ought to have regard to whether the object of the treatment was to humiliate and debase the person, and whether, as far as the consequences are concerned, it adversely affected his personality in a manner incompatible with **Section 5**. **(See Koskinen –v- Finland (1994) 18 EHRR CD at page 158, and Human Rights Law and Practice**, **Butterworths**, at paragraphs 4.3.7 and 4.3.8 page 96)."

[34] In the circumstances, punishment or treatment which was not deliberate and not intended to cause great pain and suffering or which does not cause severe pain or suffering, or does not result in the deprivation of the necessities of life is not caught by **Section 5.**

THE MARRIAGE OF FACT AND LAW

[35] From the above observations, it is clear that the extended shackling, the occasional shackling and the extended cellular confinement were permissible by the **Prison Rules** and that the only reason they became unlawful in this matter was because the first named respondent did not seek the approval of the Visiting Justices. I would venture to say also, that had the approval of Visiting Justices been sought, it was more probable than not that with prudence, such approval would have been granted given the propensity of the appellant.

[36] I now proceed to attempt to marry this law with the facts.

[37] In my judgment, the appellant did not discharge the burden placed on him to prove that when these unlawful acts were inflicted on him, that the first named respondent intended them to be a punishment, that the first named respondent acted in bad faith, was insolent, arrogant or vindictive and was being deliberately cruel to him. He failed to prove that the said respondent was outrageous in his behaviour or that he was abusive. He failed to prove that he suffered physical injuries.

[38] The appellant also failed to prove that as a result he suffered intolerable pain or suffering intentionally inflicted on him physical or mental. Here I have to disagree with the finding of the Trial Judge when she opined that "the shackling of the applicant for such a lengthy period must have traumatized him and he must have suffered psychologically". There was absolutely no evidence to support such an opinion. Instead, the evidence disclosed a hardened criminal who, was capable of jumping from rooftop to rooftop and who, endured a life sentence for Murder and

25 years for Armed Robbery in Canada and 12 years in Barbados for shooting and who it is reasonable to conclude, by then, must have grown accustomed to prison confinement and shackling. Even when he sought to complain, it took him some three months after seeing his lawyer before he could have approached the Court for relief. He had the option of the very swift proceedings of the Writs of Prohibition or Mandamus. He never availed himself of that route.

[39] The appellant failed to prove that he was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of degrading punishment.

[40] I do not accept the Learned Judge's findings that the appellant was placed in solitary confinement. The evidence did not support such a finding. The evidence showed cellular confinement in a different population of the prison. Solitary confinement means confinement away from the entire prison population.

[41] In sum, the appellant failed to prove that what was done to him attained the required minimum level of severity to bring it within the scope of **Section 5 of the Constitution**.

[42] Given those factors, and applying the law above stated, I fail to see a successful marriage between those facts and the aforementioned law.

[43] Mr Francois for the appellant in support of his arguments, relied heavily on the case of **Thomas –v- Baptiste (Supra)**: In that case **Lord Millet** in the **Privy Council** made the observations:

> "The Appellants were detained in **cramped and foul smelling cells and were deprived of exercise and access to the open air for long periods of time.** When they were allowed to exercise in the fresh air they were handcuffed. The conditions in which they were kept were in breach of the prison Rules and thus unlawful. It does not follow that they amounted to cruel and unusual treatment. In a careful judgment de la Bastide C.J. found that they did not.

> "The expression is a compendious one which does not gain by being broken up into its component parts. In their Lordships' view, the question for consideration is whether the conditions in which the Appellants were kept involved so much pain and suffering or such deprivation of the elementary necessities of life that they amounted to treatment which went beyond the harsh and could properly be described as cruel and unusual.
>
> "Prison conditions in third world countries often fall lamentably short of the minimum which would be acceptable in affluent countries. It would not serve the cause of human right to set such demanding standards that breaches were commonplace. Whether or not the conditions in which the Appellants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account local conditions both in and outside prison.
>
> "Their Lordships do not wish to seem to minimize the appalling conditions which the appellants endured. As the Court of Appeal emphasized, they were and are completely unacceptable in a civilized society. But their Lordships would be slow to depart from the careful assessment of the Court of Appeal that they did not amount to cruel and unusual punishment… IT WOULD BE OTHERWISE IF THE CONDEMNED MAN WERE KEPT IN SOLITARY CONFINEMENT OR SHACKLED OR FLOGGED OR TORTURED."

[44] Mr Francois for the appellant chose to dissect the emphasized last four lines of that opinion and relied on them in support of the appellant's case. It is my view that the opinion expressed therein had to be read in context. When so read it will be seen that **Lord Millet** was agreeing with the Court of Appeal of Trinidad that the appalling conditions endured by the appellant in that case did not amount to cruel and unusual treatment. However, as I understand the text, if these conditions were coupled with solitary confinement or shackling or flogging or torture, it would be otherwise.

[45] In my view that case did not support the arguments of Learned Counsel for the appellant. The appalling conditions that existed in **Baptiste** did not exist in the instant matter. There was no allegation or evidence of cramped or foul smelling cell in this matter. As earlier mentioned the evidence disclosed that the appellant alone occupied a cold cell with a blanket, eventually with a bed, and he was allowed one-hour daily exercise outside of that cell. It must also be remembered

that the shackling and cellular confinement could have been permitted by the **Prison Rules** provided they were authorized by the Visiting Justices.

[46] My conclusion on **Section 5 of the Constitution** therefore, is that the appellant failed to discharge the burden placed on him to show that the respondent subjected him to torture or to inhuman or degrading punishment or any other treatment offensive to **Section 5**.

[47] The Learned Trial Judge wrote a scholarly judgment but she went wrong when she obviously concluded that because the **Prison Rules** were breached, **Section 5 of the Constitution** was also automatically breached. It appears also that she allowed the emotive opinions of **Mitchell J** and **Adams J** in the **St. Vincent case of Peters –v- Superintendent of Prisons** to influence her in her deliberations. That was unfortunate because the Peter's case was different from the instant matter. In **Peters**, the Superintendent of Prisons breached the Prison Rules and inflicted corporal punishment on Peters with the cat-o-nine-tails with the intention of punishing Peters. That was not the situation in this matter. This Court has already in the Peter's appeal, voiced its own opinion of those opinions. I now address the false imprisonment issue.

[48] **THE PERIPHIRAL ISSUE: FALSE IMPRISONMENT**

Mr Francois for the appellant argued before this Court for the first time in this matter, that the appellant's judicial incarceration metamorphosed into false imprisonment when the first named respondent breached the **Prison Rules** as aforementioned. Learned Counsel made this submission on the basis that the appellant was made to suffer from intolerable conditions.

[49] That issue has now become academic because of my ruling on **Section 5 of the Constitution**. However, I would adopt the opinion expressed by the **House of Lords** in the **Hague and Milton Cases, (R –v- Deputy Governor of Parkhurst Prison exp Hague [1991] 3 WLR 340 H.L.)** that an otherwise lawfully detained

prisoner had no "residual liberty," the deprivations of which, can give rise to an action of false imprisonment. I say no more on this issue.

CONCLUSION

[50] I conclude this judgment therefore by holding that this **Constitutional Motion** brought by the appellant was misconceived and ought to have been dismissed by the Trial Judge.

[51] Learned Counsel for the appellant has failed to repel the very sound arguments of Senior Counsel for the respondents. In my considered opinion, the Learned Trial Judge erred when she did not uphold the submission of counsel for the respondents to decline to hear the matter because the appellant had adequate means of redress for the contravention of the **Prison Rules** under the law concerned with prerogative writs. [See the **proviso to Section 16 of the Constitution**.] The case was heard on affidavits with no cross examination of witnesses. The affidavits did not disclose any evidence of malice, injury or bad faith in the respondents. It appears that the Learned Judge did not consider these factors when she exercised her discretion. In my view, this omission impaired the proper exercise of her judicial discretion. **[Kemraj Harikissoon -v- the Attorney General (1979) 31 WIR 348]**.

[52] I would therefore order that the cross appeal by way of the respondents' notice be allowed and that the judgment of the Trial Judge be set aside. Accordingly, the appellant's appeal will stand dismissed. The Constitutional Motion will also stand

dismissed. There will be no order as to costs. Learned Senior Counsel Mr Astaphan in his address to the Court had intimated that should the respondents succeed, he would not be asking for costs.

SATROHAN SINGH
Justice of Appeal

I concur

ALBERT REDHEAD
Justice of Appeal

I concur

ALBERT MATTHEW
Justice of Appeal