

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA No. 2548 of 1998

IN THE MATTER OF THE CONSTITUTION  
OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF AN APPLICATION BY NANKISSOON BOODRAM  
a/k DOLE CHADEE, JOEY RAMIAH, JOEL RAMSINGH,  
RAMKALAWAN SINGH, RUSSELL SANKERALLI,  
BHAGWANDEEN SINGH, CLIVE THOMAS,  
ROBIN GOPAUL AND STEPHEN EVERSLEY

PERSONS ALLEGING THAT THEIR RIGHTS GUARANTEED  
TO THEM BY SECTIONS 4(a) AND (b) AND (d) AND 5(2) (a),  
(b), (d), AND (e) OF THE CONSTITUTION ARE BEING OR  
ARE LIKELY TO BE CONTRAVENED IN RELATION TO  
THEM FOR REDRESS IN ACCORDANCE  
WITH SECTION 14 OF THE CONSTITUTION

AND

IN THE MATTER OF AN APPLICATION BY NANKISSOON  
BOODRAM a/k DOLE CHADEE, JOEY RAMIAH,  
JOEL RAMSINGH, RAMKALAWAN SINGH  
RUSSELL SANKERALLI, BHAGWANDEEN SINGH,  
CLIVE THOMAS, ROBIN GOPAUL AND  
STEPHEN EVERSLEY FOR AN INTERIM STAY  
OF EXECUTION OF THE SENTENCE OF DEATH ON THEM  
OR ALTERNATIVELY FOR A CONSERVATORY ORDER

BETWEEN  
NANKISSOON BOODRAM a/k DOLE CHADEE,

JOEY RAMIAH, JOEL RAMSINGH, RAMKALAWAN SINGH,  
RUSSELL SANKERALLI, BHAGWANDEEN SINGH,  
CLIVE THOMAS, ROBIN GOPAUL AND  
STEPHEN EVERSLEY

*APPLICANTS*

AND

CIPRIANI BAPTISTE  
(COMMISSIONER OF PRISONS)  
EVELYN ANN PETERSEN  
(REGISTRAR OF THE SUPREME COURT)  
THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

*RESPONDENTS*

*Before: The Hon. Justice Nolan Beraux*

**Appearances:** F Solomon SC, F Hosein, R Armour, G Delzin  
for Applicants, instructed by R Clarke

M Daly SC, R Martineau SC, M Dean-Armorer, N Aimes-  
Darmanie, R Harnanan, D Sirjusingh-Siew, J Walker,  
A Mc Gowan for Respondents instructed by S Lalla of the Chief  
State Solicitor Office

#### JUDGMENT

On 3<sup>rd</sup> September, 1996, Nankissoon Boodram also known as Dole Chadee, Joey Ramiah, Joel Ramsingh, Ramkalawan Singh, Russell Sankeralli, Bhagwandeem Singh, Clive Thomas, Robin Gopaul and Stephen Eversley (collectively called ‘The Applicants’) were convicted of murder and were each sentenced to death by hanging. They all appealed to the Court of Appeal which affirmed their convictions and sentences on 16<sup>th</sup> April, 1997. The applicants then petitioned the Judicial Committee of the Privy Council (“the Board”) for special leave to appeal. The Board refused their petition on 1<sup>st</sup> April, 1998.

In April, 1998, a petition on behalf of all of the applicants was filed before the United Nations Human Rights Commission. The petition was rejected by a majority vote. In August 1998, a petition on behalf of Mr Chadee to the Inter American Commission on Human Rights was ruled inadmissible by the Commission.

By their amended notice of motion the applicants seek the following reliefs:

1. A Declaration that the execution of the sentences of death on the applicants will contravene their rights not to be deprived of life, liberty and the security of the person except by due process of law guaranteed to them by Sections 4(a), 4(b), 4(d) and 5(2), (b), (e) and (h) of the Constitution of the Republic of Trinidad and Tobago.
2. A Declaration that the execution of the sentences of death on the Applicants will contravene their right to equality of treatment from any public authority in the exercise of any functions guaranteed to them by Sections 4(d), 5(2) (b) and (e) of the Constitution of Trinidad and Tobago.
3. A Declaration that the execution of the sentences of death on the Applicants will contravene their right to equality before the law and the protection of the law guaranteed to them by Sections 4(b) and 5(2), (b), (e) and (h) of the Constitution of Trinidad and Tobago.
4. A Declaration that the Applicants' rights not be subjected to cruel and unusual treatment or punishment have been, are being and are likely to be violated.
5. An Order vacating the sentences of death against the Applicants.
6. An Order staying the executions of the Applicants.

7. All such orders, writs, and directions as may be necessary or appropriate to secure redress by the Applicants for a contravention of human rights and fundamental freedoms guaranteed to the Applicants by the Constitution of Trinidad and Tobago.

The grounds on which they rely in support are as follows:

1. On the 3rd day of September, 1996, the Applicants were convicted of murder and were sentenced to death by hanging. The Applicants all appealed to the Court of Appeal which on the 16th day of April, 1997, affirmed their convictions and sentences. The Applicants then applied to the Judicial Committee of the Privy Council for special leave to appeal which was refused on the 1st day of April, 1998.
2. It was always the law of Trinidad and Tobago (prior to Independence and subsequently) that a person duly convicted of murder should mandatorily be sentenced to death. It was, however, never the law of Trinidad and Tobago (either before Independence or subsequently) that a person who had been sentenced to death had to be executed.
3. A condemned person continues to be entitled to the protection and enjoyment of the fundamental rights and freedoms guaranteed to him under the constitution. When the death sentence is imposed arbitrarily, inconsistently, discriminatorily, or only very infrequently, its imposition will amount to cruel and unusual treatment and punishment, the denial of due process and the violation of the right to equality before the law and the protection of the law.
4. A sentence of death imposed on a person convicted of murder may also be altered by the President in the exercise of a power under Section 87 of the constitution. In the exercise of this power, the President is required to act on the advice of

the Minister of National Security. The Minister of National Security is obliged to consult with the Advisory Committee before rendering such advice.

5. Since Independence and increasingly since the advent of republicanism in 1976, the death penalty has been applied to condemned prisoners arbitrarily and with discrimination and in a manner which is wholly unpredictable, uncertain and unaccountable to legal norms.
6. Since 1980, several hundred persons have been under sentences of death, but only one person has suffered execution, namely Glen Ashby, who was hanged in 1995 in circumstances of grave irregularity and even while the Court of Appeal was considering his constitutional motion. Apart from Glen Ashby, one Bobby Gransaul who made no complaint under the Constitution, was the last person to be hanged in Trinidad and Tobago. He was executed in November, 1979.
7. On the 17th day of March, 1989, a Commission of Enquiry was appointed to enquire into, consider and report on *inter alia* whether the death penalty should be retained for any offences. This Commission was chaired by a Mr Elton Prescott. On the 27th September, 1990, the Prescott Commission submitted a written report.
8. On the 20th day of October, 1990, the Cabinet accepted the Prescott Report. Thereafter, on the 30th November, 1990, it was laid in the House of Representatives and on the 19th December, 1990, it was laid in the Senate. The Government proceeded to cause certain of the recommendations of the Prescott Commission to be implemented but sought to do so without enacting enabling legislation, but rather by bureaucratic and political manipulations. As a consequence of the Prescott Report condemned persons who had been on death row for ten years or more had

their sentences commuted en masse.

9. In 1994, the Judicial Committee of the Privy Council gave judgment in the case of **Pratt and Morgan v The Attorney General of Jamaica**
10. Following upon Pratt and Morgan in Trinidad and Tobago, sentences of death of over fifty (50) persons were commuted en masse for the rest of their natural lives on the advice of the Minister of National Security.
11. Of those sentenced to death between 1980 and the present, well over one hundred persons have had their death sentences commuted by the President on the advice of the Minister (purporting, in the majority of cases, to be acting under the power of pardon, but it is submitted doing so for improper motives), either in furtherance of governmental policy following the adoption of the Prescott Commission Report, or for administrative expediency following the judgment of the Judicial Committee of the Privy Council in Pratt and Morgan.
12. The mass communications by the President on the advice of the Minister of National Security following Pratt and Morgan amounted to an abuse of the power of pardon and was in effect an unconstitutional dispensation of the law.
13. The judgment of Pratt and Morgan afforded the Government the opportunity for both general and personalised discrimination. The condemned population was divided into 2 classes, the first class to comprise those whom the State did not care to execute and the second, which includes the Applicants, comprising those whom the Government intended to execute. These two classes were created without legislative or judicial authority.
14. The first class of condemned persons who were to escape hanging had their appeals neglected or delayed. Those in the

second class, selected by the executive for hanging had their appeals fast tracked. The Applicants have been placed in the second class and have, even within this class, been the targets of discriminatory treatment having been targeted by the Government for a certain and early execution which constitutes cruel and unusual treatment and punishment and a denial of due process and the denial of equality of treatment and the protection of the law.

16. In the premises, the system of administration of the death penalty is arbitrary, discriminatory, and is susceptible to capriciousness and has been used capriciously. Further powers and authority of the Minister of National Security in relation to the death penalty have not been an exercise of decision making power of mercy but an application of general political policies that do not involve the consideration of individual circumstances in relation to the application of mercy on the individual who is subject to State power.
17. Since their arrest on May 14, 1994, and throughout their subsequent incarceration, the Applicants have been subjected to cruel and unusual punishment and treatment by the manner and circumstances of their incarceration.
18. Section 88 of the Constitution establishes an Advisory Committee on the Power of Pardon. In addition, it stipulates that a designated Minister (in this case the Minister of National Security) shall be the chairman and the Attorney General shall be a member. On diverse occasions, the Attorney General made public statements to members of the media and the public specifically referring to the planned execution of the Applicants prior to their case being considered by the Advisory Committee on the Power of Pardon.

19. On a date unknown to the Applicants, the Attorney General, Mr Ramesh Maharaj and the Honourable Minister of National Security, Mr Joseph Theodore participated in a meeting of the Advisory Committee on the Power of Pardon which was then convened to consider the Applicants cases. The Applicants contend that having regard to the relevant circumstances there was a real danger of bias on the part of the Attorney General and the Minister of National Security in the sense that they unfairly regarded with disfavour, the Applicants' cases then under consideration.
20. Further, the Applicants contend that the Minister of National Security ought not to have referred the matters relating to the Applicants to the Advisory Committee on the Power of Pardon in circumstances in which two issues raised by the Applicants herein, namely, whether the existing prison conditions (either on death row or on remand) either by themselves or cumulatively with delay of less than two years would constitute cruel and unusual treatment and punishment sufficient to render the proposed execution of condemned prisoners unconstitutional, are currently awaiting a decision of the Judicial Committee of the Privy Council.
21. On the 4th September, 1998, in an application for an urgent hearing of an appeal of Briggs and James pursuant to an Order of Madame Justice of Appeal Permanand before the Honourable Chief Justice, Justice of Appeal Michael De La Bastide, the Court ordered that the stay of execution granted to Briggs and James continue and further ordered that the said appeal be set down 10-28 days after the delivery of the reasons in the Appeals of Darren Roger Thomas and Haniff Hiliare which are now before the Privy Council and awaiting judgments.

22. The State was always aware of the status of these above-mentioned matters in the Court and the stated policy of the Chief Justice in respect of proceeding with similar matters while Thomas and Hiliare appeals were pending. The State is also aware of a similar order of the Privy Council in the Bahamas decision of Reckley and the statement of the Privy Council on this issue. Despite this, the State has read warrants for the execution of the Applicants on 17th, 18th and 19th of November, 1998 knowing full well that whether they live or die may be affected by the outcome of the Thomas and Hiliare appeals and knowing that based on the above, any proposed executions of the Applicants are likely to be stayed. In the circumstances, the Applicants have been subjected to further cruel and unusual treatment or punishment and their right to the due process of law has been violated by the oppressive, arbitrary and unreasonable decision of the Minister of National Security inclusive of the reading of the warrants of execution to them.
23. In the premises, the Applicants will contend that their right not be subjected to cruel and unusual treatment has been violated and that to execute them now would also be cruel and unusual treatment since the law does not authorise the infliction of cruel and unusual punishment prior to execution.
24. In the circumstances, the execution of the Applicants will violate their right not to be deprived of life, liberty and security of the person except by due process of law, their right to equality before the law and to the protection of the law and their right not be subjected to cruel and unusual treatment or punishment guaranteed to them by S. 4(a), (b) and (d) and 5(2) (a), (b), (c) and (h) of the Constitution of Trinidad and Tobago.

In support of their motion, the applicants filed 10 affidavits in support including 4 by Mr Chadee, 1 joint affidavit by the other 8 applicants and 3 affidavits by Roberta Clarke. The respondents filed 14 affidavits in opposition, including 4 affidavits by Miss Monica Reid, Administrative Assistant in the Ministry of National Security, 3 by the Commissioner of Prisons Cipriani Baptiste and 2 affidavits by the Clerk of Appeals, Mr John Gonsalves.

### **Preliminary Objections to Applicants' Affidavits**

Objections were taken by the respondents to certain paragraphs in the affidavits filed on behalf of the applicants.

With respect to the affidavit of Mr Chadee affidavit filed on 6th November, 1998, ("the first Chadee affidavit"), the respondents contend that paragraphs 5 & 7 should be struck out or disregarded on the ground that they contravene Order 41 rule 5(1) of the Rules of the Supreme Court, 1975. In paragraph 5, Mr Chadee contends that he has always been singled out for special treatment and sets out what it consisted of. Having examined the paragraph, I do not consider that it offends Order 41 rule (1) of the Rules. In my judgment, the facts referred to by Mr Chadee are matters of which he is competent to speak.

Paragraph 7 (lines 1 to 8) in my judgment is a question of weight. I take the liberty to say now it is at best a self-serving expression of opinion which is of no probative value and proves absolutely nothing. The respondents also object to paragraphs 15 and 24 of the first Chadee affidavit on the ground that they constitute an opinion and that they are irrelevant. Having read paragraph 15, I agree with the respondents that it is both an opinion and is irrelevant and it is struck out. So too is the second sentence of paragraph 24. However, the rest of paragraph 24 contains references to comments of the Attorney General reported in the newspapers which the respondents have accepted as true. In my judgment, the applicant has merely repeated those comments and has not misrepresented them in any way. The respondents also object to paragraph 26 of the first Chadee

affidavit on the ground that its prejudicial effect outweighs its probative value and to paragraph 28 on the ground that it is irrelevant. I do not accept that paragraph 26 has a prejudicial effect all, given that I sit as both judge and jury, It is also a question of the weight, if any, that I consider should be attached to the paragraph. As to paragraph 28, I hold that it is irrelevant and it is hereby struck out.

The respondents also took objection to paragraph 11 of the joint affidavit of the second to ninth applicants (“the other applicants”) on the ground that its prejudicial value far outweighs its probative value and that it offends Order 41 rule 5(1). I uphold the objection on the latter ground only. This paragraph expresses the opinion that the Attorney General was biased and that he has usurped the functions of the Advisory Committee on the Power of Pardon. That is a matter for me. The paragraph provides nothing by way of fact. Paragraph 11 is hereby struck out.

The respondents also object to paragraphs 5, 12, 13, 20 and 21 of the affidavit of Roberta Clarke filed on 13th November, 1998 (“the first Clarke affidavit”) on the ground that they offend Order 41 rule 5 (1).

A further objection was taken to paragraph 5 on the ground that it was an opinion. It seems to me that here too it is the weight that I must choose to attach to these paragraphs when I come to consider the merits of the applicant’s motion..

Finally, objection was taken to paragraphs 14, 15 & 16 of the affidavit of Roberta Clarke filed on 30th November, 1998. (“the second Clarke affidavit”). As to paragraph 14, the objection is that it is irrelevant and as to paragraphs 15 and 16, the objections are they do not form part of the motion. I agree with the respondents that para 14 is irrelevant. I can see no relevance whatever to the issues before me. That paragraph is also struck out. As to paragraphs 15 & 16, the objection is rejected. The fact that they are not specifically part of the applicants’ motion is to me beside the point. They form part of the applicants’ evidence in support of their grounds and the reliefs which they seek. As I

understand, the applicants' case as articulated by Mr Armour during the course of the hearing, it goes to the question of breach of Section 5(2)(b) and the issue of cruel and unusual treatment or punishment.

### **Preliminary Objections to Respondents' Affidavits**

By notice dated 11th December, 1995, the applicants sought to strike out certain sentences and paragraphs from each of Mr Baptiste's three affidavits on the grounds that they infringed Order 41 rule 5 and that it constituted hearsay.. As to the first Baptiste affidavit , objections were taken to paragraph 6 & 7, paragraph 8 (first line) and paragraphs 9 & 10.

As to the second Baptiste affidavit, similar objections were taken to paragraph 4, (lines 9 to 10), (13 to 14) and (17 to 18), paragraph 5, (lines 4 to 7), paragraph 7, paragraph 10, paragraph 12 (last 3 lines), paragraph 13, (lines 8 to 13), paragraphs 16, 17 & 18, the exhibit "CB1" referred to in paragraph 20 and line 17, paragraph 21, (lines 8 to 9), and paragraph 23, (line 1).

As to the third Baptiste affidavit sworn on 25th November, 1998, objections were taken to paragraphs 5 and 6, paragraph 7, (lines 6, 10 and 11), paragraph 8, (lines 4 to 7), paragraphs 9 & 10, paragraph 11, (lines 2 to 5), paragraph 12, paragraph 13, (lines 3 to 5), the exhibit "CB2" in paragraph 14, paragraph 18, (lines 5 to 8), the exhibit "CB3" in paragraph 20 and paragraph 23, (line 1).

I think that the objections can be answered by reference to para 3 of the first Baptiste affidavit. In paragraph 3 of the first Baptiste affidavit, he states that he has been Commissioner of Prisons since 1993, having served as Deputy Commissioner of Prisons for two years and as Assistant Commissioner of Prisons for four years. He has been in the Prison Service for 36 years and has gained considerable experience in dealing with prisoners under sentence of death.. Mr Baptiste, from his service has considerable knowledge and experience, of prison conditions, the prison cells and their dimensions, the procedures of the prison and the prison environment in general. He has access to all records and files

pertaining to the State Prison and its occupants

The matters of which Mr Baptiste speaks, he does so not just as Commissioner of Prisons, but from his knowledge of the prison and of the procedures followed in relation to the keeping of records, the serving of meals, the methods of sanitation adopted within the prisons, as well as the ventilation of cells. Indeed, during cross-examination by Mr Armour, Mr Baptiste displayed a quite intimate knowledge of the cells of the prison, their dimensions and their ventilation. He is competent to speak on matters based on his reference to the prison records and on methods and procedures relating to the sanitizing of cells.

It is in this context that Mr Baptiste's evidence is to be viewed and the objections of counsel addressed.

I shall uphold the objections of the applicants in respect of paragraph 4 of the second Baptiste affidavit sworn on 23rd November, 1998. In my judgment, those are conclusions which he cannot competently draw irrespective of his experience. As to all other objections for the aforesaid reasons and, subject to my additional comments on specific paragraphs next hereinafter, the objections are disallowed. There is nothing in these paragraphs which in my judgment offends either Order 41 of the Rules of the Supreme Court or the hearsay rule.

**The First Baptiste Affidavit dated 13th November, 1998**

Specifically as to paragraph 6 of the first Baptiste affidavit, I accept the respondents submissions. The Commissioner is speaking from his own observations and has formed opinions. He has been in the prison service for 36 years. It is an opinion which bears directly on his management of the prisoners under his control and which he is entitled to make in the best interests of the prison and the prison population.

As to paragraphs 7, 8, 9 & 10, I also agree with the submissions of the respondents that the deponent is entitled "*as a matter of necessity*" to rely on and

give evidence as to reports made to him by his subordinate officers, he being the head of the Prisons in Trinidad and Tobago and not himself having access to all parts of the prison, I am of the same view with respect to exhibits “CB1”, “CB2” and “CB3”, and with respect to paragraphs 5, 6 and 13 of the third Baptiste affidavit. The objections of counsel for the applicants to these exhibits and paragraphs are to the competence of the Commissioner to rely on and give evidence based on reports made to him by subordinate officers. In my judgment the objections cannot succeed

The Commissioner of Prisons is the head of the prison service. He has charge of many subordinates and a large number of prisoners. There are six prisons in Trinidad and Tobago, along with a Youth Training Centre and a convict depot in Tobago. There is one deputy commissioner of Prisons, two assistant commissioners and two senior superintendents and eight superintendents. A superintendent is directly responsible for the administration of a prison to which he is assigned and he is accountable to the commissioner of prisons. In running the prisons, the Commissioner cannot but rely on his subordinates, be they junior or senior officers. He is not to be expected to have an active or intimate knowledge of every administrative detail or every event which may occur or has occurred in the prisons at any given time. As head of the prison service, he acts through his subordinates. He may order investigations and enquiries and receive reports through them. The collective knowledge of his subordinates in relation to these investigations, or day to day events must necessarily be imputed to him as head of the prison service. No doubt, the best evidence would be the direct evidence of those persons who conducted the investigations or compiled the reports but it does not debar the Commissioner from giving that evidence provided he reveals the manner in which he received them.

The comments of Lord Diplock in **Bushell v Secretary of State for the Environment** 1980, 2 All E R 608, are apposite. In that case his comments

concerned the question of ministerial decision-making and the information provided to the minister by public servants in his ministry in the course of that decision-making. Those comments are equally applicable to this case and were as follows:

*“To treat the minister in his decision making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone is in constitutional theory accountable to Parliament is to ignore not only practical realities but also Parliament’s intention. Ministers come and go: departments, though their names change from time to time, remain. Discretion in making administrative decisions is confined upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision, the collective knowledge, experience and expertise of all those who serve the Crown in the department of which for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the Minister’s own knowledge, his own expertise”.* (emphasis mine)

I am fortified in my opinion by the decision of Brooks J in HCA S1409 of 1991, **Santana v The Commissioner of Police and the Police Service Commission.** who in coming to a similar conclusion stated that at pg 18::

*“this proposition should not be regarded as a hard and fast rule but in but in appropriate cases depending on the circumstances, the type of investigation undertaken and the information supplied, the nature and quality of the knowledge gained, the Commissioner [of Police] in my view should be permitted to give such evidence provided the necessary background information*

*on which such evidence is based is supplied.”*

Mr Baptiste testified that the information provided in the exhibits “CB1”, “CB2” and “CB3” was obtained from the superintendent responsible for the administration of the prisons and he depends on the superintendent to carry out his functions as Commissioner of Prisons and that it was in this context that the information in these exhibits were given to him.

In my judgment the exhibits do not offend Order 41 rule 5 or the hearsay rule.

In any event, if I am wrong, the exhibits “CB1”, “CB2” and “CB3” are admissible under Order 38 rule 3 (2)(a) and they are so admitted.

With specific reference to paragraph 7, I agree with the submissions of the respondents that Mr Baptiste is testifying to matters which influenced his actions in removing the applicant from remand and housing him in a separate cell. This falls squarely with **Subramaniam v Public** Prosecutor (1956 1WLR 965). In any event, paragraphs 9 & 10 are admissible under Order 38 rule 3 (2)(a) and I do so admit them.

**The Second Baptiste Affidavit dated 23rd November, 1998**

As to paragraph 5, (lines 12 to 15), the Commissioner does not say in his affidavit whether he speaks of the other applicants from his personal observations or from reports. Prima facie, it is a matter for cross-examination and a question of weight to be given to the evidence. The same is to be said of the objections to paragraphs 9, 10, 13, 18, 20 and 24.

**The Third Baptiste Affidavit dated 25th November, 1998**

As to the objection to the date “5th June, 1995”, in paragraph 7, this issue arose out of the cross-examination of Mr Baptiste and goes to his credibility. It is dealt with later on in this judgment. The objection to lines 10 to 11 of the same paragraph is upheld.

## **Issues**

The applicants thus seek four declarations alleging breaches of section 4(a)(b) and (d) and section 5(2)(b)(e) and (h) of the Constitution, together with an order vacating the sentences of death pronounced upon them.. In so far as the applicants allege a breach of section 5(2)(b)(e) and (h), the true complaint lies in a breach of section 4 of the Constitution, since section 5 itself creates no new rights of its own, but merely provides further and better particulars of the rights set out in Section 4. (See **de Freitas v Benny** 1976 AC 239).

The broad issue in this case therefore is whether the applicants' rights under Section 4(a), 4(b) and 4(d) have been, are being or are likely to be infringed. To the extent that the applicants contend that they have been or are being subjected to cruel and unusual treatment or punishment, I understand this to be an allegation of a breach of their right to life and their right to security of the person under Section 4(a). I shall deal with each section separately. First, the alleged breaches of Section 4(b) and 4(d).

## **Sections 4(b) & 4(d) - Equality**

The complaint of the applicants is with what they call the arbitrary capricious and discriminatory application of the death penalty. In **Smith v L J Williams Ltd** (1980) 32 WIR 395, Bernard J (as he then was) spoke of section 4(b) in this way.

*“In my opinion section 4(b) applies to both legislation as such, as well as to administrative acts of officials ..... In so far as official acts are concerned the nub of the matter is in my view, that the section both guarantees and is intended to ensure that where parties are similarly placed under the law, they are entitled to like treatment under that law. However, there is a presumption of regularity in the acts and conduct of officials. Consequently, the burden of proof is upon the aggrieved party to establish mala fides in the administration of the enactment.*

He adds at page 412 letter (g) in respect of both sections 4(b) and 4(d) that:

*they are designed among other things to strike down “curry-favour” and other unfair practices on the part of those who manage and/or operate the wheels of government and quasi-governmental organisations under particular law”*

Section 4(d) is specific to officials who are public authorities and would include the office of the Commissioner of Prisons for purposes of the applicants’ case, but the principle of mala fides is equally applicable.

The applicants’ case here relates both to the administration of the death penalty as well as his treatment while in prison. This latter issue arises out of the evidence of Mr Baptiste and I shall consider it only after I have addressed Mr Baptiste’s evidence later in this judgment.

I understand the applicants contentions in their grounds to be this. The death penalty has been applied to condemned prisoners arbitrarily, with discrimination and in a manner which is wholly unpredictable and uncertain. The decision of the Board of the Judicial Committee of the Privy Council in **Pratt & Morgan v The Attorney General of Jamaica** afforded the Government the opportunity for both general and personalised discrimination. The condemned population was divided into two classes. The first class comprising those whom the State did not wish to execute and the second class comprising those it wished to execute. The applicants were included in the second class. Those in the first class had their appeals neglected or delayed, while those in the second had their appeals fast-tracked. The applicants have been placed in the second class and even within this class have been the targets of discriminatory treatment, having been targeted by the Government for a certain and early execution.

The arbitrary and capricious administration of the death penalty is exhibited by

the manner in which the Government implemented the recommendations of the Prescott Commission. These were done not by enacting enabling legislation, but rather by bureaucratic and political manipulations in consequence of which condemned prisoners who had been on death row for ten years or more had their sentences commuted “*en masse*”.

They contend that from 1980 to the present, well over one hundred persons had their death sentences commuted by the President on the advice of the Minister, purporting to act under the power of pardon but in fact in the majority of cases, doing so for improper motives. These commutations were done either in furtherance of governmental policy following the Prescott Commission report or administrative expediency following the decision in **Pratt v Morgan**. May I say now that as to this allegation of improper motive, nothing of the kind was proved on the evidence before me.

In support of their contentions in this regard, the applicants rely essentially on four affidavits. The first Chadee affidavit, two affidavits of Roberta Clarke, Attorney at Law sworn and filed on 13th November, 1998 and 30th November, 1998 and the affidavit of Ravi Rajcoomar sworn and filed on 2nd December, 1998.

In reply, the respondents rely essentially on four affidavits of Monica Reid filed on 13th, 23rd, 25th November, 1998 and 1st December, 1998 and two affidavits of John Gonsalves filed on 25th November and 2nd December, 1998.

### **Arbitrariness**

The applicants contend that the death penalty has been applied arbitrarily and capriciously and rely primarily on the first Clarke affidavit. I do not from the evidence, agree. Much of the evidence of Miss Clarke is opinion which begs the question. There is no factual foundation to support the opinions.

Further, the evidence, even if acceptable, does not support the allegations. To the extent that commutations were granted pursuant to the recommendations of the Prescott Commission or pursuant to the decision of the Board in **Pratt & Morgan** they are neither arbitrary nor capricious but made pursuant to quasi judicial inquiry, or pursuant to a decision of our highest court. In any event, the evidence of Miss Monica Reid, which I accept, is that there were no mass commutations of sentences of death after the Prescott Commission report.

Moreover, any conclusion on the arbitrariness or otherwise of the committee's decision requires an examination of the individual facts and circumstances which may have led the Advisory Committee on the Power of Pardon to recommend commutation. Those facts are not before me.

**Fast-Tracking of Applicants' Appeals:**

The applicants' case is this. Their criminal trial was the longest trial in the history of trials of this country lasting forty-nine (49) days yet the transcripts of the trial which according to Mr Ravi Rajcoomar, Attorney at Law consisted of 3,387 pages, were ready within a reasonably short period of time. This, coupled with the Attorney General's repeated statements that Mr Chadee will be executed, demonstrated that the applicants' appeals were accelerated. A document entitled "*Status Report on the Implementation of the Death Penalty*" was exhibited to the first Chadee Affidavit. That document issued by the Ministry of the Attorney General details the efforts of the Executive to speed up the appellate process for persons under sentence of death. Certain appeals (placed into 3 categories by the second Clarke affidavit) were pointed to as being examples of appeals which, though earlier in time to the applicants were heard after the applicants' appeals.

Mr Gonsalves in his principal affidavit of 25th November, 1998 states that the average period of time between convictions and the determination of appeals was 8 months and that the time taken between conviction of the applicants and the determination of their appeals was consistent with the average time taken in

capital cases which was 8 months. He denies that the applicants were fast-tracked.

Much time was spent in the course of this hearing on the cross-examination of Mr John Gonsalves. Other than to unduly prolong the hearing, it did nothing to assist the applicants' case. Mr Gonsalves' cross-examination was directed at ferreting out information which may assist the applicants' case. The undertone was that influence was brought to bear on the listing process so as to bring about an early listing of the applicants' appeals.

What fell from the lips of Mr Gonsalves however, revealed an intention scrupulously to abide by the guidelines of the Board set out in **Pratt & Morgan** and as later explained in **Guerra v Baptiste**. Mr Gonsalves stated that after the Judicial Committee's decision in **Pratt** appeals were listed according to the dates of conviction subject to the availability of the notes of evidence and the judge's summing up. Mr Gonsalves stated that in preparing the lists of criminal appeals, he would prepare a draft list which was settled by the Chief Justice. The settlement of the final list was uniformly implemented but the applicants' case was one such exception. He adds that he was directed by the Chief Justice to include the Applicants' appeals on the list for May, 1997. In re-examination, however, he stated that the Applicant's case was not the only exception to this practice.

Mr Gonsalves with leave of the court provided information in respect of 2 out of the 3 categories of the appeals referred to in the second Clarke affidavit. Information on the 3rd category was not permitted by this court. In my judgment, the information provided therein by Mr. Gonsalves put to rest any suggestion that there was something sinister in the manner in which the applicants' appeals were listed.

The contention that the applicants' appeals were fast-tracked and that they were discriminated against is misconceived. In the first place, the applicants have no

ground for complaint if their appeals were in fact accelerated. The concept as propounded by the Board in **Pratt** and in **Guerra** is that it could be cruel and unusual treatment or punishment to carry out the death sentence on persons who suffer the anguish of an intolerably long appellate process while under sentence of death. The speeding up of that process in all cases or in any one case so that the delay is minimised, while it does hasten the prisoners death, can in no way be a legitimate ground of complaint under the Constitution. Indeed, it is consistent with the directions of the Board that the whole appellate process should proceed with dispatch.

As Lord Griffiths stated (supra at pg 786).

*“A states that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence allowing a reasonable time for appeal and consideration of reprieve.*

*..... If the appellate procedure enables the prisoner to prolong the appellate bearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment.”*

The evidence of Mr Gonsalves and Miss Monica Reid show that the period of delay between conviction and final determination of the criminal appeals for persons under sentence of death has been significantly reduced and continues to be reduced since the decision in **Pratt and Morgan**

But it seems to me that contention is misconceived for a second and more fundamental reason. The applicants have been tried and convicted at a criminal trial and their appeals have been heard and dismissed. Unless they can demonstrate that the overall process from trial to final appeal was somehow

corrupted or manipulated so as to bring about a conviction, they cannot complain that they have been in any way “targeted” for execution by the Attorney General or the Executive.

As Lord Diplock put it in Maharaj v The Attorney General All E R 670 at 679g:

*“the fundamental human right is not to a legal system that is infallible but to one that is fair”*

The applicants must demonstrate that the whole criminal process from trial to final appeal was a sham otherwise they have no constitutional basis for complaining that they were targeted for execution. Indeed, it is ironic that the complaint of the applicants in this case is not that the process was too slow but that it was too fast. If anyone can have a ground on which to be unhappy it would be those whose appeals are delayed or neglected.

Further, I find no evidence that the applicants’ appeals before the Court of Appeal or before the Privy Council were accelerated in any way. Mr Gonsalves testified that the listing of appeals is done by the Chief Justice in conjunction with the Clerk of Appeals. That is a matter of public record revealed by the Chief Justice himself in his annual address on the opening of the 1996/1997 law term. Having regard to what I have earlier said on this aspect, I shall add only that the listing of appeals is entirely a matter within the discretion of the Chief Justice in his administrative capacity and such evidence as emerged in this case has revealed a scrupulously fair administrative process.

As to the issue of “slow tracking” or delaying of the murder appeals of those whom the State “did not care to execute”, there is no evidence to support this contention. The applicants rely *inter alia* on the dictum of Hosein J A in Criminal Appeal No. 5 of 1990 Debideen v The State in which he stated that:

*“In view of the heavy backlog of appeals awaiting a hearing we*

*decided that priority should be given to those appeals in which the five year period had not yet expired and hence the delay in giving our reasons in this matter.”*

There is nothing in that statement that acknowledges any delaying of appeals against conviction for murder so that appellants in those cases would not be executed. The dictum speaks for itself and requires no explanation, by me, of its purport.

In the result, the applicants' contention must fail.

**Breach of Section 4(b), 5(2)(e) & 5(2)(h) - Bias**

The breach complained of is in my judgment a breach of the applicants' right to the protection of the law under 4(b) as particularised in section 5(2)(e) and 5(2)(h) i.e. the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations and the right to procedural provisions.

The contention is that on divers occasions, the Attorney General made public statements to members of the media and to the public referring to the planned execution of the applicants prior to consideration of their cases before the Advisory Committee on the Power of Pardon.

They contend that the Attorney General and the Minister of National Security both considered the applicants' case at a meeting of the Advisory Committee on a date unknown to them and that given their utterances, there was a real danger of bias in the sense that they unfairly regarded with disfavour the applicants' case before the Committee. They rely on the first Chadee affidavit, the second Clarke affidavit and the affidavit of journalist Sandra Chouthi filed on 27th November, 1998.

Miss Chouthi refers to statements of the Attorney General and the Prime Minister at a political meeting. Counsel for the applicants submits that those comments are

prejudicial to the applicants. Miss Chouthi adds that at the same meeting she heard the Minister of National Security speak about protecting the victims of crime, about families who have been assassinated and of the need for a witness protection programme.

It was submitted on behalf of the applicants that the evidence shows the applicants were viewed as symbols of criminality and that by appearing on the same platform as the Prime Minister, the Minister of National Security must be presumed to share the political views of the Prime Minister. The Minister thus deprived himself of the independent personal discretion required of him as Chairman of the Advisory Committee. The Minister had committed himself to making a decision in a ‘*certain way*’ because he had an interest in furthering the policy of the Executive and was thus pre-disposed or prejudiced against the applicants for reasons unconnected to the merits of their case.

These submissions are without merit. The grant or refusal of mercy by the Minister is not subject to review under section 14 on the ground of bias. This issue was completely ventilated in **Reckley v The Minister of Public Safety and Immigration** (No. 2) [1996] 1 All E R 563 where articles 90 to 92 of the Bahamian Constitution (identical in most respects to sections 88 and 89 of the Trinidad and Tobago Constitution) were considered by the Judicial Committee. It was held that the exercise of the prerogative of mercy in death sentence cases was not amenable to judicial review since the prerogative of mercy was by its nature not the subject of legal rights but began where legal rights ended.

As Lord Goff stated at page 571(d) after approving the dicta of Lord Diplock in **de Freitas v Benny** 1976 AC 239 at 247 letter (d)

*“A man accused of a capital offence in the Bahamas has of course his legal rights. In particular, he is entitled to the benefit of a trial before a judge and jury, all the rights which that entails.”*

*After conviction and sentence, he has a right of appeal to the Court of Appeal and if his appeal is unsuccessful to petition for leave to appeal to the Privy Council. After his rights of appeal are exhausted, he may still be able to invoke his fundamental rights under the Constitution. For a man is still entitled to his fundamental rights under the Constitution, and in particular, to the protection of the law, even after he has been sentenced to death.”*

He adds at letter (g)

*“But the actual exercise by the designated minister of his discretion in death sentence cases is different. It is concerned with a regime, automatically applicable, under which the designated minister, having consulted with the Advisory Committee, decides, in the exercise of his own personal discretion whether to advise the Governor General that the law should or should not take its course. Of its very nature, the minister’s discretion, if exercised in favour of the condemned man will involve a departure from the law. Such a decision is taken as an act of mercy or, as it used to be said, an act of grace.*

This dictum provides a complete answer to argument of counsel and in particular, the argument that the minister’s powers and the Advisory Committee’s powers under section 89 are reviewable because they are statutory. I would add only that it applies equally to the Constitution of Trinidad and Tobago, section 89 being virtually identical to that of the Bahamian provision on this point

However, even if section 89 were reviewable, there is no evidence of bias or of its likelihood in this case. As the unchallenged evidence of Miss Monica Reid shows Mr Ramesh Maharaj, Attorney General did not sit as a member of the Advisory Committee when the applicants’ cases were before the Committee. He was out of

the jurisdiction and his place was taken by Minister Ganga Singh.

There is also no evidence to show what the views of the other members of the Advisory Committee were, or that they were in any way influenced by the comments of the Attorney General. They must be presumed to carry out their functions under section 89 conscientiously and independently. Moreover, the evidence of Miss Chouthi as to comments of the Minister of National Security does not in any way indicate prejudice or bias on his part.

The applicants' contention on this aspect must also fail.

**Section 4(a), 5(2)(b) - Cruel and Unusual Treatment or Punishment**

The applicants seek a declaration that, as of each of them, their right not to be subjected to cruel and unusual treatment or punishment have been, are being and are likely to be violated and they rely on ground 17 of the amended notice of motion.

They contend that since their arrest on May 14, 1994, and throughout their subsequent incarceration, they have been subjected to cruel and unusual treatment and punishment by the manner and circumstances of their incarceration and, that to execute them now would also be cruel and unusual treatment and punishment since the law does not authorise the infliction of cruel and unusual punishment prior to execution.

May I say from the outset that even if these applicants were to succeed on this point, at best the relief to which they may be entitled would be a declaration or an order for compensation or both, but it cannot require a vacation of the death sentences as per the **Pratt** decision or the **Guerra** decision.

In **Thomas & Hiliare v Baptiste & Others**, Civil Appeals No. 1373 and 1494 of 1998 (unreported) de la Bastide, Chief Justice put the proposition this way at

pg. 7.

*“It seems to me that the underlying principle of Pratt and other cases like Guerra v Baptiste 1996 IAC 397, which followed in its wake is the conclusion that given the delay that has occurred to execute the prisoner would amount to cruel and unusual punishment. It is the act of hanging the man which is rendered cruel and unusual by the lapse of time.*

He adds

*“Undoubtedly, the anguish that the convicted person has suffered during the delay is a key factor but this is because it renders the carrying out of the sentence repugnant to basic standards of humaneness. Delay in carrying out the sentence of death also has this unique feature. It cannot sensibly be suggested that it is open to the person under sentence to take steps to put an end to the cause of his complaint by asking for his own execution to be hastened. This is palpably not the case when the cause of the complaint is not delay but inhumane treatment in prison. There is not in this case the same nexus between the abuse complained of and the death sentence, as exists between delay in carrying out the death sentence and the actual carrying out of it. It is not apparent to me why it should be regarded as unreasonable at least to acknowledge and take account of the possibility that someone who is subjected to inhumane treatment while in prison may seek from the court an appropriate remedy to terminate and possibly compensate him for such treatment whether or not he is under sentence of death, especially if the treatment in question not only contravenes the Prison Regulations themselves but has also crossed the threshold of cruel and unusual treatment.”*

The applicants’ argument on cruel and unusual treatment is three pronged. It is

all or any of the following:

- (a) Prison Conditions - i.e. that throughout their period of detention from arrest to the date of the motion, they have been subjected to cruel and unusual treatment by the manner and circumstances of their incarceration.
- (b) that to execute them now having suffered such cruel and unusual treatment would itself be cruel and unusual treatment since the law does not authorise such treatment or punishment prior to execution.
- (c) that the applicants were subjected to further cruel and unusual treatment or punishment by the reading of warrants for the execution of the applicants on the 17th, 18th and 19th November, 1998 in the circumstances in which the issues at (a) above were to be decided before the Judicial Committee in two appeals pending before it and of which the state was aware

### **Issue (a) - Prison Conditions**

My decision on this aspect requires an examination of the evidence and in particular, an analysis of the cross-examination of the first respondent, Mr. Cipriani Baptiste, Commissioner of Prisons.

#### **(1) The first applicant**

The applicant Chadee relies on 4 affidavits in support. The first Chadee affidavit as well as affidavits of Mr Chadee dated 13th November, 3rd December and 17th December, 1998. The total period of incarceration since his arrest on 14th May, 1994 to the date of this constitutional motion is approximately 4 years and 5 months. He was convicted on 3rd September, 1996. The period which thus elapsed between his arrest and conviction was approximately 2 years 3 months and 18 days. For all but 6 months and 9 days of that period he was held in death row even though he was not yet convicted of murder. During his total period of

incarceration he was moved from one cell block to another and variously from the Port of Spain Prison to the Golden Grove Prison and back.

These periods can be broken down into the following:

- (i) From 16th May, 1994 to 17th May, 1994, 18 hours in Block G of the Port of Spain Prison.
- (ii) From 17th May, 1994 to 18th January, 1995, 8 months at Block D1 of the Port of Spain Prison. During this period, he allegedly shared a cell with two to seven other persons. There was only one slop pail provided and he was never allowed a bath on weekends.
- (iii) From 18th January, 1995 to 25th January, 1995, he spent seven days at the Golden Grove Prison. No details are provided by the applicant as to the conditions he allegedly endured.
- (iv) From 25th January, 1995 to 20th June, 1995, a period of 6 months, he was housed at Block H on Death Row. He was allegedly not given any airings nor any opportunity to exercise for 3 of the 5 months he spent there. At this time too he was the only person on death row not convicted of murder. He describes this period as an anguishing experience. The cells were lit with fluorescent lighting on a 24 hour basis. He contends that he contracted insomnia and that the cell in which he was detained for the first month lacked ventilation.
- (v) From 20th June, 1995 to 20th December, 1995, he was incarcerated at the Golden Grove Prison where, although he had committed no breach of the prison rules, he was lodged at the punishment block. He contends that he was the only person on the punishment block. He saw his family twice weekly but no one else. From his cell he could see no one.

His cell was plagued by mosquitoes.

- (vi) From 20th December, 1995 to 3rd September, 1996, the date of his conviction, he was returned to the Port of Spain Prison and placed in Block H Cell 13. Here too, he was the only non convicted person on death row. He was allowed only infrequent airings those being no more than once every two or three weeks. During his stay there death warrants were read to Franklin Gonzales and Raphick Sahadath. Their anguish increased his bewilderment, anxiety and fear. He spent many days contemplating his fate. This caused him much anguish even though he was not yet convicted of murder.
- (vii) After his conviction on 3rd September, 1996, he was placed in the F2 Division of the Port of Spain Prison. During this time Mr Chadee alleges that he was allowed only infrequent airings, sometimes not being allowed to go outside for three weeks. He contends that during the first three months in the F2 Block he was given no airings at all.
- (viii) From 7th October, 1997 to 23rd July, 1998, he was placed in Cell 2 of the same division. He contends that this cell is directly opposite the gallows chamber. He witnessed prison officers going into the chamber to make preparations for hanging. He heard equipment being tested and was taunted by prison officers unnamed.
- (ix) On 23rd July, 1998, he was moved from Cell 2 and placed in another cell in the same division.

He and the other applicants are currently in cells measuring approximately 6 feet by 8 feet with artificial light being kept on twenty four hours a day. The ventilation is poor. They are allowed out of their cells for fifteen minutes each morning to shower and to empty and clean their slop pails. They are allowed out

of their cells three times a day to collect meals. The period of airings lasts one hour but is usually less.

The F2 division has one ceiling fan which turns very sluggishly and has no effect whatsoever on ventilation.

(2) **The other 8 applicants**

In addition to the living conditions which they allegedly endured after their convictions on 3rd September, 1996 (deposed on their behalf by the first applicant), the other eight applicants (“the other applicants”) jointly allege that during the period prior to conviction, they were locked in cells for at least twenty-three (23) hours a day. They had to share cells which measured 6 feet by 9 feet with a number of persons varying between 5 to 10 other inmates. There was a single slop pail for use of all in the cell and the stench emanating therefrom was overpowering and unbearable. The lighting and ventilation were poor. They contend that since their conviction, they have each lived in cells 6 feet by 8 feet with access only to artificial light which is kept switched on twenty-four hours a day. They also make the same allegations about the period of exercise and airings allowed them as does the first applicant

**Evidence of the Respondents**

The applicants’ allegations were countered by the first respondent Mr Cipriani Baptiste, Commissioner of Prisons in three affidavits in opposition filed on 13th, 23rd and 25th November, 1998 respectively, (respectively “the first”, “second” and “third” Baptiste affidavits).

In the first Baptiste affidavit, the Commissioner sought to explain why Mr Chadee was treated differently from other remand prisoners, as well to justify the sharing of cells by prisoners on remand. His reason for the latter was the rapid growth “*over the last few years*” in the prison population and “*the increased population of condemned prisoners*” which made it necessary to utilise other divisions in the prison to house prisoners under sentence of death. The co-opting of other cell

divisions of the prison undoubtedly reduced the availability of cells for housing other classes of prisoners, including prisoners on remand.

His reason for the former was security. Mr Chadee said Commissioner Baptiste, was always viewed as a high risk prisoner. He personally observed Mr Chadee's relationship with other prisoners to be one in which he was the acknowledged leader. By the time of his removal to a single cell (in my judgment on or about 18th January, 1995), he had become the acknowledged leader of at least 50% of the remand population. According to the Commissioner, Mr Chadee's apparent influence "made it necessary to be wary of the disruptive collective action" by the prisoners. Secondly, there were a growing number of violent confrontations between prisoners loyal to Mr Chadee and another group of prisoners loyal to "another inmate named King". Thirdly, as a result of rumours concerning Mr Chadee, prison authorities had to be vigilant to curtail any risk of unusual contact between Mr Chadee and other prisoners as well as persons outside of the prison.

In the second Baptiste affidavit, he denied the allegations of the other applicants. He contended that good health standards are maintained at the prison. The corridors of the cells divisions and the external areas of the State Prison are cleaned by sanitation staff on a daily basis. Inmates are responsible for cleaning out their own cells. Personnel from the Ministry of Health visit the prison to spray the entire grounds and the general surroundings are inspected by Public Health Inspectors from time to time, without notice.

He denied that they were locked in their cells for at least twenty-three (23) hours a day. All inmates on remand he stated leave their cells every morning for approximately 45 minutes to empty their slop pails, brush their teeth and to collect their meals. They are allowed 2 hours of airing and exercise, weather permitting, during which period they are allowed to bathe. Like all other inmates, the other applicants came out of their cells on evenings to collect their meals in the ration room.

He explained that given the increased prison population, there was a shortage of remand cells resulting in the allocation of more than one person per cell. The number of inmates sharing cells varied depending on the number housed at the State Prison at any given time. He denied that it was possible that the other applicants would have had to share cells with as much as ten other persons.

He denied that overcrowding led to violent confrontations over minor incidents. He never received any reports of violent confrontations involving the other applicants nor any complaints that they suffered from stress or claustrophobia. He stated that all cells including cells on remand permit natural light to enter. He added that in addition to slop pails there were a number of semi-private toilets located in the remand airing yard which are available for use by prisoners on remand

Further, Commissioner Baptiste deposed that prisoners under sentence of death occupy a single cell that is to say, they do not share their cells with other prisoners.. He added that while lights were kept switched on 24 hours a day for security reasons, during the day whenever there is sufficient light coming into the cells, they are usually switched of.

In the third Baptiste affidavit, Commissioner Baptiste denies that Mr Chadee would have shared a cell with more than five prisoners while on remand. He also denies that the applicant was held in solitary confinement on Block H or on the punishment Block at the Golden Grove Prison or that he was the only person on the punishment block. Mr Baptiste states that the first applicant received his quota of visits from his family and friends and on numerous occasions was permitted meals prepared for him externally.

Mr Baptiste admits that Cell 2 in the F2 Division is located directly opposite to the gallows chamber but states that once the wooden door of the chamber is sealed it is extremely difficult to hear in the F2 Division any sound emanating

from inside the chamber particularly the sound of the equipment or the trap door. He adds that prison officers entering the chamber used a private entrance unseen by Mr Chadee.

### **Cross-examination of Mr Baptiste**

I turn now to the cross-examination of Mr Baptiste.

Mr Baptiste was challenged in cross-examination by Mr Armour as to *inter alia*, the basis of his knowledge of Mr Chadee's assumption of leadership of 50% of the remand population, of his knowledge of the number of violent confrontations between the alleged two rival factions and the basis of his information concerning rumours involving Mr Chadee which all led to his removal from the remand yard and his placement in a single cell among prisoners convicted of murder.

It emerged that Mr Baptiste had been on vacation for various periods between November, 1994 and October, 1998 and he acknowledged that for those periods, he was unable to speak from his personal knowledge of matters taking place in the prisons concerning the applicants. These were:

21st November, 1994	to	19th December, 1994
11th August, 1995	to	11th September, 1995
26th August, 1996	to	11th October, 1996
25th January, 1998	to	26th July, 1998
8th August, 1998	to	7th October, 1998

Objection was later taken that for these periods of vacation Mr Baptiste was not competent to testify of matters occurring therein. In my judgment, the fact that Mr Baptiste was on vacation leave when certain events may have occurred is of no moment whatever for the reasons I have given earlier.. He can rely on the records of the prison and the collective knowledge of his subordinates in providing evidence to this court.

Mr Baptiste in his third affidavit contradicted Mr Chadee's contention that he was

not aired for 3 out of 5 months during the period 25th January, 1995 to 20th June, 1995. He had conceded in cross-examination that he did not personally check the records of the prison at the time of swearing but from his investigations, the first applicant was aired on 10th March, 1995, 10th April, 1995, 24th April, 1995, 5th June, 1995, 9th June, 1995, 1st July, 1995 and 9th July, 1995. Those investigations were carried out by a senior official.

The records of the prison in respect of airings of prisoners at the State prisons are contained in what is called an Occurrence Book in which day to day occurrences at the prison are recorded as they relate to each prisoner. Mr Baptiste stated in cross-examination that an Occurrence Book is essential to the administration of the prisons, but not all occurrences are noted. It emerged during cross-examination that there are separate occurrence books in respect of prisoners on remand and prisoners under sentence of death, for the recording of events concerning prisoners. That is to say, an event concerning a prisoner on remand is to be recorded in the Occurrence Book for remand rather than the Occurrence Book for prisoners under sentence of death.

It was turned out however, that the records of events concerning Mr Chadee were made in the Occurrence Book for prisoners under sentence of death. Mr Baptiste conceded that this book was not available at the time of his swearing of his 25th November affidavit, but would have been available during the course of his investigations which were conducted through his subordinate. There was no record of Mr Chadee being aired on 5th June, 1995. It also turned out that that Occurrence Book ended on 29th June, 1995, as a consequence of which the July dates referred to by Mr Baptiste could not be verified from that Book. Mr Baptiste also conceded the following facts:

- (1) There were no entries in the Occurrence Book between 25th January, 1995 and 9th March, 1995 of Mr Chadee being aired..
- (2) That the practice of recording only the airings of prisoners

under sentence of death in the Occurrence Book for condemned prisoners was not maintained in certain instances.

- (3) That under Rule 250 of the Prison Rules, each prisoner whether under sentence of death, on remand or otherwise has a right to be aired for at least one hour each day.

Mr Baptiste qualified this answer by saying that under his interpretation of the rule, the period of airing was qualified by the words "*as far as practicable*" and as such would depend on the availability of staff and the exigencies of the prison service.

- (4) That according to the records of the Occurrence Book for prisoners under sentence of death, Mr Chadee did not get the benefit of a right which other remand prisoners are entitled to.
- (5) That under Rule 90 of the Prison Rules, it is his duty to conform to the laws and rules of the prisons and to be responsible for the due observance of those rules by all members of staff.
- (6) That part of that duty and responsibility was to ensure that prisoners are humanely treated as recorded in Rule 15.
- (7) That under Rule 283, prisoners are classified according to certain specified classes and that during his period on remand Mr Chadee would not have been classified in accordance with Rule 283.
- (8) That when he placed Mr Chadee in the punishment block at the Golden Grove Prison, Mr Chadee was not put there as a result of having been found guilty of any offence against prison discipline as set out in Rules 268 to 274.
- (9) There was no rule under the 1950 prison rules (or subsequent to 1950), by which he could support or justify

forming the conclusion that Mr Chadee was a security risk.

- (10) There was nothing on the records of the prison which justified him as commissioner of prisons treating Mr Chadee differently between 25th January, 1995 and 3rd September, 1996. Mr Chadee was placed in the condemned cells by him on the basis of nothing that existed on the prison records.

I understood from this answer in particular, and from the answers given by the Commissioner on this aspect that the prison records included the first applicant's personal file and the information therein contained and that there was nothing in his personal file that had caused Mr Baptiste to separate Mr Chadee from the other prisoners

- (11) The information on which he and other senior officers concluded that the first applicant was a security risk prisoner came from information received. In re-examination, he told the court that sensitive information concerning Mr Chadee was received from his brother officers from the protective and intelligence services as it related to the security of the prison

Objection was taken to the admissibility of this evidence as being hearsay. Such evidence as was led, was led only as to the nature of the information (i.e. security) rather than to the actual substance of information itself. The objection was overruled on the basis that the information provided did not go to establish the truth of what was said but was merely evidence of what informed the Commissioner's decision to separate the applicant from other prisoners. See **Subrananiam v Public Prosecutor** (Supra). In my judgment, not only was the nature of the information admissible but so too its substance.

- (12) He did not check before swearing his 13th November

affidavit to see whether violent confrontations involving the other applicants were recorded in the Occurrence Book. It was possible that there might be violent confrontations involving the applicants on record.

In addition, the Commissioner gave these answers to questions from Mr Armour.

- (a) One of the bases for regarding the first applicant as high risk had to do with Mr Baptiste's personal observations of him on remand.
  - (b) He considered the first applicant to be the leader of the other applicants with whom he had been charged.
- (13) He was not always personally able to observe the other applicants in their cells on remand. But on those occasions when he conducted his own patrols of the remand yard cells, the other applicants were not sharing cells with up to 10 persons as stated in paragraph 4 of the other applicants' affidavit.

### **Assessment of the Evidence of Mr Baptiste**

Counsel for the applicants, Mr Armour, in his written submissions contends that the evidence of Mr Baptiste is "*unreliable*" and should be rejected. He submits that Mr Baptiste relies on "*records*" which he chooses not to identify except when pressed in cross-examination. He has not testified that he is the keeper of those books. He merely states that he has access to those records. Nor does he depose to the reliability of the safe custody of the "*records*".

On the contrary submits Mr Armour, Mr Baptiste confesses that in many material instances, the records cannot be located. Mr Baptiste's evidence, he contends and his ability to reconcile it with the records of the prison is "*demonstrably*" unreliable. He points to Mr Baptiste's assertion that the records of airings of Mr

Chadee who was then on remand would not have been recorded in the Occurrence Book for prisoners in Block H who were under sentence of death, but which subsequently proved to be inaccurate. Mr Baptiste gave no explanation for this contradiction. Mr Armour adds that paragraph 7 of the third Baptiste affidavit was demonstrated to be an inaccurate record of what the Occurrence Book actually recorded, a fortiori, any other record on which he claims to rely not of his own knowledge.

He submits further that both Mr Baptiste and Sanjeev Lalla of the Chief State Solicitor's office cannot locate records of the name of a remand prisoner who was aired but that the exhibit "CB2" purports to give a record of Mr Chadee while he was still on remand. I pause here to note that Mr Lalla in his affidavit of 15th December, 1998, refers to a notice to produce for inspection the Occurrence Book at Golden Grove Prison for an eight months pre-dating January, 1995, referred to at paragraph 8 of the first Chadee affidavit. I have not seen that notice but paragraph 8 of the first Chadee affidavit states that Mr Chadee stayed for 8 months in "Block D1" up to 18th January, 1995. I have understood from Mr Baptiste's evidence that Block D1 is Block D1 of the Port of Spain Prison and not the Golden Grove Prison. Mr Lalla's affidavit does not state that those records for Block D1 of the State Prison (i.e. the Port of Spain Prison) are unavailable.

Mr Armour also points to Mr Baptiste's failure to check whether violent confrontations between the other applicants and other inmates had been recorded in the Occurrence Books and submits that when pressed the Commissioner retreated to the position that prison officers do not record every occurrence in the Occurrence Book.

Mr Armour also submitted that the Occurrence Book on which the Commissioner relies are not records in the nature of a register. A register is the only record which a court can accept as admissible secondary evidence of the statements of fact put forward by Mr Baptiste. No weight can therefore be attached to Mr Baptiste's evidence (so far as he relies on records) or to the exhibits "CB1",

“CB2” and “CB3”. I do not agree. The Occurrence Book is a record of activities within the prison and is thus part of the official records of the prison.

I do not agree with Mr Armour that Mr Baptiste’s evidence was unreliable. Mr Baptiste was cross -examined over a period of three to four days. I found him to be an impressive witness who gave honest straightforward answers. In his affidavit where records were not available, he said so. There was no attempt to mislead or deceive. His reference to the records of the prison were not in my judgment any deliberate attempt to be vague or ambiguous. He spoke decisively, candidly and confidently.

There were two significant areas in cross-examination in which some inaccuracies in his original affidavit evidence were demonstrated. The first related to his assertion that the records of airings of Mr Chadee as a remand prisoners should have been recorded in the Occurrence Book for remand prisoners only. As it turned out Mr Chadee’s airings were noted not in the remand Occurrence Book but in the Occurrence Book for prisoners under sentence of death. I did not then, nor do I now, see that concession as a major inconsistency or flaw. The fact is that recordings of Mr Chadee’s airings were made. Given that Mr Chadee was kept in the Block for prisoners under sentences of death, the error is understandable.

Those recordings in the relevant Occurrence Book, with one exception were consistent with the dates provided by Mr Baptiste in his first affidavit at paragraph 7 for the period January, 1995 to June, 1995.

The second significant matter was the fact that the date “*June 5, 1995*” referred to in his first affidavit was not reflected in the relevant Occurrence Book put before him. He explained in re-examination however, that the date 5th June, 1995 which was not a date reflected in the Occurrence Book, was an error made during transcription of the affidavit and that the true date was 5th May, 1995. Oddly enough, this date must have escaped Mr Armour during discovery of the

Occurrence Book since he made no mention of it in his cross-examination. With the exception of the dates in July, 1995, which was not covered in the Occurrence Book for that period and the error referred to, the dates provided by Mr Baptiste were reflected in the Occurrence book in question.

I have had the benefit of hearing and viewing Mr Baptiste in cross-examination. I accept his evidence as truthful. I am satisfied that he is familiar with the conditions of the prisons. To the extent that he says that slop pails are regularly cleared from the cells of both remand and death row, I accept that evidence. I also accept his contention that the applicants were not confined to their cells for 23 hours a day. He did concede however, that ventilation fans installed in the F2 Division may have malfunctioned from time to time. He did also concede that so far as the Occurrence Books were concerned, there was no record of Mr Chadee being aired between 25th January, 1995 and 9th March, 1995. I accept Mr Chadee's contention in this regard that during this period he received no airings. However, I also accept the evidence of Mr Baptiste that the applicants were aired as indicated in "CB1", "CB2" and "CB3"

I further accept his evidence that Mr Chadee was not kept in solitary confinement when placed on the punishment block at Golden Grove Prison, and that he was permitted twice weekly visits by members of his family.

The question for me is this. Do the circumstances of the applicants as I have found them amount to cruel and unusual treatment or punishment.

Wooding C J in Collymore V The Attorney General 1967 12 WIR at pg 20 stated that:

*"I would interpret cruel in its relation to the treatment or punishment provided in section 2(b) as not merely severe or harsh but as inhumane and inflictive of human suffering."*

Sharma J A in Thomas & Hiliare opined at pg 5 that:

*“the words ‘cruel and unusual’ are used conjunctively and they are not to be regarded as synonymous; that treatment or punishment can be cruel but not unusual and vice-versa.”*

Counsel for the applicants submits that I should look at the applicants’ case “*in the round*’ and has commended to me American and Indian authorities on this aspect. These authorities provide valuable learning on what may constitute cruel and unusual treatment or punishment and I have no doubt that in an appropriate case they are of valuable assistance. However, I am mindful of the words of Lord Diplock in *Ong Ah Chuan v Public Prosecutor* 1980 3WLR 855 at 864 D to F where in interpreting the Constitution of Singapore, he referred to the difference between Singaporean Constitution and the Indian and American Constitutions. He then stated:

*“In view of these differences their Lordships are of the opinion that decisions of Indian Courts on Part III of the Indian Constitution should be approached with caution as guides to the interpretation of individual vehicles in Part IV of the Republic of Singapore; and that decisions of the Supreme Court of the United States on that country’s Bill of Rights, whose phraseology is now nearly 200 years old are, of little help in construing provisions of the Constitution or other modern commonwealth constitutions which follow broadly the westminister model.*

But from my own examination of those authorities, they are distinguishable, having as their main focus the issue of delay rather than prison conditions.

The decision of the Supreme Court of Zimbabwe in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General & Others* [1993] 2LCR 279, also relied on by Counsel for the applicants while concerned with prison conditions, was a case which dealt with post conviction delay of 6 years in prison conditions which were substantially more severe than the matters before me.

### **Airings**

One of the main areas of concern in respect of the first applicant centred upon his lack of airings and exercise, particularly for 3 months out of 5 between 25th January, 1995 and 20th June, 1995. Moreover, such airings did not always last the stipulated period of one hour. In addition, such airings take place while the applicants are handcuffed. Mr Baptiste's explanation was that the length of time for airings was at the discretion of the Commissioner and was subject to availability of staff. As de la Bastide C J stated in **Thomas v Hiliare**, lack of availability of resources is not a good enough reason to deny a prisoner what is his entitlement. It is clearly a breach of the prison rules that Mr Chadee was not permitted airings for 3 months out of 5 months between 25th January and 20th June. It is equally unsatisfactory that some airings permitted did not last the stipulated one hour period. While the Commissioner's explanation does not excuse the breach, it does negate any malicious intent on his or his officers' part. The evidence from exhibits "CB1", "CB2" and "CB3" is, as well that not only did the applicants receive more frequent airings subsequently, but that they refused to be aired on a number of occasions.

### **Sharing of Cells**

As to the question of sharing of cells, I have accepted the Commissioner's evidence that none of the applicants would have shared cells with more than 4 other persons at any given time. Indeed, given the dimensions of the cells in question the contentions of the other applicants in particular, appear to be grossly exaggerated.

One of the contradictions of the first applicant's case is that while on the one hand he complains of initially sharing cells with other prisoners on remand, on the other hand he complains of solitary confinement when placed singly in a cell on the punishment block at Golden Grove. The contention that he was isolated is not buttressed by even his own evidence since he does admit that he had visits from

members of his family. In addition, the unchallenged evidence of Commissioner Baptiste is that he was able to communicate with other prisoners while on punishment block, he was permitted twice weekly visits from members of his family and was permitted meals prepared from outside the prison.

### **Reading of Warrants**

The first applicant also deposed at paragraph 13 of the first Chadee affidavit that he suffered some angst when warrants of execution were read to two prisoners under sentence of death, Franklyn Gonsalves and Raphick Sahadath. Even if that allegation were true, these incidents occurred prior to Mr Chadee's conviction on 3rd September, 1996, any such anguish would have been tempered by the fact that he was not yet convicted and by the hope that he may yet have been acquitted of the charge.

### **Taunts by Prison Officers and Proximity to the Gallows**

At paragraphs 17 and 18 of his first affidavit Mr Chadee alleges that unnamed prison officers taunted him. The names and identities of these alleged prison officers are not stated nor even physical attributes described. Given the imprecision of the allegations, I attach no weight whatsoever to them. He states as well that from his cell he saw preparations for hangings and heard clanging noises as equipment was tested as well as statements of prison officers. I do not accept that evidence. Mr Baptiste's evidence which was not challenged in cross-examination is that while Mr Chadee's cell was placed opposite the gallows, he could not see prison officers come and go because there was another entrance used by the officers and the gallows is sound proof.

### **Conclusion**

The relevant but not necessarily exclusive considerations are infrequency of airings and overcrowding. It also appears that the ventilation in Block F2 where ceiling fans have been installed but malfunctioned from time to time, is not always up to par.. It would also appear that the applicants' cells are searched 3 times a day. Taken singly or in total, they do not amount to cruel and unusual

treatment or punishment. As I have stated earlier in this judgment the system of airings for all the applicants leaves a lot to be desired and is unsatisfactory, so too is the sharing by five prisoners of cells designed to accommodate three. However, the airings of the applicants have been significantly increased, since the decision of the Court of Appeal in **Thomas and Hiliare**. In addition, the sharing of cells all pre-dated the applicants convictions and would have been mitigated by the fact that they were not yet convicted.

In my judgment, the applicants have on the totality of the evidence not demonstrated that they have been subjected to cruel and unusual treatment or punishment as prohibited by section 5(2)(b). As stated by de la Bastide C J in **Thomas and Hiliare** (Supra) at pg 12.

*“It is not my view that prison conditions need not exceed the lowest conditions under which people in the society subsist but at the same time I do not think that we should put out of our minds the knowledge that we all have, for instance, that there are substantial numbers of people in this country who live in premises that are very cramped and overcrowded and do not have the benefit of plumbing or electricity. It is by no means uncommon for those who do have plumbing to be without a supply of water for considerable periods. Of course, happily, the number of people who have to endure such hardships has been and continues to be reduced.”*

Taken as a whole, the circumstances of the applicants are not such as to amount to cruel and unusual treatment.

#### **Issue b**

In view of my conclusion on prison conditions above, this issue no longer falls to be considered.

#### **Issue c - Further cruel and unusual treatment or punishment by the reading**

**of warrants for the execution of the applicants.**

The applicants rely on grounds 20, 21 and 22 of the amended motion. Counsel for the applicants contends that the decisions of the Judicial Committee in **Pratt**, in **Guerra** and in **Reckley v Minister of Public Safety and Immigration** [1995] 46 WIR 27 establish a duty on the Minister of National Security not to refer a case to the Advisory Committee where there is pending a decision of the Judicial Committee which may affect the views of the Advisory Committee. I agree with the submissions of the respondents that those cases do not support the contention. No doubt, there will be circumstances in which matters touching upon the application of the death penalty are before the courts and because of which prudence may dictate that the decision of the courts should be awaited. I do not agree, however, that this is transformed into a duty or that the prisoner suffers unduly or to such an extent that it constitutes a breach of section 5(2)(b). Once the prisoner has access to the courts, the appropriate remedial action can be taken pursuant to section 14 of the Constitution. It is to be remembered however, that Lord Griffiths dictum in **Pratt** (Supra) remains apposite.

The applicants' contentions on this ground must also fail.

**Breach of Section 4(b) & (d) - Different treatment of the first applicant in Prison**

During cross-examination of Mr Baptiste, he admitted that there were no entries in the Occurrence Book between 25th January, 1995 and 9th March, 1995 of Mr Chadee being aired and that according to the records, Mr Chadee did not get the benefit of a right to which other remand prisoners were entitled. He also admitted that there was no justification under prison rules or in particular under Rule 283 for concluding that Mr Chadee was a security risk or for treating him differently from other prisoners by placing him in a cell alone, between 25th January, 1995 and 3rd September, 1996.

In re-examination, Mr Baptiste stated, however, that one reason why Mr Chadee was placed in a cell by himself was because of security concerns based on information received from the security and intelligence personnel in the protective services.

I have already set out the principles which guide allegations of breaches of sections 4(b) and 4(d). The question is, has Mr Chadee's treatment amounted to a breach of section 4(b) and (d) of the Constitution. I do not consider that it does

In the first place, neither section 4(b) nor 4(d) prohibit discrimination per se. What they prohibit is discrimination done with mala fide or colourable intention, or on some other wholly unjustified or unacceptable basis. In this regard, I do not for myself construe the term "*mala fide*" as being necessarily confined to an evil or malicious intent. But, in my judgment, a mere difference of treatment is not of itself discrimination, moreso, discrimination which offends sections 4(b) and 4(d). See Matadeen v Pointu 1998 3 WLR 18 at pg 34B. It follows that where there is some appropriate and justifiable basis for different treatment, there can be no breach of sections 4(b) and 4(d) of the Constitution.

Mr Baptiste has testified that security concerns was one of the reasons why he removed Mr Chadee from remand. That is a valid and justifiable basis for separating Mr Chadee from other prisoners. It is to be remembered that the Commissioner has charge of a prison. Inherent in his duty as commissioner of prisons, is a duty to ensure that security at the prison is maintained. Such a duty inheres in his duty as commissioner of prisons and derives from Rule 15 of Prison Rules, by which he is charged with the proper management of the prisons of Trinidad and Tobago. The management function of the commissioner of prisons is one which includes the public interest and which concerns not just the general well being of the prisoners and prison officers but that of the public at large.

Further, Commissioner Baptiste also stated that he had personally observed that the first applicant had become the acknowledged leader of a faction of prisoners

on remand. This to my mind is an additional and independent basis for separating Mr Chadee from other remand prisoners. That is to say, even if the nature of the information from the protective services which Mr Baptiste received is not admissible, Mr Baptiste's personal observations were sufficient to justify Mr Chadee's separation. Indeed, the subsequent discovery of cellular phones in Mr Chadee's cell is evidence that his separation was justified.

I shall close by referring to the comments of Lord Hoffman in **Matadeen v Pointu** (supra) at pg 26 letter H

*“Of course, persons should be uniformly treated unless there is some valid reason for treating them differently. But what counts as a valid reason for treating them different? And, perhaps, more important, who is to decide whether the reason is valid or not. Must it always be the courts?”*

He adds that:

*“the fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle - that it should always be the judges who have the last word on whether the principle has been observed.”*

I find that there has been no breach of section 4(b) & (d) of the Constitution in relation to the first applicant's treatment while incarcerated.

The second applicant Joey Ramiah has already had adjudicated against him a decision on prison conditions by Moosai J in HCA 1164 of 1998. To that extent and as the respondents have pointed out, the matter is res judicata. My findings on prison conditions therefore relate to all the applicants except Mr Ramiah whose action has already been adjudicated upon by my brother Moosai J.

### **Order**

In the result there has been no breach of any of the applicants' rights under section 4(a)(b)(d), 5(2)(b)(e) and (h) of the Constitution.

The applicants notice of motion is dismissed with costs certified fit for one senior and one junior advocate attorney.

Dated this 5th day of March, 1999

Nolan Beraux  
Judge