

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 1804 of 1998

BETWEEN

DENNY BAPTISTE

Applicant

AND

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

Respondents

Before the Honourable Mr. Justice P. Moosai

Appearances:

Mr. R. Armour and Mr. G. Delzin for the Applicant

Mr. K. Hudson-Phillip S.C., Ms. V. Gopaul, Mr. K. Narinesingh

And Ms. R. Sharma for the Respondents

JUDGMENT

This is a Constitutional Motion by Denny Baptiste filed on 21st August, 1998 (re-amended by consent on 6th October, 1998)

The major reliefs sought are:

1. A Declaration that the execution of the sentence of death on the Applicant will contravene his right not to be deprived of life, liberty and the security of the person except by due process of law guaranteed to him by Section 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 instructions for dealing with applications to the Inter American Commission on Human Rights and the UN Human Rights Committee issued by the Government of Trinidad and Tobago and approved by the Cabinet contravene Section 4(a), 4(b), 4(d), 5(2)(b), 5(2)(e) and 5(2)(h) of the Constitution of Trinidad and Tobago are null, void and of no effect.
3. A Declaration that the execution of the sentence of death on the Applicant will contravene his right to equality before the law and the protection of the law guaranteed to him by Sections 4(b) and 5(2)(b), (e) and (h) of the Constitution of Trinidad and Tobago.
4. A Declaration that the Applicant's right not to be subjected to cruel and unusual treatment or punishment has been, is being and is likely to be violated.
5. An Order vacating the sentence of death against the Applicant. An order that the sentence of death on the Applicant be commuted to a term of life imprisonment and that the Applicant be removed to the St Ann's Hospital and there remain subject to the President's pleasure.

The material grounds upon which the Application is based are:

1. The Applicant was convicted of murder on the 29th day of May, 1995 at the Port of Spain Assizes and sentenced to death.
2. The Applicant immediately appealed his conviction and sentence on the 6th day of November, 1996 the Applicant's conviction and sentence was affirmed by the Court of Appeal. Reasons for the Court's judgment were provided on the 10th March, 1997.
3. The Applicant lodged an appeal before the Privy Council on the 7th day of October, 1997 and on the 7th day of November, 1997 the said appeal was dismissed by the Privy Council.
4. The Applicant has been on Death Row from the 29th May, 1997 and his appeal was determined before the Privy Council on the 6th November, 1997, a period in excess of two years and five months. The Applicant is therefore outside of the two year period prescribed by the Privy Council for the determination of domestic appeals in death penalty matters and therefore a presumption of cruel and usual treatment contrary to the Constitution arises and/or the Applicant has been subjected to cruel and usual treatment by virtue of the delay and/or by virtue of the prison conditions which he has been on death row for a period in excess of three years when the death warrant was read to him.

5. The Applicant was arrested on the 16th February, 1991 and detained on remand in inhuman and degrading conditions for a period in excess of four years, namely until his conviction on the 29th May, 1995. The said delay was manifestly excessive and increased the cruel and unusual nature of the punishment inflicted on the Applicant.
6. The Applicant is afflicted with a condition of insanity clinically defined as Panic Disorder, a condition which ought to have been known to the Respondents. In not providing to the Applicant any or any reasonable opportunity to avail himself of, and/or in failing to provide psychiatric assessment and care, the Applicant was denied by the first Respondent the or any reasonable opportunity of representing to the Minister and/or the Advisory Committee on the Power of pardon the fact that due to his said psychiatric condition he should not be executed. Alternatively, the first Respondent had a duty to make full disclosure to the Minister and/or the Advisory Committee of all material circumstances relevant to the consideration of a reprieve for the Applicant from the execution of the sentence of death. The first Respondent failed in his said duty with the result that Minister and/or the Advisory Committee were accordingly deprived of the or any opportunity to consider the

Applicant's said condition. Accordingly, the Applicant was denied the protection of the law and due process.

7. Further the Applicant raises issues which are identical to two Constitutional Motions which are currently being determined before the Privy Council, those of Daren Roger Thomas, and that of Haniff Hillaire, Court of Appeal proceedings 1767 of 1998 and 178 of 1998 respectively) and therefore submits that this motion should be determined upon the determination of the aforesaid constitutional motions.

7(a)The applicant from the date of arrest to the date of the reading of the warrant for his execution suffers and has suffered from mental illness which has been exacerbated by the conditions under which he has been kept on Remand and on Death Row.

8. In the circumstances, the execution of the Applicant will violate his right not to be deprived of life, liberty and the security of the person except by due process of law, his right to equality before the law and to the protection of the law and his right not to be subjected to cruel and unusual treatment or punishment guaranteed to him by Sections 4(a), (b) and (d) and 5(2)(a), (e) and (h) of the Constitution of Trinidad and Tobago.

Affidavits in support of the Motion were filed by:

Denny Baptiste	21st August, 1998
Peter Lewis	2nd October, 1998
Om Lalla	9th October, 1998
Om Lalla	14th October, 1998

Sanjay Bhandari (leave granted to use Affidavit dated 14th October, 1998 in its present form subject to the undertaking of counsel to file same in its proper form)

Affidavits by the Respondents in response were filed by:

Junior Belgrave	8th September, 1998
Dave Moore	“
Dr. Iqbal Ghany	“
Dr. Ibitoro Osakwe	“
Peter John Pursglove	“ 9 th October, 1998 11 th October, 1998
Norma Cox	“
Roslyn Babb	“
Duncan Byam	“
Jennifer Scanterbury	“
Dr Gregory Chen	“
Fatima Gopee	“
Leo Abraham	“
John Gonsalves	“
Jacqueline Sampson	“
Monica Reid	“ 9 th October, 1998

Leave was granted to cross-examine all deponents but Dr. Gregory Chen was the only deponent cross-examined.

The Applicant in this case is the co-accused of Haniff Hillaire. In Civil Appeals Nos. 177 and 178 of 1998, Thomas & Hillaire v. Cipriani Baptiste et al. ("Thomas & Hillaire") the Court of Appeal of Trinidad and Tobago was called on to determine issues arising out of the very grounds raised by this Applicant on facts (as to delay, cruel and unusual punishment and prison conditions) similar in certain aspects to the facts of the Applicant's case before this court.

With respect to the Applicant's grounds with reference to access to the international bodies, legitimate expectation and equal treatment, Mr. Armour has admitted that this Court is bound by the decision of the Court of Appeal in Thomas & Hillaire. That decision having been appealed to the Privy Council and judgment reserved, Mr. Armour reserves his right to pursue these grounds at the appropriate time, if necessary.

On 15th September, 1998 Madam Justice Barnes granted leave to have the Applicant examined by a Psychiatrist of his choice, Dr. Peter Lewis. Leave was also granted to amend paragraph 21A of the Motion.

On 6th October, 1998 I ordered the Respondents to permit the Applicant to inspect and take copies of the Applicant's medical records existing at the State Prisons, Port of Spain, and referred to at paragraph 4 of the report of Dr. Peter Lewis dated 30th September, 1998. It is important to note that Mr. Armour

specifically stated those were the only records he requested. I further granted leave to re-amend the Notice of Motion.

Objection was taken by the Applicant to paragraphs 6, 7, 8, 9, 12, 14, 15, 16, 17, 18, 19, 25, 27, 29, 30, 31 and 32 of John Pursglove's Affidavit of 8th September, 1998. I held that the matters referred to at paragraphs 1 and 2 of Pursglove's Affidavit were sufficient to give him the authority to depose to the matters contained in the disputed paragraphs save and except paragraph 25 thereof. With respect to paragraph 25, I was of the view that the deponent in his capacity as legal consultant to the Attorney General on all human rights issues could state what Government's policy was.

In coming to my conclusion I also took into consideration the two cases of Santana v. The Commissioner of Police No. S1409 of 1991 and Nationwide Building Society v Bateman [1978] 1 All ER 999 and relied on the doctrine of practicability set out in Santana.

With respect to paragraphs 2 and 3 of Pursglove's Affidavit of 9th October, 1998, it was thereafter agreed by consent of both Attorneys that a copy of the 'pertinent parts' of the Petition referred to at paragraph 2 be used as an exhibit.

I set out certain pivotal dates in tabular form.

Date of Arrest	16 th February, 1991
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Date of Conviction	29 th May, 1995
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Dismissal of Appeal	6 th November, 1996
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Dismissal of Petition to Privy Council	7 th November, 1997
Proof of filing IACHR	3 rd December, 1997
Mercy Committee Meeting	17 th August, 1998
Warrant Read	20 th August, 1998
Proposed date of execution	25 th August, 1998
Constitutional Motion filed	21 st August, 1998

The gravamen of the Applicant’s complaint is that the Respondents have subjected him to cruel and unusual treatment or punishment in violation of the provisions of sections 4(b) and 5(2)(b) of the Constitution.

Sections 4(b) and 5(2)(b) of the Constitution provide:

“4. It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:-

b. the right of the individual to equality before the law and the protection of the law.”

“5 (2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not:-

b. impose or authorise the imposition of cruel and unusual treatment or punishment.”

DELAY PLUS TREATMENT

Mr. Armour submits that the delay of three years and two months between conviction and warrant having been exacerbated by the Applicant’s diagnosed

state of mind and lack of treatment amounts to cruel and unusual treatment or punishment.

Alternatively having regard to the totality of evidence in respect of this Applicant's mental state and his lack of treatment by the State, his state of mind from arrest to the reading of the warrant (7 years 6 months) is relevant in evaluating the effect of delay on him. This case qualifies as being "sufficiently serious" and having "exceptional circumstances" within the meaning of the possibility left open by the majority in Fisher v The Minister of Public Safety Privy Council Appeal No. 53 of 1997.

MEDICAL

Mr. Armour submits that the one significant difference in facts between Thomas & Hillaire and this case which mandates this court to view the subjective conditions of this case afresh concerns the circumstances of the Applicant's mental state and the absence of treatment which he suffers from as a consequence of dereliction of duty by the State.

It is important to note that in his Affidavit of 21st August, 1998 in support of the Motion the Applicant at paragraph 21 states:

"21. At age seventeen I suffered a nervous breakdown and was warded at the St Anns Hospital. At the time of my arrest I continued to suffer with this mental condition. While on remand I was seen on three occasions by Dr. Iqbal Ghany, a psychiatrist and on each occasion he prescribed medication which I was given.

However on each of these times I received a course of medication for a two week period only. My mental condition deteriorated as a result of this inadequate course of medication. I cannot recall events readily and I tend to be absent-minded and forgetful.”

At paragraph 26 the Applicant states that he suffers from high blood pressure for which the prison doctor has seen him since he has been on Death Row. On each occasion the doctor prescribed medication for this condition, which he has received. He has been unable to keep his high blood pressure under control and he suffers dizziness and blackouts as a result of the limited medication. He also experiences severe eye problems, has blurred vision and is unable to see properly when he is taken outside. He also has intense headaches whenever he attempts to read or write. He has requested an eye examination several months ago and was only taken for this on 2nd July, 1998. To date he has not been given glasses as recommended by the doctor.

At paragraph 27 of his Affidavit, the Applicant states that some time during 1997 he was again examined by a psychiatrist whose name he does not now recall who also prescribed medication, but so far he has not received it. Frequently he requests medication for his mental condition from his prison infirmary officer. If the medication is available, he is given it, but generally the medication is not available. Overall he was in a continuous nervous state prior to the reading of the warrant. Once the death warrant was read this increased to the point of complete nervous collapse.

At paragraph 29 of his Affidavit, the Applicant states that during the period of incarceration of Death Row he has lived in a condition of constant turmoil and anguish. He has experienced alternating periods of great anxiety and agitation as well as periods of depression.

The Applicant goes on to state that since the warrant was read, it had a devastating effect on him, he has been in a deep depression which has gotten even more debilitating. He is unable to sleep. All the pre-execution procedures increased his mental anguish to unbearable proportions. He is in absolute mental torment as a result.

It is instructive to note that at the time of filing his Affidavit on 21st August, 1998, and before Dr. Peter Lewis's report was filed, the Applicant seemed to be fully aware of his existing medical and mental condition even to the point of listing all his medical complaints. He even stated that in 1997 he requested medication for his mental condition and got it when it was available.

It is of the utmost importance in ascertaining the facts to assess the credibility of the witness. There is no evidence from Dr. Iqbal Ghany, Dr. Gregory Chen nor Dr. Peter Lewis (the Applicant's expert) of the Applicant having suffered a nervous breakdown at age 17 nor of the Applicant having been warded at St. Ann's. In fact the Applicant told Dr. Lewis that he suffered a nervous breakdown in his middle twenties while Dr. Ghany's assessment of the Applicant is silent on that. There was no attempt to cross-examine Dr. Ghany. The onus of proof is on the Applicant in these proceedings. I therefore reject that evidence of the Applicant.

The Applicant indicates in his Affidavit that he has intense headaches when he attempts to read or write. In addition there is annexed to the Affidavit of Monica Reid of October 9, 1998 the letter written by the Applicant dated February 13, 1998. Yet in the report of Dr. Lewis dated September 30, 1998, a report on which the Applicant places great reliance, the Applicant says he cannot read nor write. This is also what the Applicant told Dr. Ghany when he was first seen by Dr. Ghany on February 22, 1992. One would have thought that the Applicant would have provided his psychiatrist with a true account to enable him to arrive at a proper assessment so that the Court would be fully apprised of the mental condition of the Applicant.

REMAND YARD, GOLDEN GROVE

Junior Belgrave, Acting Officer II attached to Golden Grove Prison deposed to an Affidavit on 8th September, 1998 on behalf of the Respondents. He has been working in the Infirmary since 1989. His duties as an Acting Prison Officer II in the Infirmary at Golden Grove Prison include the supervision of the care of inmates and the supervision of junior staff in the administration of medication as recommended by the Prison Medical Officer. He also has access to all the Infirmary records which contain the administration of medication to remanded inmates, all complaints made by remanded inmates to Officers at the Infirmary and the medication given to them.

He has examined the Infirmary records at Golden Grove of the administration of medication to the Applicant for the period July 1992 (the time the Applicant moved from Port of Spain to Golden Grove) to March 1995. The

said records reveal that from 26th June, 1993 the Applicant received the drug Amytryptalline as prescribed by the Prison Medical Officer for treatment of nervousness until he left the Remand Prison at Golden Grove on 24th March, 1995. There are no instances in the said records where the Prison Medical Officer prescribed medication for the treatment of the Applicant's nervousness and the Applicant did not receive the said medication.

Surprisingly no attempt was made to cross-examine Belgrave. The Applicant's Attorneys seemed to be relying on the remarks made by Dr. Chen in his cross-examination namely, that between 25th June, 1993 and 8th March, 1995 there is no notation on the exhibit "O.L.I" of the drug Amytryptalline being administered (which in the context in which it was used means prescribed) to the Applicant. Dr. Chen pointed to 50g Amytryptalline being administered (prescribed) on March 8, 1995. Dr. Chen also pointed out in his cross-examination that there is a distinction between infirmary records and medical records. Although they are kept in the same place I got the distinct impression that the records are kept separate and apart. That seems to be the reason why Belgrave stated that he examined the Infirmary records at Golden Grove. Surprisingly, there was no request by the Applicant for the production of these records at Golden Grove.

There being no cross-examination on Belgrave's Affidavit, I accept his evidence that between June 26, 1993 and March 24, 1995 while the Applicant was at Remand Yard, Golden Grove, he received the drug Amytryptalline for treatment of his nervousness as prescribed by the Prison Medical Officer. In

addition there are no instances in the said records where the Prison Medical Officer prescribed medication for treatment of the Applicant's nervousness and the Applicant did not receive the said medication.

CONDEMNED DIVISION, STATE PRISON

Dave Moore, Acting Officer II attached to the State Prison on Frederick Street, states at paragraph 3 of his Affidavit of 8th September, 1998 that he has worked at the Infirmary since 1982. His duties are similar to those of Belgrave.

He has examined the Infirmary records of complaints and treatment in respect of the Applicant for the period 1995 to the present date whilst the Applicant has been on Death Row. The records reveal that on three occasions during the period 1995 to 1998, the Applicant received the drug Aldomet for one month daily in accordance with the recommendations of the Prison Medical Officer. The said records also reveal that on one occasion during 1995 to 1998 the Applicant also received the drug Brinerdin for the treatment of hypertension for one month daily as recommended by the Prison Medical Officer. There are no instances in the said records where the Prisons Medical Officer recommended either Aldomet or Brinerdin for the treatment of the Applicant's hypertension and he did not receive it.

Infirmary records also show that the Applicant complained of dizziness on ten occasions since 7th July, 1998 and he was treated with stemitil and folic acid. Except for those complaints of dizziness, there is no record of complaints of blackouts, nervousness, headaches, anxiety, agitation or depression made by the Applicant whilst on death row.

The records also revealed that whilst the applicant was examined by a psychiatrist, Dr. Hypolite, in 1997 no psychiatric report was received indicating whether the applicant was to receive any medication subsequent to his psychiatric examination.

Surprisingly Moore was also not cross-examined on his Affidavit. I therefore accept the evidence of Moore. In particular I emphasize that there is no record of complaints of blackouts, nervousness, headaches, anxiety, agitation or depression made by the applicant and, secondly, that the Applicant was seen by a psychiatrist in 1997.

Dr. Iqbal Ghany consultant psychiatrist at St Ann's Hospital swore to an Affidavit on 8th September, 1998 on behalf of the Respondents. Dr. Ghany's duties include inter alia, the psychiatric examination of prisoners when called upon to do so by the Prisons Authority. He also prescribes medication to address any of the psychiatric problems of the prisoners which may arise and his recommendation for the prescription of drugs is forwarded to the relevant Prison Medical Officer. In his capacity as Consultant Psychiatrist at St Anns Hospital, he has access to the records of all patients warded at the said Hospital.

He examined the applicant on 23rd January, 1992 and 22nd February, 1992 at the State Prison on Frederick Street and he recorded his findings in a letter dated 26th February, 1992 addressed to Dr. Chen. That letter revealed that the Applicant spoke freely and coherently, had a history of smoking marijuana and drinking alcohol from the age of eighteen years. He attended the psychiatric

clinic at Sangre Grande, but at the time Dr. Ghany had not been able to see his notes. It appears to Dr. Ghany that the Applicant's reason for attending the psychiatric clinic was for the management of drug induced symptoms and anxiety symptoms. He is unable to read and write. There is no evidence of a psychotic illness and it would appear to Dr. Ghany that the Applicant's problems in the past were due to his drug abuse and anxiety disorder.

The Applicant was therefore seen on two occasions by Dr. Ghany in early 1992 at the State Prison, Port-of-Spain with Dr. Ghany not having had the opportunity of seeing the notes from the Sangre Grande Psychiatric Clinic. At paragraph 21 of his Affidavit the Applicant acknowledged that while on Remand he was seen on three occasions by Dr. Ghany and on each occasion he prescribed medication which he was given. On each of those occasions he received a course of medication for a two-week period only. Surprisingly this aspect of the Applicant's evidence was not challenged. I therefore accept that he received medication prescribed by Dr. Ghany.

The State has led no evidence as to the circumstances in which the Applicant was referred to Dr. Ghany. In addition Prison Officer Moore has only provided information on the records from 1995. The medical records put in are also conspicuously silent for the early part of 1992.

I have taken note that Rules 71 to 96 make provisions for the Medical Officer who has the general care of the health of the prisoners. Medicines are to be supplied at the State's expense. Rule 86 provides that the Medical Officer shall have the special care of the mental health of the prisoners, keeping under his

special observation any whose mental condition appears to require such observation and shall take such steps as he may consider proper to their treatment as mental patients.

This being the background and given the fact that Dr. Ghany's letter was addressed to Dr. Chen, I am of the view that the Prison Medical Officer ought to have been aware of the Applicant's anxiety disorder at that time. I note that under cross-examination Dr. Chen indicated that there are other doctors namely, Dr. Low Chew Tong, Dr. Paltoo, Dr. Hosein and Dr. Chai Hong attached to the State Prison and that whichever doctor is there, that particular doctor is in charge.

Between July 1992 to March 1995 the Applicant was at Remand Yard, Golden Grove. The medical records ('O.L.1') includes, inter alia, the special medical remarks, or observations. It is instructive to note that on 24th July, 1992 there is the endorsement "For psychiatric assessment". On 10th August, 1992 "Requests psychiatric assessment again". On 25th June, 1993 "Had Psychiatric assessment: recommended Amytryptalline 25mg".

As noted earlier Prison Officer Belgrave stated that the Applicant received the drug Amytryptalline for nervousness on all the occasions it was prescribed. His Infirmary records revealed that the Applicant began receiving the drug Amytryptalline the day after it was recommended by the Psychiatrist.

The Applicant from March 25, 1995 onwards was at the State Prison, Port of Spain. The medical records are silent as to whether the Applicant was seen by a psychiatrist although both the Applicant and Prison Officer Moore confirm that he was seen by one. Moore stated that the Applicant was seen by

Dr. Hypolite in 1997 but no psychiatric report was prepared indicating whether the Applicant was to receive any medication subsequent to his psychiatric examination. Having accepted Moore's evidence in that regard, I reject the Applicant's contention that he requested medication for his mental condition from his Prison Infirmary Officer who would give it to him whenever it was available but generally the medication was not available. However that would suggest that the Applicant knew what his mental condition was and what medication was required for same. The Psychiatrist having seen the Applicant, I am of the view that it is not open to the Court to question his professional judgment.

Dr. Chen in his Affidavit of 8th September, 1998 states that his duties as a Prison Medical Officer include the medical examination of condemned prisoners at least once per week and to prescribe medication to address any of their medical problems. Complaints are recorded on his medical record.

From the date of the Applicant's Affidavit he has examined his medical records at the Port of Spain Prison from 1992 to the present date. These reveal that the Applicant complained of a slight muscular pain on 4th July, 1995, that he complained of his eyes watering on 2nd April, 1996 and 22nd December, 1996. There was no complaint of dizziness.

The medical records also revealed that the Applicant also suffered from hypertension since November 1993. Between 1993 to 1995 the Applicant's diastolic range was between 90 to 110. The drugs Aldomet and Brinerdin were interchangeably prescribed for hypertension during the period 1993 to 1995.

Since the Applicant has been on Death Row Dr. Chen has seen him seven times concerning his blood pressure and prescribed Aldomet or Brinerdin for the treatment of his blood pressure. These drugs are prescribed for a limited time such as one month within which the patient's blood pressure can be stabilized. Dr. Chai Hong also visited the Applicant on three occasions concerning his blood pressure. It is unlikely that the Applicant would suffer dizziness and blackouts as a result of his hypertension or as a result of lack of medication for his hypertension.

There is no record of any complaints of blackouts, nervousness, headaches, anxiety, agitation or depression made by the Applicant during the period 1992 to the present date.

CROSS-EXAMINATION OF DR. CHEN

Dr. Chen stated that he was seeing the medical records (Exhibit "O.L.I") for the first time. The record he was dealing with was his own personal record, which did not include the records contained in "O.L.I." Amytryptalline is a drug used for the treatment of depression and anxiety.

Also included in the bundle "O.L.I" is the Applicant's out-patient record dated 5th February, 1993 from Sangre Grande Out-patient Clinic, addressed to the Doctor in Charge, Prison, Golden Grove. That record states:

"The above named has been under treatment in this clinic since 1981 for anxiety state. He is currently on Amytryptalline 25mg p.o. [per orally at night]."

As a doctor, Dr. Chen admits that it is essential when treating someone to

have access to their medical records as they inform the doctor of a prisoner's medical condition. If doctors see a particular recommendation from Sangre Grande Hospital, they would act on it.

Dr. Chen also admitted that he was not quite familiar with the Prison Rules. He further concedes that when Sangre Grande Hospital wrote that letter to Prisons, Golden Grove it was directing the Prisons to the Applicant's condition. Dr. Chen however stated that he did not know of the Applicant's condition.

He also states that for whatever reasons the Applicant, from the records did not get said medication. I pause to note that that clearly was not so. When he said in his Affidavit that there is no record of any complaints of blackouts, nervousness, headaches, anxiety, agitation or depression made by the Applicant during the period 1992 to the present date, he was basing that on the notes he had in his possession.

Dr. Chen insists that he was not aware that the Applicant said he was suffering from anxiety and depression during the time he was in prison. When he swore to his Affidavit he was asked specific questions on anxiety and depression and he based his answers on the notes he had in his possession. As far as he recalls, no medical officer drew his attention to the Applicant's condition of depression.

When a person suffers depression and a drug is recommended by a psychiatric department, that implies that that person is suffering from an impaired state of mental health. To administer the drug would be to relieve that person of his discomfort. He admits that a psychiatrist like Dr. Peter Lewis would be able

to say if their depression would be worse.

If he was aware that the Applicant was suffering from this mental condition, it was not necessary that he be given any kind of special treatment. The judgment as to whether his mental condition was deteriorating or not would have to be made by a psychiatrist. Had Dr. Chen known of his condition he would have referred him to a psychiatrist.

A psychiatrist would be the best person to assess the Applicant, recommend a course of care, and recommend to him (Dr. Chen) the effects of incarceration on him. That not having been done he would consider that he did not have proper information to take care of the Applicant.

Mr. Delzin:

Q. Do you agree having regard to those Rules, that there was a failure by the Prisons to properly take care of Baptiste?

A: In a sense, yes.

In re-examination Dr. Chen said the Applicant never made any complaints to him about anxiety or depression. In addition when he saw and spoke with the Applicant, he did not appear anxious or depressed. He appeared capable of making a complaint.

It was never suggested to Dr. Chen in cross-examination that the Applicant complained to him about his mental condition. This was crucial and critical. The Applicant never put in an Affidavit in reply. Further when one looks at the Applicant's Affidavit (para.26) there is no mention of any complaint to Dr. Chen about his mental condition. I therefore find as a fact that the Applicant did

not complain to Dr. Chen about his mental condition.

MEDICAL REPORT OF DR. PETER LEWIS

Dr. Lewis based his conclusions on the Applicant's medical notes and a review of the Applicant's Affidavit together with two clinical interviews lasting approximately two and a half hours in total. Submissions were made by Mr. Hudson-Phillips with respect to the factual basis of the report nevertheless I accept as a fact that the Applicant suffers from panic disorder, a psychiatric disturbance characterised by intense anxiety. The essential feature of Panic Disorder is the presence of recurrent unexpected Panic Attacks. Panic Attacks are a discrete period of intense fear or discomfort in which symptoms such as feelings of being frightened or feeling wild, heart skipping beats and racing, a heat or sick feeling throughout the body, feeling terrified and being afraid of dying are present. The disorder has persisted even following the Applicant's incarceration. Despite his treatment at the Sangre Grande Psychiatric Clinic for a ten-year period and medication during his initial period of incarceration he continued to have episodes of acute panic and limited symptom attacks. (I pause to note that the attacks appear to be episodic.) The Applicant's current mental state is significantly impaired by the symptoms of a continuing panic disorder and there are also emerging signs of a clinical depression. It is the view of Dr. Lewis that the absence of treatment and the confinement in circumstances described in detail in the Applicant's Affidavit have contributed to his current psychiatric disturbance.

It is clear when the Applicant was arrested he was suffering from some

mental condition. In early 1992 he was seen by a Consultant Psychiatrist on two occasions and a report was prepared indicating that there was no evidence of a psychotic illness and that the Applicant's problems were in the past were due to his drug abuse and an anxiety disorder. Dr. Ghany was proved to be right by the subsequent report from Sangre Grande Hospital. The Applicant's evidence is that medication was prescribed which he received although on each occasion he received medication it was for a two-week period. It is certainly not the duty of a court to question the judgment of a Consultant Psychiatrist who would obviously have seen the Applicant and prescribed a course of treatment. It is important to note that there is no suggestion that the medication was to be provided on an on-going basis. Even Doctor Lewis described the attacks as episodic. What is clear throughout these proceedings, and it has given the court difficulty in arriving at the facts, is that the court does not have before it all the medical and/or infirmary records from both Golden Grove and Port of Spain.

The Applicant went to Remand Yard, Golden Grove from 1992 to 1995. He requested psychiatric assessment on two occasions in July and August 1992. It is important to note that there was no suggestion by Dr. Ghany that the Applicant receive further treatment. Further the Prison Medical Officer at Golden Grove had not at that time received the document dated February 5, 1993 from Sangre Grande Hospital. The records reflect that he had a psychiatric assessment on June 25, 1993 and from June 26, 1993 and continuing received a course of Amytryptalline as recommended.

The Prison Authorities at Golden Grove had express notice that the

Applicant was being treated for an anxiety condition at Sangre Grande Hospital by letter dated 5th February, 1993 which seemed to have been received on 18th February, 1993, and he saw a Psychiatrist some four months after. In terms of local conditions it is not unusual for patients to wait for a few months to see a specialist. There is no evidence to suggest that the Applicant was to receive follow-up treatment but the medical officers ought to have been aware of his mental condition.

Between 1995 and Dr. Lewis's report there is only one instance of the Applicant being seen by a Psychiatrist, Dr. Hypolite, in 1997 and no psychiatric report was prepared indicating whether he was to receive any medication subsequent to his psychiatric examination. There is no indication from the records as to who referred the Applicant to Dr. Hypolite. Dr. Lewis acknowledges that the Applicant was treated until 1995 but indicates that the treatment apparently stopped in 1995. But the Applicant himself deposed that frequently he requests medication for his mental condition from his infirmary officer and gets it whenever available. Although I have rejected that evidence Dr. Lewis indicated in his report that he reviewed the Applicant's Affidavit. Surely the fact that the Applicant was alleging that he was receiving medication was a very important matter to be taken into consideration. Dr. Lewis did not take that into consideration. One wonders why. That in my view would diminish the weight to be given to Dr. Lewis's report and, of course, the reliability of the Applicant's evidence. This would also suggest that the Applicant knew of his mental condition even though Dr. Lewis in his report indicated that the Applicant did not

know what his diagnosis was.

Dr. Lewis's report also did not take into account the fact that the Applicant was seen by Dr. Hypolite in 1997. In addition no account is taken of the fact of the reading of the death warrant to him which, as the Applicant's Affidavit clearly shows, devastated him.

Dr. Lewis was of the view that the absence of treatment and the confinement in circumstances described in detail in the Applicant's Affidavit have contributed to his current psychiatric disturbance. There is great dispute as to the circumstances of the Applicant's confinement. Bearing in mind the onus of proof is on the Applicant, the Applicant's Attorneys never sought to cross-examine the various deponents who contradicted the Applicant's version of events. In those circumstances, I am of the view that the Applicant has not satisfied this Court that the conditions of confinement have been proved. That again would diminish the weight to be attached to Dr. Lewis's report.

In *Thomas and Hillaire* (supra) de la Bastide C.J. at page 11 stated:

“Complaint has been made about the refusal of the trial judge to accede to a request by Thomas' counsel that he be examined by a psychiatrist. Without underestimating the potential results of such an examination, it does strike me as unlikely that, given the impact of the reading of the death warrant on Thomas, it would have been possible for a psychiatrist however skilful to reconstitute an accurate picture of the effects which the conditions of Thomas' imprisonment had on him during the period of his early

incarceration.”

Having regard to all the circumstances, I am of the view that the Medical Officer at State Prison ought to have known of the Applicant’s mental condition. The present system of having Infirmary Officers function as paramedics seems to suggest that there is not much cohesion in the medical department at the State Prison. In addition the medical records are in an unsatisfactory state. Dr. Chen himself admits that having regard to the Rules he would admit that the Prison Authorities in a sense failed to properly take care of the Applicant. I agree.

I have also taken in account the Prisons Rules which provide a system of procedural due process for the lodging of complaints. The Applicant has not availed himself of this system. This is supplemented by prisoners having recourse to their welfare officers and, of course, their Attorneys. It would certainly reinforce an Applicant’s claim and his bona fides if he followed the procedure set out in the Rules and if complaints were registered contemporaneously with the happening of events.

CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT

In ascertaining what amounts to cruel and unusual punishment Sharma J.A. in *“Thomas & Hillaire”* said at pages 4 and 5:

“It is true that cruel and unusual punishment is a highly subjective matter and is capable of generating all sorts of esoteric and philosophical arguments. Be that as it may, one could hardly dispute that whatever the relative values, basic requirements

should be met and a fair balance struck between dehumanizing a prisoner and discipline, order and institutional security so necessary in a prison

It is important to note 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.”

In R.v Miller Cockriell (1976) 70 D.L.R. (3d) Ritchie J. delivering the majority decision stated at p. 345:

“In my opinion the words “cruel and unusual” as they are employed in S.2(a) of the Bill of Rights are to be read conjunctively and refer to “treatment or punishment” which are both cruel and unusual.”

In Estelle v Gamble (1976) 97 Supreme Court Reporter 285, Justice Marshall delivering the majority opinion of the Supreme Court of the United States stated at page 290:

“The history of the constitutional prohibition of “cruel and unusual punishments” has been recounted at length in prior opinions of the Court and need not be repeated here. It suffices to note that the primary concern of the drafters was to proscribe “torture[s]” and other “barbar[ous]” methods of punishment. Accordingly, this court first applied the Eighth Amendment by comparing

challenged methods of execution to concededly inhuman techniques of punishment...

Our more recent cases, however, have held that the Amendment proscribes more than physically barbarous punishments. The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency.....” (emphasis added) Jackson v. Bishop, 404 F. 2d 571, 579 (C.A. 8 1968), against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with “the evolving standards of decency that mark the progress of a maturing society.” (Emphasis Added). Trop v. Dulles, supra, at 101, 78 S. Ct. at 598, see also Gregg v. Georgia, supra, at 172-173, 96 S.Ct. at 2925(joint opinion);... or which “involve the unnecessary and wanton infliction of pain,” Gregg v. Georgia, supra, at 173, 96 S. Ct. at 2925 (joint opinion);”

In Collymore v The Attorney General of Trinidad and Tobago (1967) 12 WIR 5 at page 20 (i) Wooding C.J. in dealing with the present S.5.(2) (b) of the Constitution stated:

“I would interpret ‘cruel’ in its relation to the treatment or punishment provided by s.2 (b) as not merely severe or harsh but as inhumane and inflictive of human suffering.”

In determining whether treatment is cruel and unusual one is to have regard to the likely effect rather than the actual effect. Nevertheless, it has also been recognised that evidence of actual effect is virtually essential in order to establish the likely effect: *Thomas & Hillaire* per de la Bastide C.J. at p. 10.

In *Estelle v Gamble* (supra) the United States Supreme Court held, inter alia, that while deliberate indifference to prisoner's serious illnesses or injury constitutes cruel and unusual punishment in violation of Eighth Amendment, prisoner's pro se complaint showing that he had been seen and treated by medical personnel on seventeen occasions within the three month period was insufficient to state a cause of action against physician both in his capacity as treating physician and as Medical Director of the Corrections Department, but the case would be remanded to consider whether a cause of action was stated against other prison officials.

At page 291 Mr. Justice Marshall stated:

“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the “unnecessary and wanton infliction of pain,” *Gregg v Georgia*, supra, at 182-183, 96 S. Ct. at 2925 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs, or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference

to a prisoner's serious illness or injury states a cause of action under § 1983."

Further at page 292 Justice Marshall stated :

"Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute" an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment." (Emphasis added)

I agree with the test adopted by the United States Supreme Court in Estelle v Gamble namely, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is in keeping with what Sharma J.A. suggested in Thomas & Hillaire that " basic requirements should be met and a fair balance struck between dehumanizing a prisoner and discipline order and institutional security so necessary in a prison". I do not agree

with Mr. Armour that Estelle –v- Gamble is solely restricted to cruel and unusual punishment and does not extend to cruel and unusual treatment.

In the instant case in addition to the psychiatric visits the Applicant was also seen by the Prison Medical Officer at least once per week. Further since he was on Death Row Dr. Chen has seen him seven times concerning his blood pressure. Dr. Chai Hong also visited the Applicant on three occasions concerning his blood pressure. Dr. Osakwe has attended to the Applicant at Port of Spain General Hospital at the Ophthalmology Department on two occasions. He complained of dizziness on 10 occasions since July 7, 1998 and was treated with stemetil and folic acid. There are Prison Infirmary Officers who also administer care twenty-four hours a day to prisoners. The Applicant also knew, as I have found, of his mental condition and did not make any complaints to Dr. Chen, the Prison Medical Officer. It is difficult when one looks at the numerous occasions on which the Applicant has been seen by medical personnel to conclude that the Applicant would have complained of a mental condition and not be treated for same. In the context of local conditions prisoners seem to have an advantage over many of our citizens in terms of access to medical personnel.

In my view a failure of the Medical Officer to take proper care of the Applicant, even if it amounts to negligence, cannot be elevated to the violation of a fundamental right. Negligence does not equate to cruel and unusual punishment. I am of the view that the framers of the Constitution envisaged something more than mere negligence. He must allege acts or omissions sufficiently harmful to

evidence deliberate indifference to serious medical needs. I therefore conclude that the Applicant has not been subjected to cruel and unusual treatment or punishment.

Even if I were wrong and the Applicant was treated in a cruel and unusual manner while awaiting the carrying out of the death sentence, he is not entitled to the remedy of commutation of his sentence. A fortiori if the treatment falls short of cruel and unusual it cannot be relied on in conjunction with other factors such as delay, to provide the basis for commutation.

In *Thomas and Hillaire* de la Bastide C.J. stated at page 8:

“This is palpably not the case when the cause of 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.

Inhumane treatment in prison may be said in a sense to make worse any other punishment that follows, in the sense that it is in addition to it, but I do not see why it should for that reason so change the quality of what follows, be it hanging, flogging or simply more imprisonment, as to render it unconstitutional. If the argument is that to permit the punishment that follows the inhumane treatment in prison is to impose a double penalty, this proves too much, for the person who has been subjected to the inhumane treatment should then be freed of any further punishment and be released.”

I have considered the Applicant’s treatment for the entire period he was incarcerated and found that he was not treated in a cruel and unusual manner. Having considered the entire period from date of incarceration to date of warrant, it follows that the treatment complained of between the date of conviction and the date of warrant falls short of cruel and unusual.

In Fisher v The Minister of Public Safety and others Privy Council Appeal No. 53 of 1997 the majority of the Privy Council accepted that pre-trial delay might in exceptional circumstances be capable of being taken into account in determining whether it would be unconstitutional to carry out the death sentence. Lord Goff at page 11 stated:

“Their Lordships are unwilling in a case concerned with constitutional rights, to impose any hard and fast limit on the matters to be taken into account when considering whether a right

of this kind, especially one so fundamental as that in Article 17 (1) of the Bahamian Constitution, has been infringed. They are unwilling therefore to exclude the possibility that pre-trial delay, if sufficiently serious in character, may be capable of being taken into account for this purpose.

Their Lordships however anticipates that only in exceptional circumstances is such a case likely to occur.”

This case does not qualify, in my view, as being “sufficiently serious” and having exceptional circumstances to bring it within the meaning of the possibility left open by the majority in *Fisher*.

I am also of the view that the Prison Medical Officer, Dr. Chen, is now aware of the Applicant’s medical condition. Even the Applicant’s Psychiatrist, Dr. Lewis, has not indicated whether this Applicant requires a prescribed course of treatment urgently, or even if he requires medication on a daily basis.

The Prison Authorities just cannot sit idly by. They ought to address their minds to the concerns I have just raised.

ACCESS TO THE ADVISORY COMMITTEE AND THE MINISTER

Mr. Armour submitted that the failure of the First Respondent to assess and treat the Applicant’s mental condition amounted to:

- (a) A failure to place before the Minister and the Advisory Committee the primary material which these bodies should have placed before

them and constitutes a failure to consult within the meaning of the reservation in Reckley v the Minister of Public Safety (No.2) (P.C.) [1996] 1.A.C 540.

- (b) In the light of the evidence revealed by John Pursglove in his Affidavit sworn on October 11, 1998 and the Affidavit of Sanjay Bhandrai sworn to on October 13, 1998, it is arguable that the State misrepresented the Applicant's true mental state both to the International bodies and to the Minister and the Advisory Committee as being no more than hypertension. Such a misrepresentation constitutes a violation of the Applicant's rights to due process and to the protection of the law.

In Reckley (No. 2) (supra) Lord Goff delivering the judgment of the Privy Council stated at page 540:

“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, with all the rights which that entails. After conviction and sentence, he has a right to 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, and in particular to his right to the protection of the law even after he has been sentenced to death. If therefore it is proposed to

execute him contrary to the law, for example because there has been such delay that to execute him would constitute inhuman or degrading punishment, or because there has been a failure to consult the Advisory Committee on the Prerogative of Mercy as required by the Constitution, then he can apply to the Supreme Court for redress under article 28 of the constitution. 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, as an act of grace. As Lord Diplock said in *de Freitas v Benny* [1976] A.C. 239, 247G: "Mercy is not the subject of legal rights. It begins where legal rights end." And the act of the advisory committee in advising the minister is of the same character as the act of the Minister in advising the Governor-General."

Our provisions are very similar to that in the Bahamas. The act of the Advisory Committee in advising the Minister, being of the same character as the

act of the Minister in advising the President, is not the subject of legal rights.

In Reckley (No. 2) (supra), Lord Goff continued at page 542C:

“Indeed it is clear from the constitutional provisions under which the advisory committee is established, and its functions are regulated, that the condemned man has no right to make representations to the committee in a death sentence case; and that being so, there is no basis on which he is entitled to be supplied with the gist of other material before the committee. This is entirely consistent with a regime under which a purely personal discretion is vested in the minister. Of course the condemned man is at liberty to make such representations, in which event the minister can (and no doubt will in practice) cause such representations to be placed before the advisory committee, although the condemned man has no right that he should do so.”

In the instant case whether or not there was a report by the Prison Authority to the Advisory Committee and/or the Minister, the Applicant has no right to make representations to the Advisory Committee and/or the Minister. However it is to be noted that Monica Reid’s Affidavit of October 9, 1998 sets out that the Advisory Committee considered the contents of the Applicant’s letter of February 13, 1998 together with the contents of the letter dated July 24 1998 from the Applicant’s London based solicitor. The July 24th letter referred to the

fact that the Applicant has a history of mental illness.

For these reasons set out above. I am of the view that this Motion cannot succeed. I hereby dismiss the Applicant's Motion with no order to costs.

The carrying out of the sentence of death on the Applicant is hereby stayed until 9.00 a.m. on the 4th day of December, 1998 to facilitate the filing of an appeal.

Dated this 1st day of December, 1998.

PRAKASH MOOSAI
JUDGE