(58)

ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SUIT NO.: 246 of 1997

BETWEEN: REYNOLD PETERS — APPLICANT

V

BERNARD MARKSMAN
SUPERINTENDANT OF PRISONS
THE ATTORNEY GENERAL — RESPONDENTS

VI Cuffy Esq for the Applicant
D Browne Solicitor-General and Ms J Jones-Morgan with him for the Superintendent of Prisons
P Campbell Esq for the Attorney-General

Mitchell J

JUDGMENT

This is a constitutional motion. It principally involves the question whether flogging with a Cat-o-nine tails infringes the Constitution of St Vincent and the Grenadines. It was brought by way of a Motion filed in the Registry of the East Caribbean Supreme Court at St Vincent and the Grenadines on 9 July 1997. The Motion is supported by an Affidavit of VI Cuffy Esq barrister and solicitor sworn on the same day, with further Affidavits of 14th July and 23rd July. The Affidavits were originally intended to be sworn by the Applicant, but he was not permitted by the prison authorities to swear them. The Superintendent of Prisons has filed an Affidavit in Reply on 22 July. At the commencement of the hearing counsel for the Respondents took a preliminary point as to whether the application had been authorised by the Applicant. The Applicant had signed an Affidavit on 18 July which was exhibited with the Affidavit of the Respondent Superintendent of Prisons to the effect that he had not authorised his solicitor to file these proceedings on his behalf, and that many of the allegations in the Affidavit of Mr Cuffy were not true. At that point in the proceedings the court called forward and questioned the Applicant, who confirmed that he approved of and had authorised the application. He had, he said, signed the repudiating Affidavit "for reasons" that he did not go into. I was satisfied that the application was properly before the court, and ordered that argument on the matter should proceed.

THE APPLICATION

The following reliefs are sought in the Motion:

1. *A Declaration that the execution of a purported sentence of whipping by 10 strokes of a Cat-o-nine tails whip or instrument on the Applicant ordered by Superintendent of Prisons, Bernard Marksman, on August 26 1996 was unconstitutional and unlawful in that it was done in contravention of the Applicant's right not to be subjected to torture or to inhuman or degrading punishment or other treatment guaranteed to him by Section 5 of the Constitution of St Vincent and the Grenadines, 1979.*

2. *A Declaration that the Superintendent of Prisons acted without lawful authority by ordering that corporal punishment be administered to the person of the Applicant on August 26 1996 for what was alleged to have been breaches of Prison Rules s. 51 (a), (d), (f), and (s) of Booklet 1 of Cap 281 of the Laws of St Vincent and the Grenadines.*

3. *A Declaration that cellular confinement of the Applicant since August 26 1996 and continuing to the present time without break and ordered by the Superintendent of Prisons amounts to inhuman or degrading punishment which the Applicant is guaranteed not to be subjected to by Section 5 of the Constitution of St Vincent and the Grenadines.*

4. *A Declaration that the Applicant having been kept in iron-clad foot leggings and handcuffs from August 26 1996 until the month of February 1997 continuously and with which he had to sleep and eat so bound and only relieved of these shackles when he was allowed a bath amounted to torture or to inhuman or degrading punishment contrary to section 5 of the Constitution of St Vincent and the Grenadines.*

5. *A Declaration that the whip or instrument known and referred to as the "Cat-o-nine tails" is not an instrument which is legalized at the present time or at the time of August 26 1996 in St Vincent and the Grenadines for the purpose of punishment of offenders against the criminal and/or penal law or the prison rules or regulations in St Vincent and the Grenadines.*

6. *An order that the Superintendent of Prisons and/or the Attorney General of St Vincent and the Grenadines do pay compensation in damages to the Applicant for the unlawful assault and beatings ordered by the Superintendent of Prisons, Bernard Marksman, upon him on August 26 1996 with a Cat-o-nine tail whip or instrument, and also for his unlawful holding in leg-irons and hand-cuffs, and also in unlawful extended cellular confinement for the periods mentioned herein above respectively.*

7. *Alternatively, if the Applicant proves to this court that an act of torture or other cruel inhuman or degrading treatment or punishment is well founded by or at the instigation and order of the Superintendent of Prisons, Bernard Marksman, demand is made that the Applicant be awarded redress and compensation as provided for under Article 11 of the United National Declaration on the Prevention of Crime and the Treatment of Offenders Act 1984 Cap 143 of the Laws of St Vincent and the Grenadines Revised Edition 1990.*

8. *Such orders, writs, or directions as may be necessary or appropriate to secure redress by the Applicant for contravention by the Respondents or either of them of the Fundamental Rights and Freedoms guaranteed to him by section 5 of the Constitution of St Vincent and the Grenadines.*

THE FACTS

The evidence in the various filed Affidavits may be summarised as follows. The Applicant Reynold Peters (hereinafter Mr Peters) is 40 years old. He is serving a term of 12 years imprisonment for manslaughter, imposed on 12 June 1988, at the State Prison for men in Kingstown. On 26 August 1996 he is alleged to have assaulted Senior Prison Officer Linus Goodluck. To be specific, he is said to have hit him in the back of his head with a 3 foot length of 2" x 2" wood, rendering him unconscious for several hours. Even while Officer Goodluck was unconscious and being dragged from the prison, Mr Peters pursued him with the length of wood attempting to strike him again. There is no suggestion that he succeeded in striking Officer Goodluck more than once. Nor is there any indication what sparked the assault. There is a charge of assault causing actual bodily harm still pending in the Magistrates Court relating to this incident. Mr Peters is liable, if he is convicted of this charge, to be sentenced to a lengthy term of imprisonment to run either concurrently with or consecutive to the balance of the term he is still serving.

On 26 August, the day of the incident and immediately after it had occurred, the Applicant was additionally, charged as a result of this incident with various contraventions of section 50 of the Prison Rules. The actual assault on Officer Goodluck did not form part of the disciplinary

charges brought under the Prison Rules. That offence of assault is being dealt with by the police, not the prison authorities, and is still before the Magistrate. The disciplinary charges brought against Mr Peters under section 50 included, under paragraph (a) disobeying a lawful order; under paragraph (d) using abusive, insolent and threatening language to prison staff; under paragraph (k) being in possession of a piece of wood without authorization; and under paragraph (s) offending against good order and discipline.

The above charges under section 50 were heard by the Superintendent of Prisons on the same day as the incident. The Superintendent found Mr Peters guilty of the above disciplinary charges. As punishment the Applicant was ordered to receive 10 strokes with a Cat-o-nine tails, and to cellular confinement. He was placed lying on his stomach on a bench with iron stays to each of his legs to keep them in place. His hands were handcuffed. A hood was placed over his face. His back was then exposed. The flogging with 10 strokes of the Cat-o-nine tails was then carried out.

Following the execution of this physical punishment the Applicant was placed in a single cell, where he was still kept at the time of the hearing of this application on 24 July 1997. He is confined to his cell continuously, allowed out only for a short period each day to shower. The evidence in the Affidavit of the Superintendent is that this cellular confinement was for a twofold purpose, to aid recovery from the flogging, and to form part of the punishment for the threat on the lives of officers, including that of the Superintendent. The Applicant must have recovered from his injuries from the flogging by this time. He must, therefore, be still in solitary confinement for the other remaining reason, as punishment.

He was for some months kept in his single cell in restraint. That is, he was kept shackled in solitary confinement in a single cell. He had to eat and sleep bound with foot-leggings and hand-cuffs. These shackles were sometimes removed for short periods of time, for example, when he showered. Mr Peters as a result of his continuously being shackled has suffered abrasions and contusions to his lower legs. Finally, on 10 January 1997, after an intervention by Mr Peters' solicitor to the Prime Minister in his capacity as Minister of Justice, the shackles were removed. He does not appear still to be shackled. When he appeared in Court he was unchained and accompanied by a single Prison Officer.

The evidence of the Respondent Superintendent of Prisons is that the Male Prison in St Vincent where this incident occurred is severely overcrowded with well over 380 prisoners congregated at the time of the incident in a space originally designed for a fraction of this number. He described the atmosphere in the prison on the day of the incident as being "rife for a riot". He explained that the actions of the Applicant on the day in question fuelled an already tense situation in the prison. The Superintendent's evidence is that he did what he did in order to contain the situation in the Prison. I accept that, I also accept as fact the statement made at the bar by counsel for the Respondent that for some years no Board of Visiting Justices has been appointed in St Vincent. Neither are any ex officio Visiting Justices called upon to perform at the Prison the duties of the Board.

Counsel for the Applicant urged the court to declare that an order for flogging with a Cat-o-nine tails by a Superintendent of Prisons in St Vincent is unlawful, and is also unconstitutional in that it amounts to torture or inhuman treatment. Further, it contravenes the UN standards for the treatment of prisoners, which UN standards form part of the statute law of St Vincent. He submits that the Cat-o-nine tails is not an instrument that can in St Vincent be used by any authority or court at any time. Only a caning, according to the Criminal Code, can, within the limits prescribed by law, be administered as corporal punishment. He urges that the Superintendent of Prisons has no authority to order the administration of corporal punishment, and acted unlawfully in doing so. He submits further that when a sentence of corporal punishment is imposed in prison by the Visiting Justices, the Visiting Justices act as a court. As a court the Visiting Justices are restricted in the forms of corporal punishment they can apply to the forms allowed to any court. No court is empowered to impose a flogging with a Cat-o-nine tails. Nor, he urges did the Superintendent have the authority to impose solitary confinement. Holding a prisoner in shackles for month after month, he submits is similarly against the prison rules and amounts to a form of torture outlawed by the Constitution. He urges that not only

should the requested declarations be granted, but also, an amount of compensation that would send a strong message should be awarded.

Counsel for the Respondent Attorney General urged first that this was a public law action. This was not a private action claiming damages, so that the court had no authority to award damages if it should find that the actions of the prison authorities complained of were unlawful. He submitted that the use of the Cat-o-nine tails in prison was lawful and constitutional if properly and lawfully ordered by the Visiting Justices. It was a form of punishment preserved by the transitional provisions of the Constitution. As such, it could not be in contravention of section 5 of the Constitution. He conceded that the Superintendent had no authority to order the flogging with the Cat-o-nine tails. That, he urged, was a matter for Mr Fete. s to take up if he wished in a private suit for damages against the Superintendent for the tort of assault. He urged that the Motion should be dismissed. Counsel for the Respondent Superintendent of Prisons associated himself with the submissions of counsel for the Attorney General. I must indicate at this point how grateful I am to both counsel for their diligent research and helpful argument before the court in support of their clients' positions. Counsel for the Respondent Attorney General was particularly to be commended for the able way that he responded in assisting the court with his argument at very short notice.

Let us now look at the legal instruments that were discussed in the argument.

THE LAW

1. The Corporal Punishment (Abolition) Ordinance, 1966

In St Vincent and the Grenadines, since 1966 corporal punishment as a sentence of a court has been severely restricted. The long title of the above Ordinance is:

> *"An Ordinance to abolish sentences of flogging and whipping as sentences of Courts; to confer power on courts to order juveniles to be caned on conviction of certain offenses; and for purposes connected therewith."*

The Ordinance provides, inter alia:

"...

3. *No person shall be sentenced by a court to flogging; and so far as any law or any provision of any law confers power on a court to pass a sentence of flogging it shall cease to have effect.*

4. *No person shall be sentenced by a court to whipping; and so far as any law or any provision of any law confers power on a court to pass a sentence of whipping it shall cease to have effect.*

5. *Any court before which a juvenile offender is convicted of any of the offenses mentioned in the First Schedule to this Ordinance shall have power to order him to be caned in lieu of or in addition to dealing with him in any other manner in which the court has power to deal with him.*

...

13. *The following Ordinances are repealed:-*

(a) *The Flogging Regulation Ordinance (Cap. 128)*

(b) *The Laws (Corporal punishment) Revision Ordinance, 1941"*

2. **Corporal Punishment of Juveniles Act, Cap 123**

The long title to this Act is

> *"An Act to repeal and replace the law relating to corporal punishment of juveniles".*

It came into effect on 25 January 1983. This Act provides inter alia:

...

> *"5. Where, on conviction of an offence punishable by caning, a court orders a juvenile offender to be caned, the number of strokes which may be ordered to be administered in respect of any one offence shall not exceed twelve, and the number ordered to be administered shall be specified in the order.*
>
> ...
>
> *7. Caning shall be administered privately, on the buttocks, with a light rod or cane of birch or tamarind or other twig."*

...

3. **Criminal Code, Cap 124**

This Act came into effect on 30 October 1989. By its long title it is expressed to be an Act to amend and codify the criminal laws of St Vincent and the Grenadines and for matters incidental thereto. It provides, inter alia:

...

> *"23. Subject to the provisions of this Code and of any other law in force relating to the jurisdiction of particular courts, the following kinds of punishment may be imposed by a court on persons convicted of offences:*
>
> *(a) death*
> *(b) imprisonment*
> *(c) fine*
> *(d) payment of compensation*
> *(e) finding security to keep the peace ...*
> *(f) probation ...*
> *(g) forfeiture of articles involved in the offence*
> *(h) costs*
> *(i) in the case of a male person of any age, corporal punishment in accordance with the provisions of the Corporal Punishment of Juveniles Act ..."*

4. **The Constitution**

The Constitution of St Vincent and the Grenadines came into effect of the 26 July 1979. It provides inter alia:

...

> *"5. No person shall be subjected to torture or to inhuman or degrading punishment or other [such?] treatment.*
>
> ...
>
> *SECOND SCHEDULE*
>
> ...
>
> *10. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 of the Constitution to the extent that the law in question authorises the infliction of any description of punishment that was lawful in St Vincent and the Grenadines immediately before 27th October 1969 (being*

the date on which St Vincent and the Grenadines became an associated state)."

...

Other than the apparent typographical error of the missing word "such", the provision in section 5 of the Constitution is identical to the same provision in other Commonwealth Constitutions.

5. **United Nations Declaration on the Prevention of Crime and the Treatment of Offenders Act, Cap 143**

This Act came into effect on 15 May 1984. In its long title it says it is an Act to incorporate into the laws of St Vincent and the Grenadines the Declaration of the United Nations on the Prevention of Crime and the Treatment of Offenders.

By section 6 of the Act:

> *"Any person who -*
> *(a) contravenes Article 1;*
> *(b) does anything which may constitute participation in, complicity in, incitement to, or an attempt to commit, torture; or*
> *(c) offends against Article 10,*
> *is guilty of an offence and liable to a fine of two thousand dollars and to imprisonment for two years.*
>
> ..."

The text of the Declaration, as adopted by St Vincent and the Grenadines then follows as a Schedule to the Act:

> ***"Article 1***
> *For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him, or a third person, information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons ... Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.*
>
> ...
>
> ***Article 3***
> *No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war, or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.*
>
> ...
>
> ***Article 10***
> *If an investigation under Article 8 or Article 9 establishes that an act of torture as defined in Article 1 appears to have been committed, criminal proceedings shall be instituted against the alleged offender or offenders in accordance with national law ...*

Article 11

Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed, by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law."

...

All of the above law deals with the position of corporal punishment in a court. The position in the prison it has been suggested by counsel for the Respondents has always been different, as there are special provisions for corporal punishment in prison. The starting point must be the:

6. **Prisons Act Cap 281**

This Act came into effect on 15 February 1968. It provides, inter alia:

"...

34. Any prisoner who

(a) mutinies, or incites to mutiny;

(b) escapes, or attempts to escape;

(c) takes part in any gross personal violence to any member of the prison staff or the medical officer;

(d) aggravatedly or repeatedly assaults another prisoner

...

and is found guilty thereof on an inquiry before a court composed of two visiting justices appointed under section 43 or of one ex officio visiting justice, sitting in prison, such court may impose any or all of the following punishments:

(a) reduction of diet to No 1 punishment diet ...

(b) reduction of diet to No 2 punishment diet ;

(c) suspension or postponement of any privileges ;

(d) forfeiture of remission for any period not exceeding 90 days;

(e) cellular confinement for a period not exceeding 14 days ... or 28 days;

(f) stoppage of earnings for a period,...

(g) in the case of the offence of mutiny or the incitement to mutiny, or taking part in any assault or attack on any member of the prison staff or medical officer, corporal punishment.

...

35. Where any prisoner commits any grave or minor prison offence then, on such prisoner being found guilty thereof on an inquiry before the Superintendent, the Superintendent may impose any or all of the following punishments:

(a) reduction of diet to No 1 punishment diet ...

(b) reduction of diet to No 2 punishment diet ;

(c) suspension or postponement of any privileges ...

(d) forfeiture of remission.

...

36. (1) Where corporal punishment is imposed under section 34, the number of strokes shall not exceed, in the case of a young prisoner, 10, and in the case of any other prisoner 18.

(2) Corporal punishment shall be inflicted by such instrument and in such manner as may be specified in Prison Rules.

...

40. A prisoner may, within 48 hours of the time at which the punishment was ordered, appeal in writing to the Visiting Justices against any sentence imposed on him by the Superintendent.

...

43. (1) There shall be, in respect of each prison, a Board of Visiting Justices and the Governor-General may appoint for such time as may be specified in the appointment, such and so many justices of the peace to be members of such Board.

(2) All judges of the High Court and magistrates, including additional magistrates, shall be ex officio visiting justices for each of the prisons in St Vincent and the Grenadines."

7. **The Prison Rules**

The Prison Rules are found at the back of Cap 281 in what is called Booklet 1. They came into effect on 20 February 1968. The relevant provisions are:

*"50. **Offences**.*
A prisoner shall be guilty of an offence against discipline if he:

(a) disobeys any lawful order of the Superintendent or of any other member of the prison staff or any prison rule.

...

(d) uses any abusive, insolent, threatening, or other improper language.

...

(f) commits any assault.

...

(s) in any way offends against good order and discipline.

*51. **Investigation of offences and awards by Superintendent***

(1) Save as provided by rules 52 and 53, the Superintendent shall investigate every offence against discipline and may determine thereupon and make one or more of the awards provided in section 35 of the Act.

...

*52. **Investigation and awards by visiting justices***

(1) Where a prisoner is reported for any grave prison offence, other than the offences provided in section 34 (1) or (3) of the Act [Note that section 34 of the Act is not divided into subsections] for which such award as the Superintendent is authorised to make is deemed insufficient, the Superintendent shall, after investigation, report the offence to the Board of Visiting Justices or to an ex officio visiting justice. Two visiting justices or an ex officio visiting justice shall inquire into the report and shall determine thereon and may make one of the awards provided in section 34 of the Act.

...

*53. **Especially grave offences**.*
Where a prisoner is reported for one of the following offences namely:

(i) mutiny or incitement to mutiny;

(ii) gross personal violence to any member of the prison staff or the medical officer;

the Superintendent shall forthwith report the same to the Board of Visiting Justices and two visiting justices, or an Ex officio visiting justice, shall inquire into the charges on oath and shall determine thereupon, and for this purpose may make one or more of the awards set out in section 34 of the Act, and in the case of a male prisoner may order, subject to the restrictions imposed by section 36 of the Act, corporal punishment in addition to or instead of any such awards.

*54. **Corporal punishment***

...

(5) Every instrument used for the infliction of corporal punishment shall be of a pattern approved by the Governor-General.

*57. **Mechanical restraints***

(1) Mechanical restraints shall not be used as a punishment or for any purpose other than safe custody during removal, except on medical grounds by direction of the medical officer, or in the circumstances and under the conditions stated in the following provisos of this rule.

(2) When it appears to the Superintendent that it is necessary to place a prisoner under mechanical restraint in order to prevent him injuring himself or others, or damaging property, or creating a disturbance, the Superintendent may order him to be place under mechanical restraint, and notice thereof shall forthwith be given to the visiting justices and to the medical officer.

...

(3) No prisoner shall be kept under mechanical restraint longer than is necessary, or a longer period than 24 hours, unless an order in writing from a justice of the peace who is a member of the Board of Visiting Justices is given, specifying the cause thereof and the time during which the prisoner is to be so kept, which order shall be preserved by the Superintendent as his warrant.

*58. **Temporary confinement***

The Superintendent may order any refractory or violent prisoner to be temporarily confined in a special cell certified for the purpose in the same manner as cells to which rule 9 applies, but no prisoner shall be confined in such a cell as a punishment or after he has ceased to be refractory or violent.

...

*166. **Restraint.***

(1) If the Superintendent represents to a member of the Board that he or the medical officer has, in a case of urgent necessity, put a prisoner under mechanical restraint, and that it is necessary that the prisoner be so kept for more than twenty four hours, such member may authorise the continuance of that restraint by order in writing, which shall specify the cause thereof and the time during which the prisoner is to be so kept.

(2) If the Superintendent represents to a member of the Board that he has arranged for a prisoner to work temporarily in his cell and not in association, such member may authorise

the arrangement by order in writing, and such order may be renewed from month to month."

The above were the principal pieces of statute law brought to the attention of the court. Additionally, the Applicant produced two cases one on flogging and the other on cellular confinement from a Commonwealth country, Zimbabwe.

In the first case, heard before 5 judges, S v Ncube and others 1987 (2) ZLR 246, the Supreme Court of Zimbabwe considered the contention that the imposition of a sentence of whipping upon the person of a male adult offender is an inhuman or degrading punishment in contravention of the Declaration of Rights contained in the Constitution of Zimbabwe. The facts in the case were that the 3 appellants had been convicted on separate occasions of cruelly raping a number of children. They were each sentenced to terms of imprisonment and a whipping as authorised by law. The Supreme Court considered the various statutes that permitted a sentence of whipping by a court and also under the Prison Act as a disciplinary measure in certain prison offences. Dicta and quotations from various studies critical of whipping were quoted approvingly by Gubbay JA, who gave the decision of the Court, to the following effect:

From South Africa, where whipping was not susceptible to a constitutional attack:

"whipping is a punishment of a particularly severe kind. It is brutal in its nature and constitutes a severe assault upon not only the person of the recipient but upon his dignity as a human being."

And later:

"... the degenerating and brutal punishment of flogging with a whip or cane has been abolished or greatly restricted in operation in almost the whole civilised world."

And, also from South Africa:

"The use of corporal punishment is based on fear which breeds resentment and hostility towards the society that uses it. Such treatment debases, not only the individual, destroying his dignity and self respect, but also the society that permits it. ... Corporal punishment not only brutalises the individual but tends to weaken the sense of shame on which the hope of improvement depends. When that shame is destroyed society has lost an important chance to reclaim that individual."

And, quoting the report of the Cadogan Committee which led to the abolition of corporal punishment in the United Kingdom in 1948:

"In its own interests society should in our view, be slow to authorise a form of punishment which may degrade the brutal man still further and may deprive the less hardened man of the last remaining traces of self-respect. As applied to adults, corporal punishment is certainly more degrading than any of the other punishments recognised by the criminal law."

And, from Australia:

"Corporal punishment brutalises the prisoner and executioner alike. It breeds hatred and bitterness, uproots personal dignity, and frustrates any attempt at social re-adjustment. At the same time it arouses among fellow prisoners a community of interest against the prison regime and a sympathy with its victims."

Gubbay JA described the basic meaning and purpose of section 15(1) of the Zimbabwean Constitution in these words:

"The raison d'etre underlying section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity

humanity, and decency, against which penal measures should be evaluated. It guarantees that the power of the State to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant. Thus a penalty that was permissible at one time in our history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances."

In concluding that the whipping each appellant had been ordered to receive breached section 15(1) of the Constitution of Zimbabwe as constituting a punishment which in its very nature was both inhumane and degrading, the Court of Appeal relied upon the following adverse features which are inherent in the infliction of a whipping. They were:

"1. The manner in which it is administered. It was reminiscent of flogging at the whipping post, a barbaric occurrence particularly prevalent a century or so past. It is a punishment, not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency.

2. By its very nature it treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status.

3. No matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of a sadistic and unscrupulous prison officer who is called upon to administer it.

4. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him, society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general".

On the question of confinement to a cell, the Supreme Court of Zimbabwe considered the issue on an application for redress under the Constitution of Zimbabwe in the case of Conjwao v Minister of Justice 1992 (2) SA 56. In that case the Applicant and his two co-accused had been convicted of murder in attempting to blow up an ANC building in Zimbabwe, and had been sentenced to death. Subsequently, another person was found guilty of having conspired with others to forcibly effect the release from lawful custody of the Applicant and his co-accused and to remove them from Zimbabwe. Strict security measures were implemented. The applicant's access to the exercise yard was reduced to half an hour on weekdays only. During this time he had to shower, attend to his laundry, wash his eating utensils, and sweep out his cell. The Supreme Court unanimously found that such confinement was plainly offensive to notions of humanity and decency and transgressed the boundaries of civilised standards and involved the infliction of unnecessary suffering. The court unanimously found, Gubbay CJ, as he now was, presiding, that the Applicant's deprivation from access to fresh air, sunlight and the ability to exercise properly for a period of 2 1/2 hours per day, by holding him in a confined space was virtually to treat him as non-human and was repugnant to the attitude of contemporary society. The Supreme Court found it lacked the expertise to determine the maximum exercise period. It accepted that the special security circumstances required special confinement. However, they ordered that the Applicant be allowed to exercise in the open air every weekday for one hour in the morning and one hour in the afternoon exclusive of the time taken by him to bathe and for one hour each day on weekends and public holidays, exclusive of the time taken by him to bathe.

CONCLUSIONS

1. Applying the clear and unambiguous provisions of the Prison Act and the Prison Rules set out above I find that the sentence of whipping by 10 strokes of a Cat-o-nine tails ordered on 26 August 1996 by the Superintendent of Prisons to be administered to the Applicant Reynold Peters was illegal. The Superintendent was dealing with minor disciplinary charges against Mr Peters. He had decided to leave the more serious matter of the assault on Officer Goodluck to the courts. In dealing with minor disciplinary matters the Superintendent is limited to the punishments set out at section 35 of the Prisons Act. These punishments do not include a flogging, or a whipping, or a caning, or any other form of corporal punishment.

2. A corporal punishment sentence is envisaged by section 34 of the Prison Act in relation to the offences of mutiny, escape, aggravated assault, and the like. Only a court consisting of two Visiting Justices or one ex officio Visiting Justice is authorised by section 34 to administer corporal punishment. Even the Visiting Justices cannot impose a sentence of corporal punishment on a prisoner charged with the disciplinary offences of the type that Mr Peters was charged with before the Superintendent. If the Visiting Justices had ordered a sentence of any form of corporal punishment administered to Mr Peters on the charges that were before the Superintendent that would have been an unlawful sentence. When the charge of assault comes up next to be dealt with in the Magistrate's Court, the court may well wish to consider that the punishment that was imposed on Mr Peters by the Superintendent was intended for the offence of the assault, and that no further punishment ought to be inflicted. But I leave that matter in the hands of the court that will hear the evidence and have to adjudicate on it.

3. The fact that no Visiting Justices have been appointed for a very long time, and, as a consequence, there was no Visiting Board to approve the sentence against Mr Peters does not assist. First, only the Superintendent can remedy this lack. A memo from the Superintendent to the Minister of Justice would advise the Minister of the vacancies on the Board. This is the only way that the Minister can know that the Visiting Justices need to be appointed. With the approval of Cabinet a list of suitable persons would be presented by the Minister to the Governor General for the vacancies to be filled. The Governor General would not otherwise know that he is required to perform his statutory duty to appoint the Visiting Justices. With the assistance of the Bar and of the Magistracy the new Board could quickly be made aware of their duties and responsibilities under the law. Even in the absence of the Board, I cannot help but be aware that the Kingstown Magistrates' court is across the street from the Prison. The Court House, with at least one and sometimes 2 High Court Judges in office, is in the same courtyard as the Prison. The Judges and Magistrates are all ex officio Visiting Justices, and could be asked to deal with the matters that require under the Prison Act the approval of the Board. A Board of Visiting Justices is essential for the proper functioning of the Prison. The Superintendent cannot properly run the Prison without the assistance of the Board. The Board sanctions and approves or disapproves of various disciplinary matters that the Superintendent has in mind. The approval of the Board is the necessary warrant and authority the Superintendent requires. Without such approval, what he does with the best intention in the world is likely to be illegal. But, second, and more important, there was nothing the Board could have done to have made the flogging administered in this case lawful.

4. Now to the main question that arises on this Motion, the constitutionality of the use in St Vincent and the Grenadines of the Cat-o-nine tails. I have no difficulty in ruling that the use of the Cat-o-nine tails in St Vincent and the Grenadines in this the last decade of the twentieth century is unconstitutional in that it contravenes section 5 of the Constitution of St Vincent.

   (a) My first reason for so deciding is that I find that it is an unacceptable offence against the dignity of man in St Vincent and the Grenadines. Section 5 of the Constitution prohibits
      (i) torture;

(ii) inhuman punishment;
(iii) degrading punishment;
(iv) inhuman treatment; and
(v) degrading treatment.

Flogging is performed only with a Cat-o-nine tails. Such flogging is incompatible with the standards of decency that are expected of the Prison Service. It brutalises not only the person being flogged, but also it brutalises the society that permits it. It breeds hatred and bitterness of the law and of society. Flogging with a Cat-o-nine tails meets the definition of torture found at Article 1 of the UN Declaration on the Prevention of Crime and the Treatment of Offenders. This Declaration is a part of the statute law of St Vincent. Torture is there defined as any act by which severe pain or suffering, physical or mental, is intentionally inflicted on a person for the purpose of ... punishing him. Torture, it continues, constitutes an aggravated and deliberate form of cruel, inhumane or degrading treatment or punishment. What may have been acceptable in the past as a form of punishment for prisoners may not be acceptable by society today. Today, let the Cat-o-nine tail whip of the Male Prison in St Vincent take its place in the prison museum along with such other instruments as the rack, the whipping post, the thumb screw, and the body cage in which rebellious West Indians were once suspended until they had starved to death.

(b) My second reason for holding that flogging in prison, even when ordered by the Visiting Justices, contravenes section 5 of the Constitution is that flogging in Prison, even in serious cases of aggravated assault brought under section 34 of the Prison Act, was not preserved either expressly or impliedly by section 10 of the transitional provisions found at the Second Schedule to the Constitution. Counsel for the Respondents submitted that, abhorrent though the punishment of flogging with a Cat-o-nine tails might be in this day, the court would be presuming to legislate in the place of Parliament in declaring any such punishment unconstitutional. The Constitution, he submitted, had specifically preserved the punishment of flogging in prison, as it was a punishment lawfully in use in prison for serious disciplinary offences before the date of the Associated State Constitution. I do not agree with this submission. The Corporal Punishment (Abolition) Ordinance, 1966 abolished all forms of corporal punishment for adults as a sentence of a court. The distinction that I consider this Ordinance made was not that between a sentence of a court and a punishment in a prison, but between the sentence of a court and the chastisement of a child and additionally, in the case of St Vincent, the caning of a juvenile offender. If the legislature had intended in 1966 to preserve the flogging with a Cat-o-nine tails of an adult in a prison by order of a court of the Visiting Justices, then I have no doubt it would have said so expressly. Since the Corporal Punishment (Abolition) Act of 1966 no court in St Vincent has been permitted to sentence any person to flogging or to whipping, only to caning. In 1966 the flogging of an adult prisoner by order of any court had been abolished. When the Visiting Justices sit in prison to hear a charge under section 34 of the Prisons Act they sit as a court. The Prison Act says so. The Visiting Justices are no less a court when sitting in Prison than the Magistrate's Court or the High Court is a court. It follows that the 1966 Act abolished flogging as a sentence of a court of Visiting Justices. So that, when the Prisons Act came into effect in 1968 and purported to give the Visiting Justices the power to impose corporal punishment, that provision did not authorise the Visiting Justices to order a form of corporal punishment, either flogging or whipping, that had earlier been abolished. The form of corporal punishment the court of Visiting Justices were authorised to impose when in 1968 the Prison Act was passed is not spelled out. There is nothing in

that Act or in the Rules to indicate that the punishments of flogging or whipping were intended to be revived. It is possible that the intention was to permit a form of caning which had been preserved for juveniles. In the absence of specific words in the Prison Act authorising the use of the Cat-o-nine tails, or specifically mentioning either flogging or whipping, it would be unreasonable to find that this 1968 Act impliedly reintroduced the specifically repealed sentences of flogging or whipping. When the transitional provision at section 10 of the Second Schedule came into effect on 26 July 1979 it preserved descriptions of punishment that were lawful before the date of Associated Statehoodship, that is, before 27 October 1969. On 27 October 1969 both descriptions of flogging and whipping as a sentence of a court had been abolished since the Corporal Punishment (Abolition) Act of 1966, leaving only the sentence described as caning for juveniles. In 1989, circumstances unknown to us moved the Legislature to reintroduce corporal punishment into the court system. The strategy chosen was to reintroduce corporal punishment for adults "in accordance with the provisions of the Corporal Punishment of Juveniles Act." The Corporal Punishment of Juveniles Act provided for caning. This method of corporal punishment for juveniles was saved by the transitional provision 10 of the Second Schedule to the Constitution. The Legislature appears to have taken the view in 1989 that the wording it chose at section 23(1) of the Criminal Code was necessary to avoid any reimposition of corporal punishment for adults being held to be in contravention of section 5 of the Constitution. Section 23(1) provided, in effect, that if a court in future imposes corporal punishment on an adult, that punishment can only be by a caning with a birch, tamarind or other twig. It cannot be a whipping or flogging of the type that prevailed previously to the Corporal Punishment Abolition Ordinance 1966. A question will one day arise as to whether any caning of an adult by way of a sentence of a court is within the Constitution. That question, thankfully, is not before us today and will fall to be determined on another occasion. Be that as it may, in 1989 the Legislature reintroduced caning as a sentence for adults. It would appear that the Prisons Act had done a similar thing for prisoners in 1968.

(c) It will be said by the die-hards that the Cat-o-nine tail whip is an important tool for keeping the prisoners cowed at the Male Prison. Without the fear of the Cat hanging over them the prisoners will be more difficult to control. It may well be that this is one reason why Visiting Justices are not appointed and permitted to perform their duties: they interfere in the administration of the prison, and make it more complicated and difficult to run given the overcrowding and harsh conditions prevailing. The critical need to maintain discipline in an antiquated and overcrowded facility will partially explain why the Superintendent was so quick to use the Cat on Mr Peters without allowing him the chance to appeal conferred by section 40 of the Prison Act. But, the time will come when the very overcrowding in the present old nineteenth century prison will be the basis for a constitutional challenge to a term of imprisonment in such a facility as being inhuman and degrading, which challenge will at the least cause serious embarrassment. It is open to our Legislature in St Vincent to reform our penal law to introduce a wider variety of sentences that courts can impose. If the courts were able to impose community service, curfews, home confinement and all the other panoply of modern sentences, in addition to the present ones of fine and imprisonment, then the prison population might well be reduced. If they choose not to act, then the court will not sit silently by while the basic right of our citizens to be treated as human beings is denied.

5. Concerning next the fourth relief sought by Mr Peters in his Motion, a declaration as to the unconstitutionality of the continuous shackling between August 1996 and January

1997. No authority on shackling a prisoner for extended periods was produced to me. Nor was any case from the Commonwealth Caribbean produced to me in support of any of the argument. I apply the law as set out above to the facts in this case and come to the following conclusion. Shackling is permitted under rules 57 and 166 of the Prison Rules in very limited circumstances. It may not be used as a method of punishment under any circumstances. It may only be used to move a prisoner from one place to another or, in a case of urgent necessity to temporarily restrain a violent prisoner, and in any event for no more than 24 hours without the order of the Visiting Justices. I am satisfied that in the circumstances of this case the shackling of the prisoner for an extended period, including while he slept and ate, without the order of the Justices, was a brutal and severe assault on the person and psyche of Mr Peters. It was designed to brutalize and break him and to reduce him to compliancy by stripping him of all dignity and self respect. It amounted to a form of torture.

6. The question of confinement to a cell or "solitary confinement" is dealt with by rules 58 and 166 of the Prison Rules as set out above, and as interpreted by the courts. Confining a prisoner to any cell, whether a special cell or his own cell, is not permitted as a punishment. It is permissible only with the authorization of the Board of Visiting Justices and may only last for a month, unless renewed by the Visiting Justices. Even if there were a good reason to confine a prisoner to a cell, for example, because he is considered an uncontrollably violent person who is a danger to staff or other inmates, he must be allowed reasonable access to exercise and sunlight. To confine a prisoner to a cell in solitary for an extended period of time as a punishment without a lawful reason and without the sanction of the Visiting Justices is to treat him as a non-human, to inflict unnecessary suffering and to degrade him, and is repugnant to the values and attitudes of Vincentian society.

7. The remedy sought by the Applicant under the United Nations Declaration on the Prevention of Crime and the Treatment of Offenders Act is not available to me to grant him. That Act creates a criminal offence of torture. That offence must be tried in the criminal courts of the country. If the offence is proved, then the punishments set out in the Act apply, and the remedies available there flow The competent authority may under that Act award compensation to a victim of torture. The competent authority is under the Act the Attorney General. It does not appear to me that the court hearing this Motion, even if it were convinced as I am that the treatment of Mr Peters amounted to torture, is enabled to award compensation under this Act. Mr Peters must apply for an investigation and an award. I will indicate for what it is worth that in my view any award should be substantial, ie, not falling below EC$225,000.00. I would have divided that as to $75,000.00 each for the flogging, the solitary confinement. and the shackling. That is what I would have awarded if I had the power.

8. The Applicant Mr Peters does seek at paragraph 6 of the Motion compensation for his unlawful flogging, solitary confinement and shackling. I do not believe that a court hearing a constitutional motion has the power to award an amount of damages or compensation for the breach of the applicant's rights when they are found to have occurred as I so find. No authority or the point has been brought to my attention. If I am wrong on this I will indicate that in my view, for what it is worth, the amount that I would have awarded if I had been aware of any authority so permitting me would not have been less than the above amount. I am aware that the provisions of the Public Authorities Protection Act probably at this time make it unlikely that he will be able to bring a writ in the High Court for compensation for the flogging, as the time limits are against him.

THE AWARD

I therefore grant Mr Peters the following reliefs as sought by him

1. A Declaration that the execution of a purported sentence of whipping by 10 strokes of a Cat-o-nine tails whip or instrument on the Applicant Reynold Peters ordered by the Superintendent of Prisons, Bernard Marksman, on August 26 1996 was unconstitutional

and unlawful in that it was done in contravention of the Applicant's right not to be subjected to torture or to inhuman or degrading punishment or other such treatment guaranteed to him by section 5 of the Constitution of St Vincent and the Grenadines.

2. A Declaration that the Superintendent of Prisons acted without lawful authority by ordering that corporal punishment be administered to the person of the Applicant on August 26 1996 for what was alleged to have been breaches of Prison Rules 50 (a), (d), (f) and (s) of Booklet 1 of the Prison Act Cap 281 of the Laws of St Vincent and the Grenadines.

3. A Declaration that cellular confinement of the Applicant since August 26 1996 and continuing to the present time without break and ordered by the Superintendent of Prisons amounts to inhuman or degrading punishment which the Applicant is guaranteed not to be subjected to by section 5 of the Constitution of St Vincent and the Grenadines.

4. A Declaration that the Applicant, having been kept in iron-clad leggings and handcuffs from August 26 1996 until the month of February 1997 continuously and with which he had to sleep and eat so bound and only relieved of these shackles when he was allowed a bath amounted to torture or to inhuman or degrading punishment contrary to section of the Constitution of St Vincent and the Grenadines.

5. A Declaration that the whip or instrument known and referred to as the "Cat-o-nine-tails" is not an instrument which is legalized at the present time or at the time of August 26 1996 in St Vincent and the Grenadines for the purpose of punishment of offenders against the criminal and/or penal law or the prison rules or regulations in St Vincent and the Grenadines.

6. I award the Applicant his costs to be taxed if not agreed.

ID Mitchell, QC
High Court Judge (Ag)
31 July 1997