IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

SUIT NO.: 525/98

IN THE MATTER OF THE CONSTITUTION OF SAINT VINCENT AND THE GRENADINES

AND

IN THE MATTER OF AN APPLICATION BY KEVIN LUCAS ACTING HEREIN BY HIS NEXT FRIEND VIRGINIA MASCOLL ALLEGING THAT THE RIGHTS GUARANTEED TO HIM BY SECTION 5 OF THE CONSTITUTION HAVE BEEN CONTRAVENED IN RELATION TO HIM AND FOR REDRESS IN ACCORDANCE WITH SECTION 16 OF THE SAID CONSTITUTION

BETWEEN:	KEVIN LUCAS "BY NEXT FRIEND" VIRGINIA MASCOLL	APPLICANT
	AND	
	MYRTLE JACK and THE ATTORNEY GENERAL OF ST. VINCENT AND THE GRENADINES	RESPONDENTS

Mr. Victor Cuffy for the Applicant

Miss Dawn Lewis for the Respondents

[19th February,1999; 5th, 11th May, 1999]

[Delivered 11th October, 1999]

JUDGMENT

ADAMS J.

The Applicant Kevin Lewis by his next friend Virginia Mascoll moves the court by way of notice of motion in which he complains that his right not be subjected to inhuman or degrading punishment or treatment provided for in section 5 of the Constitution of St. Vincent and the Grenadines has been contravened, and seeking redress by virtue of the provisions of Section 16 of the said Constitution.

He seeks specifically the following relief:

1. A Declaration that the execution of a flogging with 6 strokes or lashes with a leather strap on the body of the Applicant on the 13th November, 1998 by the first named Respondent Myrtle Jack was unconstitutional and unlawful in that it was done in contravention of the

Applicant's right not to be subjected to inhuman or degrading punishment or other treatment guaranteed to him by section 5 of the constitution of Saint Vincent and the Grenadines, 1979.

2. A Declaration that the first named Respondent acted without lawful authority by applying corporal punishment in the form of 6 strokes or lashes with a leather strap on the body of the Applicant on the 13th November, 1998 causing him injury, pain and suffering.

3. An Order that the first-named Respondent Myrtle Jack and/or the Attorney General of Saint Vincent and the Grenadines, the second-named Respondent do pay compensation in damages to the Applicant for the said unlawful assault and flogging performed and applied by the first-named Respondent on the Applicant on the 13th November, 1998.

4. For all such Orders, Writs, 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 right and protection guaranteed to him by section 5 of the Constitution of Saint Vincent and the Grenadines, 1979.

5. Alternatively for a declaration pursuant to article 3 of the United Nations Declaration on the Prevention of Crime and the Treatment of Offenders Act 1984 that the applicant was subjected to inhuman or degrading treatment or punishment.

The case which he makes against the defendant and upon which his application is grounded is as follows:

The applicant on Friday 13th November, 1998 attended a talk delivered at his school. At the end of the talk the applicant was asked to remain in the class and write what he thought he had learnt from the session The applicant did so. It was then about 1:30 p.m., and being lunchtime the applicant went to the school kitchen for lunch. There was an exchange of words between the applicant and the cook who seemed to be enquiring as to why the applicant had not gone for lunch earlier. Having eaten his lunch the applicant went to his class. Myrtle Jack the first respondent who apparently had been informed of the hostile dialogue between the applicant and the cook then went to the applicant's class, took him from the classroom, reprimanded him for his exchange of words with the cook and according to the applicant's affidavit:

> "Thereupon in the kitchen she flogged the applicant six lashes on his back with a leather strap which injured the applicant. He then went home to his mother who took him to a doctor for medical attention."

A medical certificate dated the very 13th November which was produced in evidence revealed

> "on examination he was found to be suffering from a weal about 2" x 1 1/2" on the back of the chest wall on the right side and multiple relatively smaller weals on the anterior aspect of his right forearm. He was treated with analgesics and sent home."

Since the substance of the allegation made by the applicant is that he was subjected to punishment which is outlawed by the Constitution of St. Vincent and the Grenadines, I set it out verbatim:

> "Section 5" No person shall be subjected to torture or to inhuman or degrading punishment or other treatment"

Section 5, it is to be noted is not in anyway qualified but in the Second Schedule to the Constitution Order at Section 10 thereof is to be found this provision:

> "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 Saint Vincent and the Grenadines immediately before 27th October, 1969 (being the date on which St. Vincent and the Grenadines became an associated state)"

Miss Lewis for the respondents submitted as a preliminary point that section 10 of the second schedule to the Constitution Order which is set out immediately above is a complete answer to the applicant's claim, since whipping is authorised as a form of punishment in a law in existence prior to 27th October, 1969 (being the date on which St. Vincent became an associated state), and that accordingly it could not be considered a law that contravenenes Section 5 of the Constitution, which section forbids inhuman treatment.

I reject that submission on the ground that Section 10 validates the punishment of whipping only when lawfully executed and its terms are applicable only if the whipping was executed in accordance with the law. See Riley v. Attorney General of Jamaica 1983 1 A.C. 719, Pratt v. Morgan 1993 3 W.L.R. p. 995.

Having cited these provisions of the Constitution relevant to the instant matter I shall firstly proceed to examine the question whether the applicant was subjected to conduct prohibited by Section 5 of the Constitution and having so decided, consider what is the effect of Section 10. I shall finally determine what relief if any might be available to the applicant in the circumstances of his case - under section 16 where the provisions dealing with redress are to be found.

In considering a provision identical in terms to our section 5, Aguda J.A. of the Court of Appeal in Botswana in dealing with that section said,

> "I take it that whilst "torture" stands by itself the word "punishment" is the noun which is qualified by the words "inhuman" and "degrading" in the alternative. In other words the sub-section prohibits the infliction of torture, inhuman punishment, degrading punishment, inhuman treatment and degrading treatment on any person. It must be remembered that treatment has a different connotation from punishment."

See State v Petrus and another 1985 LRC Const. page 725.

I respectfully adopt this classification provided by Aguda J.A.

As is to be expected when dealing with matters of an intrinsically emotive nature, a divergence of opinion often arises. In acknowledging the inevitability of differing opinions upon a subject such as the one at hand McNally J.A. had this to say in State v. A. Juvenile:

> "There are many subjects upon which it is said the world is divided into two schools of thought. Corporal punishment is one of them. Indeed the use of the phrase "schools of thought" may be misleading. We are not dealing merely with processes of logical thought. Attitudes towards corporal punishment are deeply influenced by the emotional and psychological make up of the people holding those attitudes. The view of the sensitive and articulate minority tends inevitably to be heard more frequently and more persuasively than that of the silent majority. It does not necessarily follow that the former is more "right thinking" than the latter."

See 1989 (2) ZLR 61(x).

Mindful of this very impressive conclusion of McNally JA relating to the objectivity or otherwise of human opinion I proceed to consider the question whether the whipping inflicted upon the applicant in this case was in breach of his fundamental right provided him by the Constitution of St. Vincent and the Grenadines - more particularly Section 5.

It would seem to me that in considering the question which this court is required to resolve it would be useful to consider the meanings to be attributed to the relevant words in Section 5 of the Constitution.

Looking at the 7th Edition of the Oxford Concise dictionary the word "inhuman" is given the meaning "brutal" "unfeeling" "barbarous". "Torture" the dictionary says it means "infliction of

severe bodily pain e.g. as a punishment or means of persuasion". I would go on to adopt the definition of the European Court of Human Rights that the degrading element of the infliction of corporal punishment is the total lack of respect for the human being, and the view of the Appellate Division of the Court of South Africa in State v. Veu'n'Ander 1989 SA 532 that:

> "Whipping was by its very nature an extremely humiliating and physically very painful form of punishment and ought to be imposed with great circumspection and only when the personal circumstances of the accused or the nature and the circumstance of the crime clearly justifies it. It was imposed on juvenile and/or adults where there was a significant degree of cruel violence in the commission of the crime."

In similar vein was the view of Gubbay JA, elegantly expressed in State v Neube 1987 (2) Z.L.R. 246 (S.C.). Referring to the Zimbabwe equivalent of our Section 5 this is what he had to say:

> "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 civilized 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. A penalty that was permissible at one time in our nation's 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 civilization advances."

While I am tempted to consider the question of what is torture, but more particularly what is inhuman or degrading punishment or treatment against the background of the social evolution of the Commonwealth Caribbean, I consider myself restricted to regard what the view might be, considered against the background of the evolution of St. Vincent and the Grenadines in relation to the question, and particularly by looking at the legislative endeavours of the Parliament of this country with respect to the question of corporal punishment.

Under Section 29 of the Education Ordinance 1937 (No. 29 of 1937) regulations were made in respect of Government and Assisted Primary Schools Regulations. Those regulations are to be found in Statutory Rules and Orders 1959 No. 44. Regulation 9 deals with the discipline of pupils and I shall quote the regulation verbatim being the only one of the clauses that specifically deals with corporal punishment.

9. Discipline of Pupils

(1) .....

(2) The discipline enforced in schools shall be firm but all degrading and injurious punishments shall be avoided -

(3) Corporal punishment may be administered as a last resort by the Headteacher or by an Assistant Teacher in the presence, under the direction and on the responsibility of the Headteacher. A girl shall not receive corporal punishment except on the palms of her hand and whenever possible said punishment shall be administered by a woman teacher.

(4) .....

(5) .....

(6) .....

It is to be observed from Regulation 9(2) that there was a ban on all degrading and injurious punishment, but corporal punishment was explicitly permitted under regulation 9(3) subject to the qualification that it was to be inflicted only as a last resort. It was to be inflicted by the Headteacher or if not, then by an Assistant Teacher only if the Headteacher was present and directly responsible for its imposition.

St. Vincent and the Grenadines' legislation in relation to corporal punishment was obviously a concern of its Parliament when it legislated on the matter by the passage of the Corporal Punishment Abolition Act 1966. By that Act flogging and whipping were abolished in relation to all persons, other than juvenile offenders who were defined as persons proved to be or in the absence of legal proof to the contrary appeared to the Court to be of the age of sixteen years.

Caning was retained for juvenile offenders. The caning was to be carried out by being administered privately on the buttocks with a light rod or cane or birch of tamarind or other twig. The number of strokes was restricted to twelve and a doctor was required to certify the fitness of the offender to receive the punishment and also required to be present during the infliction of the punishment.

The Parliament of St. Vincent it seems by the Corporal Punishment Abolition Act 1966 while obviously retaining to a limited extent corporal punishment, was concerned to see that it was inflicted only in the context of safeguards being required to be taken, and caning was the only form of corporal punishment retained.

In 1983 by the Act known as the Corporal Punishment of Juveniles Act to be found at Vol. 4 Chapter 123 of the Revised Edition 1991 of the Laws of Saint Vincent and the Grenadines, Parliament re-affirmed the desirability of the caning of juveniles in substantially the same terms as

the Corporal Punishment (Abolition) Act No. 13 of 1966 except that it added by section 10 the following which took effect on 25th January, 1983.

> "10. Notwithstanding the repeal of the Corporal Punishment (Abolition) Act 1966 any juvenile offender who is convicted after the 25th January 1983 of an offence under any section of the Indictable Offences Act or the Summary Conviction Offences Act specified in the first schedule to the Corporal Punishment (Abolition) Act 1966 may be ordered to be caned and the provisions of that Act shall apply to such caning."

Dealing with the question of corporal punishment once more, an Act referred to as the Criminal Code, to be found in Chapter 124, Revised Laws of St. Vincent and the Grenadines 1991 was passed taking effect from the 30th October, 1989. In section 23 thereof it specified the following:

> "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 by 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) <u>in the case of a male person of any age corporal punishment in accordance with the provisions of the Corporal Punishment of Juvenile Act.</u>

This provision of the Criminal Code underlined immediately above was in effect allowing a caning to be administered to men of all ages, as was legislated for under the Corporal Punishment of Juveniles Act.

In May of 1984 on the 15th day thereof, the Parliament of St. Vincent and the Grenadines passed an Act described as the United Nations Declaration on the Prevention of Crime and the Treatment of Offenders Act CAP 143. By virtue of this Act the people of St. Vincent and the Grenadines adopted and undertook to adhere to the Declaration which was set out in the schedule to the Act, and by section 4 declared that "the provisions contained in the Articles of the Declaration shall have the force of law in St. Vincent and the Grenadines.

In the case of Bernard Marksman and the Attorney General v. Reynold Peters Civil Appeal Nos. 22 and 23 of 1997 (St. Vincent and the Grenadines) referring to the provisions of the United Nations Declaration incorporated into domestic law of St. Vincent and the Grenadines, Mitchel J. said:

> "All the above law deals with the position of corporal punishment in a Court" (Emphasis mine).

I agree with that. It was cited by Counsel for the Applicant but I believe he was inviting the Court to look at the whole spectrum of the approach of this State in relation to the question of corporal punishment. The Court is indebted to him for that.

Having considered the legislative approach of St. Vincent and the Grenadines to this question of corporal punishment, I return to the cases some of which were cited by counsel for the applicant citizen. The first of these was the case of Tyler v United Kingdom 1978 2 EHRR 1 emerging from the European Court of Human Rights. It involved a boy of 15 years old who was sentenced to 3 strokes with the birch having pleaded guilty to unlawful assault occasioning actual bodily harm on a senior pupil at his school. Seven judges sat in that case and by a majority of six to one held that the boy had been subject to "degrading" treatment within the meaning of article 3 of the European Convention which provides that:

> Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

I observe in parenthesis that this was again punishment imposed by a Court, but counsel for the applicant citizen no doubt felt and I agree with him that the judgment of both the majority and the single dissenting one give an insight into the concepts behind the words "torture or inhuman or degrading treatment or punishment".

In considering whether the conduct of the State had breached the protective provisions of the Convention in Tyler's case the following principles were enunciated:

(1) For conduct to amount to torture the citizen must suffer a level of punishment much higher than the infliction of three strokes. (In Tyler's case the birching was carried out in the presence of a doctor and the boy's father; and he was made to take off his underpants, receiving the strokes on his bare buttocks as his arms were held by two policemen).

(2) In order to amount to inhuman treatment the suffering occasioned must attain a certain level before it can be so

determined. (In view of the Court that level had not been reached).

(3) In considering whether the complaining citizen has suffered degrading treatment it has to be remembered that humiliation may arise from the mere fact of being criminally convicted. However what was relevant to show was that he was humiliated not by his conviction but by the execution of the punishment which was imposed upon him.

(4) The humiliation or debasement involved must be considered to have arisen or not, depending on all the circumstances of the case and in particular on the nature and context of the punishment itself and the manner and method of its execution.

(5) Publicity may be a relevant factor in assessing whether a punishment is degrading within the meaning of Article 3 but the court does not consider that abuse of publicity will necessarily prevent a given punishment from falling into that category; it may well suffice that the victim is humiliated in his own eyes even if not in the eyes of others.

(6) A degrading punishment did not lose its degrading character because it was an effective deterrent.

(7) The treatment or punishment must be looked at in the light of contemporary conditions and the court would be influenced by commonly accepted standards of the particular state that is being accused.

My acquaintance with the law as it is emerging from the European Court of Human Rights leads me to the conclusion that the Court considers that there is something intrinsically revolting about corporal punishment, but that such punishment does not become the frightening spectre of torture or of degrading or inhuman punishment or treatment unless accompanied by certain circumstances.

> "The assessment is in the nature of things relative" the Court has said and "it depends on all the circumstances of the case and in particular on the nature and content of the punishment itself and the manner and method of its execution."

The majority in the penultimate paragraph of their judgment went on to state that they were not prepared to prejudge the question whether corporal punishment as a disciplinary measure at school may per se be considered as a degrading punishment within Article 3 of the Convention.

For my part based on the state of the affidavits and restricted to them as the only evidence provided at the hearing I would be quite uncomfortable with a finding that the treatment meted out to the applicant reached that minimum level of ill treatment or degradation that it should be considered the type outlawed by our Constitution.

Accordingly I hold that provisons of Section 5 of the Constitution protecting the citizen against certain types of treatment have not been breached.

I am mindful that in holding that the treatment to which the applicant claims he was subjected was not inhuman or degrading I am setting a standard perhaps out of accordance with the sensitivities of people of other States who will contend that corporal punishment of any kind (and therefore that meted out in the instant case) is or should be outlawed by our Constitution. But it must at the same time be borne in mind that certain legal precepts including the approach to corporal punishment are to be accorded a greater welcome here not for xenophobic reasons but because they emerge from the very environment they are called upon to serve, marching in time with indigenous needs yet not immune to foreign influence that may help in shaping their course with the passage of time.

Finally I must address a concern raised by Miss Lewis for the Crown. Miss Lewis drew the Court's attention to Section 16 of our Constitution which provides as to how the rights of the citizen under the Constitution are to be enforced. Section 16 reads as follows:

> 16(1) "If any person alleges that any of the provisions of Section 2 to 15 inclusive of this Constitution has been or is likely to be contravened in relation to him (or in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person) then without prejudice to any other action with respect to the same matte that is lawfully available, that person (or that other person) may apply to the High Court for redress.
>
> The High Court shall have original jurisdiction -
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section and
>
> (b) to determine any question arising in the case of any person which is referred to in pursuance of subsection (3) of this section and may make such declarations and orders issue such writs and give such directions as it may consider appropriate for the purpose of enforcement of the provisions of Sections 2 to 15 (inclusive) of this Constitution.

> Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

That the Court which deals with the fundamental rights and freedoms provided by the Constitution should be used as one of last resort has become an accepted principle in the jurisprudence of the Commonwealth Caribbean. Among the cases that have promoted this principle are De Merieux v Attorney General of Barbados No. 734 of 1981, Ramdhan and others v Attorney General of Trinidad and Tobago No. 1919 of 1984, Attorney General of Tobago v K.C. Confectionery Ltd. 1986 L.R.C. Const (C.A.) 172 and Harikisoon v Attorney General of Trinidad and Tobago 1980 A.C. 268.

The classic admonition relating to the unnecessary recourse to the Constitutional court for redress is to be found in Harikisoon supra when the Privy Council had this to say:

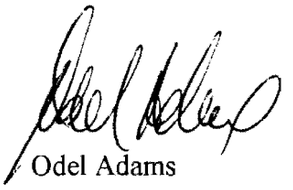
> "The notion that whenever there is a failure by an organ of Government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action in an originating application to the High Court under section 6; the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

Miss Lewis was of the view that suitable redress was available under "other law" here and it was wrong for the applicant to have sought constitutional redress in the circumstances. She drew attention to the procedure provided by Statutory Rules and Orders No. 44 of 1959; but it is to be noted that the procedure (which is invoked for alleged misconduct) leads to punishment of the Teacher. In my respectful view that would not be adequate redress from the applicant's viewpoint. See Ramson v Barker 1982 33 WIR 183.

In this case the applicant alleging in essence brutal conduct was quite entitled to seek a constitutional remedy for his allegation with the hope that it might be considered a breach of the

provisions of Section 5 of the Constitution. What I do think is that this case, having regard to clear evidence as to where the injuries were inflicted and the nature of the case, should not have reached a court of law and the authorities may well have been persuaded to provide some compensation to the injured boy.

As I indicated before, the motion is dismissed. There shall be no order as to costs.



Odel Adams

HIGH COURT JUDGE